

APPLICATION BY VIRGIN BLUE FOR DECLARATION OF AIRSIDE SERVICES AT SYDNEY AIRPORT

ISSUES PAPER

National Competition Council

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Background

On 1 October 2002, the Council received an application under Part IIIA of the *Trade Practices Act 1974* (TPA) from Virgin Blue Airlines Pty Ltd (Virgin Blue) for a recommendation to declare the following services:

1. for the use of runways, taxiways, parking aprons and other associated facilities (Airside Facilities) necessary to allow aircraft 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
2. 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 (Domestic Terminal Service).

On 26th November 2002, Virgin Blue wrote to the Council informing it that Virgin Blue and Sydney Airports Corporation Limited (SACL) had reached commercial agreement on terminal access. Virgin Blue foreshadowed that once final documentation reflecting the agreement is entered into by the parties, it intends to withdraw its application for declaration of Domestic Terminal Services. Until such time as this occurs, Virgin Blue requested that the Council put on hold further consideration of the application for declaration of Domestic Terminal Services. It did, however, ask the Council to proceed with consideration of Virgin Blue's application for declaration of the Airside Services pursuant to its original application. The Council considers this course of action appropriate. As such, this issues paper relates to the application for Airside Services only and does not relate to Domestic Terminal Services.

Submissions

The Council is required to assess Virgin Blue's application against the criteria in Part IIIA of the TPA and to make a recommendation to the designated Minister.

The Council is calling for submissions on issues relevant to this application from interested parties. To assist in the preparation of submissions, the Council has developed this issues paper which:

- provides a description of Part IIIA and the declaration process;
- includes the applicant's arguments in support of its application¹; and
- raises issues for comment.

Interested parties should feel free to comment on issues additional to those raised in this paper.

Unless confidentiality is requested, submissions will be treated as public documents and be published on the Council's web page. A submission with confidential information should have the confidential sections marked and separated. Two copies should be provided – one with the confidential sections and the other without confidential sections, suitable for public release. If the Council considers that a submission does not warrant confidential treatment, it will advise the interested party of its decision. It can then agree to publish or withdraw the submission.

Written submissions should be sent to Ms Deborah Cope , Acting Executive Director, National Competition Council, GPO Box 250B, Melbourne VIC 3001, or e-mailed to info@ncc.gov.au by 28 February 2003.

It would be appreciated if respondents could supply a copy of their submission in both electronic and print form.

Any queries should be directed to Ms Nevenka Codevelle on (02) 9590 9950 or to the above e-mail address.

¹ The application together with the amendment to the original application is available from the Council's website at www.ncc.gov.au

Abbreviations and glossary of terms

ACCC	Australian Competition and Consumer Commission
ACTO	Australian Cargo Terminal Operators Pty Ltd
Airside Service	According to Virgin Blue's application, the use of runways, taxiways, parking aprons and other associated facilities necessary to allow aircraft domestic passengers to: <ul style="list-style-type: none"> (i) take off and land using the runways at Sydney Airport; and (ii) move between the runways and the passenger terminals at Sydney Airport
CoAG	Council of Australian Governments
Council	National Competition Council
CPA	Competition Principles Agreement
FAC	Federal Airports Corporation
NCP	National Competition Policy
Part IIIA	Part IIIA of the Trade Practices Act 1974
Phase 1 airports	Airports leased to private operators in 1997 - Brisbane, Melbourne and Perth.
Phase 2 airports	Airports leased to private operators in 1998 - Adelaide, Alice Springs, Canberra, Coolangatta, Darwin, Hobart, Launceston, Townsville, Mount Isa, Tennant Creek, Archerfield, Jandakot, Moorabbin and Parafield.
PC	Productivity Commission
PSA	Prices Surveillance Act 1983
SACL	Sydney Airports Corporation Limited
TPA	Trade Practices Act 1974

Tribunal	Australian Competition Tribunal
Virgin Blue	Virgin Blue Airlines Pty Ltd ACN 090 670 968

The national access regime

In April 1995, the Council of Australian Governments (CoAG) adopted the National Competition Policy reform package. Part IIIA of the TPA formed part of this package. It establishes a national access regime under which access seekers may gain a legal right to use the services of natural monopoly infrastructure. The rationale for providing access to such services is to promote competition in upstream and downstream markets.

