AUSTRALIAN CARGO TERMINAL OPERATORS PTY LTD APPLICATION FOR DECLARATION OF AIRPORT SERVICES

ISSUES PAPER

DECEMBER 1996

Application for Declaration under Section 44F of the *Trade Practices Act 1974*

National Competition Council

Contents

Foreword

On 6 November 1996, the National Competition Council (the Council) received applications from Australian Cargo Terminal Operators Pty Ltd (ACTO) for the declaration of services:

- provided through facilities owned by the Federal Airports Corporation (FAC) at Tullamarine International Airport (Melbourne) and Kingsford Smith International Airport (Sydney);
- provided through facilities owned by Qantas at Melbourne and Sydney airports; and
- provided through facilities owned by Ansett at Melbourne and Sydney airports.

The Council is now calling for written submissions from interested parties to assist in assessing the applications in relation to the services provided through facilities owned by the FAC.

It is the Council's intention to deal with the applications through a staged process with the applications in relation to the FAC services dealt with first. The Council considers this to be the most efficient means of dealing with the applications and ensuring that each application is dealt with on its merits. The Council will proceed with the applications in relation to Qantas and Ansett services once it has made its recommendation to the Commonwealth Treasurer in respect of the FAC services. In brief, the applications for Qantas and Ansett services relate to access to ramp services and some cargo terminal operations owned by each airline at the airports.

ACTO provides cargo terminal services to international airlines by breaking down and building up freight and transferring that freight, on pallets and in unit load devices, to and from international aircraft. An important component of ACTO's service is the ability to load trucks with freight that has been unloaded from inbound aircraft and unload freight from trucks to enable outbound aircraft to be loaded.

ACTO has applied to have three services declared at each of Sydney and Melbourne International Airports. These services are:

Sydney

1. use of the freight apron and hard stand to be able to load and unload international aircraft (S1);
2. use of an area within the airport perimeter to store the equipment required to load and unload international aircraft and to transfer the freight to and from trucks to and from the equipment used to load and unload international aircraft (S2); and
3. use of an area within the airport perimeter to construct a cargo terminal (S3).

Melbourne

1. use of the freight apron and hard stand to be able to load and unload international aircraft (M1);
2. use of an area within the airport perimeter to store the equipment required to load and unload international aircraft and to transfer the freight to and from trucks to and from the equipment used to load and unload international aircraft (M2); and
3. use of an area within the airport perimeter to construct a cargo terminal (M3).

As stated above, the applications in respect of services provided through facilities owned by Qantas and Ansett relate to access to the services provided by ramp handling equipment and some services provided by the cargo terminals (or equipment in the cargo terminals). These applications identify,

and relate, to an alternative way that ACTO could operate its business. By gaining access to the FAC services, ACTO could operate by providing its own ramp handling services to load and unload aircraft, transfer freight to and from trucks (or to and from an on-site CTO) and build up and break down the freight. Through access to Qantas and/or Ansett services, ACTO could have Qantas and/or Ansett provide the ramp services to load and unload the aircraft and some elements of the CTO services. The applications for Qantas and Ansett services are not applications for the same types as services as those identified in the applications for FAC services. They do, however, identify alternative methods of operation for ACTO's business.

To assist interested parties in preparing submissions to the Council, this Issues Paper:

- provides a brief description of the National Access Regime;
- outlines the procedures the Council will follow in considering this application; and
- raises issues for interested parties to comment on that may be relevant to the Council's consideration of this application.

In preparing submissions, interested parties may find it useful to refer to the Council's recent publication, *The National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act*. The guide provides, among other things, an indication of how the Council may interpret various provisions in Part IIIA of the TPA when assessing an application. Copies are available on request. The Council can also supply copies of the ACTO application.

Written submissions should be sent to Mr Ed Willett, Executive Director, National Competition Council, GPO Box 250B, Melbourne VIC 3001 by **7 February 1997**. The Council aims to forward its recommendation to the Treasurer by 11 April 1997.

It would be appreciated if respondents could supply a copy of their submission on disk (IBM compatible; Microsoft Word Version 6), with two printed copies. Unless confidentiality is requested, submissions will be treated as public documents and will be made available to interested parties on payment of an administration fee.

Should you have any queries, please contact Ms Ingrid de Vos (administrative matters) on 03 9285 7484 or Ms Michelle Groves (other matters) on 03 9285 7476.

