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Submissions – Port of Newcastle
National Competition Council
GPO Box 250
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RE: Declaration of the shipping channel service at the Port of Newcastle – Draft Recommendation

Virgin Australia Airlines Pty Ltd (**Virgin Australia**) welcomes the opportunity to provide this submission in response to the Draft Recommendation of the National Competition Council (**Council**) in response to the application (**Application**) by Glencore Coal Pty Ltd (**Glencore**) for declaration of the shipping channel service at the Port of Newcastle under Part IIIA of the *Competition and Consumer Act 2010* (**CCA**).

Virgin Australia does not wish to make any submission in relation to any factual matter concerning the Application.

However, Virgin Australia is a regular user of nationally significant infrastructure with bottleneck characteristics, and is therefore interested in the approach adopted by the Council in assessing applications for the declaration of services under Part IIIA of the CCA.

In particular, in relation to the Draft Recommendation, Virgin Australia wishes to comment on the approach adopted by the Council in assessing declaration criterion (a) under s 44G(2)(a) of the CCA.

The most recent judicial consideration of criterion (a) was in relation to the application brought by Virgin Australia to have the Airside Service provided by Sydney Airport declared. In considering that application, the Full Federal Court (French, Finn and Allsop JJ)[1] considered criterion (a) in detail and set out the approach to be adopted in interpreting and applying it.

Importantly, the Full Federal Court held that the assessment of criterion (a) should not be performed by reference to the current factual circumstances of the person who has made the application for declaration. The assessment of criterion (a) relates to the service provided by the facility, not to whether or not any particular access seeker has or has not been granted a particular level of access to the facility.

The Full Court makes this point in a number of places in its judgment:

> *For the reasons that follow, the submissions of SACL [Sydney Airport owner] that it is necessary for the engagement and operation of s 44H(4)(a) to identify and determine the existence and extent of a denial or restriction of access should be rejected.* (at [76])
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> ...

[1] *Sydney Airport Corporation Ltd v Australian Competition Tribunal and Others* [2006] FCAFC 146 (**Sydney Airport case**). Sydney Airport Corporation Limited sought special leave from the High Court to appeal this decision but leave was denied.

The context and background and evident purpose of the legislation make clear that the regime is not only engaged when some denial, or restriction of supply of the service can be demonstrated. Such a construction would limit the operation of this Part and impede it by an anterior and collateral factual enquiry. Further, to the extent that the found denial or restriction acts as a focal point or governor of the enquiry as to the promotion of competition contemplated by s 44H(4)(a) the section would be acting more like a remedy for a wrong, rather than as a public instrument for the more efficient working of essential facilities in the economy.

Further, the possibility that one might need to decide whether access was being denied or restricted or merely that monopoly charges were being made to people who could pay them (which could be part of this antecedent enquiry) reveals the tension between the section so operating and the underlying aims of the Act, and in particular s 2 of the Act, and also of Part IIIA itself. The whole scheme of Part IIIA, when understood against the background to its passing, is antithetical to s 44H(4)(a) operating to limit the possibility of declaration except where it can be demonstrated as a fact that the service provider has in the past denied or restricted access to the service or supply of the service. (at [78] – [79])

Virgin Australia is concerned that the Council's assessment of criterion (a) in the Draft Recommendation does not accord with the approach adopted by the Full Federal Court in the Sydney Airport case.

The Council engages in a detailed assessment of the current access circumstances of Glencore, the applicant for declaration, rather than considering the facility and the service provided by the facility and determining whether access (or increased access) to the shipping channel service would promote a material increase in competition in a dependent market. As noted by the Full Federal Court, this is to engage in an unnecessary anterior and collateral factual inquiry and incorrectly treat the provisions of Part IIIA as acting as a remedy for a wrong rather than as a public instrument for the more efficient working of essential facilities in the economy.

In the Sydney Airport case, the Full Federal Court determined the correct interpretation of the term "access (or increased access)" as it appears in criterion (a). Importantly, the Full Federal Court held that access (or increased access) is **not** to be equated with declaration as it appears in criterion (a):

We disagree with this approach whereby "access" becomes "declaration under Part IIIA". (at [83])

Instead, the Full Federal Court held:

… all s 44H(4)(a) requires is a comparison of the future state of competition in the dependent market with a right or ability to use the service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service. (at [83])

The Full Federal Court held that this is the correct approach to assessing criterion (a) despite the inclusion of the words "increased access" (at [86]), and rejected submissions that this approach could not be adopted where an applicant for declaration already had access:

We do not accept the Tribunal's basis for rejecting the submission that it would be unrealistic to undertake a counterfactual analysis which discounts the fact that Virgin has access. That, with respect, is not the point. The terms of s 44H(4)(a) do not incorporate the requirement for comparison with what is factually the current position in any given circumstances. Once a declaration is made any potential user can take advantage of it. Thus, it is an unnecessary constriction of a provision by way of pre-condition, to engage in a detailed factual enquiry heavily dominated by the past and the present. (at [84])

Virgin Australia notes that while there has been subsequent judicial consideration of the declaration criteria in Part IIIA, this consideration has concerned other criteria (principally criteria (b) and (f)), not criterion (a). Further, while criterion (a) has been amended since the Sydney Airport case, this amendment has simply been to include the words "a material increase in" before the word "competition" and does not affect the approach to the application of criterion (a) set out by the Full Federal Court above.

Accordingly, the application of criterion (a) is a different, and arguably far simpler process than that adopted by the Council in the Draft Recommendation. A significant part of the Council's consideration of criterion (a) in the Draft Recommendation is a detailed factual enquiry into Glencore's current access conditions. As held by the Full Federal Court, this enquiry is unnecessary. Therefore, questions as to whether there is a price dispute between Glencore and the provider of the service at the Port of Newcastle, and whether this is a (or the sole) motivating factor behind the Application are wholly irrelevant under criterion (a).[2]

Instead, according to the Full Federal Court in the Sydney Airport case, in determining whether access (or increased access) would promote a material increase in competition, the Council need simply consider:

- the state of competition in the relevant dependent markets with a right or ability to use the shipping channel service at the Port of Newcastle; and
- the future state of competition in the dependent markets without any right or ability or with a restricted right or ability to use the service.

Please do not hesitate to contact me on (07) 3087 4407 or shane.lord@virginaustralia.com if you would like to discuss this submission further.

Yours sincerely

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[2] In the Sydney Airport case, the Full Federal Court held at [85] that the circumstances in which the service is provided could be a relevant consideration as to why no declaration should be made, however that inquiry was simply not mandated by the precondition of satisfaction of criterion (a).