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**Application under Part IIIA of the  
Competition and Consumer Act  
2010 (Cth) requesting a  
recommendation that the  
Domestic Terminal Service  
provided by Sydney Airport  
Corporation Limited be declared**  
Tiger Airways Australia Pty Ltd

**NON-CONFIDENTIAL VERSION**

3 July 2014

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## 1 Executive summary

### Introduction

Tiger Airways Australia Pty Ltd (**Tigerair**) applies to the National Competition Council (the **Council**) to recommend declaration of the Domestic Terminal Service<sup>1</sup> at Terminal 2 (**T2**) at Sydney Airport under s 44G of the *Competition and Consumer Act 2010* (Cth) (the **CCA**).

### Background

Tigerair is a low cost carrier (**LCC**) providing low fare travel services principally targeted to the budget and leisure traveller. In Australia Tigerair is the only low cost domestic competitor airline to Jetstar.

Tigerair commenced commercial operations at Sydney Airport in 2009 and opened a domestic operations base at Sydney Airport in July 2012. Tigerair operates through the common user domestic terminal (T2) owned and operated by Sydney Airport Corporation Limited (**SACL**).

Domestic travel to and from Sydney (through Sydney Airport) is the largest segment of the overall Australian domestic aviation market. For Tigerair (or any airline) to be a strong competitor in the domestic aviation market, and in particular to provide competing services for Sydney travellers, access to the use of T2 for departing and arriving passengers is essential.

Since establishing its Sydney Airport operations base, Tigerair has increased the number of aircraft based in Sydney from 1 to 4, launched 6 new routes and increased the number of daily services operating in and out of Sydney from 18 to 42.

Tigerair proposes to further increase its Sydney Airport base to 6 aircraft, which will enable it to establish a more competitive and efficient schedule of services out of Sydney, including allowing it to: spread fixed costs across a broader network; recruit a sustainable pool of staff; support a viable engineering presence and utilise aircraft more efficiently.

By establishing a Sydney Airport base and increasing that base, Tigerair has been and will be able to build a stronger schedule and range of services out of Sydney Airport which will enable it to attract and retain more customers.

However, Tigerair has been restricted in establishing a competitive and efficient schedule of services to and from Sydney Airport through a lack of efficient and competitive access at T2, including in respect to check-in counters, departure gates, bussing arrangements, baggage reclaim facilities and way finding signage.

The lack of efficient and competitive access at T2 is also providing a poor customer experience for Tigerair's passengers, further restricting Tigerair's ability to provide competitive services through Sydney Airport. Tigerair notes that its customer satisfaction survey results for T2 at Sydney Airport are significantly lower than its results for its operations at other airports, such as Brisbane Airport.

This lack of efficient and competitive access will further constrain

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<sup>1</sup> Defined below within the Executive Summary and at section 5.1 of this application as "a service for the use of the Sydney

Tigerair's ability to increase its base at Sydney Airport to 6 aircraft and is further constraining its overall ability to increase its total domestic fleet.

Tigerair's objective is to increase its fleet to 23 aircraft with longer term potential to increase up to 35 aircraft. Increasing its overall fleet size will enable Tigerair to achieve scale economies and be a stronger competitor in the budget and leisure travel segment of the domestic aviation market against Jetstar.<sup>2</sup>

Efficient and competitive access at T2 is essential to Tigerair's overall ability to grow and establish a substantial domestic fleet in competition with Jetstar.

Tigerair sees substantial potential demand for an increased level of domestic low cost services focussed on the budget and leisure travel market segments. Tigerair notes that air travel in Australia has been growing at an average annual rate of 5.2% for the last 9 years.

Further, Tigerair considers that there is available capacity at T2 to efficiently and competitively accommodate its existing and proposed increased Sydney Airport based fleet. Tigerair notes that on 15 August 2013, Qantas Group moved all QantasLink services from Pier B at T2 to Terminal 3 (T3). QantasLink operates over 300 return flights a week to and from Sydney Airport and over 1 million passengers per year were being processed through T2 to travel on QantasLink services.<sup>3</sup> All of these services and passengers are now accommodated at T3 meaning that significant capacity became available at T2.

From observations conducted by Tigerair at T2 between September 2013 and January 2014, it is apparent that there is significantly more available capacity at Pier B compared to Pier A, evidenced by the fact that utilisation of Pier B was 57% lower than use of Pier A.

Tigerair has the landing slot access that it needs to conduct and grow its operation. However, it cannot make full use of these slots until it obtains improved and increased terminal access at T2.

#### Tigerair's request to SACL for increased and improved access at T2

Before Tigerair can viably grow its operations at T2, it requires increased and improved access for the 4 aircraft currently based there. Tigerair has requested:

- access to two hard stand gates on Pier B between 0630 and 0730 each morning (the **morning peak period**) in accordance with SACL's *Sydney Airport T2 Aircraft Bay & Gate Allocation Procedures* dated 27 March 2009 (**Aircraft Bay & Gate Allocation Procedures**);
- increased access to Pier B hardstand gates throughout the course of each day in accordance with the Aircraft Bay & Gate

<sup>2</sup> The need for Tigerair to increase the size of its fleet to achieve scale economies was recognised by the Australian Competition and Consumer Commission (ACCC) in its Public Competition Assessment on Virgin Australia Holdings Limited (**Virgin Australia**)'s acquisition from Tiger Airways Holdings (**Tiger Airways**) of 60% of the shares in Tigerair (**Virgin Australia Acquisition**). Australian Competition and Consumer Commission, Public Competition Assessment, "Virgin Australia Holdings Limited - proposed acquisition of 60% of Tiger Airways Australia Pty Ltd", 31 July 2013 at para 56

<sup>3</sup> Qantas Media Release "QantasLink moves to Terminal Three at Sydney Airport" see <http://www.qantasnewsroom.com.au/media-releases/qantaslink-moves-to-terminal-three-at-sydney-airport>

Allocation Procedures; and

- the allocation of additional check-in counters in the short term and the deployment of check-in kiosks and automated bag drop solutions at T2 in the long-term. At the moment Tigerair only has access to 4 full size check-in counters at T2 and 2 smaller “auxiliary” counters located behind the 4 full size counters. Tigerair’s limited access to check-in counters means that it can only process passengers for a maximum of 3 closely spaced flights.

Following the relocation of QantasLink to T3, Tigerair has requested on a number of occasions that SACL manage access to the Pier B gates in accordance with its Aircraft Bay & Gate Allocation Procedures and provide Tigerair with the increased access specified above.

While negotiations with SACL are ongoing, SACL has not, to date, accommodated Tigerair’s requests and does not appear likely to accommodate those requests in a reasonable commercial timeframe. SACL has previously responded to Tigerair’s requests by stating that:

**[Information confidential to Tigerair and SACL redacted]**

Further, SACL has sought to impose new charges on Tigerair in addition to the passenger facility charge for use of T2. These will impose unjustified costs on Tigerair and undermine its ability to provide competitive low cost fares. For example, SACL has proposed a new **[Information confidential to Tigerair and SACL redacted]** to Tigerair for the installation of check-in kiosks and automated bag drop facilities notwithstanding that the provision of these facilities should be included in the standard terminal passenger facility charge. Tigerair notes that other airports introduced these facilities as part of their standard provision of domestic terminal services, without additional charges.

The current situation leaves Tigerair with: no clarity as to its position; no timeframe for a final decision on gate access; no confidence that its current access issues will be resolved; and a concern that it will be forced to accept access terms at T2 which are not efficient or competitive. Tigerair is uncertain whether, through negotiations, it will be able to gain the level of efficient and competitive access to T2 that it needs to grow its Sydney Airport base.

In fact, the limited access that Tigerair has to Pier B Gates, efficient check-in solutions, way-finding signage and cost effective and operationally viable bussing solutions means that infrastructure access is the biggest constraint on Tigerair’s ability to increase its scale sustainably and become a more vigorous and effective competitor from its T2 base. It has also meant that consumers, particularly those travelling from T2 in the morning peak period, have not had as much choice of airline as would otherwise be the case and there have not been as many low-cost fares available.

#### Application for declaration

Tigerair wishes to make clear its firm intention to continue to seek a mutually acceptable commercial agreement with SACL as quickly as possible and remains hopeful that commercial agreement will be reached.

However, given the uncertain negotiations to date and the potential for such negotiations to be further protracted with no confidence that an efficient or competitive solution will be reached, Tigerair considers it

appropriate to seek declaration at this point, to provide an arbitration “circuit breaker” in the event that commercial agreement with SACL cannot be reached.

The importance of being able to move quickly to establish a viable existing and future base of operations at Sydney Airport is such that Tigerair cannot afford to risk more weeks or months negotiating with SACL only to find that the parties still cannot reach commercial agreement. If Tigerair were to commence the declaration process at that later time, it would be further substantially delayed in resolving the critical issue of T2 access.

In any event, aside from the current access issues that Tigerair is experiencing, the essential nature of the relevant facilities at Sydney Airport for domestic aviation in Australia means that the Domestic Terminal Service is an appropriate candidate for declaration, and it is appropriate for any airline to have the ability to arbitrate T2 access disputes with SACL.

#### The relevant service and period for declaration

Tigerair requests declaration of the “**Domestic Terminal Service**”, being:

*a service for the use of the Sydney Airport multi-user domestic passenger terminal (Terminal 2) and related facilities for the purposes of processing arriving and departing domestic airline passengers and their baggage.*

Tigerair submits that the Council should regard each of the criteria in s 44G of the CCA as being satisfied for the reasons given below and recommend the declaration of the Domestic Terminal Service.

Tigerair requests that the Council recommend declaration for a period of 10 years. In this regard, Tigerair notes that:

- while the Sydney Airport Master Plan 2033 refers to the development of new T2 Piers C and D, the development of these piers is not planned to start for at least another 15 years; and
- the proposed second Sydney airport at Badgerys Creek is not expected to become operational for at least another 10 years.

#### Criterion (a) –that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for

Tigerair considers that the relevant markets for the purposes of criterion (a) are:

- the market for the supply of “Domestic Terminal Services” in Sydney; and
- the market “related to the carriage of domestic air passengers into and out of Sydney” (the **domestic aviation market<sup>4</sup> or the dependent market**).

Whether access will promote competition in a dependent market is

<sup>4</sup> Tigerair notes that when consideration is given to the significance of travel to and from Sydney to the overall domestic market, no material difference arises whether the dependent market is considered regionally by reference to travel to and from Sydney or nationally.

## the service

assessed on a “with and without” basis. This is to be considered on the basis of the “world with access” to the service and the “world without access”.<sup>5</sup> It may also be considered on the basis of the “world with declared access”, providing a right to arbitration, or the “world without declared access”. No material difference arises in this matter if this approach is adopted.

Tigerair’s submits that criterion (a) is satisfied as the Domestic Terminal Service is a necessary input for effective competition in the dependent market. In particular, access to the use of T2 is essential to compete in the domestic aviation market, as there are no other viable alternatives (except for Qantas at T3) to conduct domestic airline services through Sydney.

Tigerair submits that:

- given the strategic nature of Sydney as Australia’s largest city and a significant gateway to international air travel, access to Sydney Airport is essential to compete in the domestic aviation market;
- Sydney Airport is a natural monopoly and SACL has and can exert monopoly power. Over the relevant period there will be no other airport at which the Domestic Terminal Service could be provided:
  - neither Bankstown or Richmond Airport could provide the Domestic Terminal Service;
  - the parent company of SACL has the first right of refusal to build and operate any second major airport within 100 kilometres of the Sydney CBD, and in any event will not be operational in the relevant period;
- increased access/declaration would promote a material increase in competition in the domestic aviation market by providing an increased opportunity for:
  - LCC capacity to be offered on more routes to and from Sydney Airport; and
  - Tigerair to engage in more vigorous competition with Jetstar;
- restricted access is hindering Tigerair’s physical capacity to provide services, impeding its ability to provide a competitive level of service and amenity to its customers, undermining its ability to increase its Sydney Airport base and the level of services through Sydney, in turn substantially lessening the level of competition that Tigerair can provide now and over the longer term in the domestic aviation market; and

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<sup>5</sup> Per the Full Federal Court in *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) 232 ALR 454 at paras 91-92 (**Sydney Airport**) finding that the relevant comparison was between 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

- declaration will enable Tigerair, where appropriate, to seek arbitration to resolve the terms of access to the Domestic Terminal Service where negotiations with SACL are becoming protracted and there is no confidence they will come to a satisfactory conclusion.

**Criterion (b) - that it would be uneconomical for anyone to develop another facility to provide the service**

Tigerair submits that the Council should regard criterion (b) as being satisfied because as a threshold issue there will be no practical capacity for anyone to develop another facility to provide the Domestic Terminal Service within the relevant timeframe for assessing whether criterion (b) is satisfied is the period sought for declaration, namely, 10 years.

The Council states in *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)* (**Declaration Guide**) that the assessment of the profitability of the new facility should:

- be based upon the development of a separate, new facility; and
- examine why an existing service provider would develop an alternative facility where there is the prospect that additional capacity could be provided at a lesser cost through augmentation of the service provider's existing facility.

This is a real world practical assessment. An important consideration is the fact that there are no practical circumstances in which anyone could develop another facility, economically or not, to provide the Domestic Terminal Service.

The facility used to provide the Domestic Terminal Service, T2, is an integrated part of the overall Sydney Airport facility. To develop another facility to provide the Domestic Terminal Service requires that it be integrated into an airport that can be used for interstate and intrastate domestic passenger services into and out of Sydney.

Consequently, duplication of T2 would require either:

- approval from the Commonwealth Government to develop another airport and there is no reasonable prospect that it would provide such approval; or
- duplication of T2 on Sydney Airport which would not be privately profitable for Sydney Airport to do, where it is the owner of the existing facility.

There will be no other airport in Sydney in the relevant period that will be able to support domestic passenger services:

- despite the approval of a second Sydney airport at Badgerys Creek, such an airport will not operational until at least the mid-2020s; and
- there is no realistic prospect that Bankstown or Richmond, or any other airport, will be approved for domestic passenger services in the relevant period.

Therefore the only airport at which a facility that is capable of providing the Domestic Terminal Service could be located is at Sydney Airport. At Sydney Airport it would not be privately profitable to develop another multi-user domestic terminal, particularly one that is capable of



providing the services provided by T2. That this is the case is clear from the fact that Sydney Airport itself does not propose to develop another terminal.

Further, it appears that the privately profitable option is to augment the existing facility, not to duplicate it. The Sydney Airport Master Plan 2033 refers to the construction of new T2 Piers C and D. Even this augmentation is presumably not profitable for SACL over the relevant period as the Master Plan states that the augmentation of T2 will not commence for at least another 15 years and is subject to SACL's discretion and a number of market and regulatory conditions.

For completeness, Tigerair notes that paragraph 4.5 of the Declaration Guide identifies certain information which is relevant as part of the Council's assessment of profitability (such as expected capital and operating costs, projected facility use, required rates of return on debt and equity and the return on capital). This submission addresses those matters where information is available to Tigerair. However, the principal submission of Tigerair on this matter is, as set out above, no other party would be able to duplicate an airport which would have as integrated part a facility to provide the Domestic Terminal Service; and it cannot be privately profitable for SACL to duplicate its existing facility and in this regard SACL's plans as set out in its Master Airport Plan are to only consider augmentation of T2 in 15 years demonstrates that it does not consider it privately profitable to do so in the relevant period.

**Criterion (c) – that the facility is of national significance**

In a speech given to the Institute of Transport and Logistics Studies on 7 May 2013, the SACL CEO, Kerrie Mather described Sydney Airport as "Australia's most significant piece of infrastructure".<sup>6</sup>

In the two previous declaration applications involving Sydney Airport, *Virgin Blue* and *Sydney International Airport*, the Tribunal concluded that Sydney Airport was of national significance.

T2 is an integral part of Sydney Airport and is the gateway for all non-Qantas domestic passenger services through Sydney and will be the gateway for at least the next 10 years. Tigerair submits that the facility is clearly of national significance.

**Criterion (e) – that access to the service is not already the subject of an effective access regime**

Tigerair submits that the Domestic Terminal Service is not already the subject of an effective access regime.

**Criterion (f) – that access (or increased access) to the service would not be contrary to public**

Tigerair considers that increased access to Domestic Terminal Service would not be contrary to the public interest because:

- there continues to be an asymmetry in bargaining power between SACL and all the airlines, but especially smaller airlines like Tigerair;

<sup>6</sup> See Kerrie Mather, *Sydney Airport – planning for the future*, presentation to Institute of Transport and Logistics Studies, 7 May 2013 at slide 3, see [http://sydney.edu.au/business/\\_\\_\\_data/assets/pdf\\_file/0011/170489/Kerrie-Mather-Presentation.pdf](http://sydney.edu.au/business/___data/assets/pdf_file/0011/170489/Kerrie-Mather-Presentation.pdf)

## interest

- in these circumstances, the prospect of arbitration if negotiation fails increases the likelihood of the parties reaching a commercial agreement that truly reflects a fair negotiated position;
- there are no costs of regulation that would outweigh the increase in competition in the dependent market; and
- the realisation of the opportunities for increased competition in the domestic aviation market (as mentioned in relation to criterion (a)), would also provide clear consumer benefit in the form of greater availability of low-cost airfares on existing and new routes as a result of increased Tigerair services and the likely competitive responses from Tigerair's competitors. This should result in an increase in the number of Australians travelling by air for leisure purposes and provide for a stronger domestic tourism industry.

## Section 44W(1) of the CCA

While it is not a criterion for declaration, Tigerair submits that any arbitration resulting from declaration of the Domestic Terminal Service would not prevent any existing user from obtaining the amount of the service they require, deprive them of a contractual right or have any of the other effects proscribed by s 44W(1) of the CCA.

## 2 Background to the Australian domestic airline industry

### 2.1 Recent history

The Australian domestic market has undergone significant change over the past two decades. The absence of regulatory or structural barriers has promoted the entry of a number of start-up airlines, with the removal of limits on foreign ownership of domestic airlines opening up the market to more competition.<sup>7</sup>

A major factor in market growth, particularly in recent years, has been an increase in competition from the entry of low cost airlines. A number of LCCs have entered the Australian market since deregulation of the industry. Dominated by two equally-matched incumbent airlines, Qantas and Ansett, the Australian domestic market exhibited features favourable to LCC entry including relatively high fares, a moderate number of dense routes and an underdeveloped leisure market.

Following deregulation, early entry started with the emergence of Compass Airlines (mark 1 and 2) in 1990 and 1992. LCC entry began with Virgin Blue and Impulse Airlines in 2000 (the latter later formed the basis of Jetstar Airways (**Jetstar**) after it was acquired by Qantas in 2001); Jetstar in 2004; Tigerair in 2007, and Air Australia in 2011. LCC and other entry have always sparked a vigorous capacity expansion and price competition.

These LCCs have not only contributed to growth on the major domestic trunk, but have also introduced low fare services to many regional centres. The incumbent airline, Qantas, has in turn responded to this competition, resulting in higher capacity, lower fares and significant growth in the number of passengers travelling in Australia, both for business and leisure.<sup>8</sup>

LCCs also generally adopt different strategies in determining which routes they will service. LCCs tend to be influenced by the profitability of individual routes (as opposed to seeking to provide an integrated network and wide coverage), so will typically operate on a point to point basis.

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<sup>7</sup> Virgin Blue was majority foreign-owned when it entered the Australian market and Tiger Airways is 100 per cent foreign-owned. The two largest independent regional airlines, Regional Express and Skywest, are also currently majority foreign-owned.

<sup>8</sup> The LCC model refers to airlines with a lower operating cost structure than their competitors. LCCs generally have lower fares than full-service airlines. Consequently, LCCs must make up for the lost revenue in decreased ticket prices by charging for extras and maintaining a low cost base. Establishing and maintaining a low cost base by maximising productive efficiency is key to having a viable LCC model. Features of the LCC business model include:

- *Single aircraft type* simplifies maintenance, reduces spare parts inventory requirements, lower crew training costs and efficient aircraft scheduling.
- *Simple, single-class configurations* optimises seat density and capacity.
- *Point-to-point operations* within a simpler network and system, with no interlining, codesharing or passenger hubbing processes, which adds operational complexity and costs.
- *Maximisation of aircraft utilisation* by focusing on short turnaround times and high number of sectors flown to minimise unit costs.
- *Low-cost infrastructure, where available* such as the use of secondary terminals, which allows for the significant reduction of operating costs.
- *Low fixed costs/outourcing*: operations are outsourced to the extent possible to maintain a low and flexible cost structure. LCCs are also able to conclude more productive working agreements with their staff
- *Low sales and distribution costs*: tickets are mainly sold online, which eliminates reliance on intermediaries such as global distribution systems that would incur commissions/sales incentives.

## **2.2 Qantas Group remains the dominant airline**

Despite the entry and growth of a number of airlines, the Australian domestic market is still dominated by the Qantas Group.

Qantas has long dominated the Australian market as the only 'full service' provider of nationwide scheduled air services. At one point, following the Ansett group's collapse in 2001, Qantas increased its share of domestic capacity in the Australian market from 55% to around 90%.

In this market environment, Virgin Blue, which at the time had a fleet of only nine 737s and operated on nine routes, was able to rapidly expand and win one third of the domestic market within three years, partly because of its LCC proposition. In 2004, Qantas established Jetstar in response to the competitive threat from Virgin Blue. This allowed Qantas to target two different markets – Jetstar competed with Virgin Blue on price for leisure travellers, leaving Qantas free to focus its mainline brand on business travel without a direct challenger.

This dual brand strategy has assisted the Qantas Group in maintaining its dominance of the Australian domestic market. Since 2004, the three-product offering of Qantas, Jetstar and QantasLink has accounted for around 65 per cent of the domestic market.

Building upon its dual brand strategy, there has been a shift by Qantas over the past few years towards its lower cost business. Qantas' operating statistics indicate that over the past three years, it has strategically shifted domestic capacity growth away from the mainline operations to Jetstar. In 2010, the mainline brand represented around 65% of the group's capacity, reducing to around 60% in 2011/12.

## **2.3 Current market dynamics: capacity increases and record low fares driven by competition between Virgin Australia and Qantas**

Domestic aviation in Australia is highly dynamic and the competitive landscape has changed dramatically in the past five years. This competition has been driven by the rivalry between Virgin Australia and Qantas Group.

Most recently, Virgin Australia's shift upmarket as part of its Game Change strategy, and Qantas' response, have been the key sources of competitive tension in the market.

Virgin Australia has grown and evolved its original business model since its beginnings as a LCC back in 2000. Today, it is a sustainable and expanding business that is competing more closely with and stealing market share from the domestic incumbent carrier Qantas.

Since 2009, and particularly from July 2010 with the launch of the Game Change Programme, Virgin Australia has been repositioning its product to directly challenge Qantas' dominance of the full service segment and capture a higher share of the corporate and government passengers, while maintaining its share of the leisure passengers. Virgin Australia's repositioning has been highly successful.

## **2.4 Airline product and service offerings**

Virgin Australia and Qantas have a full service product and cost base. Until as recently as 2011, Qantas, being the only full service airline flying on domestic routes, has held a share of around 90% of corporate and government accounts. Its dual brand strategy enabled Qantas to use its mainline brand to concentrate on business markets, while Jetstar competed with other carriers mainly on price. Virgin Australia's Game Change Programme has been very successful in improving its network and product in order to target the higher yield market segment. With the introduction of business class seating on domestic routes in 2011, Virgin Australia now competes directly with Qantas to attract

higher yield corporate and business passengers, while maintaining its share of leisure passengers.

