Australian Government

Department of Infrastructure and Regional Development

Regulation Impact Statement

OBPR ID 17757

Western Sydney Airport –

Market Access Facilitation

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Contents

Introduction

Purpose

This Regulation Impact Statement (RIS) has been prepared by the Department of Infrastructure and Regional Development for assessment by the Office of Best Practice Regulation and concerns market access facilitation, and in particular airport ownership restrictions, for the Western Sydney Airport (WSA) project.

Context

As part of the Government's sale of Sydney (Kingsford-Smith) Airport (KSA) in 2002, the purchaser, Southern Cross Airports Corporation Pty Ltd (SCAC), was provided with the opportunity to develop and operate any second major airport in the Sydney region, within 100 kilometres of the Sydney GPO. By virtue of the Government's 15 April 2014 announcement that the site for Western Sydney's airport will be Badgerys Creek, this right has been activated. Contractual provisions associated with this right articulate a strict process and tight timeframes in which the Government must consult with SCAC regarding its right to develop and operate the airport. The Prime Minister has indicated he expects construction to commence next year.

Overview of problem and rational for Government intervention

The share sale agreement for KSA provides that if SCAC does not exercise an option to develop and operate WSA, the Commonwealth may offer the opportunity to a third party. To enable the possibility of this to occur, amendments are currently being considered that would remove the requirement in section 18 of the *Airports Act 1996* (the Act) that KSA and WSA be under common ownership. Although this would enable an operator other than SCAC to own WSA, current airport cross-ownership restrictions in the Act would restrict access of some airport operators and their investors to any market transaction.

The Act provides that airport-operator companies are subject to a 15 percent limit on cross-ownership of certain airports (section 50). The aim of the restrictions is to ensure diversity of ownership and control of certain major airports as specified in the Act. In relation to WSA (or Sydney West Airport as it is referred to in the Act), the 15 percent limit on cross-ownership is stated to apply to the following pairs of airport-operator companies (section 49):

- WSA and Brisbane Airport;
- WSA and Melbourne (Tullamarine) Airport; and
- WSA and Perth Airport.

Consistent with the policy intent, the outcome of these restrictions is to ensure that no one person or group of persons could have ownership and or control of WSA and Brisbane, Perth or Melbourne Airports. Although the restrictions currently have no effect (given WSA has not yet been declared an airport for the purposes of the Act), once the airport was declared certain experienced airport operators and investors holding more than 15 percent equity in Brisbane, Perth or Melbourne Airports would be restricted from owning more than 15 percent in WSA.

The Government intends that most of the cost of the airport will ultimately be met by a private sector operator. If SCAC did not exercise an option to develop and operate WSA, and an offer was then made to the market, the cross-ownership restrictions would unnecessarily restrict the pool of experienced and local investors available to take part in any market transaction. This would unreasonably restrict the ability of the Government to leverage, and the market to source, private capital to deliver the project, placing a greater reliance on public funds. To help address these concerns this RIS reviews the ongoing need for the WSA cross-ownership restrictions.

This issue affects businesses only; it does not directly concern community organisations or individuals and as such they have been excluded from further consideration.

Policy options

Three policy options have been examined.

Option 1—Status quo

There would be no change to legislated cross-ownership limits for WSA. If offered an opportunity to develop and operate the airport, third parties would need to ensure they complied with the cross-ownership limits.

Option 2— Vary the threshold

Cross-ownership restrictions would be kept, but the 15 percent threshold would be relaxed.

Option 3 — Remove cross-ownership restrictions applying to WSA

Cross-ownership restrictions as they relate to WSA would be removed. This would enable experienced airport investors with investments in Melbourne, Perth and Brisbane airports, and the airports themselves, to invest more than 15 percent in WSA should SCAC elect not to exercise an opportunity to develop and operate the airport.

Analysis of options

Option 1 - Status quo

Under this option there would be no change to cross-ownership limits for WSA and the policy of ensuring diversity of ownership and control of certain major airports as it relates to WSA would be retained. If offered an opportunity to develop and operate the airport, third party operators and investors would need to ensure they complied with the cross-ownership limits.

