Mr John Feil  
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National Competition Council  
GPO Box 250B  
MELBOURNE  VIC  3001

Dear Mr Feil

Submission in relation to the application by Virgin Blue for declaration of airside services at Sydney Airport

The Department of Transport and Regional Services (DOTARS) appreciates the opportunity to make a submission concerning the National Competition Council’s ‘Draft Recommendation’ in relation to the application by Virgin Blue for declaration of airside services at Sydney Airport, under Part IIIA of the Trade Practices Act 1974.

DOTARS considers that the evidence presented does not support a clear finding that declaration of airside services at Sydney Airport is in the public interest or that it promotes net economic benefits.

The evidence supports the view that there are no major issues concerning access being granted to airside services at Sydney Airport. Under the terms and conditions of the Sydney Airport lease, Sydney Airport Corporation Limited (SACL) cannot deny access to its facilities.

SACL’s passenger-based charge provides access to airside services on reasonable terms and conditions that are more efficient than the previous tonnage based charging arrangements. The passenger-based charge is directed at facilitating competition by reducing the fixed cost component facing new entrant airlines.

The Department considers that the evidence to date supports the view that the Government’s policy approach is working.

The NCC has not found any evidence of SACL charging monopoly prices for aeronautical services, on the other hand SACL potentially continues to under-recover on its aeronautical assets.

The Department considers that it has been the entry of new airline services that has created the most significant impact on competition and the lowering of airline charges. SACL has historically been seen to facilitate access to its facilities particularly in relation to new entrant airlines.

The Australian Government has stated its commitment to a policy of light handed price regulation of airports for a five-year probationary period. That approach is strengthened by the Government’s commitment to conduct, towards the end of that period, a review on whether there have been unjustifiable price increases, along with the ability to bring that review forward. Where a review indicates evidence of unjustifiable price increases, the Government could decide to reimpose price controls.
Hence there is available to the Government a spectrum of responses to influence any inappropriate pricing behaviour by airports before re-regulation is required as a last resort.

DOTARS recognises that it would be undesirable for the NCC to inadvertently provide easy recourse to regulation, by precedent in this case and thus undermine the benefits available from the lighter handed pricing regime, which has shown itself to be working.

It should also be noted that the use of the Part IIIA provisions of the *Trade Practices Act 1974*, in relation to an application for declaration that may advance a commercial position is not supported by DOTARS. In that regard, section 44F(3) of the Act provides a discretionary safety-net for the Council.

Please contact Dr Mark Dimech on (02) 6274 6153 should you require any further information.

Yours sincerely

SIGNED

Mike Mrdak
First Assistant Secretary
Policy and Research Group
15 August 2003
SUBMISSION TO

NATIONAL COMPETITION COUNCIL

APPLICATION BY VIRGIN BLUE FOR DECLARATION OF AIRSIDE SERVICES AT SYDNEY AIRPORT UNDER PART IIIA OF THE TRADE PRACTICES ACT 1974

AUGUST 2003
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1. BACKGROUND

The development of an effective and efficient incentive based pricing regime for aeronautical services at Australia’s major airports was a critical reform objective of the regulatory regime put in place by the Australian Government as part of the lease of the airports to the private sector.

The pricing framework put in place by the Government in leasing the airports was premised on eventually moving to a lighter handed regime under which airport operators, airlines and other customers would commercially negotiate charges. The adoption of the current lighter handed prices monitoring regime recognised the inefficiencies arising for the industry in the operation of prices regulation.

The experience with the administration of the former prices oversight regime applying to the major airports was that parties were not always prepared to negotiate commercially, instead endeavouring to rely on arbitration by regulation. It resulted in disputes in the determination over what was intended to be captured by the regulatory arrangements (i.e. fell within the terms of the controls or defined services) and often lengthy debate of the facts and merits of underlying financial analysis to support a contended position. It was important to recognise however, that airports and airlines could effectively operate in partnership rather than as antagonists.