1 The National Access Regime

In April 1995, the Council of Australian Governments (COAG) adopted the National Competition Policy reform package. As part of this framework, Part IIIA of the *Trade Practices Act 1974* (TPA) establishes a National Access Regime under which access may be sought to the services provided by a narrow but important range of monopolistic infrastructure to facilitate competition in upstream or downstream markets. Part IIIA of the TPA also sets out the roles and responsibilities of government bodies which administer the regime, including the National Competition Council (the Council).

Under the National Access Regime, businesses (or individuals or other organisations) can gain a legal right to use the services of certain infrastructure operated by other businesses. The rationale for access is the promotion of competition in related markets. For example, a transport business may be able to gain access to a rail network and operate trains on that network, in competition with the existing train operator. The regime also seeks to ensure that businesses are offered reasonable "terms and conditions" of access, such as a fair price. Without a legal access regime, the owner of an infrastructure facility could charge monopolistic prices for its use.

The National Access Regime provides three alternative mechanisms to assist businesses to obtain access to infrastructure services:

- *declaration (and arbitration):* under this approach, a business which wants access to a particular infrastructure service applies to have the service "declared". If it is, the business and the infrastructure operator are then required to try to negotiate terms and conditions of access. If they fail to reach agreement, the terms and conditions are determined through legally binding arbitration.
- *other "effective" regimes:* where an "effective" access regime already exists, a business seeking access must use that regime.
- *undertakings:* this approach allows infrastructure operators to make a formal undertaking setting out the terms and conditions on which they will provide access to their services. If accepted, these undertakings are legally binding, so other businesses can use them to gain access.

1.1 The declaration process

In August 1996, the Council released *The National Access Regime: A Draft Guide to Part IIIA of the Trade Practices Act*, which among other things, discusses the process for assessing applications for declaration. Below is an indication of the declaration process, including how the Council will handle the public process:

(a) a business[1] seeking access applies to the Council for declaration of the infrastructure service;

(b) the Council acknowledges receipt of the application to the applicant, and informs the designated Minister[2] and infrastructure service provider that an application has been received;

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[1] s.44F(1) (All references in this Issues Paper are to sections of the *Trade Practices Act 1974* unless otherwise specified). Any person may apply to have an infrastructure service declared. This may be third parties seeking access for themselves, an infrastructure owner or operator, or a Minister. The Council can give infrastructure owners an informal indication of whether their service could be declarable under Part IIIA.

[2] s.44H. The State Premier or the Chief Minister of the Territory are the designated Ministers where the infrastructure owner/operator in question is a State or Territory body and the State or Territory concerned is a party to the Competition Principles Agreement. If it is not a

advertises the matter in relevant newspapers to seek public submissions; informs parties likely to have an interest in the application; and will usually prepare an issues paper to assist in the preparation of public submissions;

(c) the Council meets with the declaration applicant and infrastructure service provider (both early in the process and before making a recommendation to the designated Minister); and where appropriate meets other interested parties (although generally the Council will rely on written submissions);

(d) the Council recommends to the designated Minister that the service be either declared or not declared;

(e) the designated Minister decides whether or not to declare the service within 60 days of receiving the Council's recommendation. If the Minister does not make a decision within 60 days, the minister is deemed to have decided not to declare the service. If the Minister recommends declaration, he or she must also specify the expiry date of the declaration. The Minister must publish the decision to declare or not to declare the service. At the same time, the Minister must give reasons for the decision and a copy of the Council's declaration recommendation to the declaration applicant and infrastructure service provider;

(f) either the declaration applicant or infrastructure service provider may appeal the Minister's decision to the Australian Competition Tribunal within 21 days of the Minister's decision. The Tribunal may affirm, vary or reverse the original decision;

(g) a copy of each declaration will be held on a public register at the Australian Competition and Consumer Commission (ACCC);

(h) if the service is declared, the applicant and the infrastructure service provider are to negotiate the terms and conditions of access in the first instance;

(i) if they cannot reach agreement, they may appoint a private arbitrator and subsequently enter into a contract in accordance with the arbitrator's decision. The parties can submit their contract for registration by the ACCC;

(j) if the parties cannot agree on the appointment of a private arbitrator, the ACCC can arbitrate the terms and conditions;

(k) either party to an ACCC arbitration may apply to the Australian Competition Tribunal for a review of the ACCC's determination, within 21 days of the ACCC's determination. The Tribunal may affirm or vary the ACCC's decision;

(l) either party to an arbitration may appeal to the Federal Court, on a question of law, concerning the Tribunal's decision on a determination, within 28 days of the Tribunal's decision, unless an extended period is allowed by the Court. The Federal Court may make orders including an order affirming or setting aside the decision of the Tribunal; or an order remitting the matter to be decided again by the Tribunal in accordance with the directions of the Federal Court.