This could be expected to limit the willingness of parties who would be caught by this restriction to invest and could result in experienced airport operators and investors electing not to participate in any market transaction for the airport. Alternatively, if affected third parties wanted to take up an opportunity in WSA of more than 15 percent they would need to divest the stakes they currently hold in other relevant airports. The more likely scenario however is that only a small pool of less-experienced investors (those with minor or no holdings in other relevant airports) would consider investing in WSA. This could create risks for the project ranging from delays to cessation of the project altogether and would have implications for the ability of the Government to leverage private sector funding to develop the airport. It is difficult to articulate the likelihood of these risks occurring however if they did the consequences would be high.

One variation to the status quo option could be a 'wait and see' approach. This would involve only addressing cross-ownership restrictions should SCAC turn down any opportunity to develop and operate the airport. However, contractual timings stipulated in the KSA share shale agreement mean the Commonwealth would only have a small window of time to approach the market if SCAC turned down any offer.

Retaining the status quo and the 'wait and see' variation would have a nil cost under the Regulatory Burden Measurement (RBM) framework - see the Regulatory Burden and Cost Offsets section for further details.

Option 2 - Vary the threshold

Under this option restrictions would be kept but the 15 percent threshold would be relaxed to permit a higher level of investment.

Although the threshold could be varied across a spectrum ranging from a modest to a more significant increase, which could increase the possibility of a successful market offering, it would still maintain barriers to investment. A more modest increase to the threshold may help maintain the policy of ensuring diversity of ownership and control while a more significant increase would erode the effectiveness of the policy as it applies to WSA and its associated airport-pairings.

Regardless of the amount of the increase however, airports and investors affected by the cross-ownership restrictions would continue to be prevented from owning 100 percent of the airport, while SCAC would not be. Should SCAC decline to exercise an option to develop and operate the airport, other operators would be disadvantaged by being prevented from taking the same level of ownership as SCAC would have been able to. This would likely reduce the willingness of third party operators to participate in any market transaction for the airport.

Further, given the importance of capital availability to a greenfield airport development, any percentage restrictions (however big or small) have the potential to restrict capital flow and therefore be counterproductive to the delivery of an important infrastructure project.

This option would have a nil cost under the RBM framework - see the Regulatory Burden and Cost Offsets section for further details.

Option 3 - Remove cross-ownership restrictions applying to WSA

This would see cross-ownership restrictions as they relate to WSA being removed; the policy of ensuring diversity of ownership and would no longer apply in the case of WSA and its associated airport-pairings.

Removing the cross-ownership restrictions would remove barriers to investment for certain experienced and currently committed domestic investors. It would increase ability of the Government to leverage, and the market to source, private sector capital to deliver the project. This would maximise the possibility of a successful market offering in the event SCAC elected not to exercise an option to develop and operate the airport. It would also be broadly deregulatory in that it would involve removal of investment restrictions.

Removing the restrictions relating to WSA would help mitigate any risks (such as those highlighted in Option 1) associated with only a small pool of less-experienced airport investors being available to access any market transaction for the airport.

It would do this by creating an environment in which experienced airport operators and investors could take a greater than 15 percent share of the airport if the opportunity emerged without them having to divest their holdings in other airports. It would not prevent any other investor from participating in any market transaction for the airport.

This option would enable the estimated economic and social benefits of an airport in Western Sydney to be realised in the most expeditious timeframe taking into account potential outcomes of the right of first refusal process.

Removing the cross-ownership restrictions for WSA would have a nil cost under the RBM framework - see the Regulatory Burden and Cost Offsets section for further details.

Regulatory Burden and Cost Offsets

Regulatory costs and cost offsets have been considered for the options identified.

Having regard to regulatory costs, whether under the status quo or other options, as the cross-ownership restrictions for WSA are not yet in force they do not currently impose any administrative or compliance costs on businesses. It follows therefore that removing the restrictions altogether, as per Option 3, would also have a nil regulatory cost impact.

