

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

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AIRPORTS BILL 1996

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SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Transport and Regional  
Development, the Honourable John Sharp MP)



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## AIRPORTS BILL 1996

### OUTLINE

The amendments to the *Airports Bill 1996* to be moved by the Government have three purposes:

To include in the *Airports Bill 1996* a requirement that the airport lessee and management companies for Sydney Airport and Sydney West Airport be controlled separately from the lessee or management companies of either Melbourne Airport or Brisbane Airport. For this purpose, the Bill as amended will deem a holding of more than 15% of any of the paid up capital, voting power, and rights to distributions of profits and capital to constitute control, and will provide that the Minister for Transport and Regional Development ("the Minister") may determine that a person has "practical control" when a person with an interest of less than 15% (or no interest) effectively has control of a company.

To remove from the *Airports Bill 1996* clauses 71 and 117, which if enacted, would empower the Minister to exempt certain draft airport master plans and environment strategies from the public comment and consultation requirements of the Bill.

To make technical amendments to clause 14 of the Schedule to the Bill which replace references to a foreign company with references to a foreign person. Clause 14 sets out the application of the foreign ownership rules of the Bill to holding companies for airport companies. The amendments are necessary for the clause to achieve its purpose, as the Bill's rules on foreign ownership are based on the concept of a foreign person, not a foreign company.

### FINANCIAL IMPACT STATEMENT

The amendments do not affect the validity of the Financial Impact Statement included in the Explanatory Memorandum for the *Airports Bill 1996*.

## NOTES ON CLAUSES

### **Amendment 1**

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Amendment 1 inserts into the list of the objects of the Bill at clause 3:

“(fa) to ensure the diversity of ownership and control of certain major airports.”

This amendment is consequential to the inclusion in the Bill of rules on cross-ownership and control of airport-operator companies by amendment 12.

### **Amendment 2**

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Amendment 2 alters the simplified outline of Part 1 of the Bill at clause 4 by inserting into the outline of the ownership restrictions to which airport-operator companies are subject:

“(c) a 15% limit on cross-ownership for Sydney/Melbourne and Sydney/Brisbane airports.”

This amendment is consequential to the inclusion in the Bill of rules on cross-ownership and control of airport-operator companies by amendment 12.

### **Amendments 3 and 4**

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Amendments 3 and 4 add to the definitions of terms used in the Bill definitions of the terms *pair of airport-operator companies* and *unacceptable cross-ownership situation*.

The terms are defined to have the meanings given to them by sections 47B and 47C respectively. Those sections are inserted into the Bill by amendment 12.

The rules introduced by amendment 12 on cross-ownership and control are applied to the members of a pair of airport-operator companies. A breach of the rules on cross-ownership constitutes an unacceptable cross-ownership situation.

### **Amendments 5 and 6**

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Clause 21 provides that the Minister must not grant an airport lease to a company if the Minister is satisfied that, as a result of the grant, the ownership provisions of Part 3 would be breached.

Amendments 5 and 6 extend the scope of clause 21 so as to prevent the Minister granting a lease to a company if the Minister is satisfied that the grant

would result in a breach of the cross-ownership provisions included in the Bill by amendment 12.

### **Amendments 7 and 8**

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Subclause 25(3) provides that the Minister must not approve the transfer of an airport lease to a company if the Minister is satisfied that, as a result of the transfer, the ownership provisions of Part 3 would be breached.

Amendments 7 and 8 extend the scope of subclause 25(3) so as to prevent the Minister approving the transfer of a lease to a company if the Minister is satisfied that the grant would result in a breach of the cross-ownership provisions included in the Bill by amendment 12.

### **Amendments 9 and 10**

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Subclause 33(3) provides that the Minister must not approve a proposed airport-management company if the Minister is satisfied that, as a result of the transfer, the ownership provisions of Part 3 would be breached.