The Department considers that any tendency to adopt “gaming” tactics by stakeholders in the pursuit of commercial advantage is ultimately at the cost of economic and dynamic efficiency in airport operations. It also reinforced a ‘cost plus’ approach to regulation of the airports and created a heavy regulatory burden for all involved. Ultimately those costs were being borne by the travelling public, eroding the potential benefits from having privatised airport operations.

The Productivity Commission\(^1\) (PC) has noted that the full benefits from privatising the airports would be unlikely to be realised if commercial relationships between airports and airlines continued to be heavily conditioned by price regulation. Given that airports face significant commercial constraints and incentives that will moderate (or even eliminate) abuse of any perceived market power, it was concluded by the PC that there was significant advantage in the more light handed approach of price monitoring applying in the future.

The Government endorsed that approach for a five-year probationary period to ensure that sufficient time is available to give stakeholders and airports the opportunity to demonstrate how they could operate in a commercial environment, unencumbered or affected by regulatory control. This is an important aspect of the new regime as it intends to provide airports with greater scope to respond to the rapidly changing aviation environment and to price and invest more efficiently.

Consistent with that approach, the Government decided last year that it would repeal section 192 of the Airports Act 1996, as it was not considered that airports had a strong incentive to deny or frustrate access in order to impede competition or competitive outcomes in a way that would warrant automatic declaration of aeronautical facilities.

2. THE AUSTRALIAN GOVERNMENT’S POLICY FRAMEWORK

At the time of privatising the major airports, a prices oversight framework was applied for the first five years that incorporated a CPI-X price cap on ‘aeronautical services’ at major airports. The framework provided flexibility for airport operators to introduce new charges and restructure charges within the overall cap as well as scope to cover costs and earn a commercially sustainable rate of return on necessary new investment, under aeronautical price increases, outside of the cap. The framework was, however, intended to be transitional as airport operators and airport users (particularly the airlines) established a more commercial working relationship in an environment where the parties would negotiate directly and resolve prices rather than rely on arbitration (by the ACCC) or regulatory control.

However, the Department considers that the experience in the administration of that regime suggested it was, of itself, creating a disincentive for the parties to negotiate commercially with continued reliance being placed on arbitration under regulation. In turn, that was at a significant cost to economic and dynamic efficiency in airport operations.

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2 The Government noted that no compelling case had been made for the section 192 route to declaration of airport services to be continued and that ‘all airports should be subject to the generic access provisions of Part IIIA’ of the TPA. The repeal of section 192 provided for a uniform regulatory approach to apply on access provisions across all airports (and as to other essential infrastructure providers). In the sale of SACL, potential purchasers were advised that section 192 would be repealed.

3 The Productivity Commission concluded the same - see PC Inquiry Report No 19, Price Regulation of Airport Services, page 356.

4 Prior to its sale, Sydney Airport was subject to prices notification under the Prices Surveillance Act 1983.
In May 2002, following consideration of the PC’s recommendations resulting from its review of airport price regulation, the Government announced its decision to accept the PC’s recommendation that Sydney, Melbourne, Brisbane, Perth, Adelaide, Canberra and Darwin airports be made subject to a lighter handed regime of price monitoring for five years. The move to a lighter handed prices monitoring regime reflected a desire to minimise the costs of regulatory controls that had been seen to be a net disbenefit to achieving efficient outcomes in airport and airline operations.

Reliance on regulatory control (whether for access and/or pricing outcomes) was considered best used as a last resort, to be relied upon only where it was evident that an abuse of power (market failure) was actually taking place and required correction through regulatory mechanisms.

It was also recognised that sufficient time would be needed for airports and their stakeholders to ‘bed down’ a commercially negotiated operating environment. In that context, the Government expected that airport operators would seek to adopt efficient pricing principles and negotiate with stakeholders a path by which that may be achieved over time. Since it was expected that some stakeholders would have difficulty in making this transition to a commercial environment, an independent review of the arrangements was set for five years out.5

As an added incentive to ensure the transition was made smoothly, the Government reserved the right to bring forward the five-year review, or conduct a separate review, if it appeared there had been unjustifiable price increases.

