BARA
Board of Airline Representatives of Australia Inc

BARA supplementary submission

31 May 2019

Sydney Airport's supplementary submission

The Board or Airline Representatives of Australia (BARA) comments on, and responds to, Sydney Airport's submission (dated 17 May 2019) in regard to commercial accountability and performance data, and contract clauses to silence airline complaints.

Commercial accountability and performance data

One of BARA's core themes to this inquiry is that the operators of the major international airports accept somewhere between trivial and no commercial accountability over service delivery in their airport services agreements with international airlines. BARA does not consider the evidence provided by any of the participants to this inquiry refutes that fact.

BARA used on time performance and baggage data for international flights to show the efficiency gains possible though improved airport services agreements that satisfy market norms. It also identified the initiatives within the control of the airport operators that could deliver improved outcomes for both international passengers and airlines.[1] BARA is aware of the operating restrictions that apply to Australian airports, especially at Sydney Airport,[2] and tailored its estimated improvement in operating performance accordingly.

BARA does note the positive comments made by Dr Harry Bush CB, as commissioned by the Australian Airports Association to offer his thoughts on the Draft Report, who stated in the public hearings:

> I thought there was some stuff in the BARA submission which I thought was quite interesting in that area, and were trying to move things towards that and where there would be a lot of discussion about, "Is the service right?" This is what's happened at Gatwick – "Is the service right?", Is the on time performance right?", "What can be done to improve it?"[3]

And by HRL Morrison and Co, a specialist infrastructure manager:

> …BARA has been incredibly constructive in pushing airports to, you know, get – get more definitive, more measured, more measurability into the quality and service indicators, as – as a way of, you know, of demonstrating value for money.[4]

[1] BARA submission 7 March 2019.
[2] For example, see BARA's proposed reforms for Sydney Airport's operating environment in its policy documents *Safe and Efficient Air Navigation Services* (2016) and *Environmentally Sustainable Growth* (2018).
[3] Public hearings transcripts, p.167.
[4] Public hearings transcripts, p.348.

Sydney Airport, however, seems to view BARA's commercial framework and evidence to drive improved performance in airport services to the benefit of international passengers and airlines as misleading and based on inaccurate assertions. It is difficult to see useful commercial negotiations occurring with Sydney Airport if it has rejected the reasonable commercial expectations of international airlines, especially when it has the market power to back up that position in negotiations.

On data sources, especially baggage outcomes for international passengers, BARA notes its data correlates with the performance ratings given by international airlines in the Australian Competition and Consumer Commission's annual quality of service monitoring. Sydney Airport's international baggage system has consistently rated poorly over many years and the measured rate of mishandled international bags through the airport is also the highest of the four monitored airports.[5] It seems the parties are only arguing about the level of poor performance at the airport based on potential measurement issues in the data.

Most data made available by the airport operators is generally basic and can have limited useful commercial application. Importantly, the airport operator needs to develop most of the performance indicators on the services it provides that could be usefully included in an airport services agreement (eg its baggage system's ability to support good baggage outcomes). Under the light-handed economic regulatory arrangements, however, it is cheaper and easier for an airport operator to criticise the data developed and used by international airlines in seeking to understand and improve industry performance rather than invest in measuring the quality and performance of the airport services it provides.

The failure here, therefore, is not due to the strengths or weakness of any data source but because the airport services agreements are not negotiated with a requirement for clear service delivery accountabilities combined with commercial consequences. So, unfortunately, an economic regulatory regime designed to encourage the 'commercial' provision of airport services is in fact characterised by its lack of useful commercial content over service delivery.

Contract clauses to silence airline complaints

BARA forms a view as to an airport operator's intentions based on the 'face value' of the agreement terms member airlines are expected to sign and adhere to. Sydney Airport's 'Standards of Behaviour' (Behaviour Clauses) requirements impose draconian conditions on tenants at the airport, including member airlines. BARA remains concerned that an airport operator would seek to impose such terms and has drawn its conclusions over its motivations accordingly.[6]

The attached legal advice from Lander and Rogers details the problems with Sydney Airport's Behaviour Clauses and its claims about them. It is clear the Behaviour Clauses have the effect of silencing any criticism or comment by airlines about the standard of services or outcomes at Sydney Airport. While Sydney Airport has claimed such clauses are common in lease agreements, the legal advice is: 'clauses of the nature and scope of the Behaviour Clauses are rare in commercial or retail leases other than where SACL [Sydney Airport] is the landlord.'