Amendments 9 and 10 extend the scope of subclause 33(3) so as to prevent the Minister approving a proposed airport-management company if the Minister is satisfied that the grant would result in a breach of the cross-ownership provisions included in the Bill by amendment 12.

### **Amendment 11**

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Amendment 11 alters the simplified outline of Part 3 by inserting into the outline of ownership restrictions to which airport-operator companies are subject:

“(c) a 15% limit on cross-ownership for Sydney/Melbourne and Sydney/Brisbane airports.”

This amendment is consequential to the inclusion in the Bill of rules on cross-ownership and control of airport-operator companies by amendment 12.

### **Amendment 12**

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Amendment 12 inserts into Part 3 of the Bill new Division 4A which contains rules in relation to the cross-ownership and control of members of certain pairs of airport-operator companies.

Many of the key terms used in new Division 4A are defined in the Schedule to the Bill.

### ***New Division 4A - limits on cross-ownership of pairs of airport-operator companies***

New Division 4A ensures that no one person or group of associated persons has ownership and/or control of:

- an airport-operator company for either of Sydney (Kingsford-Smith) Airport or Sydney West Airport, along with
- an airport-operator company for either Melbourne (Tullamarine) Airport or Brisbane Airport.

#### ***New subdivision A - Simplified outline***

##### **New clause 47A - Simplified outline**

This clause provides a simplified outline of the Division.

#### ***New subdivision B - Pairs of airport-operator companies***

##### **New clause 47B - Pairs of airport-operator companies**

For purposes of this Part, this clause defines a ***pair of airport-operator companies*** as:

- the airport-lessee company or an airport-management company for either Sydney (Kingsford-Smith) Airport or Sydney West Airport, together with
- either
  - \* the airport-lessee company or an airport-management company for Melbourne (Tullamarine) Airport; or
  - \* the airport-lessee company or an airport-management company for Brisbane Airport.

#### ***New subdivision C - 15% limit on cross-ownership***

##### **New clause 47C - Meaning of unacceptable cross-ownership situation**

This clause defines the term ***unacceptable cross-ownership situation***. An “unacceptable cross-ownership situation” exists in relation to a pair of airport-operator companies and in relation to a person if the person holds a particular type of stake of more than 15% in one company in the pair and holds any type of stake of more than 15% in the other company.

Clause 11 of the Schedule defines a particular type of stake in a company held by a person as consisting of the aggregate of the direct control interests of a type in the company held by the person and the person’s associates (as defined by clause 5 of the Schedule). Clause 12 of the Schedule defines a “direct

control interest” of a person in a company as the percentage held by the person of any one of:

- paid up capital;
- voting power;
- rights to distributions of capital or profits to shareholders on winding-up; or
- rights to distributions of capital or profits to shareholders other than on winding-up.

#### **New clause 47D - Acquisitions of shares**

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This clause makes it an offence for a person or persons to knowingly or recklessly acquire shares in a company where the acquisition creates an “unacceptable cross-ownership situation”, as defined by clause 47C, or to increase the total of a particular type of stake held by a person in either member of a pair of airport companies when an unacceptable cross-ownership situation already exists in relation to the pair and the person. On conviction a fine not exceeding \$40,000 for individuals or \$200,000 for corporations applies.

This offence in relation to an unacceptable cross-ownership situation is analogous to those created by clauses 41 and 45 in relation to an unacceptable foreign-ownership situation and an unacceptable airline-ownership situation respectively.

#### **New clause 47E - Compliance by airport-operator companies**

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This clause requires an airport-operator company to take all reasonable steps to ensure that an unacceptable cross-ownership situation does not exist in relation to a pair of airport-operator companies of which the company is a member and provides that it is an offence for an airport-operator company knowingly or recklessly not to do so. On conviction a fine not exceeding \$50,000 applies.

This obligation in relation to an unacceptable cross-ownership situation is analogous to those imposed on an airport-operator company by clauses 42 and 46 in relation to an unacceptable foreign-ownership situation and an unacceptable airline-ownership situation respectively.