This was publicly announced to provide the airlines and other stakeholders with comfort that, should there be a concern as to the behaviour of an airport operator, they had an avenue for that to be considered, short of seeking declaration or reimposing regulation.

Hence there is available to Government a spectrum of responses to influence any inappropriate pricing behaviour by airports before re-regulation is required as a ‘last resort’.

The commercial interests of the parties may make it difficult for agreement to be concluded on some access terms and conditions in a way that would satisfy all parties.

5 The independent review would be carried out towards the end the five-year period of price monitoring which became effective on 1 July 2002 (Joint Press Release, Minister for Transport and Regional Services and Treasurer, 2002).
In practical terms it was envisaged that, where negotiations had seriously failed in regard to access terms, recourse could ultimately be made through the provisions of Part IIIA of the *Trade Practices Act 1974* to determine the conditions of access, including price.

It was not intended that recourse to declaration could be used to ‘leverage’ individual concessions on access terms for commercial advantage but rather to be relied upon where it was apparent that there was a clear abuse of power occurring by an airport operator. In that regard, section 44F(3) of the Act provides a discretionary safety-net for the Council.

The Department considers that the evidence to date supports the view that the Government’s policy approach is working.

The major airports have responded to light handed regulation in the manner anticipated. Melbourne, Brisbane and Perth Airports have entered into pricing agreements, based on efficient pricing principles, that give the airports and airlines pricing certainty, comfort on quality and quantity of service levels and that provide for required investment in an orderly manner.

It is understood that Sydney Airport Corporation Ltd (SACL) is moving to negotiate a similar agreement with stakeholders following approval of its master plan. The Department is of the view that there is no evidence to suggest that Sydney Airport has not engaged in commercial negotiations in good faith or that there has been unreasonable price increases.

Both SACL and Virgin Blue for example, were able to achieve commercial agreement concerning Terminal 2. SACL illustrates the use of countervailing power by Virgin Blue in negotiations concerning this case, where the airline ‘not only initiated legal action but …undertook a robust and targeted publicity campaign against the airport and its major shareholders …and lodged an application for access under Part IIIA’. This evidences the countervailing power of airlines as a constraint on an airport’s ability to exercise market power. This has lead to commercially negotiated outcomes and further demonstrates that the Government’s policy approach is working.

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6 It was noted by the PC that the potential activation of Part IIIA does provide ‘users with regulation of last resort’, providing additional encouragement for airports to enter into reasonable agreements regarding prices and conditions of airport use (PC Inquiry Report No 19, Price Regulation of Airport Services, page XL111).

7 SACL submission to the NCC, 28 February 2003, p.8.
It would appear that the airline industry has also confirmed that the approach has been working. In the BARA\(^8\) newsletter of April 2003, the Association said:

Moving forward, airlines would like to enter into a commercial arrangement with AsA (Airservices Australia) in the same way as they have with the privatised airport operators. Airlines expect that such a commercial arrangement would recognise the mutual benefits of a partnership approach to future business development.

3. ASSESSMENT PROCESS FOR DECLARATION OF AIRSIDE SERVICES AT SYDNEY AIRPORT

SACL has suggested that Virgin Blue has adequate access to Sydney Airport facilities, on terms that the National Competition Council (NCC) has found do not represent a misuse of monopoly power. The NCC has, however, indicated that access declaration is warranted despite no misuse of market power\(^9\) being evident because:

the provisions of Part IIIA do not require that an applicant for declaration demonstrate that access has been denied or that the service provider has actually exercised market power to the detriment of competition. Part IIIA is concerned with market structure and whether declaration will promote competition by unlocking access to a bottleneck service.

The NCC has indicated that it:

- (a) works from the presumption that *access regulation is intrusive and should be imposed only where it promotes net economic benefits*\(^{10}\);

- (b) carefully balances the benefits of access for potential infrastructure users (sic) against the costs to existing and potential infrastructure operators; and

- (c) aims to be responsive to the needs of government and the wider community.

\(^8\) Board of Airline Representatives of Australia.