[5] See BARA submissions dated 3 September 2018 and 7 March 2019.
[6] BARA submission 7 March 2019.

Based on its submission to the Commission, Sydney Airport seems intent on continuing to impose its draconian Behaviour Clauses on member airlines and other tenants at the airport. BARA, therefore, re-iterates the need for the Commission to recommend the Aeronautical Pricing Principles be expanded to explicitly ban attempts by the airport operators to suppress airlines from publicly raising service and performance issues about Australian airports beyond the normal requirements to keep commercially sensitive information confidential. Without this or some other form of appropriate protection, it would signal that even the poorest commercial terms imposed by the operator of a major international airport on international airlines are considered acceptable conduct under the economic regulatory arrangements. BARA sees little prospect of negotiating an airport services agreement with Sydney Airport that fits with promoting good service outcomes under such a commercial negotiating environment.

Finally, as explained at the public hearings, BARA wastes considerable time and member resources dealing with the largely ambit claim airport services agreement terms put forward by the airport operators, such as Sydney Airport's Behaviour Clauses.[7] Their tactic greatly reduces the time and resources available to BARA to negotiate an airport services agreement that would promote increasingly efficient, safe aircraft operations and good outcomes for international passengers in airport services.

[7] Public hearings transcripts, p.423.

Lander & Rogers
Lawyers

30 May 2019

Barry Abrams
Board of Airline Representatives of Australia Inc
GPO Box 198
SYDNEY NSW 2001

Our ref: RFD:EIR:2078331

By Email

Dear Barry

Thank you for meeting with me on 21 May 2019.

1. Background

We understand that:

(a) Sydney Airport Corporation Limited (**SACL**) requires new clauses 15.3 - 15.6 (inclusive) (**Behaviour Clauses**), to be included in its commercial sublease for offices intended to be occupied by various airlines at the International Terminal, Sydney Airport;

(b) the Board of Airline Representatives of Australia Inc (**BARA**) has made submissions to the Productivity Commission (**Commission**) about the Behaviour Clauses; and

(c) SACL has responded to BARA's submissions to the Commission by a further submission.

2. Advice Sought

You have instructed us to provide advice in relation to:

(a) the reasonableness of the Behaviour Clauses; and

(b) the validity of the submissions by SACL to the Commission in relation to BARA's submissions.

3. Reasonableness of the Behaviour Clauses

We have reviewed the Behaviour Clauses and comment as follows:

(a) In our experience commercial office leases do not typically contain clauses equivalent to the Behaviour Clauses.

(b) A clause like clause 15.3(a) is more typically found in a contract for personal services, such as an employment contract. It is not uncommon for an

employment contract to prohibit an employee from bringing an employer or its brand, or in the instances of professional sportspersons a code or game, into disrepute. One recent high profile example of this is the termination of Israel Folau's contract with Rugby Australia.

(c) Clauses like clause 15.3(b) and 15.3(c) are more typically found in a severance agreement or deed of release following an acrimonious split between two contracting parties.

Are the clauses reasonable?

(d) To determine whether the Behaviour Clauses are reasonable, we have considered the need of SACL to protect its legitimate business interests on the one hand and the limitations and obligations placed on the airlines as a result of the Behaviour Clauses on the other hand.

(e) Clauses 15.3 and 15.6 could render a legitimate airline complaint or a factual statement by an airline a breach of the lease and allow SACL to seek any remedies available under the lease for a breach including but not limited to:

(i) termination of the lease;

(ii) requiring the airline to immediately desist from the non-complying behaviour; or

(iii) an order that the relevant person/s leave the premises or the airport until such time as SACL is satisfied that the person/s will comply with the Behaviour Clauses.

(f) As an example, whilst it may not be the intention of clause 15.3(c), if an airline employee accused a SACL contractor of sexual harassment and the accusation was reported in the media, bringing negative attention or publicity to the SACL brand or the reputation of the contractor, SACL would be entitled to enforce any of the above breach provisions against the airline complainant.