In addition to business class, both Virgin Australia and Qantas offer flexible economy fares for business and leisure travellers. Restricted and discount fares, with fewer ancillary service inclusions (such as on-board meals or the ability to change bookings without additional cost), are offered for budget travel as part of optimal yield management. The fare mix offered by Virgin Australia and Qantas on a particular route will depend on the route characteristics, such as mix of business and leisure traffic and demand levels, as well as time of the flight, eg, minimum fares will likely be higher on a busy flight operating during peak travel time than on an off-peak service on the same route.

In contrast, the two Australian LCCs, Tigerair and Jetstar, target the segment of the travel market with latent demand: those customers who are more willing to pay elastic prices, which may include newly generated leisure travellers, or travellers attracted from other modes of transport. The customer proposition of LCCs is simple: providing the lowest possible fares on each of the routes they operate. Tigerair and Jetstar are able to do so by choosing simple fare structures, offering a similar single class 'no frills' service based on discounted fares and keeping costs low by offering a choice of service levels and ancillary products.

Both LCCs sell one basic fare type representing a seat on the plane and carry-on baggage which appeal to budget leisure travellers. A range of 'add-on' services are available for purchase on top of the basic fare providing choice to customers delivering value for money fares.

Further information on Tigerair is provided in section 3 below.

## 3 The Applicant - Tigerair

### 3.1 Tigerair's operations

Tigerair was incorporated in Australia in March 2007. Headquartered in Melbourne, it commenced flights in Australia on 23 November 2007.

At that time, Tigerair was a wholly-owned subsidiary of Tiger Airways, a Singapore incorporated company, operating four budget airlines within Asia and Australia. On 30 October 2012, Virgin Australia and Tiger Airways announced that they had entered into the Virgin Australia Acquisition. Completion of that transaction occurred on 8 July 2013. Prior to that, on 3 July 2013, Tiger Australia was rebranded "Tigerair Australia".

As referred to in section 2 above, Tigerair delivers value fares operating a low fare, low cost business model which primarily focuses on price sensitive domestic leisure travellers. Tigerair seeks to price its fares at levels that expand the overall demand for air travel in Australia by making it more affordable for those who otherwise could not afford to fly at all, or as often.

As an LCC, Tigerair's business model is volume-based, so it does not offer a number of services provided by other airlines that attempt to capture high yielding, frequent travellers. For example, Tigerair does not offer business-class services, complimentary meals, frequent flyer programs or club lounges. It achieves its low operating costs by eliminating these services and avoiding the overheads required to provide them. Among the other ways in which Tigerair further reduces its operating costs is by operating just one class of jet (the A320), which substantially reduces training and maintenance costs.

At its commencement, Tigerair initially offered 12 domestic routes, flying from Melbourne to the Gold Coast, Mackay, Rockhampton, Adelaide, Alice Springs, Canberra, Darwin, Hobart, Launceston, Newcastle, Perth and the Sunshine Coast.

Today, Tigerair has expanded from its headquarters at Melbourne's Tullamarine Airport to also operate bases at Sydney and Brisbane Airports. From these 3 locations it now operates services on 21 domestic routes<sup>99</sup> with a fleet of 13 A320 aircraft.

**Table 1: Tigerair routes**

Origin	Destinations
Adelaide	Brisbane, Melbourne, Sydney
Alice Springs	Melbourne, Sydney
Brisbane	Adelaide, Cairns, Darwin, Melbourne, Sydney
Cairns	Brisbane, Melbourne, Sydney
Coffs Harbour	Sydney

<sup>99</sup> 18 domestic routes from 22 July 2014

Origin	Destinations
Darwin	Brisbane
Gold Coast	Melbourne, Sydney
Hobart	Melbourne
Mackay	Melbourne
Melbourne	Adelaide, Alice Springs, Brisbane, Cairns, Gold Coast, Hobart, Mackay, Perth, Sunshine Coast, Sydney
Perth	Melbourne, Sydney
Sunshine Coast	Melbourne
Sydney	Adelaide, Alice Springs*, Brisbane, Cairns, Coffs Harbour, Gold Coast, , Melbourne, Perth, Whitsunday Coast
Whitsunday Coast	Sydney

[Information confidential to Tigerair redacted]

### 3.2 Tigerair's history and recent growth

Since commencing operations in 2007, Tigerair has been largely unsuccessful commercially. It has sustained constant and significant losses and in March 2011 the Civil Aviation Safety Authority (**CASA**) issued a 'show cause' notice to Tigerair asking why its licence should not be suspended. Tigerair was subsequently grounded for six weeks from 2 July 2011 on the basis that it posed a serious and imminent risk to aviation safety.<sup>10</sup> On 10 August 2011, CASA gave Tigerair conditional clearance to resume flying.<sup>11</sup> These conditions included restrictions on the number of sectors that could be flown by Tigerair (initially capped at 18 daily sectors), which limited its ability to return to its previous flying schedule. Tigerair resumed limited services on 12 August 2011. On 19 October 2012, Tigerair received a new Air Operators Certificate (**AOC**) from CASA which removed the restrictions associated with the 2011 grounding. Following an industry standard review by CASA, Tigerair Australia was awarded in November 2013 a renewed AOC valid for the next 3 years, which brings Tigerair in line with the industry.

Since its resumption of services in August 2011, and particularly since the commencement of the Virgin Australia Acquisition, Tigerair has sought to expand its operations to compete more vigorously and effectively against Jetstar. Tigerair's expansion has included:

<sup>10</sup> Civil Aviation Safety Authority, *Tiger Airways Australia suspended*, 2 July 2011, [http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC\\_100504](http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_100504).

<sup>11</sup> Civil Aviation Safety Authority, *Tiger Airways suspension lifted*, 10 August 2011, [http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC\\_100563](http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_100563).

- establishing bases at Sydney and Brisbane Airports;
- increasing the utilisation of the current fleet by 20%;
- growing the size of its fleet from 11 aircraft to 13 with a stated objective of at least 23 and potentially 35 based on consumer demand – Tigerair has already increased the size of its fleet by 2 aircraft since the Virgin Australia Acquisition in July 2013;
- increasing the number of routes it provides services on. For example, between April 2013 and April 2014, Tigerair commenced services on the following 9 routes:
  - Sydney – Cairns;
  - Sydney – Alice Springs;
  - Sydney – Perth;
  - Sydney – Whitsunday Coast;
  - Sydney – Adelaide;
  - Melbourne – Alice Springs;
  - Brisbane – Cairns;
  - Brisbane – Darwin; and
  - Brisbane – Adelaide; and
- increasing the number of services on existing routes, including, for example:
  - Sydney – Brisbane;
  - Sydney – Gold Coast;<sup>12</sup> and
  - Sydney – Melbourne.

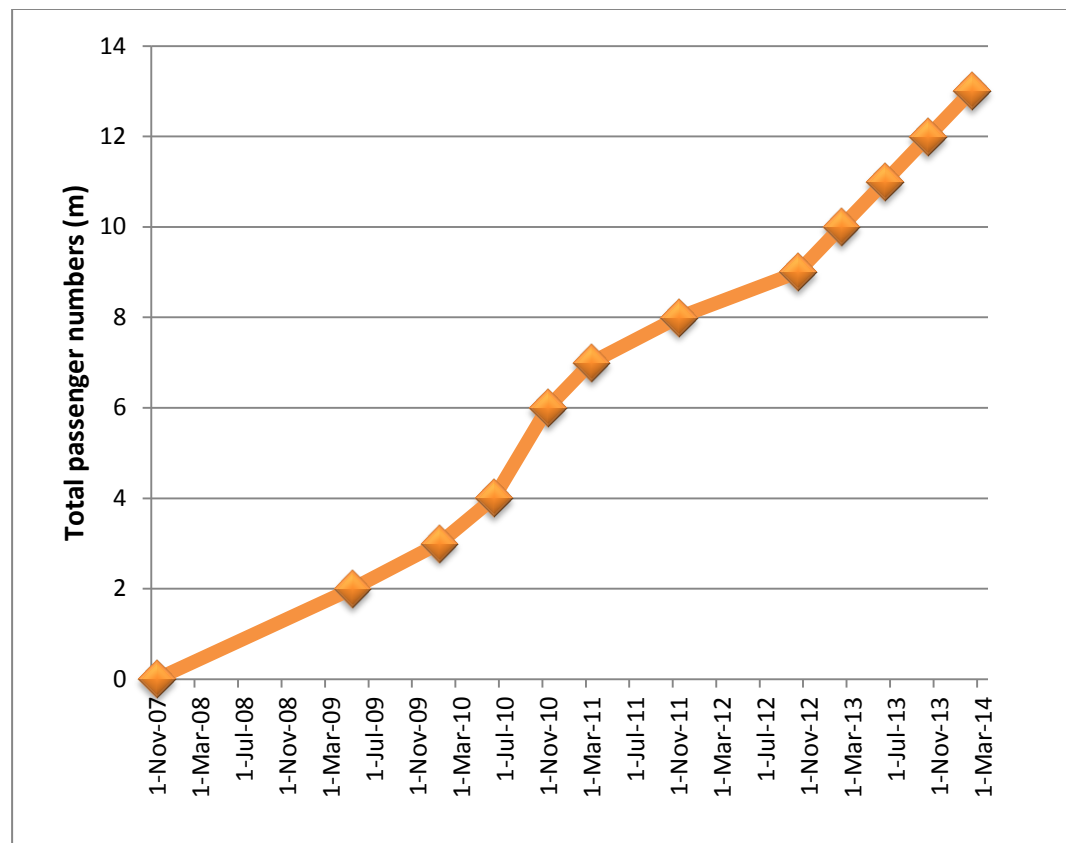
As the following timeline in Graph 1 shows, since November 2012 Tigerair has increased its number of passengers far more rapidly than it had previously.

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<sup>12</sup> From 15 September 2014, Tigerair will increase capacity on the Sydney-Gold Coast route from an average 2.07 return services per day (Q4 FY14 at 14 May) to 4 return services per day



**Graph 1: Timeline of total Tigerair passenger number growth**



### 3.3 Tigerair's ability to generate a competitive response from other airlines and its ongoing competitive position

It is Tigerair's experience that when it commences operations on new routes and, importantly, when it offers services at times that are attractive to leisure travellers, the sale of airfares is stimulated as more people choose to fly and other airlines respond to Tigerair's low prices.

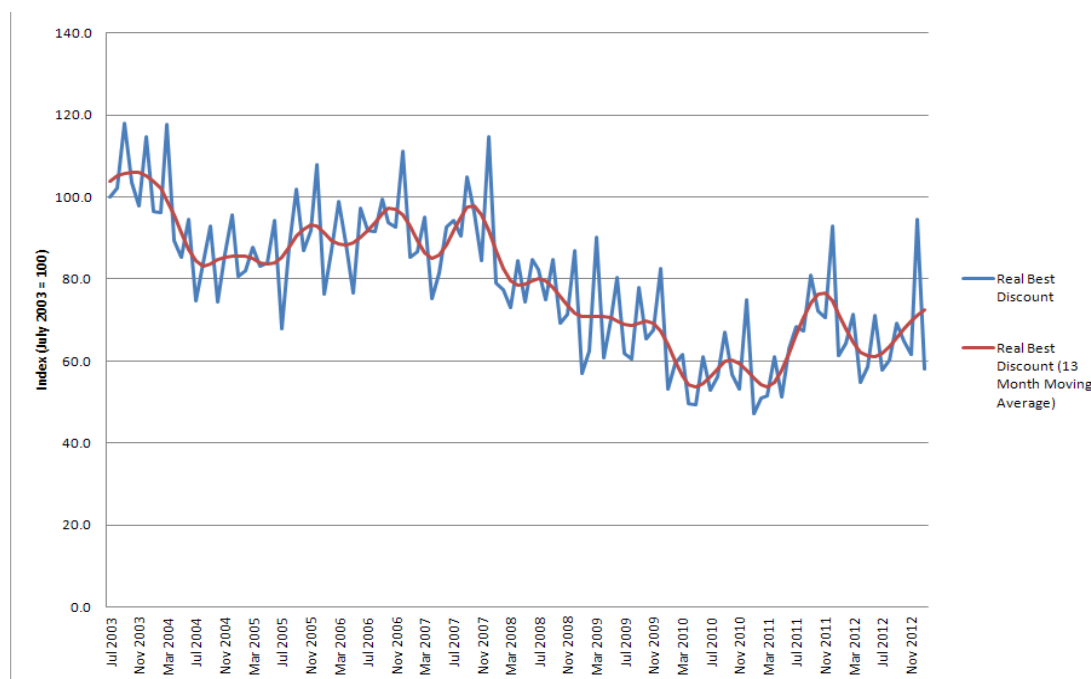
Tigerair's ability to cause this fare stimulation was recognised by the ACCC in its Statement of Issues in relation to the Virgin Australia Acquisition. In that document the ACCC:

- referred to information provided by market participants that, historically, the introduction of Tigerair services onto new routes had triggered a competitive response from all operators on those routes in terms of fares and/or capacity;<sup>13</sup> and
- created a graph using data available from the Bureau of Infrastructure, Transport and Regional Economics (**BITRE**) which shows the movement in BITRE's Domestic Air Fares (Best Discount) Index from July 2003 to November 2012. The data in Graph 2 below suggests that there may be a correlation between:

<sup>13</sup> ACCC, *Statement of Issues, Virgin Australia – proposed acquisition of 60% of Tiger Airways Australia*, 7 February 2013 at [59]

- Tigerair's entry into the market in 2007 and a downward movement in the index; and
- an upwards movement in the index over the course of 2011, a year in which Tigerair was grounded for 6 weeks by CASA.<sup>14</sup>

**Graph 2: BITRE Domestic Air Fares (Best Discount) Index**



As a result of this data, the ACCC considered that Tigerair's presence on a route may draw a competitive response from other airlines.<sup>15</sup>

In Tigerair's experience, Qantas Group has consistently reallocated Jetstar capacity and services to target Tigerair so that in circumstances where a customer has a choice between Jetstar and Tigerair, the customer will fly with Jetstar. For example, on 4 December 2013, Tigerair announced a "back of clock" (late night) Darwin to Brisbane service, a timing not served by Jetstar. On 10 December Jetstar announced the reduction in its number of Darwin flights and the closure of its Darwin operational base. Jetstar also commented that flying from Darwin was "among the most marginal" on its network.<sup>16</sup> Notwithstanding, Jetstar also announced a new service directly competing with the new Tigerair Brisbane service scheduling the service at approximately the same times.

### 3.4 Tigerair's objective to provide a better customer experience going forward

As noted in section 3.1 above, "Tiger Airways Australia" was rebranded as "Tigerair" in July 2013. The enhanced look and feel of the new brand has been progressively rolled out across the business through every customer touch point and represents a new era for

<sup>14</sup> As above at [60] – [61]

<sup>15</sup> As above, at [65]

<sup>16</sup> See <http://www.smh.com.au/business/aviation/jetstar-to-close-darwin-base-and-cut-nt-flights-20131209-2z0xl.html>

Tigerair. As part of its brand roll out, Tigerair has made a number of fundamental changes to its core processes to make travelling Tigerair an even better experience.

Two key priorities for Tigerair during this rollout have been to:

- create a stronger operating platform that can deliver growth; and
- build a sustainable and profitable business that can compete more effectively in the long run in the face of increased competition from its competitors.

Bringing sustainable competition to the budget sector will deliver consumer benefits in the form of:

- enhanced leisure network offerings;
- greater availability of competitive low cost fares; and
- a competitive environment that will drive customer-focussed innovation. Tigerair is, in fact, already delivering improvements for the consumer with new technologies, such as automated bag drop, being deployed in the budget sector for the first time.

As part of its rebrand, Tigerair is also making a number of fundamental changes to its business to provide greater flexibility and convenience to its customers. Examples include the availability of hot food options in-flight, the ability for customers to by-pass queues and improved check-in technologies that will substantially improve the customer experience.

It is Tigerair's goal to be the value airline of choice for all Australians, enabling people to see more of Australia, more often. Brand engagement and reputation is very important in this regard. Historically, Tiger Airways Australia had been synonymous with being "cheap", but the "Tigerair" brand is intended to reflect new brand attributes that are centralised around "value" with the customer at the core. This change in reputation is an important factor in Tigerair building a sustainable position.

However, Tigerair will only be able to effect this change in reputation if it can provide its customers with:

- an optimal end-to-end airport experience. Airport infrastructure plays a critical role in customer experience as it impacts the customer experience directly including consistency of experience, drives operational efficiencies and enables customer facing innovation.; and
- the level of scale that generates the efficiencies needed to provide a robust and sustainable network proposition.

## 4 Overview of Sydney Airport and SACL

### 4.1 Sydney Airport

The Sydney Airport precinct consists of the facilities described in Table 2 below.<sup>17</sup>

**Table 2: Sydney Airport precinct description**

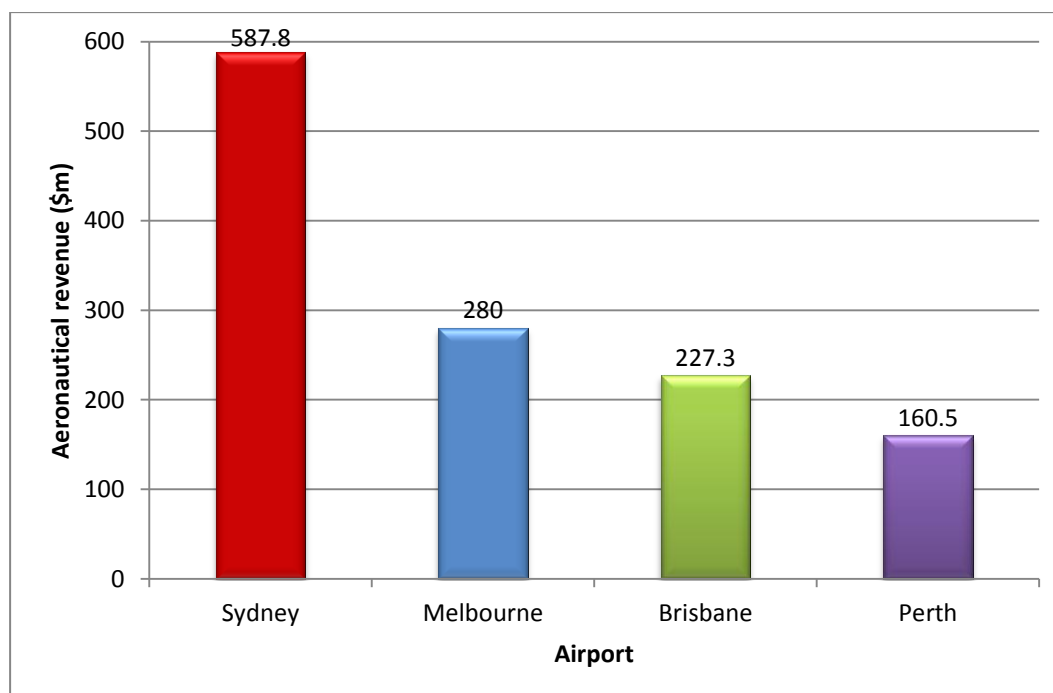
Facility	Description
Runways	3 runways: <ul style="list-style-type: none"> <li>main north south runway (4.0km)</li> <li>parallel north south runway (2.4km)</li> <li>east west runway (2.5km)</li> </ul>
Terminals	<ul style="list-style-type: none"> <li>T1 International - 25 contact gates, 5 A380 gates</li> <li>T2 Domestic – 23 gates, former Ansett terminal acquired by Sydney Airport</li> <li>T3 Qantas Domestic - 16 gates, owned and operated by Qantas</li> <li>5 international and 2 domestic freight terminals</li> </ul>
Retail	<ul style="list-style-type: none"> <li>International terminal (T1) 21,703 m2</li> <li>Domestic terminal (T2) 3,985 m2</li> <li>International terminal (T1) 150 stores</li> <li>Domestic terminal (T2) 48 stores</li> </ul>
Car parks	13,402 spaces comprising: <ul style="list-style-type: none"> <li>Terminal 1- 6,578</li> <li>Terminal 2- 4,026</li> <li>Blu Emu - 5,694</li> <li>Valet – 774 spaces</li> <li>6 car rental operators</li> </ul>

<sup>17</sup> Source: Sydney Airport website: see <http://www.sydneyairport.com.au/investors/company-overview.aspx>

Facility	Description
Check-in Hall	<ul style="list-style-type: none"> <li>Terminal 1 – 234 counters</li> <li>Terminal 2 – 71 (50 counters, 21 kiosks, Nil bag drops)</li> <li>Terminal 3 – 85 (13 counters, 48 kiosks, 24 bag drops)</li> </ul>
Lounges	<ul style="list-style-type: none"> <li>Terminal 1 – 8</li> <li>Terminal 2 – 3</li> <li>Terminal 3 – 3</li> </ul>

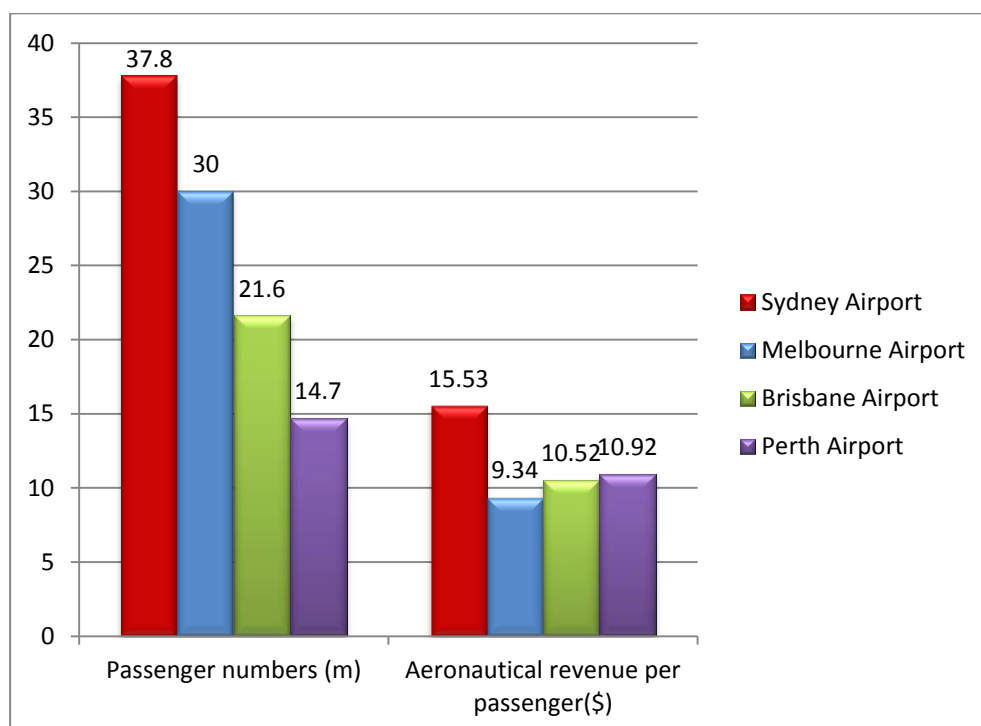
Sydney Airport is the largest and busiest airport in Australia as the following tables show.

**Table 3: 2012-2013 aeronautical revenue<sup>18</sup>**



<sup>18</sup> Source: ACCC Airport Monitoring Report 2012-13

**Table 4: 2012-2013 airport passenger numbers and aeronautical revenue per passenger<sup>19</sup>**



## 4.2 Sydney Airport Corporation Limited

On 1 July 1998 the Commonwealth Government leased Sydney Airport to SACL for a period of 50 years with an additional 49 year option. At the time, SACL was a public company wholly owned by the Commonwealth Government.