\(^9\) Application by Virgin Blue for declaration of Airside Services at Sydney Airport, NCC Draft Recommendation, June 2003, (para 6.252). See also (para 10.23) of the NCC Draft Recommendation.

It has also been stated by the NCC\textsuperscript{11} that:

\[(d)\] provided the infrastructure operator is not vertically integrated (affiliated) with upstream /down stream business interests, the public policy issue is about dealing with monopoly pricing. An access regime is one means of restraining prices and maintaining efficient levels of output in these situations…

The Department examines each of these considerations below in the context of the NCC’s draft recommendation to declare airside services at Sydney Airport, as sought by Virgin Blue.

**(a) Net economic benefits from declaring**

SACL under the terms and conditions of its airport lease cannot deny access to its facilities.\textsuperscript{12} Further, the NCC has found no evidence of SACL charging monopoly prices for aeronautical services.\textsuperscript{13}

The NCC notes that declaration will cut short the opportunity for airport users to benefit from commercially negotiated outcomes. This includes forgoing the benefits of privatisation and not allowing the current lighter handed regulatory approach to continue.\textsuperscript{14}

The NCC also noted the direct and indirect costs of regulation (i.e. the risk of regulatory error and distorting efficient investment decisions, and the costs of the arbitration process itself). Further, given the unique characteristics in the airport sector, combined with dynamic market conditions and commercial uncertainty, a regulated outcome is at greater risk of error than a commercially negotiated outcome.\textsuperscript{15}

The Council found that these costs, including the forgone benefits, were material.\textsuperscript{16} The NCC also stated that it was unable to determine whether the move to passenger-based charges for domestic runway use would adversely affect competition.\textsuperscript{17}

\textsuperscript{11} Ibid, page 4.
\textsuperscript{12} This is subject to any demand management scheme or where the operator of an aircraft has failed to pay airport access related charges.
\textsuperscript{13} Application by Virgin Blue for declaration of Airside Services at Sydney Airport, NCC Draft Recommendation, June 2003, (para 6.252).
\textsuperscript{14} Ibid, (paras 10.41and 10.60).
DOTARS notes that, notwithstanding evidence suggesting that declaration imposes significant costs, the NCC’s draft recommendation implies a net public benefit. That implication is at odds with the conclusions reached by the PC inquiry into price regulation of airport services which is the basis for the Government’s decision to adopt a light handed monitoring regime.

**(b) Benefits of access versus costs to users of infrastructure**

The Department has noted evidence that Sydney Airport has positively assisted new entrants to obtain access to its infrastructure. Virgin Blue’s application is largely based on a concern that, in the absence of declarations under section 21 of the *Prices Surveillance Act 1983*, Sydney Airport would introduce a passenger-based charge to replace the tonnage based formulae and will increase its prices in the future.

By moving from aircraft tonnage based charges to passenger-based charges an airport converts a significant fixed cost component of its airport fees to a variable cost base thereby allowing start-up airlines to share their operational risk with the airport operator. That pricing structure is generally recognised as facilitating competition by reducing the fixed cost component facing new entrant airlines. Passenger-based charges are counter cyclical and pro-competitive in that they also reduce airline variable costs when a downturn in the market is being exhibited and help to sustain less viable operators. In summary, these are considered to be more efficient ‘terms and conditions’ than a tonnage based regime.

In promoting competition in airline services DOTARS considers that regulatory the emphasis should be on removing barriers to entry and encouraging potential entrants, even if this could be perceived to be detrimental to an incumbent operator.

Incumbent operators may see a passenger-based charge as a potential disadvantage to protecting their market share as it reduces the costs of entry to potential competitors. In that regard, declaration of the airside service could actually send a signal that the removal of a potential barrier to entry, by an airport operator, is not to be encouraged.
(c) Needs of government and the wider community

The Australian Government’s policy position on airport pricing has been set out above. It is important to note, however, that airport operators have a strong commercial incentive to increase passenger throughput at their airports and, to that end, major airports have positively facilitated the entry of new airlines to the market (for e.g. Impulse, REX and Virgin Blue). This has benefited the aviation industry and the flying public.

