

Airports (Ownership - Interests in Shares) Amendment Regulations 2001 (No. 1) 2001 No. 92

EXPLANATORY STATEMENT

STATUTORY RULES 2001 No. 92

Issued by the Authority of the Minister for Transport and Regional Services

Airports Act 1996

Airports (Ownership - Interests in Shares) Amendment Regulations 2001 (No. 1)

Section 252 of the Airports Act 1996 (the Act) provides that the Governor-General may make regulations prescribing matters that are required or permitted by the Act to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act imposes limitations on the ownership of leased airports by foreign persons and by airlines, and on the cross-ownership of certain airports. The ownership rules of the Act are set out in Part 3 of the Act and the Schedule to the Act.

Section 50 of the Act imposes a 15% limit on the cross ownership of paired 'airport-operator companies' (ie a lessee or management company for a leased airport). Airport-operator companies for Sydney and Melbourne (Tullamarine) airports form a pair. Airport-operator companies for Sydney and Brisbane airports form a pair. Airport-operator companies for Sydney and Perth airports form a pair.

Paragraph 9(1)(c) of the Schedule to the Act provides that, for the purposes of the ownership provisions, an interest of a prescribed kind in a share, being an interest held by such persons as are prescribed, must be disregarded.

The essential purpose of the regulation amendments is to provide for exemptions to be obtained from the cross-ownership provisions of the Act by allowing for certain interests in shares, and the holders of those interests, to be prescribed for the purposes of paragraph 9(1)(c).

The effective result of the amendments to the Airports (Ownership - Interest in Shares) Regulations is to increase the scope for investment in Sydney Airport to the extent that if the person who holds an interest in a successful bidder for Sydney Airport holds interests in shares in one of the other pair companies (ie Melbourne, Brisbane or Perth airports), the interests in shares in that pair company are to be disregarded.

An interest will be disregarded only if the applicant has given an undertaking to the Secretary of the Department of Transport and Regional Services that they will dispose of the interest within 12 months and the Secretary is satisfied that the applicant has a firm strategy to do so.

Following the Government's consideration of the scoping study report into the sale of the Sydney Basin Airports, the Government has decided that Sydney Airport will be sold by way of trade sale, with that trade sale to be completed in the second half of this year. Existing foreign ownership and cross ownership limitation contained in the Act will apply to the sale of the Sydney basin airports. However, the Government intends to provide for a transitional period to allow for changes in ownership at other Australian airports. Accordingly, the Government agreed to the development of a regulation to provide for a period of up to 12 months to allow potential investors to divest stakes in Melbourne, Brisbane and Perth airports that would otherwise be prohibited by cross-ownership interests under the Act.

If a stakeholder is exempted under the regulations from the cross-ownership provisions, its interests in Melbourne (Tullamarine) Airport, Brisbane Airport, or Perth Airport would be disregarded for the purposes of s50 of the Act.

The proposed amendments also incorporate minor changes to existing provisions to ensure drafting consistency.

Further details of the amendments appear in the Attachment.

The Regulations commenced on notification in the Gazette.

ATTACHMENT

Airports (Ownership - Interests in Shares) Amendment Regulations 2001 (No. 1)

Item 1 - Name of Regulations

Item 1 provides for the name of the regulations.

Item 2 - Commencement

Item 2 provides that the regulations will commence on gazettal.

Item 3 - Amendment of Airports (Ownership - Interests in Shares) Regulations

Item 3 provides that Schedule 1 of the regulations amends the

Airports (Ownership - Interests in Shares) Regulations.

Schedule 1 - Amendments

Item 1 - Regulation 1

Item 1 substitutes the name of the regulations ('These Regulations may be cited as Airports (Ownership - Interests in Shares) Regulations') with the name ('These Regulations are the Airports (Ownership - Interests in Shares) Regulations 1996).

Item 2 - Regulation 2, at the foot

Item 2 inserts a note at the foot of regulation 2 to draw the reader's attention to the antiavoidance provisions (Part 4) of the Act.

Item 3 - Regulation 6

Item 3 amends regulation 6 for drafting consistency.

Item 4 - Subregulation 7(1)

Item 4 amends subregulation 7(1) for drafting consistency.

Item 5 - Subparagraphs 7(4)(a)(ii) and (iii)

Item 5 amends subparagraphs 7(4)(a)(ii) and (iii) for drafting consistency and to clarify the intention of the regulations.

Item 6 - Paragraph 9 (c)

item 6 amends paragraph 9(c) for drafting consistency.

Item 7 - Paragraph 9 (d)

Item 7 omits paragraph 9(d) for drafting consistency.

Item 8 - Subregulation 10 (1)

Item 8 amends subregulation 10(1) for drafting consistency.

Item 9 - Subregulation 10 (3), note

Item 9 replaces an incorrect spelling of the word 'obligation' with the correct spelling.