#### **New clause 47F - Remedial orders**

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This clause makes similar provisions in relation to Federal Court orders concerning an unacceptable cross-ownership situation to those of clauses 43 and 47 concerning an unacceptable foreign-ownership situation and an unacceptable airline-ownership situation respectively.

The clause gives airport-operator companies standing to apply for court orders to assist them in fulfilling their obligations under clause 47E.

### ***New subdivision D - Practical control***

Without provisions on practical control, a person might be in a position to exercise control over an airport-lessee or airport-management company through means other than holding a stake of more than 15% in the company. Such an outcome could result in a circumvention of the intention of Subdivision C to restrict common control of certain airport-operator and airport-management companies.

This Subdivision enables the Minister to address such circumstances by determining that the person has “practical control” of the company. If a person has practical control of an airport-lessee or airport-operator company, the consequences are analogous to those which would follow under Subdivision C if that person held a stake of more than 15% in the company.

### ***New clause 47G - Meaning of control***

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This clause defines the term *control* for the purposes of new Subdivision D. “Control” includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

### ***New clause 47H - Minister may declare person to have practical control of an airport-operator company***

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Subclause (1) empowers the Minister to declare, when an unacceptable cross-ownership situation as defined by clause 47C does not exist, that a person nevertheless has “practical control” of an airport-operator company if the Minister is satisfied that:

- the directors of the company are accustomed or under an obligation to act in accordance with the directions, instructions or wishes of the person (either alone or together with associates); or
- the person (either alone or together with associates) is in a position to exercise control over the company.

Subclause (3) requires the Minister to revoke a declaration if he or she ceases to be satisfied of the matters specified in subclause (1)

Subclause (4) provides that a declaration or revocation of a declaration under this clause must be Gazetted and a copy given to the airport-operator company and person concerned.

### ***New clause 47J - Requirement to relinquish practical control or reduce stake***

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Subclause (1) requires that, if a person has practical control (as per clause 47H) of one member of a “pair of airport operator companies” (as defined by clause 47B) and the person has either practical control of, or a particular type of stake of more than 15% in, the other member of the pair, then the person



must take such steps as are necessary to ensure that in respect of at least one member of the pair:

- either the directors are not accustomed or under an obligation to act in accordance with the directions, instructions or wishes of the person and the person is not in a position to exercise control over the company; or
- the person does not have any stake in the company of more than 15%.

The person must take those steps within 90 days after receiving a copy of the Minister's declaration under clause 47H or within such longer period as the Minister allows.

Subclause (2) provides that it is an offence for a person knowingly or recklessly to contravene subclause (1), punishable on conviction by a fine not exceeding \$40,000 for individuals or \$200,000 for corporations.

### **New clause 47K - Remedial orders**

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Subclause (1) provides, if a person has practical control of one member of a pair of airport-operator companies and the person has either practical control of, or a particular type of stake of more than 15% in, the other member of the pair, then the Federal court may, on application by the Minister, make such orders as it considers appropriate to ensure that in respect of at least one member of the pair:

- either the directors are not accustomed or under an obligation to act in accordance with the directions, instructions or wishes of the person and the person is not in a position to exercise control over the company; or
- the person does not have a stake in the company of more than 15%.

Subclauses (2), (3), (4), (5) and (6) make provisions in respect of the court's orders under subclause (1) of this clause similar to the provisions of clauses 43, 47 and new 47F concerning an unacceptable foreign ownership situation, an unacceptable airline ownership situation and an unacceptable cross-ownership situation respectively.

### **Amendment 13**

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Subclause 50(1) allows for the making of regulations which provide for and in relation to requiring a person:

- to keep and retain records relevant to an "ownership matter";
- to give to the Minister information relevant to an ownership matter or to ascertaining whether Division 6 has been or is being complied with;
- to give information to an airport-operator company, where the information is relevant to an ownership matter that concerns the company; and
- to meet a further requirement that information be verified by a statutory declaration.