DOTARS believes that the NCC in its determination needs to acknowledge that Sydney Airport has acted in a pro-competitive manner by ensuring that all incumbent domestic carriers are treated equally in terms of airport charges. Sydney Airport has removed the previous disincentive for airlines to use larger aircraft thus promoting increased passenger throughput with a given number of movements and has allowed more efficient and flexible use of the existing facilities.18

The NCC’s draft recommendation suggests support for moving back towards re-regulation that in DOTRAS view could lead to a less than optimal outcome with price changes again being underpinned by a cost based approach. This could lead to distortionary impacts on investment and the efficient operations of airports, and leave no guarantee of lower airfares for consumers.

Rather, the Department considers that it has been the entry of new airline services that has created the most significant impact on competition and the lowering of airline charges, not access or price regulation.

Nevertheless, the threat of possible re-regulation also remains a deterrent to any abuse of power and encourages negotiated pricing outcomes based on efficient costs and an adequate return on capital.

(d) Any need to deal with monopoly pricing?

As noted earlier, the NCC found no evidence of SACL charging monopoly prices for aeronautical services.19

SACL has also stated that the passenger-based charges introduced for runway use at Sydney are significantly less than those paid by Virgin Blue at any other airport.20

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18 See (para 6.4) and (para 6.108) of the NCC Draft Recommendation.
19 Application by Virgin Blue for declaration of Airside Services at Sydney Airport, NCC Draft Recommendation, June 2003, (para 6.252).
In terms of consumer demand, the move to a passenger-based charge is understood to add less than $1 per head for passengers flying to or from Sydney on Virgin Blue.

On the other hand it is recognised that SACL potentially continues to under recover on its aeronautical assets.\(^{21}\)

Melbourne Airport has also noted in its submission to the NCC that:

> Any change to pricing structure, even if it is in aggregate revenue neutral, must involve increases for some users and decreases for other users. The question is whether the new pricing structure gives better signals for the use of the assets, especially where capacity is constrained, as is the case at Sydney Airport. Passenger-based charges generally result in a small lowering of overall price for wide-bodied aircraft and a small increase for narrowed-bodied aircraft. A system that encourages larger aircraft would appear to be efficient at a capacity constrained airport and resistance would likely to be driven by self-interest and not a genuine reason for regulation.\(^{22}\)

4. **SUMMARY**

The Department considers that it would be difficult to determine that the move to passenger-based charges for domestic runway use would adversely affect competition.

It is DOTARS view that it would promote competition in the airline industry even if it impacted marginally on the consumption of a particular airline’s services.

The emphasis, we would suggest, should be about what helps to promote competition (and hence growth) in the industry rather than on the marginal impact on the distribution of existing market demand between incumbents.

Declaration would not be in the public interest as it has the potential to undermine Government policy and efficient airport operations.

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\(^{21}\) Application by Virgin Blue for declaration of Airside Services at Sydney Airport, NCC Draft Recommendation, June 2003, (para 6.227).

\(^{22}\) Melbourne Airport Submission to the NCC, 5 February 2003, page 3.
5. CRITERIA USED TO ASSESS APPLICATIONS FOR DECLARATION

The NCC advised that it cannot recommend that a service be declared unless it is satisfied on all of the criteria, set out in section 44G(2) of the Trade Practices Act 1974 (the Act).

The main criteria in this case relate to the promotion of competition and public interest considerations. There are two criteria that DOTARS considers have not been satisfied.

These are:

- (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service; and

- (f) that access (or increased access) to the service would not be contrary to the public interest.

It is also important that the NCC give full consideration as to whether an application has been made in good faith. This is discussed in more detail later in the submission.

In regard to paragraph (a) above, the evidence supports the view that there is no major issue concerning ‘access’ being granted. Sydney Airport is providing access on reasonable terms that are more ‘efficient’ than the previous tonnage based charging arrangements.

Increased access should not be considered an issue unless it is being proposed that the criterion requires consideration of whether financial concessions should be granted to an airline (i.e. somehow more favourable or ‘more efficient’ terms than accepted by other airline operators using the same facilities).