The Council must now decide whether to recommend to the Commonwealth Treasurer that these services be declared under section 44G of the TPA. It is expected that the Council's recommendation will be conveyed to the Treasurer by 12 March 1997.

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party (and all State and Territories currently are), the designated Minister is the Commonwealth Minister (see s.44D(2)(b)). The Commonwealth Minister (currently the Treasurer) is also designated for access to private infrastructure services.

In considering an application for recommendation that a service be declared, the Council must consider section 44F(4) and be satisfied of the matters listed in section 44G(2) of the TPA. These matters are discussed in detail in Section 2 of this paper. Further, the Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under section 44ZA of the Act. The Commonwealth Treasurer will apply the same considerations as the Council in making his decision.

2 Relevant development in airports and airport services

2.1 Privatisation and Airports Act 1996

Legislation to authorise the sale of leases at major Commonwealth airports was developed and introduced into Commonwealth Parliament in May 1996. *The Airports Act 1996,* enacted in October 1996, establishes a regulatory framework covering the powers of airport operators, quality of service, environment strategies, land use, planning and building controls, and other regulatory measures. It also establishes a framework for the leasing and management of Federal airports.[3]

The regulatory framework for leased Federal airports has been developed to ensure transparency of airport operations by requiring that airports be operated by dedicated companies, that operators of individual airports report on financial and other aspects of their operations, and that the ACCC monitor the quality of airport services.

The Government removed Sydney airport from the list of airports available for sale through 50–year leases, but intends to sell leases through competitive tender to Melbourne, Brisbane and Perth airports by June 1997. Smaller airports will follow in 1997–98.

During October, bidders interested in securing long-term leases at the three airports were invited to register expressions of interest by the end of the month. Short-listed bidders will have to lodge final bids by the end of January 1997. By November 1996, expressions of interest from 26 groups were registered and had been shortlisted to twelve bidders, of which seven were for Melbourne airport.

2.2 Airports Act 1996

Part 13 of the *Airports Act 1996* requires the Minister to determine that specified airport services are declared services for the purposes of Part IIIA of the *Trade Practices Act 1974*.

The requirement on the Minister only applies:

- to an airport service which is necessary for operating and/or maintaining civil aviation services at the airport, and which is provided by means of significant facilities at the airport which cannot be economically duplicated;
- if the service is not the subject of an undertaking on access by the owner or operator of the relevant facility in force under Part IIIA; and
- at any time twelve months or more after the relevant lease is held for the first time by a private lessee, to allow time for the undertakings to be put in place.

[3] Under the Act, a Commonwealth-owned airport can only be leased to a company, which will be known as an airport-lessee company. There will only be one airport-lessee company for each airport and the company will not be allowed to lease another airport. An airport-lessee company's sole business will be to run the airport. An airport-lessee company may contract out the management of the airport to another company which will be known as an airport-management company. Airport-operator companies, which may be either the airport lessee company or the airport manager company, are subject to ownership restrictions. In particular, a 49 per cent limit on foreign ownership, a 5 per cent limit on airline ownership and a 15 per cent limit on cross-ownership for Sydney/Melbourne, Sydney/Brisbane and Sydney/Perth airports.

Part 13 also provides the Minister with reserve powers which can be exercised in respect of the management of demand at airports if circumstances so warrant. The provisions allow declarations to be made of the capacity of an airport to handle aircraft movements in a specified period, for example, the maximum hourly handling rate. Part IIIA of the *Trade Practices Act 1974* applies subject to any arrangements which apply under the demand management provisions. As a result, a party cannot acquire or maintain access rights under Part IIIA if this access is inconsistent with a demand management scheme in place at an airport.

2.3 Air Freight Exports Inquiry

In September 1995, the House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform was requested to undertake an inquiry into air freight exports. The Committee released its report on 12 December 1996.

