14 August 2003

The Executive Director
National Competition Council
GPO Box 250B
MELBOURNE VIC 3001

Via Email: info@ncc.gov.au

Dear Sir/Madam

Application by Virgin Blue for Declaration of Airside Services at Sydney Airport – Draft Recommendation

The National Competition Council’s draft recommendation in response to Virgin Blue’s application for declaration of airside services will no doubt justify the expense of the academics and lawyers that have been engaged to manufacture Virgin Blue’s case. However, no amount of ‘wordsmiting and hypothesising will disguise the fact that firstly, there is no dispute requiring regulatory intervention and secondly, that any move to unnecessarily re-introduce stricter price regulation of airports is contrary to the policy objectives advocated by the Federal Government.

The Productivity Commission has only recently completed what is now the pre-eminent work on airport price regulation which encompasses a comprehensive consideration of the policy objectives and regulatory experience in airport regulation. This work has reinforced government thinking in support of the proposition that regulation of price and non-price terms and conditions of airport access should be ‘light-handed’ and imposed only where it is demonstrated that underlying issues cannot be resolved in a dynamic and competitive market.

The benefits of this light-handed form of regulation were perceived to be (among other things) the reduced regulatory costs, the improved environment for commercial negotiation between airports and airlines, and the level of increased airport investment that would result from such a move away from heavy-handed regulation. There have already been monumental improvements in each of these areas but, with the new regulatory regime having been only been formally in place for 12 months, the benefits of the new regime have not yet been fully realised.

The Government’s intention is that the light-handed regime should be in place for the duration of the current regulatory period (i.e. until July 2007), unless there is evidence of an abuse of market power by airports. In the absence of this, there is no reason to move away from the Government’s preferred light-handed approach. This should have been the Council’s starting point in assessing Virgin Blue’s application and the decision on whether to declare should apply a high threshold to the assessment criteria so as only to permit regulatory intervention where there is a irreconcilable dispute.
Since the events that preceded Virgin Blue’s applications for declaration of services at Sydney Airport, both parties have publicly acknowledged that the dispute over access to the terminal has been resolved and, as a result, one of the applications was withdrawn. Given that the parties have thereby clearly demonstrated that they are able to resolve such important access issues on a commercial basis, the Council should not assume that the parties will now require regulatory intervention to resolve other issues that may arise between them.

The Council’s draft recommendation identified a number of contentious issues that are currently being negotiated between Virgin Blue and Sydney Airport, such as the proposed move to passenger-based charges and the recovery of additional security/insurance costs since September 11. These are issues that are not new to the industry and can be resolved through normal commercial negotiation. At the moment however, there is no downside to Virgin Blue from engaging in regulatory gaming and proceeding with its remaining application – at the very least Virgin Blue will delay the implementation new charges or charging arrangements, notwithstanding that commercial resolution to these issues have already been successfully negotiated by Virgin Blue at a number of other airports.

It is our serious concern is that declaration will be used as a means of circumventing the Government’s intended period of light-handed airport regulation. In the wake of Virgin Blue’s application Canberra International Airport has already been threatened with declaration without any proposal whatsoever to change any term or condition of access. Declaration was intended to only be used as a measure of last resort to address “rogue” behaviour by an airport, not as a pre-emptive measure to enforce heavier-handed regulation in the absence of a demonstrated failure of ordinary market forces. Further, it has been clearly enunciated to us that if Virgin Blue’s application is successful then the focus will shift to the declaration of other airports.

Taking into consideration the results of the recent review of airport regulation, the Council should apply a high threshold for declaration and only provide for regulatory intervention where there is a irreconcilable dispute between the parties. Declaration should not be an option where the instigating party has failed to engage in good faith negotiation. The Council should therefore consider whether Virgin Blue’s application was made in good faith given the negotiated outcomes that it has achieved at other airports.

Yours sincerely

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cc Senator Ian Campbell
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