(g) Clause 15.3 provides that a tenant must ensure that each of the "Tenant's Employees and Agents" (as defined in the lease) must comply with the standards of behaviour required by clause 15.3. There are no exceptions in clause 15.3 about when it may be appropriate for a tenant to make negative comments about SACL. We have not reviewed the definition of "Tenant's Employees and Agents" in the airline leases but other SACL leases at Sydney Airport give this a wide definition as "each of the Tenant's employees, offices, agents, contractors and invitees". This is an arduous requirement for any tenant that may not have a contract with all of these parties.

(h) The requirements of clause 15.4(b) are particularly onerous since they have a retrospective effect. An airline would have to review all of its contracts with the "Tenant's Employees and Agents" and vary them to include the Behaviour Clauses. This would likely be a time-consuming, impractical exercise and may not be acceptable to an airline's many "Tenant's Employees and Agents" for the same reason the clauses are not acceptable to the airlines.

(i) We agree with BARA's submission that the Behaviour Clauses have the effect of silencing any criticism or comment by airlines about the standard of services and outcomes at Sydney Airport because they are so broadly drafted. We do not consider the Behaviour Clauses are reasonably necessary to protect the legitimate business interests of SACL. The Behaviour Clauses

are one-sided and greatly favour SACL over the airlines. There does not appear to be a satisfactory commercial reason why SACL needs such powers. The airlines will be disadvantaged if they have a legitimate complaint against SACL and SACL enforces the Behaviour Clauses to silence them.

4. SACL's submissions to the Commission

We have considered the validity of SACL's submissions and comment as follows:

(a) **SACL submission 1 -** ***"BARA's characterisation of this issue is misleading. Sydney Airport does have clauses in some leases to ensure that tenants do not behave in a way that could adversely affect our (SACL's) reputation or brand, for example, by acting illegally or mistreating employees or customers."***

It is usual for a commercial lease to contain clauses which require a tenant to:

(i) comply with all laws and the requirement of all authorities in connection with the premises, the tenant's business and its use and occupation of the premises;

(ii) not do anything in or around the premises which in the landlord's reasonable opinion may be annoying, dangerous or offensive;

(iii) conduct its business in a proper and efficient manner; and

(iv) keep all confidential information confidential

In our opinion, SACL does not require the Behaviour Clauses to achieve its stated desired outcome because it can adequately protect itself by relying on these more usual leasing provisions.

In addition, SACL could commence proceedings for defamation or engage other litigious avenues in response to inaccurate comments or false statements from an airline or its employees that adversely affect SACL's reputation or brand.

(b) **SACL submission 2 -** ***"Clauses that govern a tenant's standard of behaviour are common across commercial businesses. Sydney Airport also has similar clauses in leases with retail tenants"***

Our firm specialises in real estate law and we act for a large number of national retail tenants including Bunnings, Kmart and Officeworks. We also act for major landlords including Stockland and Investa. In our experience, clauses of the nature and scope of the Behaviour Clauses are rare in commercial or retail leases other than where SACL is the landlord.

We agree that SACL also includes similar clauses to the Behaviour Clauses in its retail leases as we have reviewed other SACL retail leases. The SACL leases also contain the clauses referred to in paragraph 4(a) above.

(c) We also agree that it is standard to include clauses which regulate a tenant's standard of carrying out the permitted use, as set out in paragraph 4(a) above, in a lease. However, we disagree that clauses equivalent to the Behaviour Clauses are common in commercial leases. As stated above, clauses which seek to control a party's behaviour in the manner set out in the Behaviour Clauses are generally associated with other commercial contracts

and agreements such as employment contracts or settlement deeds after a dispute.

(d) **SACL submission 3 -** ***"Sydney Airport has never attempted to enforce these contractual clauses against any airline in response to complaints or criticism, including during*** **the** ***Productivity Commission process****."*

It is irrelevant whether SACL has attempted to enforce the Behaviour Clauses in response to a complaint or criticism. The presence of the clauses clearly intends to deter tenants from carrying out any action in breach of the clause.

We do not consider SACL's submissions are valid for the reasons stated above.

We look forward to discussing our advice with you once you have had an opportunity to consider it.

Yours faithfully

Rachel Hill | Partner

Emma Heraud | Lawyer