

# **Airports (Control of On-Airport Activities) Amendment Regulations 2001 (No. 1) 2001 No. 146**

## **EXPLANATORY STATEMENT**

### **STATUTORY RULES 2001 No. 146**

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

Airports Act 1996

Airports (Control of On-Airport Activities) Amendment Regulations 2001 (No. 1)

Section 252 of the Airports Act 1996 ('the Act') provides for the Governor-General to make regulations, not inconsistent with the Act, prescribing all matters that by the Act are required or permitted to be described or are necessary or convenient for carrying out or giving effect to the Act.

Part 11 of the Act authorises the making of regulations for the control of liquor, gambling, commercial trading, smoking and vehicle movements at certain Commonwealth-owned airports following their leasing.

Section 169 of the Act provides for the Airports (Control of On-Airport Activities) Regulations 1997 ('the Regulations') to apply Part 11 of the Act to leased Federal airports. Section 170 of the Act provides that regulations may be made to prohibit or regulate the sale, supply, disposal or possession of liquor at a specified airport.

The Regulations provide the detail of the regulatory regime for liquor, commercial trading, vehicle movements, gambling and smoking on leased Federal airports. They deal with arrangements for those airports sold as part of the Phase 1 and 2 sales processes, including the Sydney-basin airports.

The purpose of the Regulations is to transfer a liquor licence attached to a cafe in the international terminal at Sydney (Kingsford -Smith) Airport to the cafe's new owner. Part of the business involves the sale and supply of alcohol pursuant to an interim licence issued pursuant to Regulation 10 of the Regulations. The effect of the amendment is to treat the interim licence issued to the previous owner of cafe as if it was issued to the new owner. This is the only way in which the current regulations will enable an existing interim liquor licence to be transferred to the purchaser of an existing licensed business.

The Regulations provide that, from the 6 April 2001, the appropriate on-licences were transferred to Airport Retail Enterprises Pty Ltd and the premises were deemed to be suitable to facilitate the sale and supply of liquor, under the NSW *Liquor Act 1982*. The amendment does not affect the transitional provisions already contained in the Regulations. The retrospective commencement of this provision will not contravene subsection 48(2) of the Acts Interpretation Act 1901.

Subsection 48(2) of the Acts Interpretation Act 1901 operates to prevent a regulation, among other things, from taking effect, if:

Subsection 48(2) of the Acts *Interpretation Act 1901* operates to prevent a regulation, among other things, from taking effect, if:

- (a) the rights of a person (other than the Commonwealth or an authority of the (Commonwealth) as at the day of notification would be affected so as to disadvantage that person; or

(b) liabilities would be imposed on a person (other than the Commonwealth or an agency of the Commonwealth) in respect of anything done or omitted to be done before the date of notification.

In this case, the notification of the Regulations will enable the new owners of a cafe at the Sydney Airport International Terminal to sell and serve liquor in accordance with the liquor licence originally issued to Caffè Italia Pty Ltd. No disadvantage will arise to any party because the licence is attached to the cafe and does not give rights to any person other than the owner of the cafe. The amendment is a technical one, which deems an existing liquor licence to have been transferred on the day the business was sold. Therefore the proposed Regulation does not impose a liability, but confers a right, on a retrospective basis, on the person who purchased the business.

Section 178 of the Act requires the Minister to consult with existing airport operators before making regulations under Part 11. The Minister is required to give each airport-operator company a notice stating that there is a proposal to make regulations under Part 11 which will affect that airport, at least 30 days before the regulations are made. The notice must invite them to make a submission within 30 days of receiving the notice. The Minister is to have due regard to the submission when dealing with the proposal to make regulations. Consultation with the existing airport-operator company for Sydney Airport as required under section 178 of the Act has taken place.

A Regulation Impact Statement is attached.

The Regulations commenced on gazettal.