Removing the cross-ownership restrictions would increase the extent to which certain third parties could invest in the airport and the attractiveness of such a proposition, but it would not change their ability to do so. As this change would not impact the number of entities that could participate, no regulatory burden would be created. It mirrors the current (status quo) situation whereby any market participant could participate in a market transaction for WSA, except that

certain operators and investors would not be restricted to owning only up to 15 percent where they own more than 15 percent in another specified airport.
All that would change is that these affected airport operators and investors would not be required to monitor their compliance with the 15 percent rule. In practice, the costs of doing so would be negligible and would be a business-as-usual cost, given that reporting on company structures and composition is already produced for annual reporting and standard corporate governance purposes.

The following Regulatory Burden and Cost Offset Estimate table applies to Options 1–3.

Regulatory Burden and Cost Offset Estimate Table - Options 1–3

Average annual regulatory costs (from business as usual)				
Change in costs ($million)	Business	Community organisations	Individuals	Total change in cost
Total by sector	0	0	0	0
Cost offset ($ million)	Business	Community organisations	Individuals	Total by source
Agency*	0	0	0	0
Total by Sector	0	0	0	0
Are all new costs offset? ☐ Yes, costs are offset ☐ No, costs are not offset ☒ Deregulatory, no offsets required				
Total (i.e. change in costs less cost offsets, in $ million)			$0 million	

Consultation

Stakeholders were consulted on issues and options raised in this RIS via a short discussion paper that was published on the Department's website on 12 December 2014. The paper requested submissions by 9 January 2015. A copy of the paper is still available on the website.

Airport stakeholders to which the SWA cross-ownership restrictions currently apply (Brisbane, Perth and Melbourne Airports), the Australian Airports Association (the peak body representing the interests of Australian airports) and SCAC were specifically notified and invited to provide any comments they might have. Any other interested party was also able to provide comments. Prior discussions had also been held with SCAC about this issue in the context of broader contractual consultations with the Commonwealth.

The paper invited stakeholders to provide comments on any aspect covered in the paper and also on matters not raised but which were considered relevant to the issue. In addition, the paper posed four questions that stakeholders were invited to consider:

1. *Three options have been examined in response to the issue of market access facilitation for the WSA project. What are your views on these options?*

2. *The Department considers Option 3 would be the most effective to maximise the possibility of a successful market offering. What are you views on this?*

3. *Do you consider that any of the options would have an adverse competitive impact on the Australian aviation industry?*

4. *Removing the cross-ownership restrictions for WSA has been assessed as having a nil regulatory cost impact on affected industry stakeholders. What are your views on this?*

No submissions were made by stakeholders in response to the consultation paper.

Recommended option

Recommendation

The Department recommends Option 3 be adopted to increase market access to the WSA project within the context of SCAC's contractual right of first refusal to develop and operate the airport. It is the most effective option to address the problem as outlined.

Discussion

Option 1, retaining the status quo, is not considered to be an effective or appropriate option. Retaining the status quo would continue to restrict access of some airport operators and their investors to any market transaction for the project. While it would ensure the policy of ensuring diversity of ownership and control continued to be applied to WSA and its associated airport-pairings, it would unnecessarily restrict the pool of experienced and local investors available to take part in any market transaction and would unreasonably restrict the ability of the Government to leverage and the market to source private capital to deliver the project. This could have negative implications for the project in the event that SCAC declined an opportunity to develop and operate the airport. This has broader economic and social implications for developing a vital piece of infrastructure for Western Sydney. Out of the three options considered this option has the lowest net benefit.

Option 2, retaining the restrictions but relaxing the threshold, is also not a desirable option given it would still maintain barriers to investment. Should SCAC decline to exercise an option to develop and operate the airport, other operators would be disadvantaged by being prevented from taking the same level of ownership as SCAC would have been able to. Although a smaller increase would help maintain the policy of ensuring diversity of ownership and control of WSA and its associated airport-pairings, it would still act to maintain barriers to investment in WSA. Given the importance of capital availability to a greenfield airport development, any percentage restrictions (however big or small) have the potential to restrict capital flow and therefore be counterproductive to the delivery of an important infrastructure project.