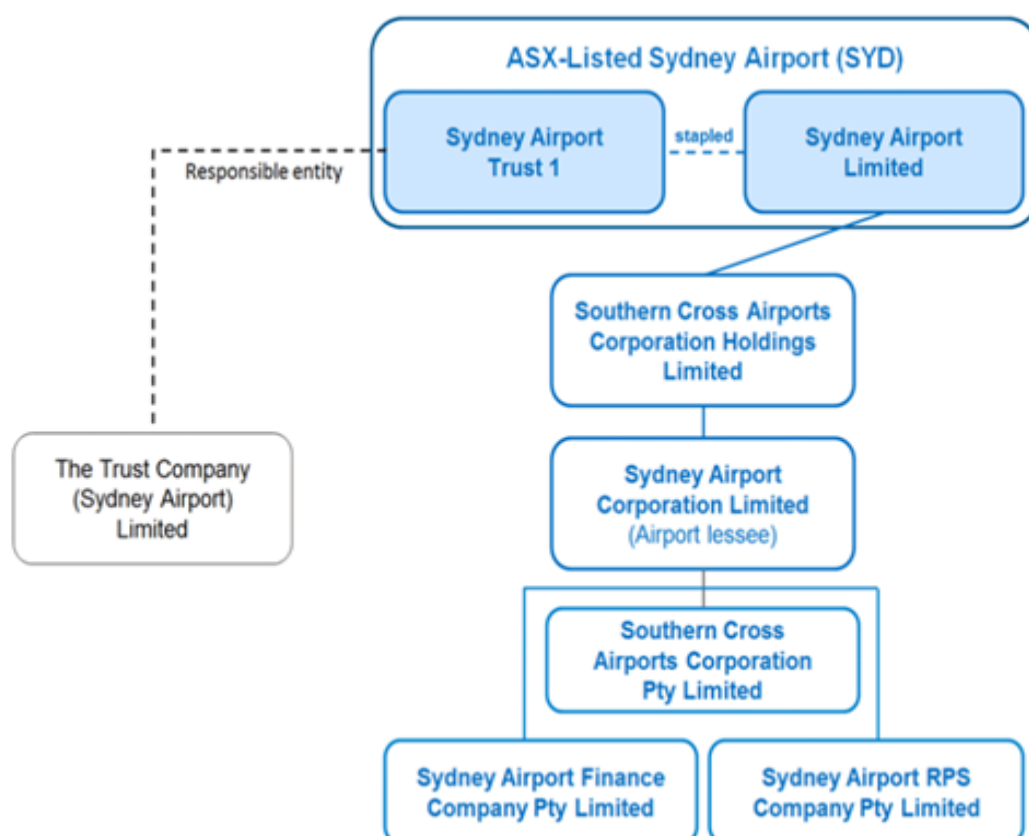
SACL listed on the Australian Securities Exchange on 2 April 2002. On 28 June 2002, Sydney Airport was sold to the Southern Cross Airports Consortium. On the same day, the shares in SACL were acquired by Southern Cross Airports Corporation Pty Ltd, a member of the Southern Cross Airports Consortium.

On 14 August 2002, SACL announced it had agreed to purchase the remaining 15.2% interest in Sydney Airport that it did not already own. As a result, Sydney Airport is today 100% owned and operated by SACL. SACL's current market capitalisation is approximately \$9.1 billion.<sup>20</sup>

<sup>19</sup> Source: ACCC Airport Monitoring Report 2012-13

<sup>20</sup> See <http://www.smh.com.au/business/markets/quotes/summary/SYD/sydney-airport>

Diagram 1: Sydney Airport ownership structure<sup>21</sup>



### 4.3 Terminal 2

T2 and T3 at Sydney Airport operate as domestic terminals. As noted in section 4.1 above, unlike T3 which is owned and operated by Qantas exclusively for Qantas Group domestic flights, T2 is owned by SACL and operates as a domestic common user terminal. It is a three level structure which supports two single level linear and satellite type arrival/departure passenger concourses. The facilities at T2:

- serve up to a total of 23 contact aircraft gates and a number of stand-off bussed aircraft positions; and
- contain 50 check-in counters, no bag drops, 21 self-service kiosks and 8 hand baggage screening facilities.<sup>22</sup>

As Diagram 2 below shows, the Gates at T2 are located along 2 piers:

- Pier A contains Gates 31 – 48, including the bus bay at Gate 47; and
- Pier B contains Gates 49 – 59. Gate 52 on Pier B is a non-dedicated bussing bay.

The “stand-off” bays for aircraft loading passengers by bus are located on the “Foxtrot” apron and also at the “Dom 4” and “Dom 6” aprons.

<sup>21</sup> Source: <http://www.sydneyairport.com.au/corporate/about-us/management-and-governance/ownership.aspx>

<sup>22</sup> Sydney Airport Master Plan 2033 at 232

For aircraft parked at the “contact stands” at the Gates on Piers A and B, refuelling occurs through a hydrant, whereas for aircraft parked at the “stand-off” bays, tankers must be used.

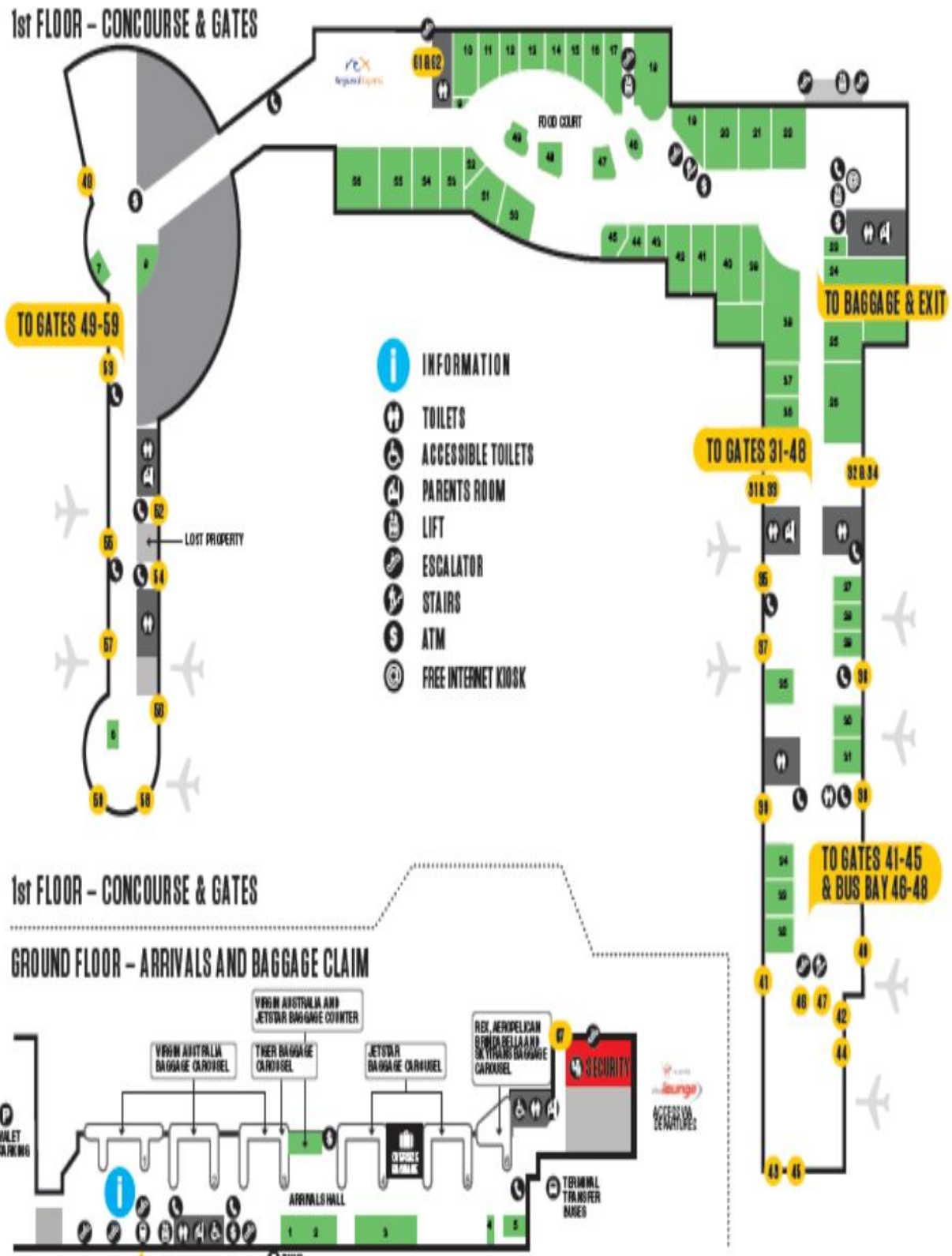
Use of T2 by airlines is governed by a number of documents, including:

- the Sydney Airport Conditions of Use which include the terms, conditions and charges that all airline operators at Sydney Airport are subject to. The current Conditions of Use are dated 1 January 2014;
- the Aircraft Bay & Gate Allocation Procedures;
- the Sydney Airport T2 Apron Procedures dated 27 March 2009;
- the Sydney Airport T2 Counter Allocation Procedures dated 27 March 2009;
- the Sydney Airport T2 Baggage Handling System Procedures dated 27 March 2009; and
- “T2 Agreements” being commercial agreements between SACL and certain, but not all, airline operators.

Copies of each of these documents, except the T2 Agreements, are attached to this application.



Diagram 2: Map of T2



#### 4.4 Operation of the Aircraft Bay & Gate Allocation Procedures and T2 Agreements

T2 operates as a common user terminal but the T2 Agreements that SACL has with various airlines give those airlines certain “first right gates” and “preferred piers”. Clause 11.1 of the Aircraft Bay & Gate Allocation Procedures lists the following as being the allocated first right gates and preferred piers:

- (a) *Qantas Airways*
  - (i) *First Right Gates – 49, 52, 53, 54, 55, 57*
  - (ii) *Preferred Pier – B;*
- (b) *Virgin Blue*
  - (i) *First Right Gates – 31, 32, 33, 34, 35, 36*
  - (ii) *Preferred Pier – A*
- (c) *Regional Express Airlines*
  - (i) *Foxtrot Bays*
- (d) *Aeropelican Airlines*
  - (i) *Foxtrot Bays*

Tigerair considers that clause 11.1 is now out of date as the only T2 gates that are not subject to first rights are Gate 35 on Pier A and Gate 58 on Pier B. Accordingly, it is only these gates that truly operate on a common user basis.

The priority given to airlines that have signed T2 Agreements is reflected in clause 4 of the Aircraft Bay & Gate Allocation Procedures which states:

#### **4. Allocation Principles**

##### **4.1 SACL allocates bays and gates according to:**

- (a) *the Apron Operational Procedures (AOP), which indicate the aircraft type that may be operated on each bay and the restrictions associated with that use;*
- (b) *according to the following terminal wide procedures:*
  - (i) *Special services such as VIP flights and security risk related flights may be given priority over other flights;*
  - (ii) *Passenger services have priority over non-passenger services;*
  - (iii) *Aircraft whose passengers are being facilitated through T2 have priority over any other approved aircraft;*
  - (iv) *Scheduled seasonal services (as notified to SACL by ACA [Airport Co-ordination Australia]) will be given priority over any of the following:*
    - (A) *non-scheduled services;*

- (B) *supplementary or charter services.*
  - (v) *In allocating bays, SACL will, wherever possible, apply a 10-minute separation (based on STD [scheduled time of departure] of aircraft occupying the same apron) to avoid pushback conflicts.*
  - (vi) *SACL will attempt to apply a 10-minute separation between each aircraft movement on the same apron (based on STD of the aircraft occupying the bay & STA [scheduled time of arrival] of the arriving aircraft).*
  - (c) ***in relation to areas and facilities covered by a T2 Agreement, consultation with the airline regarding their prioritisation of flight and gate allocation and in accordance with relevant T2 Agreement operational procedures which take priority over these procedures and which include the following principles:***
    - (i) ***Pier consistency by Airline;***
    - (ii) ***Bay consistency by destination;***
    - (iii) ***Connecting flights to be allocated adjacent bays; and***
    - (iv) ***off schedule T2 Agreement airline flights to be given priority parking in areas and facilities covered by a T2 Agreement.***
  - (d) *the procedures set out in the remainder of clause 4.*
- 4.2 ***In accordance with T2 Agreements for certain airlines, details of the “first right” areas and preferred piers for those airlines are set out in clause 11.***
- 4.3 ***SACL will allocate bays and gates to airlines at T2 in accordance with the following priorities:***
- (a) ***firstly, bays and gates within areas and facilities covered by a T2 Agreement (where applicable) and in accordance with T2 operational procedures;***
  - (b) ***secondly, preferred piers; and***
  - (c) ***thirdly other bays and gates servicing T2.*** (emphasis added)

Tigerair considers that these Allocation Principles no longer reflect current practice as it is Tigerair’s understanding that T2 Gates which are not subject to T2 Agreements will be allocated according to the “seasonal throughput” of each airline.

Further detail on the current use of T2 is provided in section 6.3 below.

As will be explained in section 6.6 below, recent observations conducted by Tigerair of the utilisation of Pier B show that Tigerair could operate 2 additional services during the morning peak period without any disruption to Jetstar’s schedule.

Tigerair considers that this means that if the Domestic Terminal Service was declared, any arbitration which followed would not require the ACCC to make a determination that would have the effect of:

- preventing Jetstar (or any other existing user) from obtaining a sufficient amount of the Domestic Terminal Service to meet its reasonably anticipated requirements;
- preventing Jetstar (or any other existing user) from obtaining, by the exercise a pre-notification right, a sufficient amount of the Domestic Terminal service to meet its actual requirements; or
- depriving Jetstar (or any other existing user) of a protected contractual right (see s 44W(1)(a) – (c) of the CCA).

Tigerair considers that any arbitration determination by the ACCC would not have any of other effects proscribed by s 44W(1) of the CCA. Further detail is provided in section 13 below.

#### 4.5 ACCC Monitoring of Sydney Airport

Pursuant to ministerial directions under s 95ZK of the CCA, the ACCC has been directed to monitor prices, costs and profits at Sydney, Brisbane, Melbourne and Perth Airports for aeronautical and parking services.<sup>23</sup>

In its report for 2012-2013, the ACCC's findings regarding Sydney Airport included the following:<sup>24</sup>

- Sydney Airport's low quality of service ratings and relatively low investments in the face of on-going increases in demand, suggest that needed investments have not been forthcoming. While options for capacity expansion may be limited by regulatory constraints, there may be scope for addressing concerns with the quality of some aircraft-related and passenger-related services;
- the average rating for overall quality of service was unchanged at 'satisfactory' but continued to be the lowest among monitored airports;
- airlines' ratings for Sydney Airport decreased within the "poor" category
  - ratings for availability of parking bays fell to "very poor";
  - ratings for the availability of taxiways and standard of aprons fell from "satisfactory" to "poor";
  - ratings for availability of runways rose from "poor" to "satisfactory";
- passengers' ratings were unchanged at "satisfactory" during 2012-13 but remain the lowest among monitored airports;
- Sydney Airport was again the airport with the smallest proportion of additions to its aeronautical asset base;
- since 2002-03, aeronautical revenues and margins per passenger have increased in real terms by 13.4% and 55.7% respectively;
- Sydney Airport continued to report the highest aeronautical revenues and margins per passenger among monitored airports;

<sup>23</sup> ACCC, *Airport Monitoring Report 2012-13*, at 2

<sup>24</sup> ACCC, *Airport Monitoring Report 2012-13*, at xxiii – xxiv

- On a number of parameters, the operational performance of Sydney Airport is the weakest among monitored airports:
  - consistently the lowest rating for overall quality of service which has never rated higher than 'satisfactory'; and
  - indicators of service levels for a number of aircraft-related and passenger-related services are below 'satisfactory'.

## 5 The relevant service

### 5.1 Relevant service for the purposes of Tigerair's application

Tigerair considers that the relevant service for the purposes of its application is the "Domestic Terminal Service", that is:

*a service for the use of the Sydney Airport multi-user domestic passenger terminal (Terminal 2) and related facilities for the purposes of processing arriving and departing domestic airline passengers and their baggage.*

The Domestic Terminal Service falls within the definition of "service" in s 44B of the CCA as it is a service provided by means of a facility, principally through the use of that facility, and does not include the supply of a good, the use of intellectual property or the use of a production process.

In its Declaration Guide, the Council refers to Tribunal's conclusion in *Sydney International Airport* that the relevant facility is comprised of "the minimum bundle of assets required to provide the relevant services subject to declaration".<sup>25</sup>

In considering the minimum bundle of assets required to provide the Domestic Terminal Service, Tigerair considers that guidance can be taken from the ACCC's *Draft Guide to Section 192 of the Airports Act (Section 192 Guide)* even though s 192 of the *Airports Act 1996* (Cth) was repealed by the *Civil Aviation Legislation Amendment Act 2003* (Cth). In the Section 192 Guide, while the ACCC noted certain differences between the passenger processing facilities required at international terminals compared to domestic terminals, the following assets were identified as being necessary for the purposes of operating and/or maintaining domestic aviation services:

- check-in desks, specifically:
  - kiosks;
  - automated bag drop facilities; and
  - Service counters;
- aerobridges;
- airside buses;
  - sufficient bussing lounge space to accommodation passengers;
  - sufficient bussing access areas to efficiently arrive and depart busses from the terminal; and
  - sufficient sized parking bays to enable busses to disembark passengers without impacting on the readiness operations of that aircraft or aircraft on the next bay;
- departure and holding lounges (except for commercially operated VIP lounges);

<sup>25</sup> National Competition Council 2013, *Declaration of Services: A guide to declaration of services under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, Melbourne at [2.16]

- public address systems;
- closed circuit surveillance systems;
- security systems;
- baggage handling and reclaim areas;
- public amenities; and
- other public areas in terminals, lifts, escalators, moving walkways and flight information display systems.

The ACCC then noted that:

*These services are essentially of a complementary nature in that passenger processing involves passengers moving through a stream of services...*

*The passenger processing services that are necessary for domestic air transport and international air transport are not the same...*

*Yet in all instances some passenger processing facilities will be required. The general conclusion remains. Without some means and requisite support services to undertake the processing of passengers, a passenger airport would not be viable.<sup>26</sup>*

Tigerair considers that the “minimum bundle of assets” required to provide the Domestic Terminal Service need to be considered from the perspective of both airline users of T2 and passenger users. Taking this approach, Tigerair considers that the minimum bundle of assets required to provide the Domestic Terminal Service, including the “related facilities” are all of the assets listed by the ACCC in its Section 192 Guide and:

- parking aprons, specifically:
  - sufficient sized parking bays and associated apron for ground support equipment (**GSE**) – this must be able to be used to efficiently manoeuvre aircraft;
  - sufficient fuelling capability – a fuel hydrant should be in place if ‘permanent’ remote operations occur;
  - sufficient room is needed for trucks to manoeuvre without impinging the operation;
  - this impacts on time performance as truck fuelling is not as efficient;
- gates;
- stand-off bays; and
- way-finding directional signage.

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<sup>26</sup> ACCC, *Draft Guide to Section 192 of the Airports Act*, October 1998

## 5.2 Previous declaration applications relating to domestic services at Sydney Airport

As the Council is aware, on 1 October 2002, Virgin Blue applied to the Council requesting it to recommend to the designated Minister that the following services be declared:

- (a) a service for the use of runways, taxiways, parking aprons and other associated facilities (**Airside Facilities**) necessary to allow aircraft carrying domestic passengers to:
  - (i) take off and land using the runways at Sydney Airport; and
  - (ii) move between the runways and the passenger terminals at Sydney Airport, (**Airside Service**); and
- (b) a service for the use of domestic passenger terminals and related facilities for the purposes of processing arriving and departing domestic airline passengers and their baggage at Sydney Airport (defined by Virgin Blue as the **Domestic Terminal Service**).

In December 2002, Virgin Blue's application in respect of the Domestic Terminal Service was withdrawn, following an agreement reached between Virgin Blue and SACL in relation to the provision of that service.

On 29 January 2004, the Parliamentary Secretary to the Commonwealth Treasurer published his decision not to declare the Airside Service.

In its review of this decision, the Australian Competition Tribunal (**Tribunal**) noted that the definition and scope of the "Airside Service" was controversial and involved some debate as to what facilities fall within the "airside" characterisation.<sup>27</sup> The Tribunal's finding was that the "Airside Service":

*encompasses those activities which commence, in relation to the departure of an aircraft, with the loading of aircraft parked at a departure gate or point of embarkation with baggage, freight and all products required on the flight, and the entrance of passengers into the aircraft. It terminates when the aircraft is airborne. That use of the service also encompasses those activities which commence, in relation to an arriving aircraft, at a point when the aircraft lands, taxis to an arrival gate or point of disembarkation, and the passengers leave the aircraft, their baggage and freight is unloaded, and supplies, waste and other items used during the flight are removed from the aircraft. In short, the "Airside Service" covers all movement in relation to aircraft between runways and passenger arrival and departure gates and the servicing, maintenance, equipping and re-equipping of aircraft at the start and end of a flight. We define the term "Airside Service" accordingly.<sup>28</sup>*

While the Tribunal's decision was subject to judicial review, challenges in connection with the Tribunal's finding as to scope of the Airside Service were abandoned before the hearing in the Full Federal Court.<sup>29</sup>

<sup>27</sup> Virgin Blue Airlines Pty Limited [2005] ACompT 5 at para 16

<sup>28</sup> Virgin Blue Airlines Pty Limited [2005] ACompT 5 at para 121

<sup>29</sup> Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146 at para 43



For the reasons given below, the relevant service in relation to Tigerair's application is distinct from the Airside Service that was previously declared.

### **5.3 No access undertaking**

Section 44G(1) of the CCA provides that the Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under Division 6 of the CCA. The Domestic Terminal Service is not the subject of such an undertaking.

## 6 Tigerair's restricted access to the Domestic Terminal Service

### 6.1 Tigerair's contractual arrangements with SACL

Tigerair's access to Sydney Airport is governed by:

- a commercial agreement between Tigerair and SACL for the provision of aeronautical services at Sydney Airport which was accepted by Tigerair on 27 March 2009 (**2009 Agreement**);
- a Variation to the 2009 Commercial Pricing Agreement for Domestic Services (**Variation Agreement**) to the 2009 Agreement dated 16 March 2012; and
- a non-binding Memorandum of Understanding (**MOU**) dated 16 March 2012.

### 6.2 Tigerair's growth at Sydney Airport

As noted in section 3 above, Tigerair opened a domestic operations base at Sydney Airport in July 2012. Since that time it has:

- increased the number of aircraft based in from Sydney from 1 to 4;
- launched six new routes. In addition to the new routes listed in section 3.2, Tigerair launched new routes between Sydney and the Gold Coast, Brisbane, Mackay, Coffs Harbour, Alice Springs and Cairns; and
- increased the number of daily services operating in and out of Sydney from 18 to 42.

As Table 5 below shows, since Tigerair established its Sydney Airport base, it has more than doubled its share of available domestic scheduled seats at Sydney Airport and helped to increase the overall share of low cost carrier seats at Sydney Airport.

**Table 5: LCC share of available domestic scheduled seats at Sydney Airport<sup>30</sup>**

	FY12	FY13	FY14 (at 14/05/14)
Tigerair	2.4%	5.7%	5.9%
Other low cost carriers	18.4%	19.6%	20.8%
Total	20.8%	25.5%	26.6%

The success and benefits of Tigerair's expanding operations at Sydney Airport have been publicly recognised by SACL itself:

<sup>30</sup> Diio Mi data at 20 January 2014

*Tiger has generated a step-change in traffic growth on routes that it has served. Tiger's introduction has led to a competitive response from incumbent airlines, generating further traffic growth.<sup>31</sup>*

Tigerair's objective has always been to grow its Sydney Airport base to at least 5 and ideally 6 aircraft. This is because a base of this size is necessary to establish a competitive and efficient schedule of services out of Sydney, and in particular to provide sufficient network breadth to viably spread fixed costs, recruit a sustainable pool of staff, enable a viable engineering presence and utilise aircraft efficiently.