Part IIIA sets out three pathways for access:

- *Declaration (and arbitration)*: any person, including the designated Minister, can apply to have a service ‘declared’. If declared, access seekers and the access provider are required to negotiate terms and conditions of access. The Australian Competition and Consumer Commission (ACCC) will arbitrate any disputes against Part IIIA criteria. Declaration is made for a specified period and does not give an access seeker exclusive rights to the declared service.
- *Certified (effective) regimes*: where an ‘effective’ access regime already exists, declaration is not available and an access seeker must rely on the effective regime for access. An access regime can be certified as effective if the designated Commonwealth Minister (following receipt of a recommendation from the Council) is satisfied that the regime meets the clause 6 criteria contained in the Competition Principles Agreement (CPA).
- *Undertakings*: access providers can give an undertaking to the ACCC setting out access terms and conditions to their services. If accepted, the undertakings are legally binding and available to all access seekers.

Declaration process

Under the declaration pathway, a business wanting access to a particular service must apply to the Council to have the service declared. The Council considers the application before forwarding a recommendation to the designated Minister,² who decides whether or not to declare the service. The Minister’s decision, in turn, may be appealed to the Australian Competition Tribunal (the Tribunal).

² The State Premier or the Chief Minister of the Territory are the designated Ministers where the provider in question is a State or Territory body and the State or Territory concerned is a party to the Competition Principles Agreement. In all other circumstances the designated Minister is the Commonwealth Minister (s44D(1)).

Declaration of a service does not provide the access seeker with an automatic right to use that service. Rather, it:

...opens the door, but before an applicant to use the service can become entitled to use the service the applicant must progress to the second stage and either reach an agreement for access with the service provider or, in default of an agreement, have its request for access determined through an arbitration by the Australian Consumer and Competition Commission (Sydney Airport decision, paragraph 7).

While declaration in itself does not entitle the access seeker to access, it is an important step as it provides for an enforceable right to dispute resolution if negotiation fails. In its role as arbitrator, the ACCC may, among other things, require the provision of access and specify the relevant terms and conditions. In reaching its determination, the ACCC must take into account the matters set out in s. 44X(1) of the TPA.

The ACCC's determination is reviewable by the Tribunal.³

Criteria for declaring access

The Council cannot recommend that a service be declared unless the Council is satisfied of all of the following matters, which are set out in s. 44G(2) of the TPA:

- (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;*
- (b) that it would be uneconomical for anyone to develop another facility to provide the service;*
- (c) 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;*
- (d) that access to the service can be provided without undue risk to human health or safety;*
- (e) that access to the service is not already the subject of an effective access regime; and*

³ The declaration/arbitration process is set out in more detail in Appendix A.

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

The Council must also consider whether it would be economical for anyone to develop another facility that could provide *part* of the service: s. 44F(4).

In interpreting the declaration criteria, the Council has used general principles of statutory interpretation and has accorded primacy to the language of the declaration criteria. In addition, the Council has regard to the following matters:

1. Relevant decisions of the Tribunal and the Federal Court. In particular, the declaration criteria have been considered by the Tribunal in the *Application for review of the decision by the Commonwealth Treasurer & published on 14 August 1996 not to declare the "Austudy Payroll Deduction Service" under Part IIIA of the Trade Practices Act 1974; by Australian Union of Students [1997] ACompT 1* ("the Australian Union of Students decision"); and the *Application For Review Of The Declaration By The Commonwealth Treasurer Published On 30 June 1997 Of Certain Freight Handling Services Provided By The Federal Airports Corporation At Sydney International Airport [2000] ACompT 1* ("the Sydney Airport decision"). The Federal Court also considered the criteria in *Hamersley Iron Pty Ltd v National Competition Council and others* (1999) ATPR 41-705.
2. Decisions of the Tribunal in relation to applications for coverage of gas pipelines for the purpose of the Gas Pipelines Access Law and the National Gas Code. This is because, apart from some minor variations, the words of the coverage criteria in section 1.9 of the National Gas Code are the same as the words of the declaration criteria in section 44G(2) of the TPA. The coverage criteria under the National Gas Code have been considered by the Tribunal in *Re: Application Under Section 38(1) Of The Gas Pipelines Access Law For Review Of The Decision By The Minister For Industry, Science And Resources Published On 16 October 2000 To Cover The Eastern Gas Pipeline Pursuant To The Provisions Of The National Third Party Access Code For Natural Gas Pipeline Systems And The Gas Pipelines Access Law [2001] ACompT 2* ("Eastern Gas pipeline decision").
3. The objectives underlying Part IIIA of the TPA. Guidance on these objectives can be found in the Hilmer Report.
4. Economic approaches to issues raised in relation to previous applications for declaration and applications for coverage, and revocation of coverage, of gas pipelines by the Gas Code considered by the Council. The Council has had particular regard to the work of Janusz A Ordovery and William Lehr, *Should Coverage of the Moomba to Sydney Pipeline be Revoked?* (Ordovery and Lehr 2001), which focused specifically on the East Australian Pipeline Limited's application for the revocation of coverage of two pipelines within the Moomba to Sydney Pipeline System under the National Gas Code.