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23 Section 44F(3) of the Act provides that: If the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the Council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared.

24 Professor Forsyth has noted that where weight based charges are levied at busy, capacity constrained airports, an inefficient pattern of use is encouraged, because low value users are not rationed away in favour of high value users. This happens at Sydney and London Heathrow airports. (See PC Inquiry Report No 19, Price Regulation of Airport Services, page 202.) Moreover, if Sydney Airport were to deny access it would be in breach of its lease conditions.

25 See (para 3.16) of NCC Draft Recommendation.
Obtaining ‘concessions’ on conditions for access is not, however, a matter DOTARS believes the NCC should consider in its interpretation of this paragraph for, otherwise, the section may become unworkable. If an airline could obtain a declaration of services with an intention of seeking price (or other) concessions, that would lead inevitably into price regulation regardless of whether it provides ‘access’ or ‘increased access’ to the infrastructure in question.

For example, in a constrained operating environment, such as at Sydney Airport, seeking ‘increased access’ through concessional charges could be meaningless if it leads to displacement of another operator who previously had access under comparable (i.e. the non-concessional) terms. Were the services to be declared this has the potential to deliver anti-competitive outcomes and seriously distort competitive neutrality.

The Department has noted, that declaration of the services at Sydney Airport could serve to reduce competition in the airline market, which is the primary driver of competition in the industry and generator of consumer benefits in all market segments.26

A reduction in competition would, however, in our view be an illogical outcome and contrary to the intended purpose of the statutory provisions in Part IIIA of the Act.

In regard to paragraph (f) it is considered that declaration would be contrary to the public interest as it would reduce competition by undermining the Government’s market based approach to having commercially negotiated outcomes.

Further, there is no evidence of an abuse of market power having occurred.

Declaration could also be seen to endorse an application that has not adequately explained any potential adverse impacts of the application being made.

The use of Part IIIA provisions of the Act, by application for declaration in order to advance a commercial position is not supported by DOTARS.

A recommendation to declare without substantive and objective evidence in support of clearly being in the public interest would be at odds with the findings of the PC and Government lighter handed policy.

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26 The Council has concluded that it does not have sufficient evidence to identify separate markets for domestic air services (para 6.37, of the NCC Draft Recommendation refers).
As noted above, it is considered that the onus is on the NCC to be satisfied that declaration is in the public interest since it has been acknowledged that access regulation is intrusive and should be imposed only where it promotes net economic benefits.

DOTARS considers that the evidence presented does not support a clear finding that it is in the public interest or promotes net economic benefits.

*In regard to an application being made in good faith*, the Department notes that the merits for making the application may be viewed in the context of the commercial events applying at the time, as that can provide an indication of whether the application was submitted in “good faith”.

SACL, for example, notes that it has not frustrated but rather actively facilitated access through the construction of a common-user terminal (otherwise known as the ‘Domestic Express Terminal’). This terminal, specifically developed for use by new entrants including Impulse and Virgin Blue, was constructed despite having some significant commercial risk.27

Virgin Blue commenced operations from Sydney Airport in August 2000. SACL provided concessional terms for using the Domestic Express Terminal in order to facilitate the airline’s ‘start-up’ operations and to promote competition in the industry. At that time Ansett Airlines was still trading.

With the financial collapse of Ansett Airlines, a commercial opportunity was presented to airlines to utilise the former Ansett terminal facilities. While Sydney Airport wished to provide suitable access to those facilities, it did not want to do so in a manner that restricted efficient utilisation of its infrastructure, limit long-term operational flexibility or reduce capacity to facilitate changes in the domestic aviation market.

The Department notes that Virgin Blue’s decision to lodge an application with the Council coincided with its court action to attempt to enforce an alleged agreement with SACL that provided dedicated access to half of the available gates (9) at the former Ansett terminal.

It could appear that the perceived effect of making the application with the Council was to add leverage to the commercial position of the airline in obtaining concessions from Sydney Airport as to the number of gates and terms on which they would be provided.