Given that demand for air travel in Australia has been growing at an average annual rate of 5.2% for the last 9 years, Tigerair considers that it now has the demand to justify growing its Sydney Airport base from 4 to 6 aircraft.

### **6.3 Recent developments at T2 relating to available capacity**

Two recent developments at T2 suggest that there is capacity at T2 for SACL to address current infrastructure access constraints and allow Tigerair to grow its base to provide an increasing level of public benefit through greater price competition and demand stimulation.

Up until recently, T2 was used by domestic and regional airlines including Tigerair, Virgin Australia, Jetstar, QantasLink, Regional Express, Aeropelican and Brindabella Airlines. However:

- on 15 August 2013, Qantas Group moved all QantasLink services from Pier B at T2 to T3. QantasLink operates over 300 return flights a week between Sydney and Tamworth, Dubbo, Canberra, Armidale, Coffs Harbour, Port Macquarie, Wagga Wagga, Albury, Lord Howe Island and Gladstone. Over 1 million passengers a year were being processed through T2 to travel on QantasLink services and will now instead be processed and travel to and from T3;<sup>32</sup> and
- on 16 December 2013, Brindabella Airlines went into receivership with all flights being suspended indefinitely. This followed directions by CASA to Brindabella in November<sup>33</sup> and December 2013<sup>34</sup> to ground 4 and 6 Brindabella planes respectively until maintenance reviews had been completed and CASA had given approval for their return to service.

It is Tigerair's understanding that the capacity left by QantasLink and Brindabella has not been filled by Jetstar or any other airline.

### **6.4 Tigerair has reached a point where its access to the Domestic Terminal Service is restricted**

Despite the growth that it has achieved to date, Tigerair currently operates in an environment on Pier B at T2 where, in addition to the normal peak congested nature of airport operations at Sydney Airport's domestic terminals, the operation of the Aircraft Bay

<sup>31</sup> Sydney Airport Master Plan 2033 page 47

<sup>32</sup> Qantas Media Release "QantasLink moves to Terminal Three at Sydney Airport" see <http://www.qantasnewsroom.com.au/media-releases/qantaslink-moves-to-terminal-three-at-sydney-airport>

<sup>33</sup> See Catherine Clifford, "CASA asks Brindabella to complete overdue engine checks", ABC News at <http://www.abc.net.au/news/2013-11-19/casa-asks-brindabella-to-complete-engine-checks/5103716>

<sup>34</sup> See CASA media releases dated 12 December 2013 ([http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC\\_101864](http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_101864)) ABC News, "Brindabella Airlines goes into receivership, 140 staff stood down, all flights suspended" at <http://www.abc.net.au/news/2013-12-16/troubled-brindabella-airlines-goes-into-receivership/5158092>

& Gate Allocation Procedures and SACL's T2 Agreement with the Qantas Group means that Tigerair cannot access under-utilised Pier B T2 Gates to:

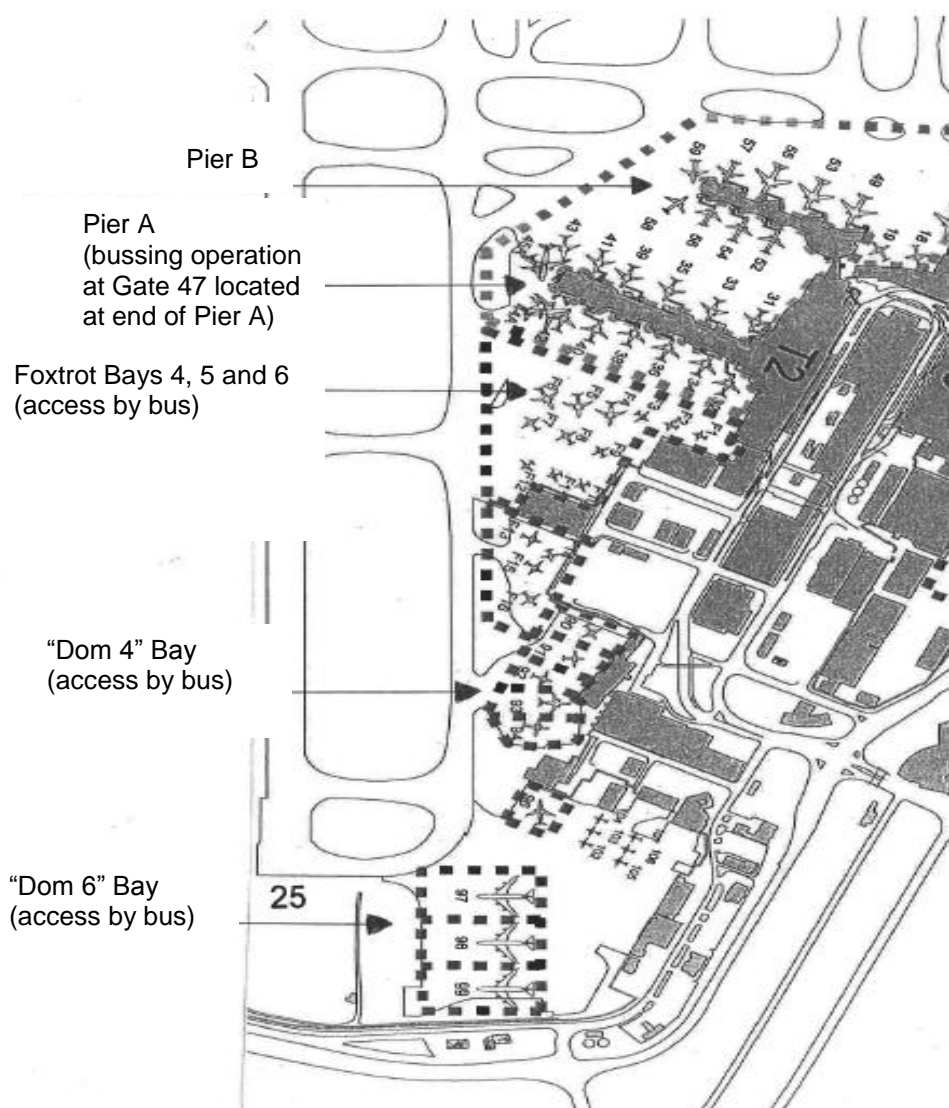
- get the access it wants to these Gates for the runway slots it currently has or that are available, particularly during the morning peak period and other times that are particularly attractive to leisure travellers; or
- increase its base to at least 5 and ideally 6 aircraft and compete more effectively against Jetstar.

The T2 Gates that Tigerair does have access to are spread across both Piers at T2. As a result, Tigerair utilises a combination of the following arrangements that are disparate and operationally difficult to support:

- the unbranded common user Gates 35 and 58, but even these Gates are not always available for Tigerair to access at the times it wishes;
- Virgin Australia coloured and branded Gates on Pier A that can be facilitated by Virgin Australia subject to its own scheduling demands;
- Jetstar coloured and branded Gates on Pier B that are haphazardly made available by Jetstar to Tigerair; and
- remote Foxtrot Bays 4/5/6 that require Tigerair to bus passengers from the facilities at Gate 47.

The various locations of Tigerair's operations at T2 are demonstrated in Diagram 3 below.

**Diagram 3: Locations of Tigerair's operations**



The effect of Tigerair not having dedicated T2 Gate access and instead having to operate at various locations while being allocated Gates on a random and haphazard basis, is reduced efficiency. For example:

- Tigerair is currently required to use the Foxtrot Bays in the morning peak period. There are no in-ground fuelling facilities at these Bays and Tigerair must rely on fuel trucks, which impacts fuel costs, operational efficiency and on time performance, which is critical to the Tigerair business model. A bussing operation is used to transport passengers from T2 to these bays; and
- Tigerair has had a history of being subject to approximately 3 – 5 last minute Gate changes a day at T2. A Gate change requires unplanned for movement of staff and equipment, affects on time performance and adds cost. Importantly in the context of this application, a reason often given by Sydney Airport Movement Control for Tigerair's Gate changes is that the Gate from which Tigerair was due to fly, is a Jetstar "first right" Gate under its T2 Agreement with SACL and, therefore, that Jetstar has priority access to the Gate.

In addition, Tigerair's enforced use of bussing for its morning peak period services has the following restrictive impacts on its business:

- the bussing facility is located at the bottom storey of Pier A, away from the other Gates. Gate 47 has a small footprint which causes passenger congestion in peak periods;
- the bussing facility has two departure gates and four bus positions. This limited capacity means that Tigerair cannot schedule flights efficiently as the limited infrastructure facilitates only two simultaneous aircraft departures. Access to Pier B Gates for morning peak period departures allows for more flexible scheduling opportunities which in turn drive better aircraft utilisation;
- only 2 buses can be utilised at any one time, yet 3 are required to transport all passengers on a single flight, so there is a built-in risk to Tigerair's on-time performance which drives cost into the business;
- the buses need to traverse the T2 operating apron at a peak period and can be delayed in getting customers to the aircraft if aircraft are taxiing, again affecting on-time performance;
- augmented staffing levels are required to facilitate bussing operations which increases costs per turnaround when bussing;
- despite the lack of available Gate infrastructure at Pier B, SACL only subsidises bussing operations at a rate of \$80.00 per movement. This only covers approximately 20% of Tigerair's cost of bussing;
- Tigerair is seldom able to park its aircraft at Gates in the peak periods and, therefore, incurs significant aircraft parking charges when there is no viable alternative choice for the utilisation of the aircraft. While Tigerair acknowledges that parking charges are intended to act as an incentive for efficient apron usage, when Tigerair is constantly forced to park its planes away from Gates, it is often because of matters outside of its control, including the fact that SACL has not provided Tigerair with access to the required infrastructure;
- poor customer service experience; and
- poor staff experience - Tigerair's staff are required to park at a remote parking station, then catch a bus to Terminal 2. This adds significant time to the end to end journey of the staff when taken in the context of the congestion in Terminal 2 security, the long distance to the bussing lounge at the end of pier A and another bus ride to remote bays. Service standards are in place for the remote parking stations however staff consistently raise issues in regard to reliability, in particular on peak periods, holidays and public holidays. The inconvenience of Tigerair's current T2 arrangements is the biggest complaint that Tigerair management receives from staff and, therefore, affects Tigerair's ability to retain (and recruit) staff. Tigerair does not experience this issue at other airports.

An outcome from the above factors is a significant impact to on time performance, in particular on time performance in the morning peak period. To assess the extent of the impact on its on time performance, Tigerair observed the departure times of its morning peak period services between July 2013 and January 2014 and then again between 1 and 8 May 2014. What these observations revealed was that:

- for the period July 2013 to January 2014 the percentage of morning peak period Tigerair flights that departed within 3 minutes of their scheduled departure time varied from 45.9% to 75.6%, with an overall average of 62.8%. This means that

across these 7 months, 2 out of every 5 Tigerair services in the morning peak period were delayed due to infrastructure constraints; and

- between 1 and 8 May 2014:
  - 55% of delays to Tigerair services in the morning peak period were caused, at least in part, by tarmac congestion and delays to pushback clearance; and
  - 42% of all delays to Tigerair services were related to tarmac congestion and delays to pushback clearance.

Commercially this is an unacceptable result to Tigerair, especially since delays during the morning peak period can cause consequential delays across Tigerair's network throughout the day. The morning peak period is, therefore, critical to overall on time performance.

During the morning peak period, and throughout the day, Tigerair is randomly granted access to remote Gates and, as a result, incurs significant bussing and parking charges that its major competitor, Jetstar, does not, despite its inefficient use of Pier B Gates (refer section 6.6 below).

In contrast to Tigerair, Jetstar occupies all 9 Pier B positions on an overnight basis with its aircraft that cannot be fitted on a Pier B Gate parked at stand-off bays. This provides Jetstar with a far better opportunity to achieve on time departures during the morning peak period.

Tigerair is dissatisfied with this situation because it pays full passenger charges to SACL and in return reasonably expects to receive fair and equitable access to the infrastructure it needs to operate efficiently and compete effectively.

## 6.5 Tigerair's denied request for increased access to Pier B Gates

Given the number of services that QantasLink was operating using Pier B and the corresponding number of passengers that were having to be processed through T2, Tigerair expected that QantasLink's move to T3 in particular would provide it with the opportunity to obtain the increased access to Pier B gates that it needed to grow its Sydney Airport base to the more efficient size of 6 aircraft. Accordingly, at various times following the relocation of QantasLink to T3, Tigerair has requested that SACL provide it with:

- access to two hard stand gates on Pier B in the morning peak period in accordance with the Aircraft Bay & Gate Allocation Procedures so as to facilitate the maximum utilisation of the Pier B gates; and
- increased access to Pier B hardstand gates throughout the course of each day in accordance with the Aircraft Bay & Gate Allocation Procedures.

As will be explained further in section 6.6 below, Tigerair only sought increased access to the Domestic Terminal Service at Pier B because:

- all of the available capacity resulting from QantasLink's move to T3 is located at Pier B;
- there was much more available capacity at Pier B compared to Pier A, evidenced by the fact that utilisation of Pier B was 57% lower than use of Pier A (see section 6.6 below); and



- Virgin Australia's majority ownership of Tigerair means that, as related bodies corporate, it is quicker, easier and more appropriate for Tigerair and Virgin Australia to reach commercial agreement with each other regarding Tigerair's increased access to Virgin Australia's first right gates and this has already started to happen. Regulatory intervention in these circumstances would, therefore, be inappropriate.

**[Information confidential to Tigerair and SACL redacted]**

Discussions between Tigerair and SACL have been ongoing and Tigerair remains hopeful that commercial agreement can be reached. It is Tigerair's firm intention to pursue this outcome. However, as a result of its current situation, Tigerair finds itself in the position where the biggest constraint on its ability to grow and become a more vigorous and effective competitor (particularly against Jetstar) is its limited access to the Domestic Terminal Service at Pier B.

In peak periods in particular, the lack of available Gate and apron infrastructure also contributes to disruptions and impacts on time performance for Tigerair and all airlines. For example, in October 2013, nearly 50% of delays at Sydney Airport were attributable to aircraft waiting on pushback clearance due to congestion, and a further 6% of delays were attributable to waiting on gate infrastructure. This is of particular importance as the morning peak period aircraft are particularly vulnerable and once delayed affect Tigerair's entire day's flying program out of Sydney.

It can, therefore, be seen that the lack of available T2 infrastructure immediately raises the cost of operations at Sydney Airport for all airlines, and disproportionately more for Tigerair.

In addition, the poor access that Tigerair is currently receiving is reducing its physical capacity to achieve scale and overall amenity for its customers, making it harder for Tigerair to attract and retain customers and compete sustainably in the domestic aviation market.

## **6.6 Tigerair's T2 Gate observations and analysis**

Following QantasLink's move to T3 in August 2013, at certain periods between September 2013 and January 2014, Tigerair conducted observations and analysis of the use of T2 Gates to determine if Tigerair's request for increased access could be accommodated in accordance with SACL's various Procedures listed in section 4.3 above.

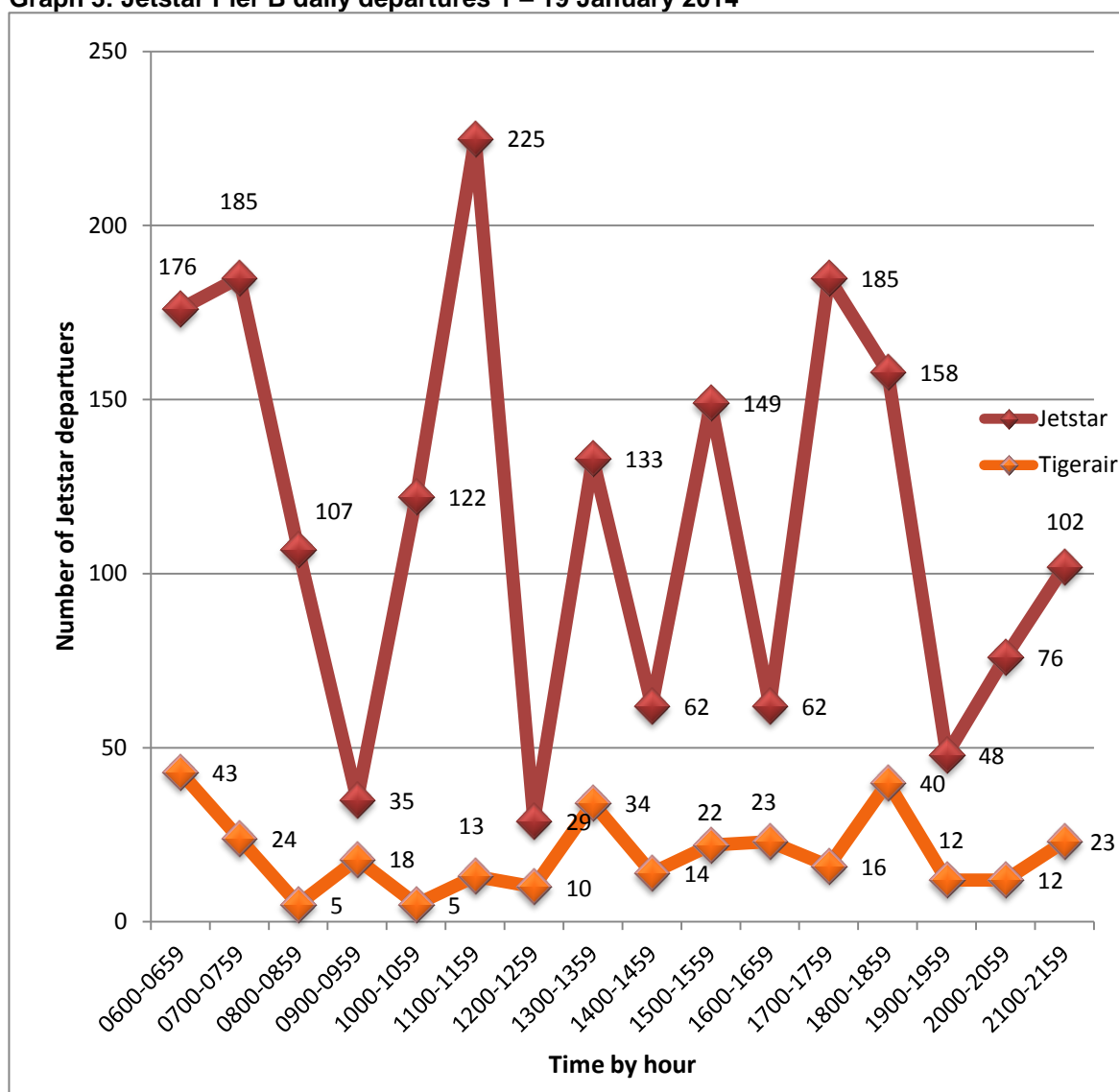
Tigerair's specific observations included the following:

- Virgin Australia's utilisation of Pier A across the day is approximately 57% higher than Jetstar's use of Pier B. Pier A utilisation on busy days is approximately 130 departures per day. In contrast, Jetstar's Pier B utilisation is around 65 movements per day. When this figure is corrected for comparison by gate number and the wide body use of Pier A, Pier A achieves around 11 departures per gate and Pier B achieves approximately 7 departures per gate. The higher efficiency is driven by schedule and an apparent designed level of inefficiency built into Pier B utilisation;
- Jetstar occupy all 9 Pier B Gates on an overnight basis;
- Jetstar aircraft being parked at Pier B Gates in the morning peak period for longer than the 30 minute and 90 minute periods prescribed by clauses 5.1(a) and 5.3(a) respectively of Aircraft Bay & Gate Allocation Procedures. As examples:



- on 7 January JQ989 arrived at Gate 57 from Perth at 0620 and was parked at Gate 57 until it departed for Hobart as JQ721 at 0800; and
- during September 2013, JQ501 departed for Melbourne at 0600 from Gate 57 and JQ782 was then towed onto bay 57 where it remained until 0855;
- post the morning peak period, there is inefficiency in Jetstar's on-gate timings. Jetstar's turns varied from 30 minutes (standard for LCCs) to up to 70 minutes including aircraft terminating and being towed to the international terminal. Over the next 2 – 3 years as activity grows and the peak expands into the shoulder periods, access will be impacted by aircraft with dwell times that exceed allocation guidelines; and
- as shown in Graph 3 below, Jetstar exhibits definite peaks throughout the day in terms of departures from Pier B and the highest peak is not during the morning peak period.

**Graph 3: Jetstar Pier B daily departures 1 – 19 January 2014**



On the basis of these observations, Tigerair was able to conclude that if SACL required Jetstar to comply with the Aircraft Bay & Gate Allocation Procedures, **Tigerair could operate 2 services from Pier B Gates in the morning peak period without Jetstar needing to change its existing scheduled services.** All that would be required would

be for Jetstar to adopt the same practice that Tigerair is currently forced to adopt, that is, park its aircraft at Foxtrot 4, 5 or 6 and tow its aircraft to the relevant Pier B Gate 30 minutes prior to departure.

In reaching this conclusion, Tigerair reviewed the time Jetstar aircraft are parked on Pier B Gates to ascertain whether infrastructure that was inefficiently used would otherwise have been available for common-user access. Tigerair looked at 18 days of scheduling from Jetstar on Pier B split across September, October and November 2013 and January 2014. The data shows a consistent result despite the different months in question.

Attachment A contains examples of the data Tigerair collated regarding Jetstar aircraft movements in the morning peak period. The data is taken from 1 January – 7 January 2014, reflecting the period of highest use by Jetstar. The tables also indicate when Tigerair services could be operated without any disruption to Jetstar's existing schedule.

Tigerair conducted further observations of Jetstar aircraft movement on 11 June 2014. The data collected that day revealed a possibility for Tigerair to operate:

- 3 scheduled departures prior to 0730 on Pier B Gates 54, 58 and 59 in accordance with the Aircraft Bay & Gate Allocation Procedures and without any disruption to Jetstar's schedule; and
- 2 additional scheduled departures at times before 11.15am.

This data is contained in Attachment B.

## 6.7 Current Tigerair constraints at T2 check-in counters

The infrastructure issues that Tigerair is experiencing at Pier B also affects the overall customer experience Tigerair is able to offer at present because the issues extend beyond access to Pier B Gates in peak periods to the number of check-in counters available and the quality of the check-in experience.

Tigerair has access to 4 full size check-in counters and two smaller sized "auxiliary" counters located behind the 4 counters. Tigerair's counters are in between other operators and queues from all carriers quickly extend out of the queuing zones at peak times blocking the flow of passengers through the terminal.

The overall area dedicated to passenger processing within T2 is quite large, but represents a very traditional model of check-in and one that has not been developed significantly over the last decade. As a result, the check-in facility at T2 operates inefficiently compared to the more recent check-in technology that is available elsewhere. For example, Qantas stated that one of the reasons why it relocated QantasLink away from T2 and into T3 was because:

*Terminal 3's Faster, Smarter Check-in services will significantly reduce check-in times for QantasLink customers.*<sup>35</sup>

As a result of the current state of the T2 check-in facilities, the overall check-in area at T2 suffers from the following:

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<sup>35</sup> Qantas Media Release "QantasLink moves to Terminal Three at Sydney Airport" see <http://www.qantasnewsroom.com.au/media-releases/qantaslink-moves-to-terminal-three-at-sydney-airport>

- insufficient queuing areas in front of the check-in counters create congestion and inhibit passengers from finding their way through T2 efficiently. At peak periods, the queues from the Jetstar counters stretch down past the Tigerair Australia check-in area. Similarly, Virgin Australia queues can also impact on our processing;
- reliance on the traditional check-in model promotes inefficient use of the space and provides no ability for Tigerair Australia to grow. This has seen an increase in efficiencies within the space. New technologies such as check-in kiosks and automated bag drops would address the infrastructure constraints and provide a sustainable position for the medium term;
- poor utilisation behind the check in counters – a large dead space exists; and
- poor placement of recycled air units which inhibit better utilisation of the queuing area.