The terms of reference asked the inquiry to consider the opportunities to improve efficiency in the exports of Australian products, particularly perishable produce, through enhancing Australia's air freight services and developing infrastructure and to make recommendations on changes that are required. In particular, the Committee was asked to consider:

- the opportunities for growth of air freight exports;
- the extent to which airlines are able to meet the existing and projected needs of Australian exporters, in particular, the needs of Australian exporters, of perishable and time sensitive produce;
- the extent to which regulatory procedures and current export industry operating practices and procedures impact on the development of air freight opportunities;
- opportunities for improved co-ordination and linkages in the export air freight chain;
- opportunities to improve market development and access;
- the need for, and the viability of, additional infrastructure, particularly to meet the needs of regional exporters for access to air freight centres;
- the ability of exporters to meet the cost of the provision of dedicated air freight capacity.

Submissions on the inquiry have been received from a variety of participants such as freight operators, exporters, and business councils, including ACTO, TNT, the Inland Marketing Corporation, the Western Australian Air Freight Export Council, Woolworths and James Transport. Public hearings were held during the inquiry at Adelaide, Melbourne, Sydney and Canberra.

Issues raised by participants include the following:

- capacity at the principal airports to handle air freight exports;
- improving the value of air-freighted products (improved handling facilities, particularly for perishable produce, shorter handling periods);
- introduction of competition into the provision of transport and cargo terminal operations;
- the development of quality handling agreements;
- the development of an inland freight hub at Parkes, NSW; and
- the removal of impediments to freight exporters.

While many of these issues go beyond the brief of the Council, the Committee has made a number of recommendations that are relevant to the Council's considerations.

In particular, the Committee made the following recommendations:

> **"Recommendation 1**
>
> **The committee recommends that the Federal Government and the Federal Airports Corporation facilitate effective competition in cargo terminal operations.**
>
> **Recommendation 2**
>
> **The committee recommends that the Federal Airports Corporation facilitate the creation of off-airport cargo terminal operators subject to operators meeting Australian Customs Service and Australian Quarantine and Inspection Service standards."**

The Council recognises that many parties may have made submissions to the Air Freight Export Inquiry that may also be relevant to the applications currently being considered by the Council and would encourage parties to forward copies of their submissions as well as comments on the applications specifically.

3 Issues To Be Considered In Assessing The Application

3.1 The types of infrastructure services covered by the declaration process

As noted in section 1, the National Access Regime provides access not to infrastructure but rather to a *service* provided by the infrastructure (or, indeed, by part of the infrastructure or by multiple sets of infrastructure). The types of infrastructure services that are declarable under the National regime are defined in Section 44B of Part IIIA of the TPA. It states:

> "**service**" means a service provided by means of a facility and includes:
>
> (a) the use of an infrastructure facility such as a road or railway line;
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> (b) handling or transporting things such as goods or people;
>
> (c) a communications service or similar service;
>
> but does not include:
>
> (d) the supply of goods; or
>
> (e) the use of intellectual property; or
>
> (f) the use of a production process;
>
> except to the extent that it is an integral but subsidiary part of the service.

In interpreting the terms and conditions in this definition, the Council, in its draft guide to Part IIIA, noted that the examples of facilities in sub-section (a) suggest that Part IIIA is principally intended to apply to services provided by significant infrastructure facilities, including plant, equipment, installation and establishment.

The Council also observed that sub-sections (a) to (c) establish the regime's focus on services rather than infrastructure facilities as the subject of a declaration application. This is because some facilities offer multiple services, only some of which might satisfy the criteria for declaration.

Sub-sections (d) to (f) exclude the supply of goods, the use of intellectual property, and the use of a production process, from possible declaration, except to the extent that such a service is an integral, but subsidiary part of a service provided by means of infrastructure. For example, access to technical know-how essential for the safe operation of rolling stock may be considered an integral but subsidiary part of a rail transportation service.

Section 44(B) defines a provider of a service to be the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service.

3.2 Criteria for declaring access

Section 44F of the TPA provides for any person, to make a written application to the Council asking the Council to recommend under section 44G that a particular service be declared. Under section 44F, the Council must recommend to the designated Minister that the service either be declared or not be declared.

In making its recommendation, the Council must be consider the matters set out in section 44G.[4] The same criteria bind the Minister when deciding whether or not to declare a particular service. To recommend that an infrastructure service be declared, the following criteria must all[5] be satisfied:

(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

  i) the size of the facility; or

  ii) the importance of the facility to constitutional trade or commerce; or

  iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest.