This issues paper considers the criteria in a different order from that laid out in s. 44G(2). Conceptually, the Council considers it logical to begin with criterion (b), as it focuses on the issue of the service to which access is sought and the facility providing that service and asks whether that facility exhibits natural monopoly characteristics. Criterion (a) is wider in scope as it requires consideration of industry structure, the related but distinct markets from the market for the service and whether the service provider is able to exercise market power in those related markets because the provision of the service has natural monopoly characteristics. In other words, criterion (a) is concerned with whether the facility is a “bottleneck” facility. That a facility exhibits natural monopoly characteristics (and so satisfies criterion (b)) is a necessary but not sufficient pre-condition for the facility to be a “bottleneck” facility (and so satisfy criterion (a)). Thus, assessing criterion (b) before assessing criterion (a) is not only preferable as a matter of logic, but also ensures intellectual rigour in the assessment of an application for declaration of a service provided by means of an infrastructure facility. This approach is consistent with the approach adopted by the Tribunal in the Eastern Gas Pipeline decision.

The process adopted by the Council for considering the criteria can be broadly summarised as follows:

- define the “service” provided by means of the infrastructure facility, delineating the physical assets that comprise the “facility” and identifying the “provider” of the “service”;
- examine whether it is economic to develop another facility to provide the service. Such an assessment is relevant to whether criterion (b) is met;
- if development of another facility to provide the service would be uneconomical, assess whether the natural monopoly characteristics associated with the provision of the service confer substantial market power in a dependent market. As part of this evaluation, dependent markets will need to be identified, as will the indicia of market power. For example, in the Eastern Gas Pipeline decision, the Tribunal examined demand in Sydney, capacity to supply that demand, likely spare capacity, the commercial imperatives facing Duke, the countervailing power of other market participants in dependent markets and other sources of supply to dependent markets to determine whether the Eastern Gas Pipeline possesses market power in dependent markets. Such an assessment is relevant to whether criterion (a) is met;
- assess whether the facility is of national significance, having regard to the size of the facility, the importance of the facility to trade or commerce or the importance of the facility to the national economy. This is relevant to criterion (c);
- assess whether access to the service can be provided safely. This is relevant to criterion (d);

- assess whether access to the service is already the subject of an effective access regime. Such an assessment is relevant to whether criterion (e) is met; and
- determine whether access would not be contrary to the public interest. This is relevant to criterion (f). This criterion comes into play if the other criteria are satisfied and enables account to be taken of other factors not raised under the other criteria, for example, the regulatory costs involved in providing access.

Background to Sydney Airport access application

Background

Sydney Airport is Australia's largest and busiest airport. It is operated by Sydney Airports Corporation Limited (SACL), formerly a corporatised Commonwealth entity. On 25 June 2002, Sydney Airport was sold by the Commonwealth Government to Southern Cross Airports Corporation, a consortium of companies sponsored by Macquarie Bank Ltd, HOCHTIEF AirPort GmbH and the Commonwealth Bank of Australia.⁴ SACL is the owner of Sydney Airport and the lessee of the land upon which Sydney Airport is situated.

