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| Consultation Paper: |
| Airport Cross-Ownership Restrictions |
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| **December 2014** |

# Purpose

This paper has been prepared to discuss possible options to increase market access to the Western Sydney Airport (WSA) project within the context of Southern Cross Airports Corporation Pty Ltd’s (SCAC) contractual right of first refusal to develop and operate the airport.

The paper considers the applicability of *Airports Act 1996* (the Act) airport-pair cross-ownership restrictions for WSA. Interested parties are invited to submit comments on any aspect covered in the paper and also on matters not raised but which may be considered relevant to this issue. Submitters are not expected to address all issues and may comment on as many or as few as required.

Submissions will be used to inform the Australian Government’s consideration of this matter and any Regulation Impact Statement requirements. Submissions, or views expressed therein, may be published unless submissions are declared to be confidential.

The opportunity to comment should not be construed as an actual, or perceived, commitment to pursue alternative regulatory settings.

Submissions and enquiries should be sent by email to [wsiu@infrastructure.gov.au](mailto:wsiu@infrastructure.gov.au) for the attention of:

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**Submissions should be made by close of business 9 January 2015.**

# Introduction

As part of the Australian Government’s sale of Sydney’s Kingsford-Smith Airport (KSA) in 2002, the purchaser, SCAC, was provided with a right of first refusal to develop and operate any second major airport in the Sydney region within 100 kilometres of the Sydney GPO. By virtue of the Government’s 15 April announcement that the site for Western Sydney’s airport will be Badgerys Creek, this right has been activated. The right of first refusal process includes a consultation process with SCAC which commenced on 1 October 2014.

The share sale agreement for KSA provides that if the Government offers SCAC an option to develop and operate WSA and SCAC does not exercise the option, the Australian Government may offer the opportunity to a third party. To enable the possibility of this to occur, amendments are currently being considered that would remove the requirement in section 18 of the Act that KSA and WSA be under common ownership. Although this would enable the airport lessee company for WSA to be in separate ownership to KSA, current airport cross-ownership restrictions in the Act would restrict access of some airport operators and their investors to any market transaction.

The Act provides that airport-operator companies are subject to a 15 percent limit on cross-ownership of certain airports (section 50). In relation to WSA (or Sydney West Airport as it is referred to in the Act) the 15 percent limit on cross-ownership is stated to apply to the following pairs of airport-operator companies (section 49):

* WSA and Brisbane Airport;
* WSA and Melbourne (Tullamarine) Airport; and
* WSA and Perth Airport.

Although these restrictions currently have no effect (given WSA has not yet been declared an airport site for the purposes of the Act and there is no airport lessee company), once an airport lease is granted certain experienced airport operators and investors having more than a 15 percent stake in Brisbane, Perth or Melbourne Airports would be restricted from having more than a 15 percent stake in WSA. This would reduce the pool of experienced investors available to take part in any market transaction and could unreasonably restrict the ability of the market to source capital to deliver the project.

# Policy Options

Three policy options have been examined in response to this issue.

## Option 1 – Maintain the status quo

Under this option, there would be no change to cross-ownership limits for WSA. If offered an opportunity to develop and operate the airport, third party operators and investors would need to ensure they complied with the cross-ownership limits.

This could be expected to limit the willingness of parties who would be caught by this restriction to invest and could result in experienced airport operators and investors electing not to participate in any market transaction for the airport. Alternatively, if affected third parties wanted to take up an opportunity in WSA of more than a 15 percent stake, they would need to divest a proportion of the stakes they currently hold in other relevant airports. The more likely scenario however is that only a small pool of less experienced investors (those with minor or no holdings in other relevant airports) would consider investing in WSA. This could create risks for the project ranging from delays to cessation of the project altogether.

One variation to the status quo option could be a ‘wait and see’ approach. This would involve only addressing cross-ownership restrictions should SCAC turn down any opportunity to develop and operate the airport. However, contractual timings stipulated under the right of first refusal process mean the Australian Government would only have a small window of time to approach the market if SCAC turned down any offer.

## Option 2 – Vary the threshold

Under this option, restrictions would be kept but the 15 percent threshold would be relaxed to permit a higher level of investment.

Although this option could increase the possibility of a successful market offering, it would still maintain barriers to investment. Airports and investors affected by the cross-ownership restrictions would continue to be prevented from owning 100 percent of the airport, while SCAC would not be. Should SCAC decline to exercise an option to develop and operate the airport, other operators should not be disadvantaged from taking the same level of ownership as SCAC would have been able to.

Further, given the importance of capital availability to a greenfield airport development, any percentage restrictions (however big or small) have the potential to restrict capital flow and therefore be counterproductive to the delivery of an important infrastructure project.

## Option 3 – Remove cross-ownership restrictions for WSA

This would see airport-pair cross-ownership restrictions as they relate to WSA being removed. It would remove barriers to investment for certain experienced and currently committed domestic airport investors. It would maximise the possibility of a successful market offering in the event SCAC elected not to exercise an option to develop and operate the airport. It would also be broadly deregulatory in that it would involve removal of investment restrictions.

Removing the restrictions relating to WSA would address any risks associated with only a small pool of less experienced investors being available to access any market transaction for the airport.

It would do this by creating an environment in which experienced airport operators and investors could take a greater than 15 percent stake in WSA if the opportunity emerged, without them having to divest their holdings in other airports. It would not prevent any other investor from participating in any market transaction for the airport.

This option would help to enable the estimated economic and social benefits of a Western Sydney airport at Badgerys Creek to be realised in the most expeditious timeframe taking into account potential outcomes of the right of first refusal process.

# Consideration of options

It is the Department’s position that Option 3 would be the most effective option for maximising the possibility of a successful market offering, if one was required. Option 1 would not address the problem, while Option 2 may partly do so but could still hinder potential investment.

Having regard to regulatory costs, Option 3 has been assessed as being cost neutral. As the cross-ownership restrictions for WSA are not yet in force they do not currently impose any administrative or compliance costs on businesses. It follows therefore that removing the restrictions altogether, as per Option 3, would also have a nil regulatory cost impact.

In a situation where the airport was declared under the Act, removing the cross-ownership restrictions would increase the extent to which certain third parties could invest in the airport and the attractiveness of such a proposition (although it would not change their ability to do so). From this perspective, Option 3 mirrors the situation under the status quo whereby any market participant could participate in a market transaction for WSA, except that certain operators and investors would not be restricted to owning only up to 15 percent where they own more than 15 percent in another specified airport.

Under Option 3 affected airport operators and investors would not be required to monitor their compliance with the 15 percent rule. In practice, the costs of doing so would be negligible and considered a business-as-usual cost, given that reporting on company structures and composition is already produced for annual reporting and standard corporate governance purposes. Similarly, investment costs are not considered to be a regulatory cost, given that such costs would still be borne by businesses in the absence of any regulation if they wanted to invest in the airport.

**Questions**

1. Three options have been examined in response to the issue of market access facilitation for the WSA project. What are your views on these options?
2. The Department considers Option 3 would be the most effective to maximise the possibility of a successful market offering. What are you views on this?
3. Do you consider that any of the options would have an adverse competitive impact on the Australian aviation industry?
4. Removing the cross-ownership restrictions for WSA has been assessed as having a nil regulatory cost impact on affected industry stakeholders. What are your views on this?