In addition, the Council must consider "whether it would be economical for anyone to develop another facility that could provide part of the service."[6] Further, an infrastructure service cannot be declared if already the subject of an undertaking accepted by the ACCC.[7]

The Council can recommend that a service not be declared if it thinks that an application has not been made in good faith.[8] This clause is designed to avoid trivial applications being made.

The remainder of this section discusses the section 44G criteria. Against each criteria, some of the issues that will be addressed by the Council in considering the airport services declaration applications and questions on which the Council seeks comment are raised.

The questions are for guidance only. Parties making submissions to the Council should not feel bound to respond only to the questions suggested, or to answer every question posed, and are free to comment on any issue they consider relevant to the Council's deliberations. Where possible, the grounds for any assertions contained in submissions should be made explicit.

Each of these criteria is discussed below. The Council must assess each of the six applications for declaration of services made by ACTO against all of the criteria.

Criterion (a) access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service

Background

In the Council's draft guide to Part IIIA of the TPA, the Council stated that "access to the service" refers to the legislated right of businesses to purchase the infrastructure service on reasonable commercial terms and conditions. The Council noted that this right would be limited by the availability of capacity in the infrastructure.

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4 Section 44G of Part IIIA of the *Trade Practices Act 1974* is set out in full in the Attachment.

5 ss.44G(2), 44H(4). Under s.44G(2), the Council must be satisfied that all of the relevant criteria are met before it can recommend declaration of a service. Provided they are, the Council intends to recommend declaration.

6 ss.44F(4), 44H(2).

7 ss.44G(1), 44H(3).

8 s.44F(3)

The Council interpreted "competition" as rivalrous market behaviour where a "market" is an area of close competition or rivalry between firms, and where there is possible substitution between different goods or services. The Council noted that the level of competition within a market is the focus of this criterion rather than the competitiveness of individual firms within that market. The Council noted that the Part IIIA concept of "market" has a wider meaning than the rest of the TPA because it extends geographic coverage beyond Australia.

The Council stated that the market in which competition is promoted cannot be only the market for the infrastructure service. The market in which competition is promoted could be upstream or downstream from the market for the infrastructure service.

ACTO Applications

Applications S1 & M1, S2 & M2, S3 & M3.

ACTO has identified two markets in which access to the pertinent infrastructure services will promote competition: the market for the provision of ramp services to international airlines; and the market for the provision of cargo terminal operator (CTO) services to international airlines.

In its application, ACTO has stated that:

> *"by gaining access to airport space and permission to operate ... ACTO will be able to offer services to over 45 international airlines which use the two airports. ... By providing these services ACTO will be able to offer international airlines better CTO services at lower cost than the current CTOs are able to do. The improvements will make a significant contribution to the cost effectiveness of international freight services and thereby make a significant contribution to Australia's trade performance."*

The application goes on to say that:

> *"ACTO's service will provide an important source of competition to the current CTOs, Qantas, Ansett and Australian Airlines Express and will enable a wide range of specialist service providers to do likewise."*

The ACTO application acknowledges that as a competitor it will not gain a high share of market in the short term (it estimates no more than 10% in the foreseeable future) but claims that it will demonstrate that off airport operations are feasible which may cause other organisations to pursue the same format. The applications provide further detail on how ACTO says competition will be promoted in the CTO and ramp services markets.

In respect of each of the six applications, the Council seeks comments on:

- Whether ACTO is correct in defining the downstream markets as: a market for CTO services; and a market for ramp handling services?
- Who are the participants in these markets?
- Is the market for CTO services already operating in a competitive manner, or will the entry of new players in to that market improve competition?
- Is the market for ramp handling services already operating in a competitive manner, or will the entry of new players in to that market improve competition?

- Will access to the service promote competition in the CTO market by ACTO? By any other company or person? If yes, how?
- Will access to the services promote competition in the ramp services market by ACTO? By any other company or person? If yes, how?
- Will access to the services promote competition in any other market that has not been identified by the applicant? If yes - what market, by whom and to what extent?

Criterion (b) it would be uneconomical for anyone to develop another facility to provide the service

Background

In the Council's draft guide to Part IIIA of the TPA, the Council stated its expectation that this criterion would limit the scope of access declarations to infrastructure with some form of monopolistic power, and usually infrastructure exhibiting natural monopoly characteristics. Such infrastructure can usually supply the entire market demand at lower cost than two or more smaller facilities.

