DEREGULATION – A FLIGHT OF FANCY?

AVIATION FREEDOM IS STILL IN THE AIR

By HUGH KING

In November the two-airline policy came to an end and the assumption was that Australia now had a deregulated domestic aviation industry. In fact, that depends on what you mean by the word.

Lawyers will always look for precision in the use of language. Where members of the media may happily use one word to describe a process or a situation, lawyers will occasionally want to use two or more. Now, the word “deregulation” by definition means the positive removal of all legal restrictions or obligations previously inhibiting or regulating behaviour. In a deregulated environment the citizen is free to follow his, her or its desires.

The partial economic deregulation of domestic aviation in Australia which we have been preparing for is much more specific and limited than the species of deregulation which have brought about such changes in aviation in the US since 1978 and in Europe since the Treaty of Rome.

The changes have their origin in a major policy statement by Senator Gareth Evans, then Minister for Transport and Communications, on October 7, 1987, in which he spoke not of “deregulation” but of “a new direction” and of “free competition” in domestic aviation.

Deregulation in Australia means only the economic deregulation of domestic interstate scheduled passenger airline operations between the major airports identified in The Airlines Agreement, annexed to the Airlines Agreement Act 1981. There will be no deregulation of safety matters; the new Civil Aviation Authority retains all its powers and resources on safety matters including navigation, air-traffic control and the like.

We have not seen the deregulation of intrastate airline operations. Nor has there been any deregulation of international airline operations into and out of Australia, or any increased access to Australian domestic operations for foreign carriers. The Australian version of deregulation does not amount to an “open skies” policy.

Any prospective deregulation of intrastate and international operations and access for foreign carriers to the domestic market are matters pertaining to micro-economic reform and the boosting of the important tourism sector. These wider issues have been raised frequently as possibly desirable corollaries to our economic deregulation, but they were not addressed or considered, except in the negative, by Senator Evans in his 1987 statement.

Throughout the post-war years, Australia has been in the unique position of having two “competing” airlines operating on the major domestic routes by reason alone of legislative fiat. It was a classic case of the regulators protecting the industry to the detriment of the consumer.

The fascinating and unique feature of these operations has been that Australia has, throughout that time and through successive changes of government, had a government-owned airline competing with a government-sponsored airline. From one the government derives all profit; from the other the private share-

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These [airport] leases effectively ... undercut the government's stated objective of creating freedom of competition in domestic aviation, and give the established airlines a considerable advantage.
prospect of potential disagreement and litigation. One would expect the leases to have provided clearly for the terms and conditions that must be included in the sub-leases, but they do not. Two essential conditions are left in a vague and unsatisfactory state.

Term: The only obligation on the established airlines is to grant the sub-lease facilities for two aircraft for not less than one year, with only one option to renew for a similar period, on either an individual or common-user basis. There is no requirement for any further right of renewal for the new entrant. Thus the established airlines may be able to extinguish their obligations to a new carrier in two years.

It is interesting that the government has ensured the stability of the existing airlines by granting them 20-year leases (with options for 10-year renewals) while ensuring that new carriers trying to get established can rely only on two-year sub-leases.

Rent: The rent to be charged to new airlines was traditionally reasonable considering the rental paid for the head-lease. This is ambiguous and clearly something over which both parties may differ dramatically.

The obligations on the lessee airlines are not onerous but they are, even so, lessened by a provision that excuses the airline from the need to enter into a sub-lease if the new carrier has had a reasonable offer of facilities elsewhere at the airport. This provision does not take into account the preference of the new carrier or the standard of the alternative facilities, other than the reference to a “reasonable” offer.

The philosophy behind the leases does not appear to comprehend the prospect that there will be substantial viable operators, in addition to Compass Airlines, prepared to compete against the established airlines. The sub-leasing obligations, clearly of vital importance to all new entrants to the industry, contain sufficient ambiguity to lead a lawyer to conclude that disagreement and litigation are possible in the foreseeable future. Whatever the legal outcome, the commercial consequences appear to be very much against the new entrants.

If new entrants do obtain gate access, there are still clear commercial difficulties in using facilities belonging to a landlord competitor. If the passengers of a new entrant have to go through ticketing and disembarkation in a terminal emblazoned with the logos and colour schemes of one of the major airlines, then problems of priority and quality of service must arise.

In the US, following deregulation, new entrant-airlines have been prevented from competing in all operational respects because of the lack of airport access. This was a prime factor in report by the Washington-based Economic Policy Institute, concluding that airline deregulation in the US has been a failure. The apparent main objective of Australia’s new freedoms, the encouragement of competition on trunk routes, may be totally frustrated by this one, single difficulty—lack of airport access.

It may be that in the very act of concluding such lease agreements with the airlines, the government sowed the seeds of deregulation’s destruction.

To return to the beginning, we really should try to define the term “deregulation” with some precision. Senator Evans, in 1987, announced the government’s intentions in terms which were limited to the removal of the economic controls at the heart of the two-airlines policy; he undertook nothing more. That is what we got on November 1, 1990.