Virgin Blue began operations as a low-fare domestic carrier in Australia on 31 August 2000 at which time Qantas and Ansett were the incumbent domestic airlines. In September 2001, Ansett was placed in voluntary administration and in March 2002, it ceased flying. Since Ansett's collapse, both Qantas and Virgin Blue have expanded their domestic capacity. Since it began operations, Virgin Blue has significantly expanded the number of routes it services. It currently services most major Australian domestic routes. Virgin Blue seeks to continue its expansion in the Australian air travel market.

In Sydney, domestic passengers are currently processed through one of the following three terminals:

- The Domestic Express Terminal (DET), which has 5 gates and is operated by SACL. Virgin Blue currently operates from this terminal.
- The Qantas Terminal which has 13 gates and is operated by Qantas.
- The former Ansett terminal ("Terminal 2") which has 18 gates and is operated by SACL. Terminal 2 now operates as a common-user terminal with Regional Express ("Rex"), QantasLink, Horizon and Aeropelican airlines operating out of this terminal.

On 6 November 2002, Virgin Blue and SACL announced that they had reached an agreement on terms and conditions of access to Terminal 2. In particular, the agreement enables Virgin Blue to use six terminal gates on a priority basis, with access to up to another six gates on a common use basis. The result of the agreement will be that, a total of 13 out of the 18 gates at

⁴ *Sydney Airport Sells For \$5.588 Billion*, Sydney Airport Press Release 25 June 2002, <http://www.sydneyairportmedia.com/upload/sydneyairportsale.html>

Terminal 2 will have been assigned between the five airlines, with the additional 5 gates available for either increased capacity for growth of the existing domestic airlines or a prospective third entrant.⁵

Access regulation for airports

There are two separate legislative instruments providing for access to airports in Australia: an airports-specific instrument (s. 192 of the *Airports Act 1996*); and a general instrument (Part IIIA of the TPA). In addition, access arrangements for privatised airports are also contained in the individual airport leases.

Section 192 of the *Airports Act 1996* sets out an access regime for all privatised airports designated as core-regulated airports under the Act.⁶ Sydney Airport is not a core-regulated airport under the Act. Accordingly, s.192 of the Act does not apply to Sydney Airport.

Following its report entitled *Price Regulation of Airport Services*, the Productivity Commission recommended the phase out of this special access arrangement for airports which was introduced as a transitional measure to streamline the access processes to the newly privatised airports. The Government accepted these recommendations. From 1 July 2002, persons wanting access to a particular service within a phase 1 airport must apply to the Council to have the service declared under part IIIA of the TPA.⁷

Persons seeking declaration of services at airports not designated as core-regulated airports under the *Airports Act 1996* must use the general access provisions of Part IIIA of the TPA. Since services at Sydney Airport were not declared by the Minister under s. 192 of the *Airports Act 1996*, the Part IIIA regime has always applied to it, and continues to do so.

Sydney Airport decision

There has been one application for declaration of an airport service under Part IIIA. In November 1996, the Council received an application from Australian Cargo Terminal Operators Pty Ltd (ACTO) for the declaration of

⁵ *Virgin Blue To Move Into Sydney T2*, Virgin Blue Press Release 6 November 2002, <http://www.virginblue.com/news/nov2002.html#061102>; Sydney Airport And Virgin Blue Reach Agreement On T2, Sydney Airport Press Release 6 November 2002, http://www.sydneyairportmedia.com/upload/FINALVB_T2_agrmt_rel051102.htm.

⁶ These are Brisbane, Melbourne and Perth airports ("Phase 1 airports"); and Adelaide, Alice Springs, Canberra, Coolangatta, Darwin, Hobart, Launceston, Townsville, Mount Isa, Tennant Creek, Archerfield, Jandakot, Moorabbin and Parafield airports ("Phase 2 airports")

⁷ From 1 July 2003, declaration applications can be made for access to services within phase 2 airports.

services provided through facilities owned by the Federal Airports Corporation (FAC) at Sydney and Melbourne International Airports. In May 1997, the Council recommended declaration of these services. The Minister subsequently declared these services. The FAC sought review of the Minister's decision in respect of the services provided by Sydney International Airport. On 1 March 2000, the Australian Competition Tribunal upheld declaration of the services of Sydney International Airport in the Sydney Airport decision. Specifically, the Tribunal:

1. declared the service provided by the use of the freight and passenger aprons and the hard stands at Sydney International Airport for the purpose of enabling ramp handlers to load freight from loading equipment onto international aircraft and to unload freight from international aircraft onto unloading equipment; and
2. declared the service provided by the use of an area at Sydney International Airport for the purpose of enabling ramp handlers:
 - (a) to store equipment used to load and unload international aircraft; and
 - (b) to transfer freight from trucks to unloading equipment and to transfer freight from unloading equipment to trucks, at the airport.