In assessing a declaration application the Council will consider the monopolistic characteristics of the relevant infrastructure facility. Where effective competition is likely, granting access will do little to promote competition, reduce output prices or improve quality, while imposing potentially significant regulatory costs on government and the infrastructure operator. However, where entrenched monopolistic behaviour is present, or would appear likely, granting access may be an effective way of stimulating competition in a related market.

The Council identified several indicators that would indicate the presence of entrenched monopolistic power and will be considered in assessing a declaration application. A key indicator of natural monopolies is the existence of significant 'economies of scale', that is, as production or output increases, the average cost of producing each output decreases. The Council noted that economies of scale are dependant on several factors including the definition of the relevant market, the nature of market demand, production technology, and the rate of technological innovation in the industry. These factors will be considered by the Council in any declaration assessment.

The Council will also consider the impact of declaration, on incentives for innovation or new entrants, for facilities with monopolistic characteristics for reasons other than economies of scale. Such a non-natural monopoly may arise where a business controls an essential or unique primary input or resource, or obtains an exclusive right to produce for the market (for example through trademarks or patents). This form of monopoly is based essentially on the inability of other businesses either to compete on an equal basis or to enter the market.

In addition to the statutory criteria set in s.44G(2) and s.44H(4), the Council and the Minister are required by s.44F(4) and s.44H(2) to have regard to whether it would be economical for anyone to develop another facility that could provide part of the infrastructure service.

This issue may arise where the two or more infrastructure facilities provide the service which the applicant seeks to have declared. If one of these facilities could be economically duplicated, then that part of the service cannot be declared.

ACTO Applications

The ACTO applications assert that:

> *"[c]learly it is not economical for an airport to be built that might compete with the Sydney and Melbourne international airports. Even if such an airport was built it is entirely unlikely that passenger aircraft which provide over 80% of freight capacity would shift to such an alternative. As a result there is no practical alternative to the two major international airports, which control about 70% of Australia's trade by air, and it is competition to the CTOs on these airports which is required."*

In respect of applications S1, M1, S2 & M2 the Council seeks comments on:

- The extent to which international freight operations are dictated by international passenger operations?
- Details on the amount of international freight that enters Australia through Sydney and Melbourne airports respectively; what percentage of all international freight to and from Australia does this represent?
- The level of competition, if any, that exists between Sydney, Melbourne and any other international airports, in the provision of services to international aircraft both passenger and freight?
- Whether another facility could be developed to provide any of the services? If yes, what services and what type of facility?
- Whether it is possible that another facility could be developed to provide part of any of the services? If yes, what part of the services could be provided by another facility, and what would such a facility entail? For example, could use of the services provided by the Ansett and Qantas facilities offer an adequate alternative to ACTO in the operation of its business?

In respect of applications S3 & M3 the Council seeks comments on:

- Whether it is necessary for a CTO to operate on site at an airport, or is it possible to develop an off airport facility to perform the operations?
- If it is necessary, why? What restraints exist that require CTO functions to be performed on airport?
- Whether it is possible that some of the CTO functions could be conducted off airport? If so, which functions and how could they operate off airport?
- Whether part of the service could be provided by another facility? If yes, what part and by what facility?

Criterion (c) the facility is of national significance having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy.

Background

The Council referred to this criterion as a "test of materiality" in its draft guide to Part IIIA of the TPA. In identifying infrastructure which is nationally significant, the Council will have regard *only* to the three points above, thus placing less important facilities outside the scope of the National access regime.

The Council noted that in some situations the size of a facility may indicate its national significance, while in other cases this test may be inconclusive.

The Council stated that a facility which is important to constitutional trade or commerce will be considered nationally significant. This may be indicated by the monetary value of trade dependent on the infrastructure service or the importance of the service to trade or commerce in related markets.

The Council stated that it will assess the importance of an infrastructure service to the national economy particularly by examining the market in which access would promote competition. The Council stated that it would generally consider national significance to be established if such a market provides substantial annual sales revenue to businesses in it and providing access would be likely to substantially promote competition.