The lack of access that Tigerair has to the check-in counters at T2 is another reason why it has not been able to increase the size of its Sydney Airport base to 6 aircraft and compete more effectively with Jetstar, particularly during the morning peak period.

This is because Tigerair's current check-in counter arrangements only allow it to process a maximum of 3 closely spaced flights. As a result, even if Tigerair was given increased access to Pier B Gates during the morning peak period, it would still not be able to schedule all 4 of its current Sydney-based aircraft (let alone an additional 2) to depart during this time because of the insufficient number of check-in counters that Tigerair has access to.

Going forward, modelling done by Tigerair suggests that if Tigerair was to operate its forthcoming schedule of services using the existing check-in facilities, its customers would experience queue wait times of up to 36 minutes as there would be up to 144 customers waiting in the queue.

Although Tigerair occasionally receives some short term access to counters used by REX and Virgin Australia, there are clear operational and commercial barriers to Tigerair's growth. Tigerair considers that these barriers include the effects of SACL's T2 Agreements with other airlines which result in:

- the check-in counters not operating as common-user counters; and
- Tigerair being the only major airline at T2 that does not have signage above its check-in counters (see photo below). All other airlines have their signage where the arrow is pointed in the photo below.



To attempt to overcome these barriers:

- in the 6 months to November 2013, Tigerair proposed to SACL that it install self-service check-in kiosks and automated bag drop facilities to replace the existing check-in counters. While plans for a trial progressed and a project was fully scoped, SACL's response to this proposal was that Tigerair would have to pay **[Information confidential to Tigerair and SACL redacted]** for this new product **[Information confidential to Tigerair and SACL redacted]**. The project did not proceed past this point; and
- Tigerair has recently requested that SACL review "interchangeable" signage options for the T2 check-in hall that would meet the needs of all airline operators and provide greater visibility of the airline using the common user check-in counters.

SACL's response has been unacceptable to Tigerair for a number of reasons including the following:

- the current per passenger charge that SACL imposes on Tigerair already includes payment for the provision of check-in facilities. If the quantity and quality of these facilities are inadequate, then the onus should be on SACL, as the provider of the facility, to improve it; and
- SACL's request for payment of additional charges is also at odds with the approach of:
  - Australia Pacific Airports (Melbourne) Pty Ltd, which recovered the cost for a similar project through its existing per passenger charge; and
  - Brisbane Airport Corporation Pty Limited which recently reached agreement with Tigerair for the completion of a similar project in an extremely cost effective manner.

The upgrading of the check-in facilities at T2 would in fact be in SACL's own interests for the following reasons:

- if SACL improved the check-in facilities at T2 in a way that allowed Tigerair to process a greater number of passengers at the same time, then, with increased Pier B Gate access, Tigerair could operate more services from T2 and increase SACL's own revenue as Tigerair would be paying more under the per passenger charge;
- passengers would be able to efficiently make their way through the check-in hall driving increased dwell times for passengers in the retail precinct;
- investment in improved check-in facilities would likely improve Sydney Airport's monitored operational performance. The ACCC's Airport Monitoring Report for 2012-2013 states that:

*On a number of parameters, the operational performance of Sydney Airport is the weakest among monitored airports:*

- *Consistently the lowest rating for overall quality of service which has never rated higher than 'satisfactory';.*
- ***Indicators of service levels for a number of aircraft-related and passenger-related services are below 'satisfactory'<sup>36</sup>...*** (emphasis added)

## 6.8 Signage throughout T2

In addition to not having access to way-finding signage opportunities at the T2 check-in counters, Tigerair has also not had signage opportunities comparable to those of other airlines throughout T2.

It is currently the case at Pier B that, apart from Gate 58, there is Jetstar branded signage fixed to the Gate facilities, including in the aerobridge walkways. This means that when a Tigerair flight is granted access to a Pier B Gate other than Gate 58, Tigerair's customers are heavily exposed to the branding of its dominant competitor. This is not consistent with the common user principles and positioning of T2 as a common user facility.

To attempt to overcome this issue, Tigerair has recently requested that SACL also review "interchangeable" signage options for boarding gates and lounges that allow the airline using the gate to have consistent and adequate branding (see email from Karen Crook (Tigerair) to Matthew Duffy and Michael Brown (SACL) dated 12 June 2014).

## 6.9 No short-term plans to augment T2 capacity

As far as Tigerair understands, SACL does not, at present, have any short to medium term plans to augment the Gate capacity at T2. As discussed in section 8 below, while the Sydney Airport Master Plan 2033 refers to the development of new T2 Piers C and D, the development of these piers is not planned to start for at least another 15 years.

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<sup>36</sup> ACCC Airport Monitoring Report 2012-13, page xxiv

## 7 Criterion (a) – material increase in competition in a related market

### 7.1 Interpretation of criterion (a)

Section 44G(2)(a) provides that the Council cannot recommend that a service be declared unless it is satisfied:

*that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.*

The terms “access” and “increased access” are not defined in the CCA. However, in *Sydney Airport*, the Full Federal Court held that criterion (a) should be interpreted in the following way:

*Virgin is correct in its submission that 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.<sup>37</sup>*

Tigerair recognises that prior to the Full Federal Court’s decision, the approach that had been taken by the Tribunal and the Council was to determine whether “declaration” of the relevant service would promote competition. Tigerair considers that regardless of which approach is taken, criterion (a) will be satisfied for the reasons given below.

### 7.2 The relevant markets and test

In *Sydney Airport*, the Full Federal Court noted that:

- the parties agreed that the “market for the service” was the market for “aeronautical services” in Sydney; and
- no complaint was made to the Court that the relevant dependent market “related to the carriage of domestic air passengers into and out of Sydney” (the **domestic aviation market or the dependent market**).<sup>38</sup>

Tigerair considers that there is no reason to define the relevant markets differently for the purposes of its application. However, in the dependent market, the Council should focus its assessment on competition between scheduled air passenger transport service offerings aimed primarily at leisure travellers, particularly price sensitive leisure travellers. This focus would be consistent with the approach taken by ACCC in its assessment of the Virgin Australia Acquisition.

In light of the definition of the relevant markets and the Federal Court’s interpretation of criterion (a), the Council should, therefore, conduct a comparison of:

- the future state of competition in the dependent market, in particular, competition for price sensitive leisure travellers in that market, with Tigerair having the ability to use the Domestic Terminal Service; and

<sup>37</sup> *Sydney Airport* at [83]

<sup>38</sup> (2006) 232 ALR 454 at 468



- the future state of competition in the dependent market, in particular, competition for price sensitive leisure travellers in that market, without Tigerair having any right or ability or with a restricted right or ability to use the Domestic Terminal Service.

Tigerair considers that if, contrary to the decision of the Full Federal Court, the relevant comparison was between “access” and “increased access”, the views of the Tribunal in *Virgin Blue* as to what “increased access” meant in the context of Virgin Blue’s declaration application should be considered. The Tribunal said:

- “increased access” equates to access on different terms and conditions; in particular, on a term that if any airline which uses Sydney Airport is unable to agree with SACL on any aspect of access to the Airside Service then an access dispute will arise which, in the absence of a negotiated resolution, will be arbitrated and determined by the ACCC; and
- “increased access” does not mean that an airline will inevitably be able to alter, vary or modify the terms upon which it is given access to the Airside Service. Rather, it means that the commercial environment will change and the airline will have the opportunity to seek to achieve such alteration, variation or modification by independent arbitrated determination in default of a negotiated resolution.<sup>39</sup>

### 7.3 Why access to the Domestic Terminal Service will promote a material increase in competition in the dependent market

In adopting either of the tests described above for considering criterion (a), Tigerair submits that access to the Domestic Terminal Service will materially promote competition in the dependent market for the following reasons.

As has already been noted in section 6 above, Tigerair’s recent interactions with SACL have involved:

- lengthy and so far unresolved negotiations in relation to access to:
  - T2 Gates throughout the day, but especially during the morning peak period; and
  - additional T2 check-in counters, deployment of check-in solutions and signage opportunities on all Tigerair check in counters and throughout T2;
- SACL imposing the new T2 Capital Charge in addition to the T2 PFC to “take account of and recover its costs in undertaking new investment in relation to Terminal 2”. The T2 Capital Charge “does not include unbudgeted new investments, which are subject to clause 8 of the Conditions of Use”;
- SACL attempting to impose a new **[Information confidential to Tigerair and SACL redacted]** on Tigerair for the installation of check-in kiosks and automated bag drop facilities to replace the existing check-in counters; and
- SACL not fully subsidising Tigerair for the cost of having to conduct bussing operations.

Tigerair considers that SACL’s results in the ACCC’s *Airport Monitoring Report for 2012-2013* (as summarised in section 4.5 above) suggest that:

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<sup>39</sup> [2005] ACompT 5 at [581] and [582]

- Tigerair is not the only airline that has had difficulties in interacting with SACL and with SACL's conduct; and
- passengers are also not satisfied with SACL's quality of service.

Despite having the power to monitor airports, the ACCC notes that:

*[M]onitoring of itself does not restrict airports from using their monopoly position to increase prices and/or lower service standards. Importantly, monitoring does not directly restrict the airports from increasing prices and/or lowering service standards and does not provide the ACCC with a general power to intervene in the airports' conduct in setting of terms and conditions of access.<sup>40</sup>*

While Tigerair recognises that increased access will not necessarily result in a variation to the terms upon which it and other access seekers are given increased access to the Domestic Terminal Service, the changed commercial environment that declaration will provide will give access seekers a better opportunity to achieve such a variation given the threat to SACL of an arbitrated determination by the ACCC in default of a negotiated resolution.

In Tigerair's case, the variations it would seek to its current access terms would provide it with the following infrastructure access:

- access to two hard stand gates on Pier B in the morning peak period in accordance with SACL's Aircraft Bay & Gate Allocation Procedures;
- increased access to Pier B hardstand gates throughout the course of each day in accordance with the Aircraft Bay & Gate Allocation Procedures; and
- access to additional check-in counters at T2 in the short term and the deployment of check-in kiosks and automated bag drop solutions at T2 in the long-term.

The changed environment in which commercial negotiations between access seekers and SACL would occur as a result of declaration is also especially important to Tigerair because of its particular circumstances as discussed in sections 3 and 6 above.

Further, in its Public Competition Assessment in relation to the Virgin Australia Acquisition, the ACCC noted that it was satisfied that Tigerair's previous poor financial results reflected a number of factors that were unlikely to be all resolved absent the proposed acquisition. These factors included Tigerair operating below efficient scale.<sup>41</sup> By not operating at a larger, efficient scale, Tigerair is placed at a competitive disadvantage to its closest competitor, Jetstar. Indeed, the Chief Executive Officer of Qantas, Alan Joyce, recently said that Jetstar had 11% lower costs than Tigerair because of its larger scale.<sup>42</sup>

By having the opportunity to seek to achieve the type of variation to the commercial environment described above, Tigerair will have a greater chance of growing the scale of its Sydney Airport base and overall fleet size in order to operate at an efficient scale and compete more effectively against Jetstar in the medium to long term .

<sup>40</sup> ACCC Airport Monitoring Report 2012-2013 page xiii

<sup>41</sup> Australian Competition and Consumer Commission, Public Competition Assessment, "Virgin Australia Holdings Limited - proposed acquisition of 60% of Tiger Airways Australia Pty Ltd", 31 July 2013 at para 56

<sup>42</sup> Rebecca LeMay, "Qantas fighting hard to hold market share", AAP Newswire, Australia, 30 April 2014

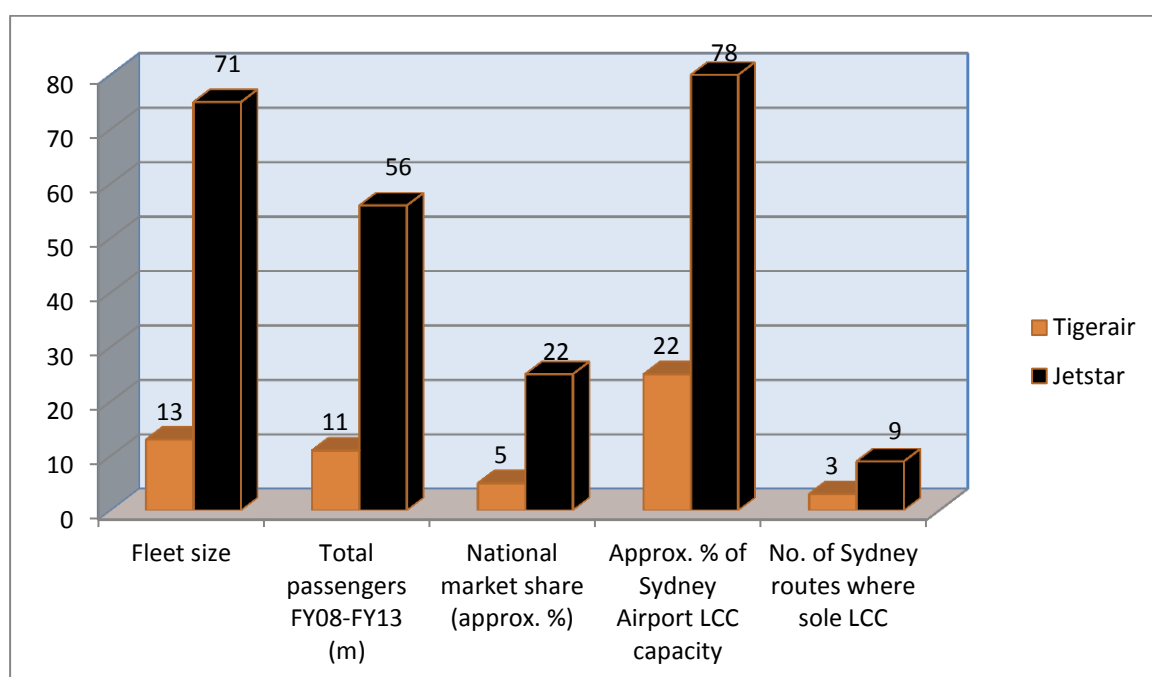


The Tribunal has recognised that this type of opportunity constitutes a promotion of a material increase in competition and satisfies criterion (a):

*A particular act will have the tendency to promote a material increase in competition in a socially useful way if sellers are given greater freedom to engage in rivalrous behaviour... will it increase their rivalry in a way that will produce greater efficiency? If the answer is in the affirmative, the act will promote an increase in competition.<sup>43</sup>*

To demonstrate the particular importance to Tigerair of being able to operate more efficiently, a comparison need only be done between the current competitive positions of Tigerair and Jetstar. As Table 6 shows, Tigerair's current competitive position compared to Jetstar is significantly inferior across a number of metrics.

**Table 6: comparison between Tigerair and Jetstar Australian domestic operations**



#### 7.4 Reasons accepted in Virgin Blue's application continue to apply

In addition to the reasons given above, Tigerair considers that the Council should regard criterion (a) as being satisfied for the same reasons as those accepted by the Full Federal Court in *Sydney Airport* and cites the following passage:

*Virgin submitted that, on its alternative construction [that the relevant enquiry in s 44H(4)(a) is the comparison between "access" and "no access" and "limited access" and "increased access" rather than whether "declaration of the service would promote competition"], which we favour, it is clear that s 44H(4)(a) would be satisfied. It submitted that this conclusion could be easily reached because (as substantially found by the Tribunal) (a) Sydney Airport is a natural monopoly and SACL exerts monopoly power; (b) the Airside Service is a necessary input for effective competition in the dependent market; (c) neither Bankstown or Richmond*

<sup>43</sup> *In the matter of Fortescue Metals Group* [2010] ACompT 2 at 1061

*Airport could provide the service; and (d) the parent company of SACL had the of first right refusal to build and operate any second major airport within 100 kilometres of the Sydney CBD. Further, there was no real debate among the experts before the Tribunal that, given the strategic nature of Sydney as Australia's largest city and a significant gateway to international air travel, access to Sydney Airport is essential to compete in the domestic air passenger market.*

*In these circumstances, there appears little doubt that on Virgin's alternative argument s 44H(4)(a) must have been satisfied here.<sup>44</sup>*

Tigerair submits that:

- there is no relevant difference between Virgin's application and Tigerair's application; and
- there has not been any change in circumstances since the Full Federal Court's decision,

and therefore the Council should regard criterion (a) as being satisfied for the same reasons in relation to Tigerair's application.

While the Commonwealth and NSW Governments have announced that a second Sydney airport will be built at Badgerys Creek, Tigerair submits that this announcement should not change the Council's view that criterion (a) is satisfied because:

- the Badgerys Creek airport is not expected to become operational until the mid-2020s;<sup>45</sup>
- SACL retains the first right of refusal to build and operate the Badgerys Creek airport and so if SACL exercises this right, it will remain the monopoly provider of the Domestic Terminal Service in Sydney; and
- until the Badgerys Creek airport is operational, the Domestic Terminal Service at T2 remains a necessary input for effective competition in the dependent market especially as neither Bankstown or Richmond Airport can provide the Domestic Terminal Service.

Further, even though the Tribunal in *Virgin Blue* compared the future with and without "declaration" (as opposed to the future with and without "access" preferred by the Full Federal Court), Tigerair considers that the Tribunal's findings in relation to SACL's conduct remain relevant for the purposes of the Council's consideration of Tigerair's application. The Tribunal found that:

*When considering the situation without declaration, it is necessary to take into account what has happened in the past and what is happening in the present with a view to determining what is likely to happen in the future without declaration. In this sense we are informed by SACL's conduct in the past and the present. If SACL has misused its monopoly power and has engaged in monopoly pricing in*

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<sup>44</sup> (2006) 232 ALR 454 at paras 91-92

<sup>45</sup> See Commonwealth Government Press release at: [http://www.infrastructure.gov.au/aviation/airport/western\\_sydney/files/Western-Sydney-Joint-Press-Release-Deputy-Prime-Minister.pdf](http://www.infrastructure.gov.au/aviation/airport/western_sydney/files/Western-Sydney-Joint-Press-Release-Deputy-Prime-Minister.pdf)

*the past or is continuing to do so in the present, that is a harbinger of what is likely to happen in the future...*<sup>46</sup>

*We are satisfied that the likely future without declaration will include the following circumstances*<sup>47</sup>:...

- *protracted negotiations for new or varied contractual arrangements in relation to the conditions of use of Sydney Airport;...*
- *new charges are likely to be imposed by SACL on airlines either directly or indirectly....*<sup>48</sup>

*Each of these factors has an impact on airlines because they either affect the efficiency of airlines in the manner in which they operate in a competitive environment or add to their cost structure in a manner which affects their ability to pass on further costs to passengers and their profitability.*<sup>49</sup>

While Tigerair's negotiations with SACL continue and Tigerair remains hopeful of reaching commercial agreement:

- the negotiations to date have been lengthy. As noted above, the importance to Tigerair of being able to move quickly to establish a viable existing and future base of operations at Sydney Airport means that it cannot afford to risk more weeks or months negotiating with SACL only to find that the parties still cannot reach commercial agreement. If Tigerair were to commence the declaration process at that later time, it would be further substantially delayed in resolving the critical issue of T2 access; and
- SACL has imposed new charges on Tigerair and other airlines and sought to impose further charges in relation to a check-in counter solution.

## **7.5 Benefits to consumers that are likely to arise as a result of a material increase in competition in the dependent market**

Tigerair submits that if the Domestic Terminal Service is declared there will be significant consumer benefit resulting from the material increase in competition in the domestic aviation market that access or increased access to the Domestic Terminal Service will promote. The principal benefits for consumers will be:

- the greater availability of low cost fares and services as Tigerair draws a competitive response from its competitors; and
- better customer experience both at Sydney Airport and inflight as Tigerair improves the facilities and technology available to its passengers.

In its Inquiry Report on the National Access Regime, the Productivity Commission stated:

*Various participants argued that there might not be an improvement in economic efficiency where competitive outcomes are not improved in final consumer markets; or where competition is only promoted in a market that is not nationally significant.*

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<sup>46</sup> at 165

<sup>47</sup> at 519

<sup>48</sup> at 574

<sup>49</sup> at 575

*These suggestions have much merit in principle, but narrowing the focus of criterion (a) to particular markets is fraught with practical difficulties.<sup>50</sup>*

While the Productivity Commission rejected any narrowing of the focus of criterion (a) in the way argued by certain participants, Tigerair submits that principal benefits to consumers arising from access or increased access would improve the competitive outcomes in the dependent market, which is a “final consumer market”.

***Consumer benefit arising from Tigerair’s ability to draw a competitive response from its competitors***

As discussed in section 3.3 above, in its Statement of Issues in relation to the Virgin Australia Acquisition, the ACCC considered that Tigerair’s presence on a route may draw a competitive response from other airlines in terms of price or capacity because there appeared to be a correlation between:

- Tigerair’s entry into the market in 2007 and a downward movement in BITRE’s Domestic Air Fares (Best Discount) Index; and
- an upwards movement in the index over the course of 2011, a year in which Tigerair was grounded for 6 weeks by CASA.<sup>51</sup>

This correlation has also been recognised by SACL itself as it has said that:

*Tiger has generated a step-change in traffic growth on routes that it has served. Tiger’s introduction has led to a competitive response from incumbent airlines, generating further traffic growth.<sup>52</sup>*

It is clear that Tigerair’s ability to draw a competitive response from other airlines is of clear benefit to consumers.

However, Tigerair considers that the nature of the response it is able to draw from competitors, and the level of consumer benefit that will result, will be determined in large part by the time of day that Tigerair is able to gain increased access to the Pier B Gates at T2. This is because there are clear times of the day when leisure travellers prefer to fly and if Tigerair cannot offer services at these times, then its competitors will not be required to respond either at all or as competitively as they would if Tigerair was able to offer services at the peak travel times. It is for this reason that Tigerair seeks increased access to the Domestic Terminal Service during the morning peak period and at other peak times throughout the day.