These declarations were effective from 1 March 2000 and will expire on 28 February 2005.

Defining the service and the facility and identifying the provider

The service

Background

The starting point for the application of each of the declaration criteria is the identification of the service provided by means of the infrastructure facility.

The types of services that are declarable under Part IIIA are defined in s 44B as the following:

‘service’ means a service provided by means of a facility and includes:

- (a) the use of an infrastructure facility such as a road or railway line;*
- (b) handling or transporting things such as goods or people;*
- (c) a communications service or similar service;*

but does not include:

- (d) the supply of goods; or*
- (e) the use of intellectual property; or*
- (f) the use of a production process;*

except to the extent that it is an integral but subsidiary part of the service.

The application

Virgin Blue seeks declaration of the service for the use of runways, taxiways, parking aprons and other associated facilities necessary to allow aircraft carrying domestic passengers to:

- (i) take off and land using the runaways at Sydney Airport; and

- (ii) move between the runways and the passenger terminals at Sydney Airport.

These are collectively referred to as the Airside Service.

Issues for consideration

The declaration process in Part IIIA provides for access to the services of a facility (or part of a facility), rather than the facility itself. A service is something separate and distinct from a facility. It may consist merely of the use of a facility. The regime does not provide a physical right of access to the facility itself but to the services provided by means of the facility.

The Council notes that the description of Airside Service refers to both the use of certain facilities and the purpose for which that use will be put without reference to a specific end-user. The Council considers this approach to be consistent with that taken by the Tribunal in the Sydney Airport case. In that case, the Tribunal concluded that the relevant service provided by SACL was the making available of the freight aprons, hard stands and other areas to enable other persons carrying on other activities (namely, the loading and unloading of aircraft and the transfer of freight from the loading and unloading equipment to and from trucks) to provide their own services (paragraph 16). The relevant services were not the services of loading and unloading international aircraft or transferring freight as such services were not provided by SACL.

The Council further notes that the description of the Airside Service includes the use of “other associated facilities”. The facilities included in the description of “other associated facilities” needs to be specifically described. This is because the Council needs to consider which specific facilities are included in the description of Airside Service as this will impact on the breadth of the service which is subject to the declaration application.

An issue for the Council in considering the application is the appropriate delineation of the relevant “service” for the purpose of Part IIIA. For instance, the Airside Service as defined by Virgin Blue is made up of a number of components including the use of runways, taxiways, parking aprons and other associated facilities for the specified purposes. The Council will need to consider whether the bundling of all of these components into one service for the purpose of Part IIIA is appropriate.

The Council considers that the relevant service for the purpose of Part IIIA is the thing that is bought and sold, or for which there are potential transactions. The way in which a service is defined and delineated must be commercially meaningful.

The delineation of the relevant service should not be confused with the quite separate analysis that may occur of identifying relevant markets. For example, in the Sydney Airport decision, there was significant discussion of

whether ramp handling services and cargo terminal operator services were in separate markets. This discussion did not relate to whether the services were appropriately delineated (Sydney Airport decision, paragraphs 74-76 and 96-97).

The Council notes that the definition of Airside Service proffered by Virgin Blue is broadly consistent with service groupings adopted by the Productivity Commission report on airport services (PC 2002) and the ACCC draft guide to s. 192 of the Airports Act (ACCC 1998). This suggests that the service delineation adopted by Virgin Blue has generally been accepted as appropriate in the consideration of aviation sector services within a regulatory context. This in turn supports the proposition that the service delineation proffered by Virgin Blue is appropriate for the purpose of Part IIIA.

The Council seeks comments on:

- *The nature of the specific facilities and assets required to provide the Airside Service.*
- *Should the components making up the Airside Service be considered to be “services” in their own right for the purpose of Part IIIA?*
- *To what extent is the definition of Airside Service generally understood and accepted within the aviation industry in commercial and regulatory contexts?*

The facility providing the service

Background

The declaration criteria in s. 44G(2) refer to the facility that provides a service, as does the definition of service in s. 44B. The term “facility” is not defined in the TPA, although examples including roads and railway lines are cited in the s. 44B definition of “service”.