## REGULATION IMPACT STATEMENT

### 1. ISSUE IDENTIFICATION

In 1997 and 1998, airports previously operated by the Federal Airports Corporation (FAC) were leased by the Commonwealth to private airport operators. New laws through the *Airports Act 1996* (the Act) were put in place to ensure that the public interest continued to be protected at the leased Federal airports. These airports are Adelaide, Alice Springs, Archerfield, Brisbane, Canberra, Coolangatta, Darwin, Essendon, Hobart, Jandakot, Launceston, Melbourne, Moorabbin, Mt Isa, Parafield Perth, Sydney-basin, Tennant Creek and Townsville airports.

Part 11 of the Act allows State and Territory laws to control a range of existing on-airport activities (liquor, commercial trading, vehicle movements, gambling and smoking) unless excluded or modified by regulations made pursuant to the Act. The *Airports (Control of On-Airport Activities) Regulations* (the On-Airport Regulations), which modify State law, were made under Part 11 of the Act to provide an interim regime, while the States and Territories adjusted their existing laws to accommodate the special needs of airports.

Pursuant to s.52 of the Australian Constitution, States are not able to modify their laws to allow different conditions to apply at leased Federal airports, as opposed to State airports, as this would be discriminating against Commonwealth sites. Under Commonwealth jurisdictions, pursuant to s.77 of the Constitution, the principle of the separation of powers requires that a Court (including a State Court applying Commonwealth laws) must only undertake judicial functions; in practice this is not always the case. For example, the Licensing Court of NSW, under the *Liquor Act 1982* (NSW), undertakes both judicial (eg convicting and imposing fines and/or jail sentences) and administrative (eg issuing/suspending/cancelling liquor licences) functions, which is not permitted under the constitution at Commonwealth Places. These and other constitutional issues create the need, in some instances, for Commonwealth regulations to be made more robust to provide a long-term regime that ensures the airports' special needs are met.

Particular problems with the On-Airport Regulations that must be addressed now are:

- the management of vehicle parking under Divisions 11 and 12; and
- control of liquor sales under Part 2.

#### Management of Vehicle Parking

The issue that is most pressing is parking management. Currently, under Part 4 of the On-Airport Regulations, the Commonwealth only provides a kerbside control and enforcement regime for Sydney, Brisbane, Melbourne and Perth airports. Arrangements have been made with these four airport operators for them to be reimbursed their kerbside enforcement costs. In effect this creates an uneven playing field amongst the 22 leased Federal airports.

The Commonwealth has made considerable efforts to hand over responsibility of parking management at Sydney and Melbourne airports to the Victorian and NSW governments. In doing so a number of significant difficulties have been identified.

To put these difficulties in perspective it is necessary to consider the requirements of the *Commonwealth Places (Application of Laws) Act 1970*. Section 4(1) of this Act deems that State laws apply at Commonwealth places as Commonwealth law. As the State laws are applied as Commonwealth laws any fine money collected for offences under these laws becomes Commonwealth money. Under the Constitution all revenue from Commonwealth fines must be deposited into the Commonwealth's Consolidated Revenue Fund. Section 20(1) of the Act provides (if there is an agreement in place between the Governor General and the Governor of the State involved) a mechanism for automatic appropriation and ensures that the Commonwealth will pay the State an amount equal to the revenue received. However, States do not have corresponding mechanisms to ensure the money can be returned to a third party (ie.

the party conducting the enforcement). It is possible for these States to take appropriation action but this is cumbersome for them and thus there is not a will to do so.

The money that a local council receives in payment of a fine for a parking infringement at a Federal airport, is Commonwealth money. The Commonwealth has a mechanism in place to return this money to the State. But the State Governments do not have a mechanism to permit airport operators to be reimbursed from the money the Commonwealth returns to the States. Despite negotiation with the States, they have indicated their unwillingness to create such a mechanism.

These problems are also encountered at other leased Federal airports. Adelaide, Coolangatta and Canberra airport operators pay for enforcement of parking management under State or Territory law but the local councils (or in the case of Canberra, the ACT Government) conduct the enforcement and keep the revenue.