***Consumer benefit arising from better customer experience at Sydney Airport and inflight***

As noted in sections 6.6 and 6.7 above, Tigerair has tried (unsuccessfully) to improve the experience of its customers at T2 by working with SACL to provide:

- modern check-in kiosks and automated bag drop facilities that provide a faster process for passengers; and

<sup>50</sup> Productivity Commission, *National Access Regime*, Inquiry Report No. 66, 25 October 2013 at 168

<sup>51</sup> As above at [60] – [61]

<sup>52</sup> Sydney Airport Mast Plan 2033 page 47

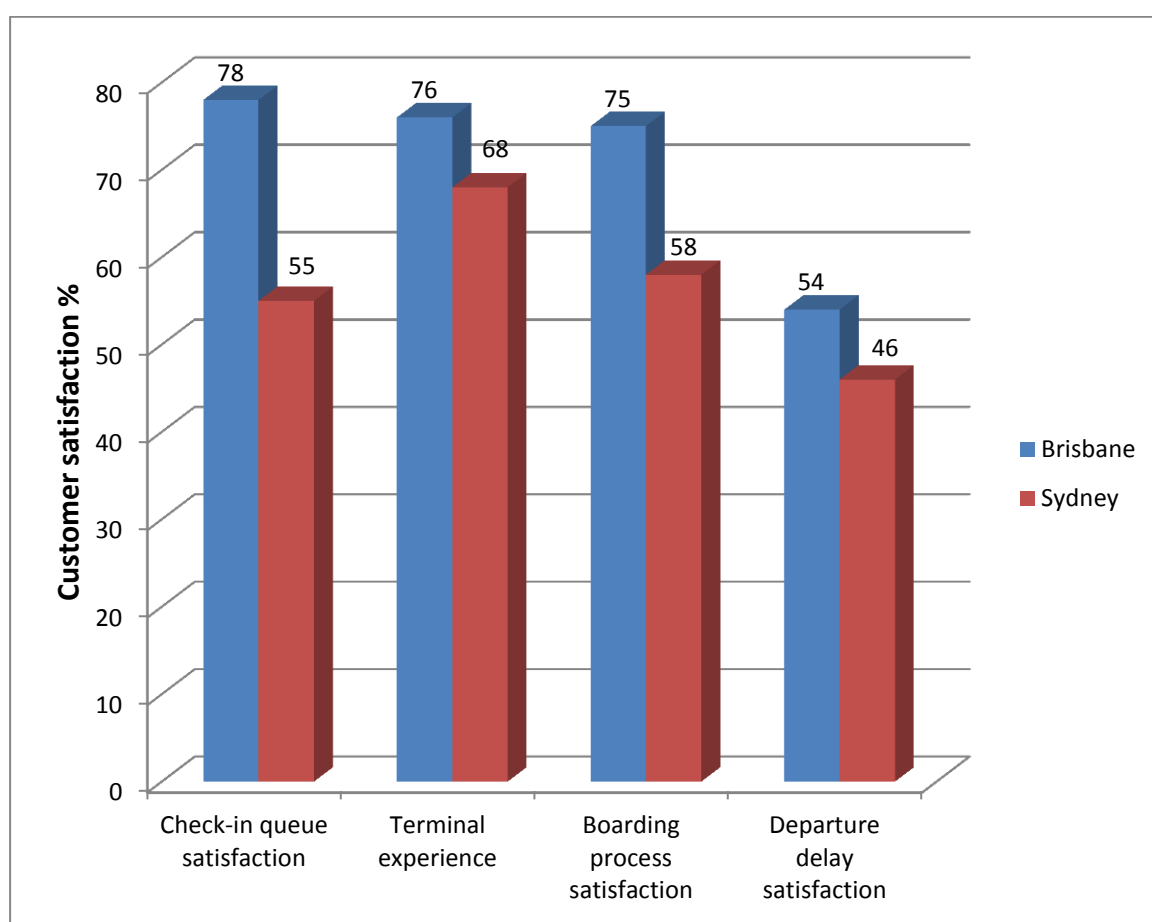
- way-finding signage opportunities at the T2 check-in counters and throughout the T2 terminal comparable to those of other airlines.

Tigerair's most recent customer survey data, captured between 24 and 31 March 2014, reveals that when a comparison is done of:

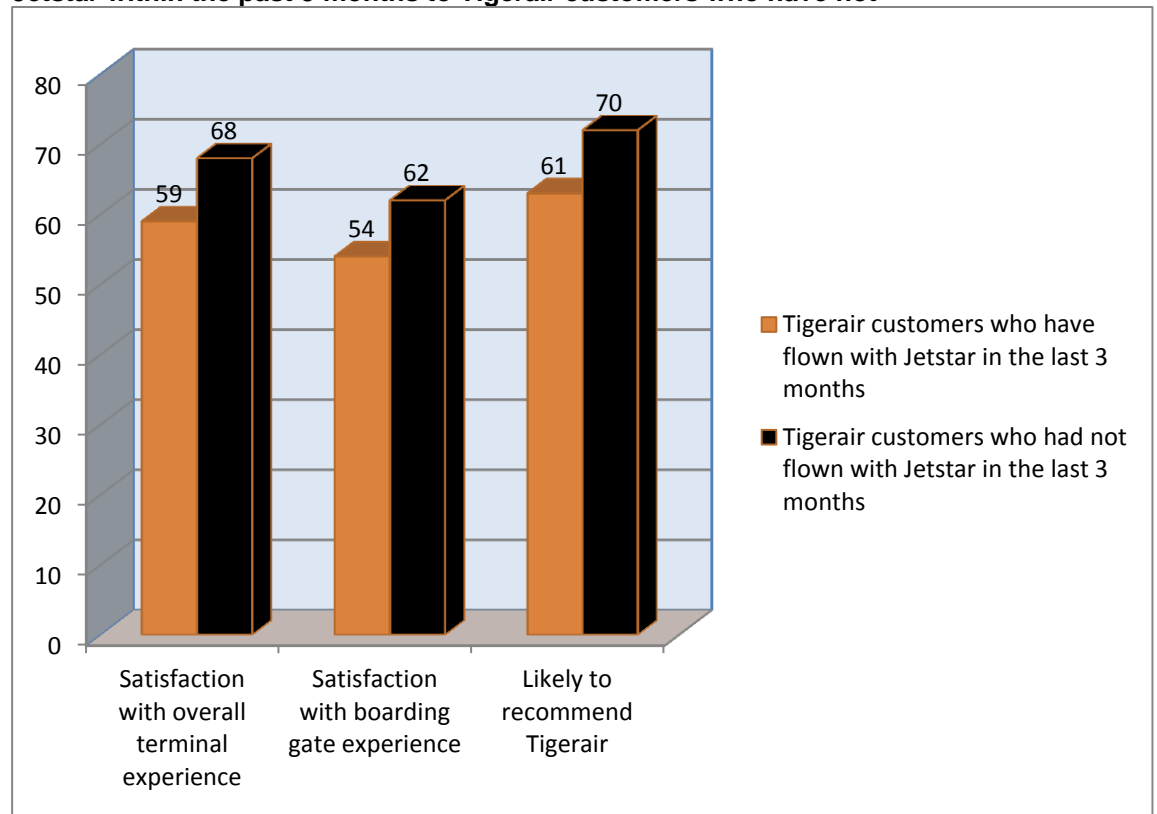
- Tigerair customer experience using the similar facilities located at T2 and Brisbane Airport, customers are far more satisfied with their experience at Brisbane Airport; and
- Tigerair customers who have flown with Jetstar within the past 3 months to Tigerair customers who have not flown with Jetstar in this period. What this comparison shows is that Tigerair customers who have flown Jetstar recently rate their overall experience with Tigerair significantly lower compared to Tigerair customers who have not flown with Jetstar and are much less likely to recommend Tigerair.

These customer survey results are provided in the Tables 7 and 8 below.

**Table 7: comparison of customer experience at T2 and Brisbane Airport**



**Table 8: comparison of experience of Tigerair customers who have flown with Jetstar within the past 3 months to Tigerair customers who have not**



Tigerair considers that the prospect of arbitration, or, failing that, arbitration itself, as a result of declaration increases the likelihood of the parties reaching a commercial agreement on these matters that truly reflects a fair negotiated position and will provide clear benefits to consumers.

## 7.6 Impact of SACL charges on Tigerair's pricing

As noted in section 7.3 above, in *Virgin Blue* the Tribunal found that SACL's conduct affected airlines' profitability by affecting their ability to pass on costs to passengers.

As a LCC, Tigerair's business model is price-based and volume-driven, with the margin that it makes per passenger being significantly lower than for those airlines that attract higher yielding customers. As a result, any increase in Tigerair's costs that SACL imposes has a higher impact on profitability compared to airlines that attract higher yielding customers and, therefore, achieve a greater margin. For example, over the past year Tigerair has **[information confidential to Tigerair redacted]**.

While Tigerair is always prepared to invest in its business, particularly for initiatives that improve the customer experience such as check-in kiosks, bag drops and the possibility of automated boarding, it is dissatisfied that to date SACL has not:

- provided Tigerair with the same level of service as other airlines despite the fact that Tigerair pays a per passenger charge like all other airlines;
- covered the additional costs that Tigerair incurs as a result of not receiving the same level of service as other airlines, for example, the costs of bussing because gates at T2 are not available; and

- agreed to provide better levels of service without financial contribution from Tigerair, for example, SACL's refusal to provide check-in kiosks and bag drops unless Tigerair contributed an annual amount of approximately **[Information confidential to Tigerair and SACL redacted]** in addition to its existing per passenger charges which are already intended to cover the cost of check-in facilities.

By continuing to incur these costs, and by not being able to attract as many customers as it would like as a result of poor customer experience at T2 (including not being able to offer more services in the morning peak period), Tigerair has been restricted in its ability to grow to its scale in the way recognised by the ACCC in order for it to become financially viable and more competitive to the benefit of Australian consumers.

Tigerair does not consider it is inappropriate for it to be focussed on the effects of SACL's conduct on its competitive position. This is because in *Virgin Blue* the Tribunal acknowledged that while it was appropriate for it to be concerned about the promotion of "competition" rather than "competitors" in the dependent market:

*The limited number of participants in the dependent market, and, in particular, the existence of a virtual duopoly, makes it inevitable that we focus on effects on the participants, particularly the major participants.*<sup>53</sup>

#### **7.7 The timing of Tigerair's application for declaration relates to whether access will promote a material increase in competition in the domestic aviation market**

Tigerair seeks increased access to the Domestic Terminal Service at this particular point in time because it considers that the opportunity for it to offer services in the morning peak period and viably increase its Sydney Airport base to 6 aircraft is not likely to be available in the long term.

As noted above, the opportunity for Tigerair to receive increased access presently exists at Pier B on T2 as a result of QantasLink's relocation to T3 in August 2013 and Jetstar's insufficient demand for all of the capacity made available by QantasLink's relocation.

However, slot and T2 Gate capacity is unlikely to be available in the long term because of the increased demand that is projected for Sydney Airport in the coming years. The Commonwealth and NSW Government-commissioned *Joint Study on aviation capacity in the Sydney region* found that:

- by 2020, all slots at Sydney Airport on weekday mornings between 6.00am and 12 noon and between 4.00pm and 7.00pm will be fully allocated, so growth of passenger capacity at these times will be dependent on aircraft upgauging;
- by around 2027, all slots will be allocated, so no new entrants can be accommodated, unless another service is cancelled; and
- by around 2035, there will be practically no scope for further growth of RPT services at the airport.<sup>54</sup>

While a Sydney Airport Capacity "Fact Sheet" published by SACL in May 2012 states that "without any change to runways, curfew or cap, Sydney and NSW will not require a

<sup>53</sup> *Virgin Blue* at para 522

<sup>54</sup> Independent Steering Committee of government and industry experts, *Joint Study on aviation capacity in the Sydney region*, 2 March 2012 at 119-120

secondary airport before 2045”,<sup>55</sup> the Department of Infrastructure and Regional Development has reaffirmed that “There are no real options for increasing aviation capacity to handle demand much beyond 2030”.<sup>56</sup>

It is for these reasons that Tigerair:

- considers that the opportunity for it to receive increased access that would promote a material increase in competition in the dependent market may not exist in the future if the Domestic Terminal Service is not declared at this point in time; and
- it is critical to Tigerair to have its current access issues resolved.

Tigerair understands that currently:

- there are 51 domestic destinations served directly from Sydney Airport;
- but there are 32 with no LCC capacity at all; and
- only 6 routes have direct competition between Tigerair and Jetstar.

By improving the conditions for competition, declaration may result in competition between Tigerair and Jetstar on more routes and LCC capacity being available on more routes.

## 7.8 Consideration of s 44W(1) of the CCA

For the reasons given in section 13 below, Tigerair considers that any arbitration determination by the ACCC in relation to access to the Domestic Terminal Service would not have any of the effects proscribed by s 44W(1) of the CCA and would, therefore, not prevent or hinder competition or any existing user’s ability to obtain sufficient amounts of the Domestic Terminal Service.

## 7.9 Conclusion on criterion (a)

Tigerair submits that the NCC should regard criterion (a) as being satisfied:

- for the same reasons accepted by the Full Federal Court in *Sydney Airport*;
- because to date there has not been a material change in SACL’s conduct since the Full Federal Court’s decision in *Sydney Airport* and, as a result, in conducting the relevant counterfactual analysis, there remains a tendency for SACL to misuse its market power in the absence of declaration; and
- because increased access would promote a material increase in competition in the dependent market by providing an increased opportunity for:
  - LCC capacity to be offered on more routes from Sydney Airport; and
  - Tigerair to engage in more vigorous competition with Jetstar.

<sup>55</sup> Sydney Airport Corporation Limited. See: [http://www.sydneyairport.com.au/investors/-/media/files/corporate/about%20us/fact%20sheets/fact\\_sheet\\_sydney\\_airport\\_capacity\\_the\\_facts.pdf](http://www.sydneyairport.com.au/investors/-/media/files/corporate/about%20us/fact%20sheets/fact_sheet_sydney_airport_capacity_the_facts.pdf)

<sup>56</sup> Department of Infrastructure and Regional Development, “Why do we need an airport in Western Sydney?”, see [https://www.infrastructure.gov.au/aviation/airport/western\\_sydney/files/Fact\\_Sheet\\_1\\_Why\\_do\\_we\\_need\\_an\\_airport\\_in\\_Western\\_Sydney.pdf](https://www.infrastructure.gov.au/aviation/airport/western_sydney/files/Fact_Sheet_1_Why_do_we_need_an_airport_in_Western_Sydney.pdf)



## 8 Criterion (b) – uneconomical for anyone to develop another facility

### 8.1 Application of criterion (b)

Section 44G(2)(b) provides that the Council cannot recommend that a service be declared unless it is satisfied:

*that it would be uneconomical for anyone to develop another facility to provide the service.*

#### **“Private profitability” test**

As the Council is aware, in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*,<sup>57</sup> (**Pilbara Infrastructure**) the High Court ruled that the test to be applied under criterion (b) is the “private profitability” test:

*The better view of criterion (b) is that it uses the word “uneconomical” to mean “unprofitable”. It does not use that word in some specialist sense that would be used by an economist. Further, criterion (b) is to be read as requiring the decision-maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility. It is not to be read as requiring the testing of an abstract hypothesis: if someone, anyone, were to develop another facility. When used in criterion (b) “anyone” should be read as a wholly general reference that requires the decision-maker to be satisfied that there is no one, whether in the market or able to enter the market for supplying the relevant service, who would find it economical (in the sense of profitable) to develop another facility to provide that service...*<sup>58</sup>

*If the minister is satisfied that it would be uneconomical (in the sense of not profitable) for anyone to develop an alternative facility, criterion (b) is met.*<sup>59</sup>

While the Council in its submission to the Productivity Commission’s inquiry into the National Access Regime respectfully submitted that the High Court’s construction of criterion (b) was unsatisfactory, the Council also correctly acknowledged that:

*The High Court’s construction of criterion (b) determines this matter. The construction is binding on the Council when considering recommendations on declaration applications and on decision-making Ministers, the Tribunal and lower courts.*<sup>60</sup>

In paragraph 4.5 of its Declaration Guide, the Council offers initial guidance as to its approach to the application of criterion (b) in light of the High Court’s judgment in *Pilbara Infrastructure*. This guidance includes the following:

- (a) *A declaration applicant needs to be able to demonstrate the basis on which it is unprofitable for it or anyone else to develop a new facility to provide the service...*

<sup>57</sup> (2012) 246 CLR 379

<sup>58</sup> (2012) 246 CLR 379 at [77]

<sup>59</sup> (2012) 246 CLR 379 at [107]

<sup>60</sup> Council submission to the Productivity Commission’s inquiry into the National Access Regime, 1 November 2012 at p 8

- (c) *The assessment of profitability should relate at least to the period for which declaration is sought but may be referable to another time period, for example the timeframe an investor or financier utilises in making their investment decision or the likely operating life of a new facility...*
- (h) *Where it appears that the only party likely to be in a position to develop a new facility is the existing service provider/incumbent, the assessment of the profitability of the new facility should:*
  - (i) *be based upon the development of a separate, new facility, and*
  - (ii) *examine why an existing service provider would develop an alternative facility where there is the prospect that additional capacity could be provided at a lesser cost through augmentation of the service provider's existing facility...*
- (j) *Where development of a new facility is unprofitable on a standalone basis but thought to be profitable as an integrated part of a larger project, the assessment of profitability should include consideration of the impact of the cost of developing the new facility on overall project profitability.*

#### **Relevant timeframe for assessment**

As paragraph (c) quoted above makes clear, the timeframe for assessing whether criterion (b) is satisfied is at least the period for which declaration is sought.

In providing its final recommendation to the designated Minister in respect of Virgin Blue's application for declaration of the Airside Service, the Council recognised that there is a "time horizon" for the assessment of criterion (b). The Council stated:

*Consideration of whether it would be uneconomical for someone to develop another facility to provide the service has temporal elements. The Council recognises that a conclusion that it would be uneconomical for anyone to develop another facility to provide the service may change over time as a result of changes in demand and changes in supply conditions, such as technological change.*

*The Council may elect not to recommend declaration of the service if, as a result of foreseeable changes in demand and supply conditions, criterion (b) would no longer be satisfied during the time horizon for the criterion (b) assessment.*<sup>61</sup>

Similarly, the majority of the High Court in *Pilbara Infrastructure* made clear that:

*...the decision to declare a service under Pt IIIA must hold good **for the whole of the period of the declaration.***<sup>62</sup> (emphasis added)

For the reasons given below, Tigerair considers that it would be uneconomical for anyone to develop another facility to provide the Domestic Terminal Service during the 10 year period sought for declaration.

<sup>61</sup> National Competition Council, *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport, Final Recommendation*, November 2003 at 5.12

<sup>62</sup> (2012) 246 CLR 379 at [99]

## 8.2 Threshold observation in relation to the assessment of criterion (b) – No likelihood in any scenario of the Domestic Terminal Service being duplicated in the relevant period

As set out below, Tigerair submits that it would not be privately profitable for anyone to develop a new facility to provide the Domestic Terminal Service.

However, before doing so, Tigerair submits that as a matter of commercial reality there is a threshold question that must be answered in relation to criterion (b) and that is whether anyone in fact has, or is likely to receive, **approval** to develop another facility to provide the Domestic Terminal Service. Tigerair considers that until this question is answered in the affirmative, no further analysis of criterion (b) needs to be undertaken.

As the Council would be aware, no one other than SACL currently has approval to develop another facility to provide the Domestic Terminal Service. This is because the Commonwealth Government has only approved the development of a second Sydney airport at Badgerys Creek and SACL has the first right to develop that airport (discussed further in section 8.3 below). Tigerair considers that:

- the history and length of time it took the Commonwealth Government to approve an airport at Badgerys Creek;
- the fact that Bankstown and Richmond Airports have not been approved to provide the Domestic Terminal Service;
- the apparent lack of any other appropriate location to develop another facility; and
- the expected levels of domestic passenger demand for the 10 year period sought for declaration would not justify the construction of a third facility to provide the Domestic Terminal Service;
- there is no realistic prospect that during the 10 years sought for declaration the Commonwealth Government will approve the development of another airport which could support a facility to provide the Domestic Terminal Service in addition to the airport at Badgerys Creek; and
- in these circumstances, no one other than SACL is likely to receive approval to develop another facility to provide the Domestic Terminal Service during the 10 year period sought for declaration.

## 8.3 SACL does not have the ability to profitably develop another facility to provide the Domestic Terminal Service during the period sought for declaration

As noted in section 8.1 above, the Council explains in paragraph 4.5(h) of its Declaration Guide that where the only party likely to be in a position to develop a new facility is the existing service provider, the assessment of the profitability of the new facility should:

- be based upon the development of a separate, new facility, and
- examine why an existing service provider would develop an alternative facility where there is the prospect that additional capacity could be provided at a lesser cost through augmentation of the service provider's existing facility.

***The announcement the airport at Badgerys Creek does not mean that SACL has the ability to profitably develop a separate, new facility***

Tigerair submits that the Council should **not** regard the Commonwealth and New South Wales Governments' (the **Governments**) announcement of a second Sydney airport at

Badgerys Creek as meaning that SACL has the ability to profitably develop a separate, new facility during the period sought for declaration because:

- the Domestic Terminal Service will not be provided at Badgerys Creek until at least the mid-2020s and so will not be economic to develop during the 10 year period Tigerair seeks for declaration; and
- that airport will not be a duplication of the “total airport” at Sydney Airport, as required by the Tribunal in *Virgin Blue* and *Sydney International Airport*.

These points are reflected in the Commonwealth Department of Infrastructure fact sheet, *Building an airport at Badgerys Creek*,<sup>63</sup> which makes clear that the airport at Badgerys Creek will be much smaller than Sydney Airport until there is sufficient demand to justify a larger airport:

*A new airport will cater for Sydney’s passenger demand for the decades to come. This means that Badgerys Creek will **eventually** develop into a full scale airport with parallel runways.*

*However, **in the initial years it will begin as a smaller airport with a single runway to serve the modest demand expected in the short term.** This may be similar to Canberra or Gold Coast Airports which service three and six million passengers respectively.*

*The airport will grow over time as passenger numbers and aircraft activity warrant additional investment...*

*The Australian Government estimates that the airport could be ready to take its first flight **in the mid-2020s.**(emphasis added)*

***Examination of why Badgerys Creek is being developed when additional capacity could be provided at a lesser cost through augmentation of T2***

The Declaration Guide suggests that an examination be conducted as to why an existing service provider would develop an alternative facility when there is the prospect that it could augment its existing facility for a lesser cost.

The circumstances in relation to the decision to develop Badgerys Creek do not fall within the scope of this suggested examination, as it was the Commonwealth Government’s decision to develop Badgerys Creek and not SACL’s. Indeed, a Sydney Airport Capacity “Fact Sheet” published by SACL in May 2012 states that “without any change to runways, curfew or cap, Sydney and NSW will not require a secondary airport before 2045”.<sup>64</sup>

Tigerair considers that regardless of who made the decision to develop Badgerys Creek, the prospect of the augmentation of T2 does not mean that SACL can profitably develop a new facility to provide the Domestic Terminal Service during the period sought for declaration.

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<sup>63</sup> See [http://www.infrastructure.gov.au/aviation/airport/western\\_sydney/files/Fact\\_Sheet\\_3\\_Building\\_an\\_airport\\_at\\_Badgerys\\_Creek.pdf](http://www.infrastructure.gov.au/aviation/airport/western_sydney/files/Fact_Sheet_3_Building_an_airport_at_Badgerys_Creek.pdf)

<sup>64</sup> Sydney Airport Corporation Limited. See: [http://www.sydneyairport.com.au/investors/-/media/files/corporate/about%20us/fact%20sheets/fact\\_sheet\\_sydney\\_airport\\_capacity\\_the\\_facts.pdf](http://www.sydneyairport.com.au/investors/-/media/files/corporate/about%20us/fact%20sheets/fact_sheet_sydney_airport_capacity_the_facts.pdf)

Tigerair acknowledges that the Sydney Airport Master Plan refers to the construction of new T2 Piers C and D and that these piers would augment the existing T2 facility in providing the Domestic Terminal Service.

However, the Master Plan also makes clear that:

- the development of these piers is part of SACL's "20 year strategic planning framework" which will be realised in a staged manner over 4 separate "five year periods",<sup>65</sup> and
- these piers are not planned for development until the fourth and final "five year period",<sup>66</sup> and that:

*The actual timing of each of the proposed developments will depend on the realisation of the demand triggers, Sydney Airport's assessment of forecast market conditions, commercial discussions with stakeholders, the carrying out of any necessary environmental assessments, internal and external approval processes, and the outcome of stakeholder consultation processes.*

*The proposed implementation plan is not a commitment that any particular project will be undertaken.<sup>67</sup>*

For these reasons, Tigerair does not consider that it would be profitable for SACL to augment T2 during the 10 year period sought for declaration.

#### **8.4 Consideration of the relevant facility as an integrated part of a larger facility**

While Tigerair has identified in section 5.1 above what it considers to be the minimum bundle of assets required to provide the Domestic Terminal Service, it nevertheless considers that it would not be economical for someone to duplicate the minimum bundle of assets required to provide the Domestic Terminal Service without also developing a "total" domestic airport. This is because the minimum bundle of assets required to provide the Domestic Terminal Service clearly form part of a broader, complementary and integrated facility the total of which is required to attract sufficient airline and passenger customers to make the provision of the Domestic Terminal Service profitable.

This reasoning is reflected in the previous decisions by the Tribunal involving Sydney Airport and the discussion in the Council's Declaration Guide.