Although this option could have a higher net benefit than that considered by Option 1, it would still be relatively low in the context of the policy aims as outlined and is therefore also not recommended as an option.

Option 3 is the most effective, appropriate and efficient option available to achieve the goal of increasing market access to the WSA project. It would maximise the possibility of a successful market offering in the event SCAC elected not to exercise an option to develop and operate the airport. Although it would mean the policy of ensuring diversity of ownership and control would, effectively, no longer apply in relation to WSA and its associated airport-pairings, it would best enable the Government to optimise private sector funding to deliver the project.

This option has the highest net benefit to the community as it would enable the estimated economic and social benefits of an airport at Badgerys Creek to be realised in the most expeditious timeframe taking into account potential outcomes of the right of first refusal process. In this context the benefits of removing the restrictions outweigh any benefits derived from the diversity of ownership and control policy. Given WSA is not yet in operation, these benefits are considered to be negligible particularly in the context of the existing policy continuing to apply to KSA.

Although it involves legislative amendment, and could therefore be characterized as having a regulatory impact, Option 3 should be considered broadly deregulatory as it involves the removal of legislative provisions.

As no stakeholders provided submissions on the consultation paper, no opposition to the Department's position that Option 3 would be the most effective to maximise the possibility of a successful market offering if one was required has been identified. There is also no opposition to the proposition that removing the cross-ownership restrictions for WSA will have a nil regulatory cost impact on affected industry stakeholders.

From a competition perspective, it is the Department's position that the recommended option will not have any adverse impacts on the Australian aviation industry. This position was not been contradicted in the consultation process. Airports operate in their own distinct geographic markets. Therefore removing airport cross-ownership restrictions to enable Brisbane Perth and or Melbourne Airports to take a greater than 15 percent stake in WSA would not alter the competition dynamic in the Australian aviation sector.

The recommended option is expected to increase the possibility of a successful market offering if one was required, and this would have positive flow on effects for the creation of competition between airport operators within the Sydney basin. From this perspective while Options 1 and 2 would not prevent competition between airport operators in the Sydney basin, these options are still not preferred given they would still maintain barriers to investment and impact the range of participants who could access the project.

While SCAC has provided some comments on the proposal, such comments are commercially sensitive within the context of its right of first refusal and are therefore not appropriate for disclosure. The Commonwealth continues to consult with SCAC in good faith consistent with its responsibilities under the contractual right of first refusal provisions.

Implementation and evaluation

Implementation

Option 3 will be implemented via legislative amendment. With Government's approval a bill would be introduced to Parliament to make this change. Beyond the Parliament's approval there are no significant implementation challenges associated with this. Timeframes associated with implementation would be contingent on the Parliamentary Sittings schedule. The amendment process would not involve any additional resourcing to manage and would not require any special governance or transitional arrangements to be developed. Affected industry stakeholders would be notified once the changes were agreed to by Parliament and provided relevant supporting information to clarify what the changes would mean for them.

Evaluation

The removal of cross-ownership restrictions for WSA will be evaluated in the context of whether SCAC elects to exercise its right of first refusal to develop and operate WSA (if it is offered such an opportunity). If SCAC accepts an offer to develop and operate the airport then there is no need to evaluate the proposed changes as they will not be utilised. This would only occur in the event SCAC declined an offer to develop and operate WSA and the Government then offered the opportunity to the wider market. In this instance a post contract evaluation could be conducted to evaluate the performance of the policy against its objectives. Although in such a situation it would be inherently difficulty to assess the counterfactual (ie, how a market offering with the WSA cross-ownership restrictions in place would progress), a qualitative approach could be taken relying on clearly articulated assumptions. However, regardless of the perceived success or otherwise following any evaluation, it would not be appropriate to reinstate the cross-ownership restrictions given the change is broadly deregulatory and there would be nothing to gain at that point in time by doing so.