The situation at other regular public transport airports varies. Darwin and Alice Springs airport operators are operating under Northern Territory law that allows them to enforce, collect and keep revenue. Townsville, Launceston and Hobart airport operators have no enforcement mechanisms in place and have been unable to enter into any suitable arrangements. There are no arrangements in place for general aviation airports.

The revenue collected at Brisbane, Sydney, Melbourne and Perth airports (under the Commonwealth's enforcement regime) has been steadily rising and could eventually exceed the airport operators' enforcement costs. Accordingly there is now a need to apply a control on the airport operators' reimbursement claims to ensure that they, as private operators, are not making a profit out of parking enforcement. It is proposed to do this through a binding commercial arrangement.

The introduction of the Australian Road Rules on 1 December 1999 means the On-Airport Regulations need to be updated anyway. As the new road rules represent a national approach and all States and Territories have agreed to adopt them, it is appropriate that the Commonwealth implements these rules at Commonwealth sites. For example, current parking regulations make no allowance for the cancellation of infringement notices that have been issued, nor to write-off the balance of partially paid fines. Further, there is only one fine (\$66) for all parking infringements, although the severity of these infringements varies considerably. A tiered system of fines is required to reflect the severity of different infringements.

## **Control of Liquor Sales**

Part 2 of the On-Airport Regulations modifies relevant State and Territory laws to meet the special needs of airports in relation to the supply and consumption of liquor. This Part was required because at the time the On-Airport Regulations were made the States were either reluctant or unable to adjust their laws to meet airport needs. All States and Territories (except NSW) are responsible for day-to-day administration of liquor control matters, including the application for new licences.

Part 2 was designed to be an interim arrangement, to be in place until the States and Territories adjusted their laws. Queensland has introduced a Special Facilities Licence, which is used for large facilities; particularly those involved in international tourism such as South Bank on the Brisbane River. The State has recognised that such facilities need greater flexibility (including 24 hour trading) to provide the necessary service levels expected by such travellers. Under the Special Facilities Licence, the State licences the controlling body, but also authorises that body to issue sub-licences to business within its area without seeking the approval of the State Liquor Authorities, merely notifying them.

A recent amendment was made to the On-Airport Regulations to allow Queensland law, in relation to the supply and consumption of liquor, to apply directly at Brisbane Airport. The special facilities licence for the airport site offers the businesses terms that are at least equal to those

available under the interim regulations, but allows flexibility for new businesses and changes to existing authorisations to occur. It is simpler and easier for businesses to amend their conditions of operation under this special facilities licence, while also offering advantages for the Queensland Liquor Licensing Division in only having to deal with one organisation at Brisbane Airport (ie the airport operator). As the Queensland Government is willing to directly control the supply and consumption of liquor at all leased Federal airports in the State, the Commonwealth proposes to withdraw its regulations for Coolangatta and Townsville airports. State law will then apply of its own force and a Special Facilities Licence will be issued for both airports. All airport operators and their liquor tenants have been consulted and agree with the proposal.

The situation in NSW is markedly different. The State has a Liquor Licensing Court that has a mix of administrative and judicial powers, creating fundamental problems in applying the NSW Liquor Act via the On-Airport Regulations due to the constitutional requirement for separation of powers. A temporary fix is currently in place whereby the Secretary of the Department is responsible for administrative matters (eg. under the On-Airport Regulations issuing new licences, approving managers and suspending/cancelling licences) and NSW is responsible for judicial matters (eg. convicting and imposing fines and/or jail sentences). This fix, however, requires NSW liquor officials to undertake the necessary investigation and research prior to the issue of new licenses. The State is not prepared to perform this role.