Amendment 13 extends the definition of an ownership matter given at subclause 50(6) so as to enable regulations made under subclause 50(1) to deal

with the information necessary to administer the rules in relation to cross-ownership and control of airport-operator companies included in the Bill by amendment 12.

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#### **Amendments 14, 15 and 16**

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These amendments makes changes to clauses 68, 69 and 70 consequential to the omission of clause 71 by amendment 17.

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#### **Amendment 17**

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This amendment omits from the Bill clause 71. Clause 71, if enacted, would empower the Minister to exempt a draft master plan to be given to him or her under clause 68 from the requirements of clauses 69 and 70, which deal with public comment and consultations on draft master plans.

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#### **Amendments 18, 19 and 20**

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These amendments make changes to clauses 114, 115 and 116 consequential to the omission of clause 117 by amendment 21.

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#### **Amendment 21**

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This amendment omits from the Bill clause 117. Clause 117, if enacted, would empower the Minister to exempt a draft environment strategy to be given to him or her under clause 114 from the requirements of clauses 115 and 116, which deal with public comment and consultations on draft environment strategies.

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#### **Amendment 22**

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Under clause 210 the Federal Court may grant injunctions relating to contravention of the Bill or a demand management scheme.

Amendment 22 extends the scope of the clause to provide for the Federal Court to grant injunctions, on the application of a member of a pair of airport-operator companies, in relation to actual or intended breaches of the cross-ownership rules inserted into the Bill by amendment 12.

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#### **Amendment 23**

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Clause 234 provides for review of certain decisions of the Minister under the Act by the Administrative Appeals Tribunal (AAT). Subclauses (1) and (2) have the effect that that all decisions are reviewable by the AAT other than certain specified decisions.

Amendment 23 includes in the list of non-reviewable decisions a decision by the Minister under new clause 47H (inserted by amendment 12) on whether a person has practical control of an airport-operator company.

#### **Amendment 24**

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Clause 235 requires the Minister to table a statement about the decision when he or she has made any one of a number of specified decisions under the Act. The decisions specified are decisions which, under clause 234, are not reviewable by the AAT.

Amendment 24 includes in the list of decisions about which a statement must be tabled a decision by the Minister under new clause 47H on whether a person has practical control of an airport-operator company.

#### **Amendment 25**

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Clause 237 provides that certain offences against the Act are indictable.

Amendment 25 includes in the list of indictable offences an offence against the cross-ownership and control rules of Division 4A of Part 3, to be inserted by amendment 12.

#### **Amendment 26**

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Clause 2 of the Schedule defines terms used in Part 3 and the Schedule.

Amendment 26 adds to the definitions given by the clause the definition of the *practical control*. The term is defined to have the meaning given by sections 47H, which is to be inserted into the Bill by amendment 12.

#### **Amendment 27**

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Clause 9 of the Schedule provides that, for purposes of the ownership provisions (defined as Part 3 and the Schedule), certain specified interests in a share must be disregarded.

Amendment 27 inserts into the list of types of interests to be disregarded an interest in a share held by the Commonwealth. This is necessary to ensure that the Commonwealth would not be in breach of the rules on cross-ownership and control to be introduced by amendment 12 if, for example, the Commonwealth were to hold shares in airport-lessee companies pending sale of the shares.

#### **Amendments 28, 29, 30, 31 and 32**

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Clause 14 of the Schedule is intended to facilitate the use of holding companies as vehicles for joint ventures between Australian and foreign investors. The intention of the clause is that the Bill's rules on foreign ownership will be

applied on the basis of the ownership of the holding company rather than the airport-lessee or airport-management companies in which it invests.

Amendments 28, 30, 31 and 32 replace references in the clause to a foreign company with references to a foreign person, consistent with the rules of the Bill on foreign ownership which are based on the concept of a foreign person, not a foreign company. Also, in the clause heading “foreign companies” will be replaced by “foreign persons”.

Amendment 29 makes a minor consequential change to the clause.