ACTO Applications

ACTO in its applications states:

> *"[a]irports are of enormous importance to the National economy in regards to their contribution to tourism, trade, and direct and indirect employment. ... Over fifty international airlines use our airports and non resident airlines (foreign carriers) represent over 55% of the airline capacity made available to Australia. A matter which is much less appreciated is the contribution airports make to trade. Approximately 20% of Australia's trade by value (not tonnage) is conducted by international airfreight - $25 billion per annum and growing rapidly. This trade is probably more important as a catalyst to trade than as a means of trade in so far as all urgent international transportation is provided by air freight, virtually all express shipments are air freight all international mail is air freight, urgently required samples and spare parts are exported by air freight. The competitiveness of Australia as a manufacturer of high value added goods is determined in part by the efficiency of our air freight system both import and export and the potential for growth in exports of high value perishable rural produce is determined by the efficiency of air freight."*

The applications also state that 70% of Australian air freight trade is conducted through Sydney and Melbourne airports.

In respect of applications S1, M1, S2 & M2, the Council seeks comments on:

- The size (in tonnage and value terms) and importance of the international air freight market to and from Australia, with specific reference to Sydney and Melbourne airports.
- Whether all the facilities described by the applications, ie the hard stand, the freight apron and areas to provide storage and to enable loading and unloading are so much part of the airports that the significance test should be applied to the airport itself, rather than to the separate facilities?
- If yes, should the Council then consider the significance of Sydney and Melbourne airports to the national economy generally, or whether the consideration should be narrowed to the role of the facilities in respect of international air freight and the significance this has for the national economy?
- If no, are the facilities of themselves significant because of either their size or importance to the national economy?

In respect of applications S3 & M3, the Council seeks comments on:

- Whether the facilities described by the applications, ie an area at each airport to construct a cargo terminal, are significant because of either their size, impact on international trade, or importance to the national economy?

Criterion (d) access to the service can be provided without undue risk to human health or safety

Background

In the Council's draft guide to Part IIIA of the TPA, the Council stated that "access should only be impeded by *bona fide* safety considerations". Applicants must provide a description of how access can be provided without compromising system integrity or safe scheduling or posing undue risk to human health or safety. Infrastructure operators who seek to deny access on safety grounds must bear the onus in demonstrating to the Council that access to the service would compromise the safety of the infrastructure service.

ACTO Applications

In its applications, ACTO states:

> *"ACTO will operate as a Ramp and CTO supplier subject to the same safety and security controls that pertain to the current operators. By being allocated the required land ACTO will be able to receive freight on dollies from aircraft parking bays and within the confines of its land and therefore be able to perform operations without impinging on other aspects of airport safety and security."*

ACTO also maintains that it hold insurance appropriate to the proposal and can guarantee safety just as well as any other airport operator. It also states in its applications that:

> *"In making this request ACTO is not seeking to establish operations that can in any way be considered unsafe. The operations ACTO proposes are common practice on the airports today*

under the purview of Qantas and Ansett and are common practice on overseas airports. ACTO is merely seeking permission to operate in a way comparable to and compatible with the way that Qantas and Ansett are permitted to operate by the FAC."

In respect of applications S1, M1, S2, M2, S3 & M3 the Council seeks comments on:

〉 Whether there are any health and safety risks in access being granted to any of the services described in the applications?

〉 If there are any such risks, what are they? Can these risks be addressed in a satisfactory way?

Criterion (e) access to the service is not already the subject of an effective access regime

Background

Infrastructure services covered by "effective" access regimes cannot be declared under the National regime.

The criteria for judging the effectiveness of State and Territory regimes are set out in clauses 6(2)-(4) of the Competition Principles Agreement. The Council will assess whether a State or Territory regime is effective at the time it assesses an application for declaration, unless the regime has already been certified.

There is no legislative indication of how to assess the effectiveness of Commonwealth or private access regimes. The Council will assess the effectiveness of such a regime with regard to the outcomes produced by the regime, the economic efficiency of such outcomes, other relevant public interest considerations and the clause 6 principles of the Competition Principles Agreement.

ACTO Applications

In its applications ACTO states:

The FAC does not have an access policy and is not answerable to an independent "access regime". ... The FAC does have an indirect access regime by way of controlling the organisations who are permitted airport security passes and on airport drivers licenses. However this indirect access regime is not based on a policy which sets out the criteria for providing on airport services or the kinds of organisations which are permitted to apply for such access."

In respect of applications S1, M1, S2, M2, S3 & M3, the Council seeks comments on:

〉 Whether an effective access regime currently exists for the services the subject of the applications?

Criterion (f) access (or increased access) to the service would not be contrary to the public interest.

Background

In the Council's draft guide to Part IIIA of the TPA, the Council noted that public interest is not defined in the Act and will therefore need to be assessed on a case-by-case basis.