Added to this constitutional problem there is little flexibility in the NSW liquor regime. This created problems for businesses operating on-airport. For example, Airport Fine Foods wished to promote Australian food and wine at Sydney International Terminal. Under the NSW system, they had to be issued with an hotelier's licence, which are very expensive and in any event not representative of the business conducted at the airport. The archaic nature of the NSW Liquor Act also made it difficult for the Commonwealth to meet its obligations (from FAC commitments) to the Burmah Fuel outlets at Bankstown and Hoxton Park and the Vicarys Winery.

In applying the South Australian, Western Australian and Victorian liquor acts via the OnAirport Regulations there are also some separation of powers issues. For Victoria, these are of a minor nature. South Australia and Western Australia are currently preparing legal advice on this matter. However, as these States embrace the opportunity to regulate liquor matters at their leased airports, they would be reluctant to hand back control to the Commonwealth and are willing to work to overcome the separation of powers issue, the Commonwealth expects to make relatively simple amendments to the On-Airport Regulations to separate powers where necessary.

There is no separation of powers issue with the application of Tasmanian and Territory liquor laws via the On-Airport Regulations.

### **Other issues**

Elements of the On-Airport Regulations that are subject to further review, but that not require change at this time are:

- Part 3 which ensures trading hours are not restricted;
- Part 4 Division 13 which covers airside vehicle operations;
- Part 5 which prohibits gambling; and
- Part 6 which ensures terminals are non-smoking environments.

## **2. DESIRED OBJECTIVES**

To introduce a sound sustainable regime to replace the interim arrangements of the On-Airport Regulations aimed at satisfying the special needs of airports and continuing to protect the public interest.

Consistent with the above objectives, the Commonwealth has further specific policy objectives for parking management and liquor as outlined below.

### **Management of Vehicle Parking**

- Ensure that the new Australian Road Rules apply to airports to provide a seamless national system; and
- Implement a sustainable regime that allows for the enforcement of parking management and the collection of fines associated with this management;

### **Control of Liquor Sales**

- Ensure that the liquor regime in place in all States and Territories is flexible enough to meet the special needs of airports; and
- Remove constitutional problems present with existing State liquor regimes applied at leased Federal airports in NSW, Victoria, SA and WA.

## **3. IDENTIFICATION OF OPTIONS**

### **Management of Vehicle Parking**

#### Option 1: Status Quo.

Constitutionally, this is not a valid option and it creates inequities between the airports.

#### Option 2: National Commonwealth Regime.

The only feasible option to solve the current problems with parking management is to amend the On-Airport Regulations. The Commonwealth should maximise their consistency with the new Australian Road Rules, thus aligning parking management on airport sites with the model national road rules it has developed with the States and Territories.

Option 3: State/Council-Based Regime. This has proven unviable for of a number of reasons, including:

- constitutional problems associated with returning the money via the *Commonwealth Places (Application of Laws) Act 1970*;
- one Council recently threatened to remove the parking authorisation from the Airport Operator because of local politics; and
- most Councils have simply refused to enter into any arrangement or enforce parking themselves.

### **Control of Liquor Sales**

#### Queensland

Of all the State/Territory liquor control systems, Queensland has the most flexible and appropriate system, specifically designed to cater for major tourist venues and there are no constitutional problems in applying Queensland law to leased Federal airports. Regulations 39 and 40 of the On-Airport Regulations enable the Liquor Act 1992 of Queensland to apply at Brisbane Airport.

It is now proposed to amend the On-Airport Regulations to allow Queensland liquor laws to apply in a direct sense at Coolangatta and Townsville airports. Doing so will allow special facilities licences to apply at these airports.

There are no meaningful alternatives to making the proposed amendments. This amendment to withdraw from regulating control of liquor in Queensland is consistent with the original intention of the interim regulations.

### New South Wales

#### *Option 1: Status Quo.*

The Commonwealth cannot allow liquor control under the NSW Liquor Act because of the separation of powers issue (ie it would be constitutionally invalid). Modifying the NSW Liquor Act would be an administrative nightmare given the archaic nature of the Liquor Act, the lack of flexibility for licensees and the State's reluctance to alter its liquor regime to accommodate the special needs of airport sites. Currently no new licences can be issued at airports in NSW.