The Tribunal has stated:

The word ‘facility’ is not defined, but the dictionary definitions may be of some help. For example, the Shorter Oxford Dictionary defines ‘facility’ as ‘equipment or physical means for doing something’; but the Macquarie Dictionary adopts a broader concept, namely, ‘something that makes possible the easier performance of any action; advantage: transport facilities; to afford someone every facility for doing something’ (Application by Australian Union of Students (1997) ATPR 41-573).

The application

In its application, Virgin Blue submits that the relevant facility that provides the Airside Service is “*the whole of Sydney Airport*”. This is due to the “*highly interconnected or bundled nature of domestic air passenger transport operations at Sydney Airport*”.

Issues for consideration

In the Sydney Airport decision, the Tribunal stated that ‘*a facility for the purposes of the Act is a physical asset (or set of assets) essential for service provision*’ (paragraph 82). It followed, therefore, that the relevant facility is comprised of ‘*the minimum bundle of assets required to provide the relevant services subject to declaration*’ (paragraph 192).

If the Council concludes that the delineation and description of Airside Service is appropriate, it will need to determine the minimum bundle of assets required to provide the service.

The Council is mindful that identification of the bundle of assets will have an impact on the assessment of the application under s. 44G(2)(b). As noted by the Tribunal in the Sydney Airport decision:

The more comprehensive the definition of the set of physical assets ... the less likely it is that anyone ... would find it economical to develop "another facility" within a meaningful time scale. Conversely, the narrower the definition of facility, the lower the investment hurdle and inhibition on development (paragraph 192).

In that case, the Tribunal concluded that the relevant facility was "*the complete suite of physical assets necessary to service international airlines flying into and out of the Sydney region*" (paragraph 99). The Tribunal found that most, if not the whole, of the airport, including all the basic airside infrastructure (runways, taxiways and terminals and related landside facilities) were necessary for international aircraft to land at Sydney Airport, load and unload passengers and freight and depart, and essential to the services to which access was sought. Therefore in practical terms, the whole of the airport constituted the relevant facility within the meaning of Part IIIA (paragraph 99).

Virgin Blue has relied on the Sydney Airport case as authority for the proposition that the relevant facility for the provision of the Airside Service is the whole of Sydney Airport. This is because the relevant facility for the provision of the Airside Service would comprise essentially the same minimum bundle of assets that comprised the relevant facility in the Sydney Airport decision; that is, '*...the minimum set of physical assets necessary for ... aircraft to land at [Sydney Airport], unload and load passengers and freight and depart ...*' (paragraph 99). This, in practical terms, amounted to the whole of the airport.

The Council considers Virgin Blue's argument that the Sydney Airport decision provides authority for the view that the relevant facility for the provision of Airside Services is the whole of Sydney Airport, to be persuasive. The Council, however, is mindful of the fact that the Sydney Airport decision was concerned with the declaration of services that were different to the Airside Services. The Sydney Airport decision was primarily concerned with international air freight operations rather than domestic passenger operations as is the case with Virgin Blue's application. As such, the assets taken to make up the relevant facility, being the whole of the airport, may differ between the Sydney Airport case and what is submitted in Virgin Blue's application. For instance, Airside Services as defined by Virgin Blue, includes the movement of aircraft carrying domestic passengers to '*move between the runways and the passenger terminals at Sydney Airport.*' It may, however, not be necessary to include passenger terminals in the minimum bundle of assets making up the relevant facility as it may be quite feasible to disembark and board passengers without the use of air bridges linking aircraft with passenger terminals.

The Council seeks comments on:

- *What is the minimum bundle of assets required to provide the Airside Service?*

- *The extent to which passengers and freight can be loaded and unloaded from points at Sydney Airport other than directly to/from the passenger terminals.*

Provider of the service

Background

The provider of the relevant facility to which access may be granted under Part IIIA is defined in s44B as follows:

“provider”, in relation to a service, means the entity that is the owner or operator of the facility that is used (or to be used) to provide the service.