##### ***Previous decisions by the Tribunal involving Sydney Airport***

In *Virgin Blue*, the Tribunal summarised the decision in *Sydney International Airport* and found, consistently with the recommendation of the Council, that the relevant facility for the purposes of criterion (b) is the **whole** of Sydney Airport:

*In the earlier decision of Sydney International Airport, the Tribunal rejected the contention that the relevant facility, for the purposes of s 44H(4)(b), was less than, what was in effect, the total airport. We see no reason to revisit this issue. The fact that a different service is provided by the facility does not alter the basic proposition that it would be uneconomical for anyone to develop another facility, being the total airport, to provide that service. There has been no evidence put*

<sup>65</sup> SACL, *Sydney Airport Master Plan 2033*, p 202

<sup>66</sup> Sydney Airport Master Plan, p 205

<sup>67</sup> Sydney Airport Master Plan, p 203

*before us in relation to events and circumstances which occurred after the hearing of Sydney International Airport which causes us to change this view. Accordingly, we are satisfied that it would be uneconomical for anyone to develop another facility to provide the service that is the subject of this application and we are therefore satisfied of the matter set out in s 44H(4)(b).<sup>68</sup>*

Tigerair considers that, like the Tribunal, the Council should regard criterion (b) as being satisfied because:

- the fact that it is the Domestic Terminal Service rather than the Airside Service that is being considered in relation to Tigerair's application does not alter the basic proposition that it would be uneconomical for anyone to develop another facility, being all of Sydney Airport; and
- there have not been any events or circumstances that have occurred after the Full Federal Court's judgment in *Sydney Airport* that should cause the Council to consider otherwise.

### ***Declaration Guide consideration of integrated facilities***

In its Declaration Guide, the Council summarises the High Court's observations in *Pilbara Infrastructure* as follows:

*Whether it would not be profitable for someone to develop another facility to provide the service requires that 'the person could reasonably expect to obtain a sufficient return on capital that would be employed in developing that facility' (at [104]). If someone could profitably develop an alternative facility as part of a larger project, it would be*

*necessary to consider the whole project in deciding whether the development of the alternative facility, as part of that larger project, would provide a sufficient rate of return.' (at [104])<sup>69</sup>*

This summary is reflected in paragraph 4.5(j) of the Council's Declaration Guide (noted in section 8.1 above) which states that if a new facility is not profitable on a standalone basis, but thought to be profitable as an integrated part of a larger project, the assessment of profitability should include consideration of the cost of developing the new facility on overall project profitability.

Tigerair considers that the cost of developing a new facility to provide the Domestic Terminal Service as an integrated part of a larger project would make the cost of the overall project unprofitable for the following reasons:

- no party other than SACL has Commonwealth Government approval to develop a new facility to provide the Domestic Terminal Service during the period sought for declaration but even if they did, the development of a larger project would be unprofitable given the forecast consumer demand for domestic aviation services and the fact that SACL will be in a position to meet all this demand and the consequent demand for the Domestic Terminal Service as it has:
  - the capacity to satisfy existing demand using the current facilities for the Domestic Terminal Service at T2;

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<sup>68</sup> *Virgin Blue* at 76

<sup>69</sup> Declaration Guide at [4.4]

- approval to develop the new facility at Badgerys Creek and augment T2 through the construction of Piers C and D; and
- it will take SACL at least 10 years to develop a new facility to provide the Domestic Terminal Service at Badgerys Creek, that is, beyond the period sought for declaration. However, even if the facility could be developed during the period sought for declaration, the lack of demand forecast for the use of Badgerys Creek compared to the relevant facility at T2 means that during this period the cost of developing the new facility at Badgerys Creek would negatively impact on the overall profitability of the new airport.

## **8.5 Other factors listed by the Council in its Declaration Guide**

While Tigerair acknowledges that the Council recommends that a declaration applicant should provide the Council with the information listed in each of subparagraphs (a) – (j) of paragraph 4.5 of the Declaration Guide, Tigerair considers that, for the reasons given above, it would be artificial to undertake such an exercise for each subparagraph when the information already provided clearly indicates that the commercial reality is that it would be uneconomic:

- for SACL to develop another facility to provide the Domestic Terminal Service during the period sought for declaration; or
- for any other party to develop such a facility given SACL's approvals in relation to Badgerys Creek and the augmentation of T2.



## 9 Criterion (c) – the facility is of national significance

### 9.1 Interpretation of criterion (c)

Section 44G(2)(c) provides that the Council cannot recommend that a service be declared unless it is satisfied:

*that the facility is of national significance, having regard to:*

- (i) the size of the facility; or*
- (ii) the importance of the facility to constitutional trade or commerce; or*
- (iii) the importance of the facility to the national economy.*

In *Pilbara Infrastructure*, the majority of the High Court referred to how criterion (c):

*may also direct attention to matters of broad judgment of a generally political kind.*

The Council has also said that:

*Criterion (c) is a test of materiality, placing less important facilities outside the scope of Part IIIA.<sup>70</sup>*

### 9.2 Previous consideration

In *Virgin Blue*, the Tribunal considered whether Sydney Airport was of national significance and stated:

*We are satisfied that the facility at Sydney Airport is of national significance having regard to its size, its importance to constitutional trade and commerce, and its importance to the national economy. As noted earlier, approximately 50% of all international passengers arriving in Australia pass through Sydney Airport, as do approximately 30% of all domestic passengers in Australia. It is thus a major international gateway for Australia's tourism industry, and also makes a substantial and significant contribution to trade in Australia. Accordingly, we are satisfied of the matter set out in s 44H(4)(c).<sup>71</sup>*

Similarly, in *Sydney International Airport*, the Tribunal said:

*The evidence before the Tribunal, key elements of which are summarised at par 38 above, make clear the predominant and pervasive role that SIA [Sydney International Airport] plays in Australia's commercial links with the rest of the world. In 1997 in-bound and out-bound freight to a value exceeding \$21 billion was cleared at SIA. Evidence was given that 50% of the airfreight into and out of Australia goes through SIA and approximately 80% of the airfreight which goes through SIA is carried by passenger aircraft. The Tribunal is affirmatively satisfied*

<sup>70</sup> Application By Fortescue Metals Group Limited For Declaration Of Services Provided By BHP Billiton Ore Pty Ltd, 11 March 2005, page 20

<sup>71</sup> *Virgin Blue* at 78



*that the facility provided by SIA is of national significance for the purpose of s 44H(4)(c).*<sup>72</sup>

### 9.3 Sydney Airport remains a facility of national significance

As the information provided in section 4 above demonstrates, there is no reason for the Council to take a different view to the Tribunal in *Virgin Blue* and the Council should, therefore, regard criterion (c) as being satisfied.

Indeed, in a speech given to the Institute of Transport and Logistics Studies on 7 May 2013, the SACL CEO, Kerrie Mather described Sydney Airport as “Australia’s most significant piece of infrastructure” and provided the following data:

- Sydney Airport contributes \$27.6 billion to the economy a year, supporting 28,000 full-time jobs across 800 businesses and organisations;
- Sydney Airport is Australia’s gateway with 42% per cent of all international arrivals;
- Sydney Airport processed 37 million passengers in 2012;
- close to 40 airlines fly to a network of 100 destinations from Sydney Airport;
- Sydney Airport is a significant freight hub, processing 550,000 tonnes of freight a year;
- the Sydney Airport precinct generates \$27.6 billion a year, comprising:
  - \$9 billion directly generated by the airport;
  - a further \$18.3 billion in tourism and freight; and
  - equivalent to 6% of the NSW economy;
- there are 28,000 direct full-time employees across more than 800 businesses and organisations and a further 22,000 employed across the Sydney Airport precinct; and
- the Sydney Airport precinct generates a total employment figure of 234,000 full time equivalent jobs when jobs in tourism and freight sectors related to Sydney Airport are taken into account.<sup>73</sup>

### 9.4 For all airlines the fallback option of arbitration is appropriate given the essential nature of the facilities

Apart from the current access issues that Tigerair is experiencing, Tigerair considers that the essential nature of the relevant facilities at Sydney Airport for domestic aviation in Australia means that, at a broader level, it is appropriate for all airlines to have the ability to arbitrate any access dispute with SACL and that the Domestic Terminal Service is otherwise an appropriate candidate for declaration.

<sup>72</sup> *Sydney International Airport* at 79

<sup>73</sup> See Kerrie Mather, *Sydney Airport – planning for the future*, presentation to Institute of Transport and Logistics Studies, 7 May 2013 at slide 3, see [http://sydney.edu.au/business/\\_\\_\\_data/assets/pdf\\_file/0011/170489/Kerrie-Mather-Presentation.pdf](http://sydney.edu.au/business/___data/assets/pdf_file/0011/170489/Kerrie-Mather-Presentation.pdf)

## 10 Criterion (e) – access to the service is not already subject to an effective access regime

### 10.1 Test in criterion (e)

Section 44G(2)(e) provides that the Council cannot recommend that a service be declared unless it is satisfied:

*that access to the service:*

- (i) *is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or*
- (ii) *is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement*

### 10.2 Previous consideration

In *Virgin Blue*:

- the Council concluded that the Airside Service provided by SACL was not the subject of an effective access regime and that Virgin Blue's application satisfied the requirements of criterion (e); and
- the Tribunal stated:

*It was not submitted that any such regime had been established and we know of no such regime. We are satisfied that access to the service is not already the subject of an effective access regime. Accordingly, we are satisfied of the matter set out in s 44H(4)(e).*

Tigerair submits that the Domestic Terminal Service is not the subject of an effective access regime.

## 11 Criterion (f) – access to the service is in the public interest

### 11.1 Interpretation of criterion (f)

Section 44G(2)(f) provides that the Council cannot recommend that a service be declared unless it is satisfied:

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

In considering the interpretation of this criterion, the majority judges in the High Court *Pilbara Infrastructure* case observed that:

*It is well established that, when used in a statute, the expression “public interest” imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in Browning, when a discretionary power of this kind is given, the power is “neither arbitrary nor completely unlimited” but is “unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view”. It follows that the range of matters to which the Council and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed. And conferring the power to decide on the Minister (as distinct from giving to the Council a power to recommend) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.<sup>74</sup>*

In its submission to the Productivity Commission’s inquiry into the National Access Regime, the Council said:

*The High Court in the Pilbara Appeal decision has confirmed that the assessment of the public interest under criterion (f) allows for consideration of a very wide range of issues and that the nature of the powers conferred on the Minister and the Council recognise that such inquiries ‘are best suited to resolution by the holder of a political office’ (at [42]). The High Court also held that there is no ‘residual discretion’ not to declare a service where the Minister is satisfied in respect of all of the declaration criteria.*

*The Council accepts the High Court’s judgment that there is no discretion not to declare a service where all the declaration criteria are met and accepts that the breadth of the criterion (f) analysis in any case would leave little scope for a residual discretion...<sup>75</sup>*

In *Virgin Blue*, the Tribunal referred to the Council’s interpretation of criterion (f):

*According to the NCC, as criterion (f) is phrased in the negative, in a case where ss 44H(a) to (e) are satisfied, in order to make a decision not to declare a service, the costs of regulated access must outweigh the benefits of regulating natural*

<sup>74</sup> (2012) 246 CLR 379 at [42]

<sup>75</sup> National Competition Council, *Submission to Productivity Commission inquiry*, 8 February 2013 at pages 19 – 20, para 4.38 – 4.39

*monopoly services. It was said that the task for the Tribunal is to assess whether the costs of regulation outweigh the benefits of declaration and, in doing so, the costs should be recognised as including both direct costs of regulation, for example, the costs of arbitration, and indirect costs of regulation, for example, the cost of distorting efficient investment or production decisions.<sup>76</sup>*

## **11.2 Previous consideration in relation to services at Sydney Airport**

In *Virgin Blue*, the Tribunal regarded criterion (f) as being satisfied for the following reasons:

*Virgin Blue submitted that a bargaining power asymmetry exists between SACL and the airlines and that the economic expert evidence had demonstrated that declaration would assist in redressing that asymmetry, leading to a net public benefit.*

*Virgin Blue argued that where a disparity of bargaining power exists between negotiating parties, the prospect of arbitration if negotiation fails increases the likelihood of the parties reaching a commercial agreement that truly reflects a fair negotiated position. Such an outcome is in the public interest. Virgin Blue also argued that where the bargaining power is equal there is no reason to conclude that declaration, introducing the possibility of arbitration, would reduce the opportunities for commercial negotiation.*

*We agree with these submissions and consider that declaration will redress the bargaining power asymmetry presently existing due to SACL's position as a monopoly provider of the Airside Service in Sydney in circumstances where the scope of dispute resolution procedures in relation to access to the Airside Service are severely limited.*

*We consider that the availability of a binding dispute resolution process provides an incentive for parties to negotiate in a realistic, practical and positive manner in an attempt to resolve differences which affect, and have a real impact on, their daily commercial activities. Indeed, we consider that the availability of a binding dispute resolution process will bring about a more efficient outcome than a situation where no such process is available. More particularly is this so where the arbitrator has to take into account the matters specified in s 44X(1) of the TPA.*

*We do not regard the outcome of the negotiations between SACL and the airlines in relation to the issues which arose between them, and which we have discussed, as an efficient disposition of their differences. The history of the conduct of SACL to which we have referred demonstrates the desirability, indeed the necessity, of having in place a binding dispute resolution process.*

*We are satisfied that where there is significant bargaining asymmetry, as we have found exists between SACL and the airlines using Sydney Airport, a binding dispute resolution process will address such bargaining asymmetry and provide a better framework for commercial negotiation.<sup>77</sup>*

For the reasons given in section 6 and 7 above, Tigerair considers that it is clear that:

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<sup>76</sup> *Virgin Blue* at [590]

<sup>77</sup> *Virgin Blue* paras 600 - 606

- there continues to be an asymmetry in bargaining power between SACL and all the airlines, but especially smaller airlines such as Tigerair;
- in these circumstances, the prospect of arbitration if negotiation fails increases the likelihood of the parties reaching a commercial agreement that truly reflects a fair negotiated position; and
- that declaration would, therefore, assist in redressing the existing asymmetry and lead to a net public benefit.

### 11.3 The costs of regulation are low and should not prevent the service from being declared

In its Inquiry Report, the Productivity Commission stated:

*The scope of the [National Access] Regime should be confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third party access to infrastructure services...*<sup>78</sup>

Tigerair submits that declaration would be consistent with the position put by the Productivity Commission because:

- increased access to the Domestic Terminal Service would promote a material increase in competition in the dependent market for the reasons given in section 7 above;
- it would appear to be an unsatisfactory policy outcome that Tigerair could obtain the slots at Sydney Airport that it needs to viably grow its operations there but not obtain sufficient access to the Gates at T2, especially on Pier B given its under-utilisation; and
- the Tribunal's decision in *Virgin Blue* does not identify any costs of regulation that would outweigh the increase in competition in the dependent market and there have not been any circumstances since the Tribunal's decision that should result in the Council taking a different view.

In *Virgin Blue*, the Tribunal referred to SACL's submissions regarding the costs of regulation and rejected them:

*SACL submitted that the direct and indirect costs of regulation would outweigh any benefits that might be obtained in the dependent market under declaration of the Airside Service. SACL relied upon the evidence of Professor Baumol who sought to show that declaration would lead to costly regulation which would be open to strategic misuse. Professor Baumol's evidence regarding the excessive cost and perniciousness of regulation was, as he acknowledged, largely based on his experience of regulation in the United States of America and to that extent his evidence in this respect was of limited assistance.*

*The direct, immediate and up-front nature of much regulation in the United States of America contrasts with the default nature of the arbitration available under a declared service pursuant to Div 3 of Pt IIIA of the TPA. The use of arbitration under Div 3 of Pt IIIA is only activated where the parties are unable to reach agreement on one or more aspects of access to a service. Arbitration is not*

<sup>78</sup> Report, page 2

*immediate and indeed may never occur. We note in this regard Qantas' reference to Australia's past experience under s 192 of the Airports Act where no arbitrations arose in the four years during which airport services at Brisbane, Melbourne and Perth were deemed to be declared under Pt IIIA of the TPA. Further, following the declaration of ramp handling services at Sydney Airport as a result of the Tribunal's decision in Sydney International Airport, there has not been resort to arbitration under Div 3 of Pt IIIA of the TPA.*

*If arbitration were to occur, the arbitration process has the potential to be swift and relatively inexpensive. The powers of the ACCC are sufficient to ensure that any arbitration that does occur is conducted efficiently and expeditiously: see, for example, ss 44Y and 44ZF. The ACCC is not bound by the rules of procedure and may give directions as necessary for expedient hearings of matters, including for matters to be heard via telephone or video link: s 44ZF. The ACCC is also empowered to terminate an arbitration where it is vexatious, where the subject matter is trivial, misconceived or lacking in substance, or where the party notifying the dispute has not engaged in good faith negotiations: s 44Y.*

*We note that SACL's other economic expert, Mr Houston, also sought to highlight the costs and disadvantages of regulation. A key assumption of Mr Houston's analysis was that declaration would involve arbitration by the ACCC and he estimated the timing and cost to the parties involved of such an arbitration. As indicated, declaration need not result in arbitration. The parties are free to reach commercial agreements and will have a clear commercial and financial incentive to do so. The commercial negotiations would presumably be no more or less expensive with declaration. Declaration therefore does not incur costs at the stage before a Div 3 arbitration is requested.*

*We consider Mr Houston's analysis to be of little probative value. It is speculative and based on a number of assumptions that will not necessarily be valid at any given point of time. Much would depend upon the nature of the dispute and the extent to which there had been negotiations to resolve the dispute. Any estimate of such costs, particularly where arbitration is not inevitable, is speculative in the extreme. It should also be remembered that the legislation anticipates a speedy and cost efficient arbitration: s 44ZF.*

*We also observe that previous independent work by Mr Houston emphasised elements of the desirability of regulation, particularly in situations of private investment in infrastructure...*<sup>79</sup>

Tigerair submits that there is no reason why the Council should regard the Tribunal's view as to the costs of regulation as no longer being applicable. The powers of the ACCC in ss 44Y and 44ZF as described by the Tribunal remain the same and so it continues to be the case that arbitration that the ACCC can ensure that any arbitration that does occur is conducted efficiently and expeditiously.

#### **11.4 Increased competition in the dependent market will benefit Australian consumers**

As discussed in relation to criterion (a), increased access/declaration would provide the opportunity for increased competition between Tigerair and Jetstar on more routes and LCC capacity being available on more routes.

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<sup>79</sup> Virgin Blue at 591-596

The realisation of these opportunities would have clear consumer benefit as it should result in an increase in the number of Australians who can afford to travel by air for leisure purposes. This should also provide for a stronger domestic tourism industry as more Australians travel.



## 12 Duration of declaration

### 12.1 Previous consideration

In *Virgin Blue*, the Tribunal made the following comments in relation to the period of declaration:

*The issues which have given rise to the application for declaration show that the period of declaration should be sufficiently long to enable SACL and any airline using Sydney Airport to make and implement strategic business decisions. However, the period of declaration should not be so long as to deny SACL the opportunity to demonstrate that its conduct is such that continuous or renewed declaration is no longer necessary. We note that it is desirable that any decisions as to pricing proposals and the implementation of terms and conditions of access to the services offered at Sydney Airport are able to be made in such a way during the period of declaration that there is sufficient time for any access disputes to be negotiated and, if incapable of commercial resolution, to be determined by arbitration by the ACCC. It is also desirable that any period of declaration allow for the implementation of any such decisions and arbitrated issues so that during the period of declaration the consequences of such decisions and arbitrated outcomes can be observed and understood...*<sup>80</sup>

*We consider that five years is an appropriate period for declaration. In the circumstances outlined above, we initially considered that a period of seven years might be an appropriate period for declaration. However, whilst SACL and the airlines negotiated terms and conditions of access over a number of years, between 1998 and 2004, we consider that declaration will truncate any future commercial negotiations of this nature as any party will be able to insist upon arbitration if genuine and good faith negotiations do not achieve a commercial resolution. Accordingly, a period of five years is a sufficient period for declaration.*<sup>81</sup>

### 12.2 A period of 10 years is appropriate

Tigerair submits that the Council should recommend declaration for a period of 10 years because:

- the second Sydney airport at Badgerys Creek is not expected to become operational until this time;
- construction of the proposed Piers C and D at T2 is not due to start for another 15 years and is subject to a number of conditions; and
- declaration for this period should result in:
  - an expeditious resolution of the current commercial negotiations between Tigerair and SACL; or
  - the ACCC quickly determining any access dispute and Tigerair and SACL having sufficient time to implement the ACCC's decision and observe and understand the outcome.

<sup>80</sup> *Virgin Blue* at 615

<sup>81</sup> *Virgin Blue* at 617



## 13 Increased access to the Domestic Terminal Service would not have any of the effects outlined in s 44W(1) of the CCA

### 13.1 Section 44W(1) of the CCA

As the Council is aware, s 44W(1) of the CCA provides that:

*The Commission must not make a determination that would have any of the following effects:*

- (a) *preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified;*
- (b) *preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements;*
- (c) *depriving any person of a protected contractual right;*
- (d) *resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;*
- (e) *requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility;*
- (f) *requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.*

For the reasons given below, Tigerair submits that any arbitration resulting from declaration of the Domestic Terminal Service would not have any of these proscribed effects.

### 13.2 Declaration and arbitration would not prevent existing users obtaining sufficient access to meet their reasonably anticipated or actual requirements

Declaration of the Domestic Terminal Service and any subsequent arbitration would not prevent existing users obtaining sufficient access to meet either their:

- reasonably anticipated requirements (s 44W(1)(a)); or
- their actual requirements (s 44W(1)(b)).
- To reiterate, what Tigerair is seeking is:
  - access to two hard stand gates on Pier B between 0630 and 0730 during the morning peak period each morning in accordance with SACL's Aircraft Bay & Gate Allocation Procedures;
  - increased access to Pier B hardstand gates throughout the course of each day in accordance with the Aircraft Bay & Gate Allocation Procedures; and
  - access to additional check-in counters at T2.

Accordingly, all that Tigerair would be asking the ACCC to do in any notified access dispute, is require SACL to operate T2, in particular Pier B, in accordance with SACL's own Aircraft Bay & Gate Allocation Procedures on a common-user basis.

As the relevant sections of SACL's Aircraft Bay & Gate Allocation Procedures are subject to the T2 Agreements that SACL has with Jetstar and Virgin Australia, increased access to Tigerair in accordance with Aircraft Bay & Gate Allocation Procedures would not, therefore, prevent Jetstar, Virgin Australia or any other user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements. As revealed in Tigerair's observations, Pier B is not being fully utilised and the increased access that Tigerair is seeking to the Gates on Pier B at T2 can be provided by SACL without any disruption to Jetstar's schedule.

### **13.3 Declaration and arbitration would not deprive any person of a protected contractual right**

Declaration of the Domestic Terminal Service and any subsequent arbitration would not deprive any person of a "protected contractual right" because:

- as far as Tigerair is aware, none of the T2 Agreements were in force at the beginning of 30 March 1995, as the definition of "protected contractual right" requires; and
- even if the T2 Agreements were in force at this time, Tigerair is not seeking to deprive any person of a protected contractual right as it seeks access in accordance with SACL's Aircraft Bay & Gate Allocation Procedures which are relevantly subject to the T2 Agreements.

### **13.4 Declaration and arbitration would not result in a third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider**

Declaration of the Domestic Terminal Service and any subsequent arbitration would not result in a third party becoming the owner (or one of the owners) of any part of the T2 facility, or of extensions of the facility, without the consent of the provider. This is because Sydney Airport is owned by the Commonwealth Government and has been leased to SACL. Given these regulatory arrangements, and the fact that the Commonwealth Government is unlikely to be a party to any notified access dispute, arbitration could not require the Commonwealth Government to cede ownership of any part of T2 or to require it or SACL to consent to a third party becoming the owner of an extension to T2. This is especially the case when the Commonwealth Government has already approved SACL's Master Plan 2033 which provides for an extension of the T2 facility through the development of Piers C and D.