#### *Option 2: Commonwealth Passenger Terminal Licence Regime.*

The most feasible long-term solution to the constitutional problems with liquor licensing in NSW is for the Commonwealth to regulate via the issuing of licences modelled generally on those used in Queensland. While in Queensland one Special Facilities Licence has been issued to the airport operator to cover all liquor outlets in the passenger terminal buildings, it is envisaged that four Passenger Terminal Licences (PTLs) would be issued for Kingsford Smith Airport. This is because of the significantly greater size of the airport and the number of outlets, as well as the nature of the domestic terminal leases held by Ansett and Qantas. Both Qantas and Ansett would be issued a PTL in respect of their domestic terminal buildings, while the airport operator would be issued a PTL in respect of the international terminal and any smaller domestic passenger terminal operations. Doing so would provide greater flexibility for licensees and sub-licensees than is currently available under the NSW Liquor Act.

Off terminal activities at Kingsford Smith Airport (such as new hotels or bistros) and all activities at Bankstown and Hoxton Park Airports would be covered by offterminal licences. In other words, each liquor outlet apart from the passenger terminals at Kingsford Smith, would be given individual licences.

#### *Option 3: Commonwealth Individual Licence Regime.*

Another alternative that would also address the constitutional problems is individual licensing between the Commonwealth and tenants. This option offers no advantages over the above approach but creates a large administrative burden for the Commonwealth and would also be difficult to police.

### Other States and Territories

It is appropriate to continue with the interim arrangements for other States, modifying State law where necessary to overcome the separation of powers issue, with the view to moving to direct State regulation in future. Application of Territories' law is working smoothly and this should continue.

[The Commonwealth could regulate leased Federal airports, in all States and Territories, in the manner proposed for NSW. However there would be a significant administrative burden for the Commonwealth. Most States and Territories are willing to control the supply and consumption of liquor at leased Federal airports and some have already put in substantial work to adjust their current systems. Therefore, it would be inappropriate to remove this function from the States, especially as liquor licensing is an important area of State social planning responsibility.]

## 4. IMPACT ANALYSIS

This section is only assessing the costs and benefits of the preferred option and only for those areas where changes to the existing arrangements are being proposed.

There are a number of parties that could potentially be affected by the proposed amendments, including airport operators, businesses operating at airports, businesses operating off airport (competitive neutrality issues), the three levels of government and the public (travellers, those accompanying travellers and those on airport for commercial/business reasons).

### Management of Vehicle Parking

- *Airport operators*

All Operators of leased Federal airports will be put on an equal footing in relation to parking management.

- *Businesses*

As the better parking management will allow for improved flow through of traffic and easier access to areas required, business should welcome the changes.

- *Government .*

The introduction of the proposed Commonwealth system will allow any local council that may be involved in enforcement of parking management to be reimbursed for the enforcement costs in a legal manner. The Commonwealth's financial reporting requirements will also be able to be met.

- *The public*

The proposed system (including the tiered fine system) should allow for more efficient management of parking, which will provide for better traffic flow. The public will face parking rules and penalties that are consistent on and off airports.

### Control of Liquor Sales

- *Airport operators*

Airport operators will be able to undertake commercial development with greater certainty.

- *Businesses*

Businesses operating at airports in NSW will be provided with a better liquor regime than is currently available which is also more equitable with other airports.

The proposed special facilities licence for Coolangatta and Townsville airports offers the businesses terms that are at least equal to those available under the current regulations, but allow flexibility for new businesses and changes to existing authorisations to occur. It will be simpler and easier for businesses to amend their conditions of operations under this special facilities licence. If the Commonwealth does not remove its regulations at Coolangatta and Townsville airports, the new Special Facilities Licence cannot be granted.

The proposed amendments to remove the separation of powers issues in Victoria, South Australia and Western Australian should have little if any impact on businesses which sell or supply liquor at leased Federal airports in these States.