In effect, the provider is the entity which controls the use of a facility and has the legal power to determine whether – and on what terms – access is provided. The provider of the service must be capable of negotiating an access contract subsequent to declaration, or if negotiation fails, of being bound by an arbitration determination.

Application

Virgin Blue considers that the relevant facility for the purposes of its application is the whole of Sydney Airport. The owner and operator of Sydney Airport is SACL.

Issues for consideration

Sydney Airport is owned and operated by SACL. The Council formally notified SACL of receipt of Virgin Blue’s application pursuant to s. 44F(2)(a).

The Council notes that Qantas currently leases from SACL the land on which the Qantas Terminal is situated together with land adjacent to the terminal to enable further expansion (Domestic Terminal Lease). The Domestic Terminal Lease was entered into in 1987 and will expire in 2017. Qantas also has long term leases with SACL for exclusive use of a number of other areas within Sydney Airport including the land on which its Jet Base and Hanger 96 are situated. Qantas owns all improvements to the leased land including the terminal building, jet base and hanger 96. Qantas has exclusive rights of use to the leased land.

Under the terms of the Domestic Terminal Lease and the other Qantas leases providing for exclusive use of Sydney Airport land, there is nothing preventing Qantas from granting and negotiating terms of access to its terminal and other assets situated on leased SACL land. In contrast, during

the term of the leases, SACL is not entitled to grant and negotiate terms of access to the land covered by the leases. For this reason, the Council considers that Qantas and not SACL is the provider of services requiring access to the Qantas Terminal and such other Qantas owned assets situated on land leased from SACL on a long term exclusive use basis.

The Council notes that s.44W(1)(c) prevents the ACCC from making a determination following a dispute about access of a declared service which has the effect of *‘depriving any person of a protected contractual right’*. A protected contractual right is defined to mean *‘a right under a contract that was in force at the beginning of 30 March 1995’*. The Council understands that the Domestic Terminal Lease and the leases for the land on which the Qantas Jet Base and Hanger 96 are situated may be protected contractual rights for the purposes of s.44W(1). However, there is nothing in Part IIIA which precludes the Council from considering and making a recommendation on declaration following the receipt of an application which may cover protected contractual rights. The existence of such rights is a matter for the ACCC to consider in the context of an access dispute arbitration. As noted by the Tribunal in the Hamersley Iron case:

“It is necessary to bear steadily in mind that the protected contractual rights constraint referred to in s44W(1)(c) is a constraint on the Commission in making a determination. The same or similar constraint is not imposed on the Council in making a declaration recommendation under s44F(1) or on the Minister in making a declaration with respect to a service under s44H” (paragraph 80).

The Council notes that Virgin Blue’s application for declaration refers to SACL as the provider of the service for which declaration is sought. This is on the basis that (as submitted by Virgin Blue) the relevant facility is the whole of Sydney Airport and that SACL is the owner and operator of Sydney Airport. Regulation 6A(d) of the Trade Practices Regulations requires that the applicant name the “provider” of the service the subject of the application for declaration. The language of the regulation suggests that each application may only identify one provider for each service. For this reason, the Council will approach Virgin Blue’s application on the basis that it does not seek access by way of declaration, to facilities operated by Qantas or any other entity aside from SACL.

The Council seeks comments on:

- *The nature of the lease arrangements between Qantas and SACL for use of land at Sydney Airport.*

s. 44G(2)(b) - that it would be uneconomical for anyone to develop another facility to provide the service

Background

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 (s. 44G(2)(b)) (criterion (b)).

The Tribunal in the Sydney Airport decision recognised that the declaration criteria are essentially intended to limit declaration to services provided by a facility that:

- exhibits natural monopoly characteristics – that is, the entire range of relevant demand can be met at lowest cost by one firm rather than two or more; and
- creates a bottleneck – that is, access to the service for which declaration is sought is essential for competition in a dependent market(s) (paragraph 82).

Criterion (b) tests whether a facility exhibits natural monopoly characteristics. Whether a facility that exhibits natural monopoly characteristics is also a bottleneck, is addressed by criterion (a) (see discussion below). Criterion (b) is concerned with the nature of the facility rather than with the competitive impact of the service provided by means of the facility.

