MORRISON&CO

30 November 2023

By email: aviationwhitepaper@infrastructure.gov.au

To whom it may concern,

RE: Aviation Green Paper Submission

Morrison welcomes the opportunity to respond to the Australian Government's Aviation Green Paper and to inform the development of the Aviation White Paper. We share the aim of promoting the efficiency, safety, sustainability, productivity, and competitiveness of the aviation sector through to 2050.

Morrison is a global infrastructure investment management specialist with over $34 billion in total assets under management. Morrison has a proud history as a major investor in Australian airports since the sector was privatised in the late 1990s. Today Morrison's Australian Airport portfolio includes investments in Perth, Melbourne, Gold Coast, Townsville, Launceston, Mt Isa and Longreach Airports.

We note that Morrison is a signatory to the Australian Airport Investor Group submission. This separate submission is intended to endorse and complement that work, rather than duplicate it. As a major investor in Perth Airport we are able to provide unique insights on the use of legal proceedings as part of the overall framework for resolving disputes between airlines. We hope our insights will be useful during consideration of the questions posed in respect of the Aeronautical Pricing Principles (APPs).

The Perth Airport case reinforces that the existing regime is effective

Since the abolition of heavy-handed ACCC price controls in 2002, there has been only one case where a commercial outcome could not be negotiated – *Perth Airport v Qantas*.

In this case, Perth Airport brought proceedings against Qantas in the Western Australian Supreme Court for the short-payment of its aeronautical charges, in circumstances where the parties had not entered into an ASA and Qantas elected to pay a rate materially below the rates invoiced by Perth Airport. The case involved Perth Airport relying on its common law rights *as plaintiff* to seek fair payment from Qantas for services provided in the absence of a contract.

The case sets a clear precedent on the use of the BBM approach to pricing,[1] provides extensive guidance on the level of detailed evidence required to substantiate reasonable charges, and reflects a court taking into account and applying the APPs in negotiating 'fair and reasonable' charges.[2]

Proponents of increased regulation have seized upon the Perth Airport v Qantas case as an example of the costs, delays, and uncertainties of litigation and for the need for an independent dispute resolution process to constrain airports.[3] We disagree with this assessment.

The timeline of the Perth Airport case is as follows:

- From late 2017 onwards PAPL commenced negotiations with its airline customers to agree new ASAs, as the previous agreements were due to expire on 30 June 2018. PAPL achieved negotiated outcomes with all its airline customers, other than Qantas, following negotiations informed by extensive and transparent consultation.[4]

- On 30 June 2018, PAPL's agreement with Qantas expired. From 1 July 2018 to 17 December 2018, Qantas rejected invoices issued by PAPL reflecting *lower* charges than previously paid by Qantas, and chose instead to pay a materially lower rate.[5]

- On 17 December 2018, after issuing multiple offers to settle, PAPL commenced common law proceedings in restitution (or 'quantum meruit') and unjust enrichment to recover a fair and reasonable price. That is, PAPL, as the *plaintiff,* relied upon a common law doctrine of restitution to seek a judicial determination to compel Qantas to pay it a *fair* price for services taken by Qantas.[6]

- On 18 February 2022, the WASC determined that PAPL was successful,[7] finding that PAPL was entitled to recover approximately $10m of under-paid amounts from Qantas reflecting $14.719 for international terminal and airfield services being 28% above the rates paid by Qantas; $8.436 for domestic terminal services being 37% above the rates paid by Qantas; and $5.383 for airfield services being 37% above the rates paid by Qantas.

- If weighted average cost of capital (WACC) is used as a proxy for price, PAPL proposed a WACC of 9.7% for its 2018 ASAs, whereas Qantas' experts advanced a WACC of 6.8%. The Court ultimately determined a WACC of 9.6%, validating the reasonableness of PAPL's position.

[1] Perth Airport Pty Ltd v Qantas Airways Ltd [No 3] [2022] WASC 51, [602] – [603]

[2] Perth Airport Pty Ltd v Qantas Airways Ltd [No 3] [2022] WASC 51 at [527].

[3] Airlines for Australia & New Zealand (A4ANZ). Submission in Response to Terms of Reference (17 March 2023)

[4] Perth Airport Pty Ltd v Qantas Airways Ltd [No 3] [2022] WASC 51 at [12].

[5] Perth Airport Pty Ltd v Qantas Airways Ltd [No 3] [2022] WASC 51 at [2].

[6] Perth Airport Pty Ltd v Qantas Airways Ltd [No 3] [2022] WASC 51 at [14].

[7] See: Perth Airport Pty Ltd v Qantas Airways Ltd [No 3] [2022] WASC 51

In the case the parties each applied the APPs and the Court used the APPs to assess the fair and reasonable prices in that case.[8] The Court rigorously assessed fair prices with reference to Perth Airport's building block model and rigorously weighed the evidence adduced by both parties.

The Perth Airport case supports the following points.

First, rather than a failing of the current regime, the case demonstrates that since 2002, there has been only one litigated dispute, with all other disagreements resolved commercially. This reinforces that litigation as a 'last-resort' is a powerful incentive for parties to reach commercial agreement with only very rare cases being escalated to litigation. As noted by the Green Paper: "*the current dispute resolution mechanism available to airlines and airports – including recourse to litigation – act as incentives for parties to seek commercial outcomes to their disputes*."[9]

Second, the public and transparent nature of Court proceedings, and the forensically high evidentiary standards required of fully contested commercial litigation means that there is now a clear, robust, evidence-based determination of aeronautical pricing and BBM inputs freely available to all industry participants.

Third, whilst the case ran for an extended period, due to pandemic related delays and a number of interlocutory disputes on a broad range of issues, the case establishes a clear precedent on the appropriate pricing methodology (being a BBM), and provides guidance on how the BBM inputs should be estimated. The case therefore is reasonably expected to materially reduce the scope of issues in disputes in any subsequent proceedings in the rare event of subsequent protracted disagreements not being able to be resolved commercially.

Fourth, the case shows that there is no need for additional dispute resolution procedures. The current APPs already include the capacity for airports and airlines to agree to dispute resolution mechanisms such as independent commercial mediation/binding arbitration. Court processes remain as a mechanism of last resort as is common in other commercial settings.

Alternative methods of dispute resolution have been considered and rejected in favour of maintaining the status quo. For example, the Productivity Commission considered the merits of a negotiate-arbitrate framework in its 2019 review into the Economic Regulation of Airports stating that "*an airport-specific negotiate-arbitrate regime that bypasses the safeguards in the National Access Regime would have few benefits and substantial risks. It should not be implemented*".[10]

[8] See for example, *Perth Airport Pty Ltd v Qantas Airways Ltd* [No 3] (2022) WASC 51 at paragraph 9, 527, 588 and 596.

[9] Green Paper, page 57, Aviation Green Paper – Towards 2050 (infrastructure.gov.au).

[10] Productivity Commission. (2019). Economic Regulation of Airports, Report No. 92, p 2. Retrieved from https://www.pc.gov.au/inquiries/completed/airports-2019/report/airports-2019.pdf

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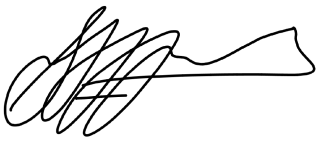
We agree with the Investor Submission that the APPs are working well. They are well balanced, provide the right incentives for investment and have yielded good outcomes since their introduction. We recommend no change to the APPs and we do not recommend mandating them.

We welcome the opportunity to discuss our views further.

Yours sincerely
HRL Morrison & Co (Australia) Pty Limited



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