- *Government*



If NSW law is to no longer apply for the supply or consumption of liquor, NSW will lose control of an area that is traditionally a State planning responsibility.

However, as NSW is reluctant to rectify the significant problems with the existing regime, there is no alternative but for the Commonwealth to regulate this area.

The Commonwealth will have some additional administrative functions. However the annual fees paid by licensees will offset these.

Introducing the proposed special facilities licence for Coolangatta and Townsville airports will offer advantages for the Queensland Liquor Licensing Division in only having to deal with one organisation at each airport.

- *The public*

Consumers will not be affected by any of the proposed amendments to the control and supply of liquor at leased Federal airports, nor the proposed refinements envisaged with the current proposal. As far as the general public is concerned, liquor operations will continue in a seamless manner.

## **5. CONSULTATION**

In preparing the proposed amendments, the Department has consulted thoroughly on the impacts with all relevant State government departments, airport-operators, major airlines and some local authorities. The outlined proposals have been developed from these consultations taking into consideration the comments and suggestions made during the consultations.

These outlined proposals were then informally presented to State officials and airport-operators. All affected parties have endorsed the proposed regimes and indicated strong support for the proposed regulatory amendments.

Section 178 of the Airports Act requires that at least 30 days before regulations are made, the Minister must give affected airport-operator companies a notice:

- stating that there is a proposal to make regulations; and
- inviting the company to give the Minister a submission about the proposed regulation within 30 days after receiving the notice.

In addition to this notice, the Minister will also write to his counterpart in each State and Territory formally seeking their views on the proposed amendments.

## **6. CONCLUSION AND RECOMMENDED OPTION**

### **Management of Vehicle Parking**

Amending the On-Airport Regulations to incorporate the relevant parts of the new Australian Road Rules is necessary to ensure a consistent national system is put in place.

Currently enforcement is being performed illegally at some airports and it is necessary to facilitate parking enforcement at all airports in a consistent manner. The best way to achieve this is to, amend the On-Airport Regulations.

### **Control of Liquor Sales**

Amending the On-Airport Regulations to allow the Commonwealth to regulate, via issuing appropriate licences, the supply and consumption of liquor at airports in NSW is necessary to overcome significant constitutional problems.

Victoria, South Australia and Western Australia embrace the opportunity to regulate liquor matters at their leased airports. They would be reluctant to hand back control to the Commonwealth and are willing to work to overcome the separation of powers issue. The Commonwealth expects to make relatively simple amendments to the On-Airport Regulations to separate powers where necessary.

## **7. IMPLEMENTATION AND REVIEW**

Arrangements have already been made for the review of the Airports Act regulatory regime, within the first 5 years of its introduction, and the proposed amendments to the Regulations will be reviewed as part of that regulatory regime.

### **Management of Vehicle Parking**

Each airport will be required to lodge a signage plan for the airport with the

Department (for approval), a map identifying all parking zones. This will then serve the basis on which parking can be enforced. If the airport wants to change their

parking zones they must put in an application to be approved by the Department. For temporary changes, airport staff will be authorised to approve these changes.

Abuse of their enforcement role by airport operators will be avoided through the Commonwealth setting fixed price contracts for the reimbursement of legitimate enforcement costs.

### **Control of Liquor Sales**

#### New South Wales

The airport operator SACL, Qantas and Ansett will each be issued with passenger terminal licences for their terminal buildings.. These three organisations could then issue sub-licences. The sub-licences could be on or off licences or a combination of the two for tenants within the terminals. Each new sub-licence will be required to be registered with the Department.

Any proposal for a hotel or tavern outside the terminals would be considered separately rather than under the airport operator's special facilities licence. If a licence were granted it would be a separate off-terminal licence.

With licence applications, the applicant will be required to submit a floor plan to the Department. Any alterations to the areas in which liquor is to be sold or consumed

will also need to be submitted.

#### All Other States and Territories

The proposed amendments will not affect existing commercial activities at these airports.