Item 10 - Subparagraphs 10(4)(a)(ii) and (iii)

Item 10 amends subparagraphs 10(4)(a)(ii) and (iii) for drafting consistency.

Item 11 - Insert after Part 3 Part 3A (Shares in other airports):

Regulation 10A -Purpose

provides the object of Part 3A as to prescribe a kind of interest in a share that must be disregarded in ascertaining whether within the meaning of section 50 of the Act, an unacceptable cross-ownership situation exists.

Section 50 states that an unacceptable cross-ownership situation exists in relation to a "pair of airport-operator companies" (Sydney and Melbourne, or Sydney and Perth, or Sydney and Brisbane) and in relation to a person if.

- the person holds a particular type of stake in the first company of more than 15%; and
- the person holds any type of stake in the second company of more than 15%.

The Schedule defines a particular type of stake held by a person in a company to be the aggregate of the percentage held by the person (and associates) of any of

- the total paid-up capital of the company;
- the voting power in the company;
- the total rights to distributions of capital or profits on winding-up of the company; and
- the total rights to distributions of capital or profits, otherwise than on winding-up of the company.

Regulation 10B - Prescribed interest in a share - other airports

provides that, for paragraph 9(1)(c) of the Schedule to the Act, a person's interest in a share is prescribed if the interest is an interest in a share in an airport-operator company for:

- Melbourne (Tullamarine) Airport; or
- Brisbane Airport; or
- Perth Airport.

Regulation 10C - Prescribed interest holder - other airports

empowers the Secretary to declare a person, for the purposes of paragraph 9(1)(c), to be prescribed if the person has an interest mentioned in regulation 10B, and the person or an

associate of the person acquires a stake in Sydney Airport and the Secretary is satisfied the applicant has met the conditions set out below.

The conditions set out in subregulation 10C(3) are:

(a) the applicant has given an undertaking to the Secretary:

- (i) to dispose of the prescribed interest; or
- (ii) otherwise to ensure that its stake in an airport-operator company of a paired airport is reduced so that an unacceptable cross-ownership situation does not exist in relation to Sydney and one of the other paired airports and in relation to the applicant;

within 12 months after the applicant acquires a stake in Sydney Airport Corporation Limited; and

(b) that the applicant has outlined to the Secretary a firm strategy and timetable to comply with the undertaking given under (a) above.

The purpose of the conditions is to ensure that the transitional exemption from the crossownership provisions of the Act being made available to suitable applicants is not abused.

If so satisfied, the Secretary must make the declaration, give a copy to the person within 7 days of making the declaration and publish a notice of the declaration in the Gazette. If not so satisfied, the Secretary must refuse to make the declaration.

However, if the Secretary refuses to make the declaration, the Secretary must, within 7 days, give notice of the reasons and give notice of the right of appeal to the Administrative Appeals Tribunal.

The combined effect of regulation 10B and 10C is that interests in shares in the operating companies for Melbourne, Brisbane and Perth airports, will be disregarded if the person is acquiring a stake in Sydney (Kingsford-Smith) Airport and a declaration has been made by the Secretary that the Secretary is satisfied that the conditions have been met. It must be borne in mind that the declaration will cease at the end of 12 months from the date of the Sydney sale, unless it is revoked earlier under amendments to regulation 11.

The subregulation 10C(6) puts the onus on the applicant to tell the Secretary if the applicant is aware that it is no longer willing or able to comply with the undertaking it made under paragraph 10C(3)(a). Further, under subregulation 10C(7) the applicant must comply with any request from the Secretary for a report on progress that it has made towards:

- disposing of the prescribed interest; or
- ensuring that its stake in an airport-operator company mentioned in the regulation 10B is reduced;

in accordance with the applicant's undertaking under paragraph 10C(3)(a).

Item 12 - Amendment of Subregulation 11(1)

Item 12 of Schedule 1 allows for the Secretary to revoke a declaration made under subregulation 10C (4) in addition to revoking a declaration made under subregulation 7(4) or 10(4).

The result of such a revocation would mean the cross-ownership provisions of the Act would be applied, taking into account any interest in a share in a 'pair company' held by the person.

Item 13 -Amendment of Subregulation 11 (1)(b)

Item 13 of Schedule 1 inserts 10C(6) and (7) into the subregulation. This provides a reason for the Secretary to revoke a declaration under subregulation 11 (1).

Item 14 - Subregulation 11(3)

Item 14 amends an incorrect reference to the third paragraph from (b) to (c).

Item 15 - Amendment to Regulation 12

Item 15 provides for the right of appeal by the applicant, to the Administrative Appeals Tribunal, against the Secretary's decision to refuse to make a declaration under regulation 10C, or the Secretary's decision to revoke a regulation 10C declaration. This is in addition to the already existing right of appeal against the Secretary's decisions under regulation 7 and 10.