A key consideration in the Council's assessment of the effect of a declaration on public interest will be economic efficiency. Economic efficiency entails production of a service at least cost (technical efficiency); ensuring that services are provided to those who value the services most highly (allocative efficiency); and preserving the incentives for innovation and investment (dynamic efficiency).

In addressing this criterion, the Council will assess the benefits and costs of declaration, including the potential for lower prices and enhanced competition in related markets leading to improvements in the three components of efficiency, as well as potential costs including compliance burden and reduced incentives for investment and innovation

The Council stated that is does not consider the public interest and economic efficiency to be synonymous. While economic efficiency will be an important consideration, other public interest factors will also be considered including:

- ecologically sustainable development;
- social welfare and equity considerations;
- transitional issues created by reform programs;
- policies concerning occupational health and safety and industrial relations;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally, or a class of consumers; and
- the competitiveness of Australian businesses.

This criterion has been expressed in the negative - "not contrary to the public interest" - rather than the positive - "in the public interest". This reflects the fact that criteria (a) to (e) already address a number of positive elements in the public interest. If declaration were judged to be neutral in public interest terms, the Council would recommend declaration if criteria (a) to (e) were satisfied.

Concurrent Developments

In determining whether access would not be contrary to the public interest, the Council may need to take account of developments within the industries the subject of the applications. In respect of the ACTO applications, relevant developments that may need to be considered are privatisation of the airports (Melbourne in particular), the Airports Act 1996 and the Air Freight Exports Inquiry. These matters have been briefly discussed in Section 2 of this paper.

The Council is also aware that the FAC is in the process of finalising a study into freight at Sydney Airport. This is also a matter that is relevant to the Council's consideration of the public interest criteria.

ACTO Applications

It is implicit in ACTO applications that the applicant is of the view that access to the services defined would not be contrary to the public interest, on the contrary they would be in the public interest.

In respect of applications S1, M1, S2, M2, S3 & M3, the Council seeks comments in the following areas:

〉 **Privatisation of Melbourne Airport**

- What regard, if any, should the Council take of the imminent leasing of Melbourne Airport?
- If the Council should take regard of this fact, how should it do so? Is this an issue that impacts on whether it is contrary to the public interest for access to be provided, or is it an issue that the Council may be better considering in the time period for declaration?

〉 **Airports Act 1996**

- What is the interrelationship between the *Airports Act 1996* and Part IIIA of the *Trade Practices Act 1974*?
- Are the services the subject of the ACTO applications, services that will be covered by the *Airports Act 1996*, ie are they services necessary to operate or maintain civil aviation services?
- If yes, how should the Council deal with these applications as the *Airports Act 1996* does not have effect until after an airport has been leased?
- If no, should the Council have regard to any aspect of the *Airports Act 1996*: if so what aspects and how?

〉 **Air Freight Exports Inquiry**

- Should the Council take into account the recommendations of the House of Representatives Standing Committee? If yes, what recommendations, and how should the Council take them into consideration?

〉 **Sydney Airport Freight Study**

- Does this study have any impact on matters that the Council should consider [the results of this study were not available at time of writing].

〉 **Other issues**

- The Council welcomes comments on any matter that may be of relevance to the public interest in considering this application.

3.3 Duration of a declaration

Section 44H(8) requires that every declaration include an expiry date. This may be a point in time and/or it can involve an event which may occur in the future. In its draft guide to Part IIIA of the TPA, the Council indicated that it would adopt a flexible approach in recommending a declaration period.

The period of declaration will need to be considered on a case-by-case basis. Relevant considerations will include the need to balance the benefits of long-term certainty for businesses against the potential for technological development, reform initiatives, or other industry changes which could undermine the grounds for declaration.

In respect of the ACTO applications, relevant considerations are the implementation of the Airports Act 1996 and any measures scheduled to be introduced as a consequence of the Air Freight Exports Inquiry.

ACTO Applications

The applicant makes no submission in its applications on the duration of the declaration.

The Council seeks comments on the following:

〉 If the Council was to recommend declaration of any of the services the subject of the applications, what should be the duration of the declarations? What factors should the Council consider in this regard? In particular, the Council would like comments on the possible effect of the leasing of Melbourne Airport (and how the Airports Act 1996 may then effect this matter) and the recommendations of the Airfreight Exports Inquiry on duration of any recommendation.