### **13.5 Declaration and arbitration would not require the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility**

Declaration of the Domestic Terminal Service and any subsequent arbitration would not require SACL to bear some or all of the costs of extending the T2 facility or maintaining extensions of T2 because:

- Pier B at T2 is not currently being fully utilised so there is no need for an extension at least in the short – medium term;
- in the long term:

- an extension of the T2 facility has already been approved by the Commonwealth Government as part of the Sydney Airport Master Plan and SACL will bear this cost; and
- the airport at Badgerys Creek will become operational providing an alternative supply of the Domestic Terminal Service to the T2 facility that may result in T2 not having to be extended.

**13.6 Declaration and arbitration would not require the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility**

As Tigerair does not envisage Declaration of the Domestic Terminal Service and any subsequent arbitration to require SACL to extend T2, it does not consider that there will be any need to develop or maintain interconnections to T2.

## 14 Conclusion

### 14.1 Tigerair will continue to seek commercial agreement with SACL

The rebranding of Tiger Airways Australia as “Tigerair” and the Virgin Australia Acquisition represent turning points in the domestic aviation industry as Tigerair seeks to provide its customers with an experience that will see them build loyalty to Tigerair and help it to improve its competitive position in a sustainable way.

In order to provide its customers with this improved experience and grow its scale to an efficient level, Tigerair must secure sufficient access to infrastructure. That is, Tigerair can only commit to further growth if it knows it has the access to infrastructure that it needs to support the delivery and viable operation of additional aircraft.

In relation to its access to the relevant facilities at T2, it remains Tigerair’s clear preference to reach commercial agreement with SACL regarding the terms and conditions on which it can be granted:

- access to two hard stand gates on Pier B in the morning peak period in accordance with SACL’s Aircraft Bay & Gate Allocation Procedures;
- increased access to Pier B hardstand gates throughout the course of each day in accordance with the Aircraft Bay & Gate Allocation Procedures; and
- access to additional check-in counters at T2 in the short term and the deployment of check-in kiosks and automated bag drop solutions at T2 in the long-term.

While Tigerair will continue to seek a mutually acceptable commercial agreement and is hopeful that such an agreement can be reached, in light of the fact that its current issues remain unresolved, Tigerair considers that it is now an appropriate time for it to seek declaration of the Domestic Terminal Service. Tigerair can no longer afford to wait to see how its commercial negotiations with SACL conclude before lodging a declaration application and having the option of arbitration available to it.

For the reasons given throughout this submission, Tigerair considers that the Council should regard each of the declaration criterion as being satisfied and that the period for declaration should be 10 years.

### 14.2 Applicant contact details

Mr Luke Woodward  
Gilbert + Tobin  
Level 37  
2 Park Street  
SYDNEY NSW 2000  
Telephone: 02 9263 4014  
Facsimile: 02 9263 4111  
Email: [lwoodward@gtlaw.com.au](mailto:lwoodward@gtlaw.com.au)

## Attachment A Jetstar aircraft movement data 1 - 7 January 2014

### 1 January 2014

The following table is based on the assumption that Tigerair will overnight TT945 (0640 DEP) on Pier A (Gate 35). The example provided reflects Tigerair overnighing 2 cold start aircraft on Pier B, with a requirement for Jetstar to tow on 3 aircraft.

The below arrow (1) indicates that JQ7000, a non-passenger "ferry flight" from either Tullamarine or Avalon, will hold for Gate 52 to be vacated by JQ571 and will depart as JQ760 to Adelaide. The below arrow (2) indicates that JQ671 from Darwin will operate outbound as JQ456 to Ballina Byron.

Flight #	Origin	Arrival time	T2 Arrival Gate	Flight #	Destination	T2 Gate	Departure time	Aircraft movement
7000	Ferry flight from either Tullamarine or Avalon	600	Hold gate 52 (1)	571	Melbourne (Tullamarine)	52	600	Aircraft terminated on bay overnight
				952	Cairns	54	600	Aircraft terminated on bay overnight
				400	Gold Coast	56	610	Aircraft terminated on bay overnight
				810	Brisbane	59	610	Aircraft terminated on bay overnight
				719	Hobart	57	615	Aircraft terminated on bay overnight
				<b>TT386</b>	<b>Mackay</b>	<b>55</b>	<b>640</b>	Suggest Tigerair to tow on or overnight on this bay
				√760	Adelaide	52	645	Aircraft terminated on bay overnight
671	Darwin	650	55 (2)	<b>TT507</b>	<b>Melbourne (Tullamarine)</b>	<b>58</b>	<b>655</b>	Suggest Tigerair to tow on or overnight on this bay
			(2)	402	Gold Coast	53	700	Aircraft terminated on bay overnight
				501	Melbourne (Tullamarine)	49	700	Aircraft terminated on bay overnight
				603	Melbourne (Avalon)	54	705	Aircraft to be towed on after the departure of JQ925
				745	Launceston	56	710	Aircraft to be towed on after the departure of JQ400
				984	Perth	57	710	Aircraft to be towed on after the departure of JQ719
				√456	Ballina Byron	55	720	

2 January 2014

The following is based on the assumption that Tigerair will overnight TT945 (0640 DEP) on Pier A (Gate 35). The example provided reflects Tigerair overnighting 2 cold start aircraft on Pier B, with a requirement for Jetstar to tow on 5 aircraft.

Flight #	Origin	Arrival time	T2 Arrival Gate	Flight #	Destination	T2 Gate	Departure time	Aircraft movement
				571	Melbourne (Tullamarine)	52	600	Aircraft terminated on bay overnight
				952	Cairns	54	610	Aircraft terminated on bay overnight
				400	Gold Coast	56	610	Aircraft terminated on bay overnight
				810	Brisbane	59	610	Aircraft terminated on bay overnight
				719	Hobart	57	615	Aircraft terminated on bay overnight
				760	Adelaide	55	645	Aircraft terminated on bay overnight
671	Darwin	650	55					
				TT386	Mackay	58	655	Suggest Tigerair to tow on or overnight on this bay
				TT507	Melbourne (Tullamarine)	53	655	Suggest Tigerair to tow on or overnight on this bay
				402	Gold Coast	49	700	Aircraft terminated on bay overnight
				501	Melbourne (Tullamarine)	52	700	Aircraft to be towed on after the departure of JQ571
				984	Perth	54	700	Aircraft to be towed on after the departure of JQ952
				603	Melbourne (Avalon)	56	705	Aircraft to be towed on after the departure of JQ400
				745	Launceston	59	710	Aircraft to be towed on after the departure of JQ 810
				456	Ballina Byron	57	720	Aircraft to be towed on after the departure of JQ719

### 3 January 2014

The following is based on the assumption that Tigerair will overnight TT507 (0635 DEP) on Pier A (Gate 35). The example provided reflects Tigerair overnighting 2 cold start aircraft on Pier B, with a requirement for Jetstar to tow on 4 aircraft.

The below arrow (1) indicates JQ989 from Perth will operate JQ456 to Ballina Byron.

The below arrow (2) indicates that Tigerair flight TT823 will depart at 0640 and JQ671 will hold for Gate 58 to be vacated before taxing on to bay and will depart as JQ721 to Hobart.

Flight #	Origin	Arrival time	T2 Arrival Gate	Flight #	Destination	T2 Gate	Departure time	Aircraft movement
				571	Melbourne (Tullamarine)	52	600	Aircraft terminated on bay overnight
				952	Cairns	54	600	Aircraft terminated on bay overnight
				400	Gold Coast	56	610	Aircraft terminated on bay overnight
				810	Brisbane	59	610	Aircraft terminated on bay overnight
				719	Hobart	57	615	Aircraft terminated on bay overnight
989	Perth	620	57					
			(1)	TT823	Brisbane	58	640	Suggest Tigerair to tow on or overnight on this bay
671	Darwin	635	58 Hold gate	760	Adelaide	55	645	
			(2)	TT386	Mackay	53	655	Suggest Tigerair to tow on or overnight on this bay
				402	Gold Coast	49	700	Aircraft terminated on bay overnight
				501	Melbourne (Tullamarine)	52	700	Aircraft to be towed on after the departure of JQ571
				603	Melbourne (Avalon)	54	705	Aircraft to be towed on after the departure of JQ952
				745	Launceston	59	710	Aircraft to be towed on after the departure of JQ810
				984	Perth	56	710	Aircraft to be towed on after the departure of JQ400
				456	Ballina Byron	57	720	
602	Melbourne (Avalon)	725	55	721	Hobart	58	800	
502	Melbourne (Tullamarine)	800		507	Melbourne (Tullamarine)		840	

4 January 2014

The following is based on the assumption that Tigerair will overnight TT945 (0645 DEP) on Pier A (Gate 35). The example provided reflects Tigerair overnighting 1 cold start aircraft on Pier B, with a requirement for Jetstar to tow on 3 aircraft. In order to accommodate for a further Tiger cold start departure (example: TT232 0715 DEP) there would be a requirement for Tigerair to tow on the aircraft after the departure of JQ810 (0610 DEP).

The below arrow indicates that JQ989 from Perth will operate outbound as JQ456 to Ballina Byron.

Flight #	Origin	Arrival time	T2 Arrival Gate	Flight #	Destination	T2 Gate	Departure time	Aircraft movement
				571	Melbourne (Tullamarine)	52	600	Aircraft terminated on bay overnight
				952	Cairns	54	600	Aircraft terminated on bay overnight
				400	Gold Coast	56	610	Aircraft terminated on bay overnight
				810	Brisbane	59	610	Aircraft terminated on bay overnight
				719	Hobart	57	615	Aircraft terminated on bay overnight
989	Perth	620	57					
				760	Adelaide	55	645	Aircraft terminated on bay overnight
671	Darwin	650	55					
				TT507	Melbourne (Tullamarine)	58	655	Suggest Tigerair to tow on or overnight on this bay
				402	Gold Coast	53	700	Aircraft terminated on bay overnight
				501	Melbourne (Tullamarine)	49	700	Aircraft terminated on bay overnight
				603	Melbourne (Avalon)	52	705	Aircraft to be towed on after the departure of JQ571
				745	Launceston	54	710	Aircraft to be towed on after the departure of JQ952
				984	Perth	56	710	Aircraft to be towed on after the departure of JQ400
				TT232	Gold Coast	59	715	Requirement for Tigerair to tow on after the departure of JQ810
				456	Ballina Byron	57	720	
602	Melbourne (Avalon)	725	53	721	Hobart	53	800	
502	Melbourne (Tullamarine)	800		507	Melbourne (Tullamarine)		840	
401	Gold Coast	840						



5 January 2014

The following is based on the assumption that Tigerair will overnight TT945 (0635 DEP) on Pier A (Gate 35). The example provided reflects Tigerair overnighting 1 cold start aircraft on Pier B, with a requirement for Jetstar to tow on 4 aircraft. In order to accommodate for a further Tiger cold start departure (example: TT945 0705 DEP) there would be a requirement for Tigerair to tow on the aircraft after the departure of JQ719 (0615 DEP).

The below arrow indicates that JQ671 from Darwin will operate outbound as JQ721 to Hobart.

Flight #	Origin	Arrival time	T2 Arrival Gate	Flight #	Destination	T2 Gate	Departure time	Aircraft movement
				571	Melbourne (Tullamarine)	52	600	Aircraft terminated on bay overnight
				952	Cairns	54	600	Aircraft terminated on bay overnight
				400	Gold Coast	56	610	Aircraft terminated on bay overnight
				810	Brisbane	59	610	Aircraft terminated on bay overnight
				719	Hobart	57	615	Aircraft terminated on bay overnight
				760	Adelaide	55	645	Aircraft terminated on bay overnight
671	Darwin	650	55					
				TT386	Mackay	58	655	Suggest Tigerair to tow on or overnight on this bay
				402	Gold Coast	53	700	Aircraft terminated on bay overnight
				501	Melbourne (Tullamarine)	49	700	Aircraft terminated on bay overnight
				TT945	Cairns	57	705	Requirement for Tigerair to tow on after the departure of JQ719
				603	Melbourne (Avalon)	52	705	Aircraft to be towed on after the departure of JQ571
				745	Launceston	54	710	Aircraft to be towed on after the departure of JQ952
				984	Perth	56	710	Aircraft to be towed on after the departures of JQ400
				456	Ballina Byron	59	720	Aircraft to be towed on after the departure of JQ810
602	Melbourne (Avalon)	725	58	721	Hobart	55	800	
502	Melbourne (Tullamarine)	800		507	Melbourne (Tullamarine)		840	

6 January 2014

The following is based on the assumption that Tigerair will overnight TT507 (0635 DEP) on Pier A (Gate 35). The example provided reflects Tigerair overnighting 1 cold start aircraft on Pier B, with a requirement for Jetstar to tow on 3 aircraft. Not operationally feasible to accommodate for second Tiger departure due to JQ602 and JQ502 arrival.

The below arrow indicates that JQ989 from Perth will operate outbound as JQ603 to Melbourne (Avalon).

Flight #	Origin	Arrival time	T2 Arrival Gate	Flight #	Destination	T2 Gate	Departure time	Aircraft movement
				571	Melbourne (Tullamarine)	52	600	Aircraft terminated on bay overnight
				952	Cairns	54	600	Aircraft terminated on bay overnight
				400	Gold Coast	56	610	Aircraft terminated on bay overnight
				810	Brisbane	59	610	Aircraft terminated on bay overnight
				719	Hobart	57	615	Aircraft terminated on bay overnight
989	Perth	620	57					
				760	Adelaide	55	645	Aircraft terminated on bay overnight
671	Darwin	650	55					
				402	Gold Coast	53	700	Aircraft terminated on bay overnight
				501	Melbourne (Tullamarine)	49	700	Aircraft terminated on bay overnight
				TT945	Cairns	58	705	Suggest Tigerair to tow on or overnight on this bay
				603	Melbourne (Avalon)	57	705	
				745	Launceston	52	710	Aircraft to be towed on after the departure of JQ571
				984	Perth	54	710	Aircraft to be towed on after the departure of JQ952
				456	Ballina Byron	56	720	Aircraft to be towed on after the departure of JQ400
602	Melbourne (Avalon)	725	53					
502	Melbourne (Tullamarine)	740	49					

## 7 January 2014

The following is based on the assumption that Tigerair will overnight TT945 (0640 DEP) on Pier A (Gate 35). The example provided reflects Tigerair overnighing 1 cold start aircraft on Pier B, with a requirement for Jetstar to tow on 4 aircraft. Not operationally feasible to accommodate for second Tiger departure due to JQ989 and JQ671 arrival.

The below arrow indicates that JQ989 from Perth will operate outbound as JQ721 to Hobart.

Flight #	Origin	Arrival time	T2 Arrival Gate	Flight #	Destination	T2 Gate	Departure time	Aircraft movement
				571	Melbourne (Tullamarine)	52	600	Aircraft terminated on bay overnight
				952	Cairns	54	600	Aircraft terminated on bay overnight
				400	Gold Coast	56	610	Aircraft terminated on bay overnight
				810	Brisbane	59	610	Aircraft terminated on bay overnight
				719	Hobart	57	615	Aircraft terminated on bay overnight
989	Perth	620	57					
				760	Adelaide	55	645	Aircraft terminated on bay overnight
671	Darwin	650	55					
				TT386	Mackay	58	655	Aircraft terminated on bay overnight
				402	Gold Coast	53	700	Aircraft terminated on bay overnight
				501	Melbourne (Tullamarine)	49	700	Aircraft terminated on bay overnight
				603	Melbourne (Avalon)	52	705	Aircraft to be towed on after the departure of JQ571
				745	Launceston	54	710	Aircraft to be towed on after the departure of JQ952
				984	Perth	56	710	Aircraft to be towed on after the departure of JQ400
				456	Ballina Byron	59	720	Aircraft to be towed on after the departure of JQ810
602	Melbourne (Avalon)	725	53	721	Hobart	57	800	
502	Melbourne (Tullamarine)	800		507	Melbourne (Tullamarine)		840	
401	Gold Coast	840						

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## Attachment B    Tigerair observations on 11 June 2014

On 11 June 2014, Tigerair conducted additional observations of Jetstar aircraft movement on Pier B at T2.

The table below summarises Tigerair's observations.

Tigerair considers that the data in the table below reveals a possibility for Tigerair to operate:

- 3 scheduled departures prior to 0730 on Pier B Gates 54, 58 and 59 in accordance with the Aircraft Bay & Gate Allocation Procedures and without any disruption to Jetstar's schedule; and
- 2 additional scheduled departures at times before 11.15am.

### ***Possibility of 3 scheduled Tigerair services prior to 0730***

In the table below it can be seen that:

- JQ671, which arrived from Darwin at 0640 on Gate 55, did not operate outbound as JQ764 to Adelaide until 1050, denying usage of that Gate for a flight in between those times;
- the Jetstar aircraft scheduled to operate JQ404 to the Gold Coast at 0850 terminated on Gate 59 the night before (10 June 2014), denying usage of that Gate for an earlier flight;
- the Jetstar aircraft scheduled to operate JQ456 to Ballina Byron at 1000 terminated on Gate 54 the night before (10 June 2014), denying usage of that Gate for an earlier flight;
- the Jetstar aircraft scheduled to operate JQ511 to Melbourne at 11000 terminated on Gate 58 the night before (10 June 2014), denying usage of that Gate for an earlier flight; and
- JQ602, which arrived from Avalon at 0725 on Gate 56, did not operate outbound as JQ954 to Cairns until 1115, denying usage of that Gate for a flight in between those times.

# 11 June 2014 observations

Flight #	Origin	Arrival time	T2 Arrival Gate	Flight #	Destination	T2 Gate	Departure Time	Aircraft movement
671	DRW	640	55	952	Cairns	55	600	Aircraft terminated on bay overnight
				503	Melbourne (Tullamarine)	57	645	Aircraft terminated on bay overnight
				603	Melbourne (Avalon)	49	700	Aircraft terminated on bay overnight
				402	Gold Coast	52	705	Aircraft terminated on bay overnight
				986	Perth	53	710	Aircraft terminated on bay overnight
				745	Launceston	56	720	Aircraft terminated on bay overnight
602	AVV	725	56					
401	OOL	740	49	782	Maroochydore (Sunshine Coast)	49	845	
				404	Gold Coast	59	850	Aircraft terminated on bay overnight
502	MEL	855	53	507	Melbourne (Tullamarine)	53	935	
				456	Ballina Byron	54	1000	Aircraft terminated on bay overnight
953	CNS	945	49	938	Cairns	49	1040	
823	ADL	950	53	723	Hobart	53	1045	
				764	Adelaide	55	1050	
506	MEL	1015	52	824	Brisbane	52	1055	
				511	Melbourne (Tullamarine)	58	1100	Aircraft terminated on bay overnight
				954	Cairns	56	1115	

## Attachment C List of attachments

	Date	Author	Title	Source
1.	31 July 2013	ACCC	<a href="#">Public Competition Assessment, "Virgin Australia Holdings Limited - proposed acquisition of 60% of Tiger Airways Australia Pty Ltd"</a>	ACCC website
2.	15 August 2013	Qantas	<a href="#">QantasLink moves to Terminal Three at Sydney Airport</a>	Qantas website
3.	2006	N/A	<a href="#">Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146; (2006) 232 ALR 454</a>	N/A
4.	2013	National Competition Council	<a href="#">Declaration of Services: A guide to declaration of services under Part IIIA of the Competition and Consumer Act 2010 (Cth)</a>	National Competition Council website
5.	7 May 2013	Kerrie Mather	<a href="#">Sydney Airport – planning for the future, presentation to Institute of Transport and Logistics Studies</a>	University of Sydney website
6.	2005	N/A	<a href="#">Virgin Blue Airlines Pty Limited [2005] ACompT 5</a>	N/A
7.	2000	N/A	<a href="#">Sydney International Airport [2000] ACompT 1</a>	N/A
8.	2 July 2011	CASA	<a href="#">Tiger Airways Australia suspended</a>	CASA website
9.	10 August 2011	CASA	<a href="#">Tiger Airways suspension lifted</a>	CASA website
10.	7 February 2013	ACCC	<a href="#">Statement of Issues, Virgin Australia – proposed acquisition of 60% of Tiger Airways Australia</a>	ACCC website
11.	9 December 2013	Matt O'Sullivan	<a href="#">Jetstar to close Darwin base and cut NT flights</a>	SMH website
12.	Undated	Sydney Airport	<a href="#">Company Overview</a>	Sydney Airport website
13.	April 2014	ACCC	<a href="#">Airport Monitoring Report 2012-13</a>	ACCC website
14.	Undated	SMH	<a href="#">SYD – SYDNEY AIRPORT</a>	SMH website

	Date	Author	Title	Source
15.	Undated	Sydney Airport	<a href="#">Ownership</a>	Sydney Airport website
16.	1998	ACCC	<a href="#">Draft Guide to Section 192 of the Airports Act</a>	ACCC website
17.	20 January 2014	Diio Mi	LCC share of available domestic scheduled seats at Sydney Airport	Diio Mio - not publicly available
18.	Undated	Sydney Airport	<a href="#">Sydney Airport Master Plan 2033</a>	Sydney Airport website
19.	20 November 2013	Catherine Clifford	<a href="#">CASA asks Brindabella to complete overdue engine checks</a>	ABC News website
20.	12 December 2013	CASA	<a href="#">Brindabella Airlines maintenance reviews</a>	CASA website
21.	16 December 2013	ABC News	<a href="#">Brindabella Airlines goes into receivership, 140 staff stood down, all flights suspended</a>	ABC News website
22.	30 April 2014	Rebecca LeMay	<a href="#">Qantas fighting hard to hold market share</a>	The Age website
23.	2010	N/A	<a href="#">In the matter of Fortescue Metals Group [2010] AComp T 2</a>	N/A
24.	15 April 2014	Prime Minister and Deputy Prime Minister and Minister for Infrastructure and Regional Development	<a href="#">Joint press release: Western Sydney Airport to deliver jobs and infrastructure</a>	Department of Infrastructure and Regional Development website
25.	25 October 2013	Productivity Commission	<a href="#">National Access Regime, Inquiry Report No. 66</a>	Productivity Commission website
26.	2 March 2012	Independent Steering Committee of government and industry experts	<a href="#">Joint Study on aviation capacity in the Sydney region</a>	Department of Infrastructure and Regional Development website
27.	Undated	Department of Infrastructure and Regional	<a href="#">Why do we need an airport in Western Sydney?</a>	Sydney Airport website

	Date	Author	Title	Source
		Development		
28.	Undated	Sydney Airport	<a href="#">Sydney Airport Capacity – The Facts</a>	Sydney Airport website
29.	2012	N/A	<a href="#">Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379</a>	N/A
30.	1 November 2012	National Competition Council	<a href="#">Council submission to the Productivity Commission's inquiry into the National Access Regime</a>	National Competition Council website
31.	November 2003	National Competition Council	<a href="#">Application by Virgin Blue for Declaration of Airside Services at Sydney Airport, Final Recommendation</a>	National Competition Council website
32.	Undated	Department of Infrastructure and Regional Development	<a href="#">Building an airport at Badgerys Creek</a>	Department of Infrastructure and Regional Development website
33.	11 March 2005	National Competition Council	<a href="#">Application By Fortescue Metals Group Limited For Declaration Of Services Provided By BHP Billiton Ore Pty Ltd - Issues Paper</a>	National Competition Council website
34.	8 February 2013	National Competition Council	<a href="#">Submission to Productivity Commission inquiry</a>	Productivity Commission website