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27 SACL submission to the NCC, 28 February 2003, p.1.
The terms being sought (i.e. dedicated access) could be seen, in themselves, to have potentially anti-competitive effects by excluding access to those facilities by other airlines.  

At the time (July 2002), the Department wrote to SACL advising that the focus of the Government’s aviation policy framework was to support safe, secure, competitive and sustainable air services. Of significant importance to achieving that outcome was the efficient and effective operation of airport infrastructure.

In that regard, the Government supported measures that:

- granted open access to airport terminals for new entrants under operational practices that do not entrench incumbent airlines in dominant commercial positions through ‘tying up’ essential infrastructure; and

- avoided regulatory or other interventions that advantage one stakeholder over another.

Although Virgin Blue withdrew its application for declaration of the domestic terminal services in December 2002, continuing with the application for declaration of the airside services may be seen as an endeavour to resist the (then prospective) move of Sydney Airport to a passenger-based charging regime. It is noted, however, that Virgin Blue has not sought to have those services declared at other airports that have introduced passenger-based charges (including airports such as Melbourne, Perth, Darwin and Canberra).

The Department considers that the application therefore appears to be directed against the introduction of a more efficient pricing structure by the airport and obtaining further concessions through the use of regulatory intervention. It does not appear to DOTARS to be concerned with improving competition in the market place.

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28 This was of such concern to the ACCC that it wrote to Sydney Airport on 24 July 2002 to advise that the ‘Commission believed that competition policy objectives would be best served by making the terminal a common user facility’.

29 Historically, in 2001, Virgin Blue sought ACCC intervention using the access provisions of section 192 of the Airport Act in relation to pricing of the domestic common user terminal at Melbourne Airport. This was despite Melbourne Airport and Virgin Blue having reached commercial agreement in 2000 on the charge for use of the terminal, and the ACCC having endorsed that charge. For further details see PC Inquiry Report No 19, Price Regulation of Airport Services, page 276.
6. CONCLUSION

The Australian Government has clearly stated its commitment to its policy of light handed price regulation of airports. The Government has endorsed that approach for a five-year probationary period to ensure that sufficient time is available to give stakeholders and airports the opportunity to demonstrate how they could operate in a commercial environment, unencumbered or affected by regulatory control. That approach is strengthened by the Government’s commitment to conduct, towards the end of that period, a review on whether there have been unjustifiable price increases, along with the ability to bring that review forward.

As outlined in this paper, the Department considers it important that the information presented to the NCC fully reflects the way in which light handed regulation operates including the spectrum of responses available to the Government to influence any actual inappropriate pricing behaviour by airports.

In our view the NCC draft decision appears to have considered the threat of re-regulation in terms of an airport either continuing under the light handed regime, or defaulting immediately to declaration and potential re-regulation.

It is important to recognise that there is actually a continuum of responses available before regulation is used as a ‘last resort’.

The PC concluded that provided there is no easy recourse to regulatory intervention, a prices monitoring regime can promote efficient outcomes while reducing the risk of regulatory failure.

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30 In summary, the key instruments the Government has under the lighter handed price monitoring regime (particularly, as it applies to Sydney Airport) include:
- mandatory price monitoring, undertaken by the ACCC effective from 1 July 2002 (including quality of service monitoring, to assist in evaluating whether any productivity improvements are obtained through the running down of assets or reduced service standards). Specific aspects include:
  - as a safeguard, the current price monitoring arrangements only apply for a probationary period of five years;
  - towards the end of that period, a review is to be conducted to determine whether there have been unjustifiable price increases;
  - the Government has a reserve right to bring forward that review; and
  - where a review indicates evidence of unjustifiable prices, the Government could decide to reimpose price controls.
- the access provisions in Part IIIA of the Trade Practices Act 1974 that provide recourse to arbitration as an ultimate constraint on abuse of any market power.

31 PC Inquiry Report No 19, Price Regulation of Airport Services, page 326.
DOTARS recognises that it would be undesirable for the NCC to inadvertently provide easy recourse to regulation, by precedent in this case and thus undermine the benefits available from the lighter handed pricing regime, that has shown itself to be working.