The application

Virgin Blue considers that the relevant facility that should be considered in the assessment of criteria (b) is the whole of Sydney Airport. Virgin Blue submits that Sydney Airport is uneconomic to duplicate. In support of this submission, Virgin Blue notes:

- (a) both the Council and the Tribunal have found that it is uneconomic for Sydney Airport to be duplicated;*

- (b) *the Commission's Draft Guide to Section 192 concludes that most larger airports, and possibly all core regulated airports, could not be economically duplicated; and*
- (c) *Sydney Airport is the busiest airport in Australia, processing over 14.8 million domestic (including regional) passengers annually and 208,086 domestic (including regional) aircraft movements each year. It operates 3 runways and covers a total of 2,369 hectares. It clearly exhibits significant economies of scale and very substantial entry and exit costs (Virgin Blue 2002, pp. 9-10).*

In its application, Virgin Blue discusses whether other Sydney airports are a substitute for services provided by Sydney Airport in its discussion of criterion (a). The Council considers that the discussion is also of relevance to the issue of whether Sydney Airport exhibits natural monopoly characteristics in satisfaction of criterion (b). Accordingly, the Council sets out Virgin Blue's argument on the point in this section of the issues paper.

Virgin Blue submits that there is no substitute for the Airside Service, as Sydney Airport is currently the only airport that offers services allowing for the landing or taking off of aircraft in Sydney that are suitable for use by a provider of domestic air passenger transport services. While there are other airports located within the Sydney metropolitan area, Virgin Blue submits that even the largest of these, Bankstown Airport, is not a substitute for Sydney Airport as a supplier of domestic air passenger transport services to or from Sydney because:

- (a) *Bankstown Airport cannot provide services allowing for the landing or taking off of aircraft of a size equivalent to a Boeing 737 or larger. Aircraft smaller than a Boeing 737 are not suitable for use on many domestic passenger routes due to higher costs of operation (on a per passenger basis) or because they lack the necessary range.*
- (b) *Bankstown airport does not offer the same suite of services that are offered at Sydney Airport, such as interconnection with other airlines. In this regard Virgin Blue notes the Tribunal's comments in the Sydney Airport decision:*

[M]any airports also benefit from economies of scale and scope generated by strong network effects associated with their geographical location and the absence of viable alternative transport modes. Passengers typically travel to destinations, not airports, and airlines will prefer to locate at one airport so that they may gain commercial benefits from interconnecting with other services and airlines (para 85); and

- (c) *demand from consumers of domestic air passenger transport services for flights from Bankstown Airport is likely to be very low due to:*

- (i) *Bankstown Airport being located significantly farther from the Sydney central business district than Sydney Airport; and*
- (ii) *a lack of facilities at Bankstown Airport, including a lack of interconnection with other airlines (pp. 7-8).*

Issues for consideration

The Council considers that it will be “uneconomical” to develop “another facility to provide the service”, and so satisfy criterion (b), where the facility or part of the facility under consideration is a natural monopoly facility.

The Council considers that a natural monopoly exists for the purposes of criterion (b) if for a likely range of reasonably foreseeable demand it is always cheaper for a single facility to provide the service under consideration rather than multiple facilities. This test was accepted by the Tribunal in the Eastern Gas Pipeline decision which stated the following:

We agree with the NCC that the test is whether for a likely range of reasonably foreseeable demand for the services provided by means of the pipeline, it would be more efficient, in terms of costs and benefits to the community as a whole, for one pipeline to provide those services rather than more than one (paragraph 137).

The Council will consider the existence of both economies of scale and economies of scope in the provision of the defined service. In doing so, the Council will consider the cost of developing another facility to provide the Airside Service. This would include consideration of the cost of developing existing Sydney airports such as Bankstown airport to provide the Airside Service.

Such an approach is consistent with that taken in the Sydney Airport decision where the Tribunal noted the following:

The Tribunal heard that most major commercial airports around the world exhibit strong natural monopoly or bottleneck characteristics. Once the basic infrastructure (runways, taxiways, control tower) is in place, the owner of the facility faces sharply falling costs of servicing increments of demand (economies of scale). By contrast, a new entrant would have to replicate this basic infrastructure which is inherently capital intensive. Such airports also typically provide a bundle of services, (for example, international and domestic passenger and freight services). In addition, many airports also benefit from economies of scale and scope generated by strong network effects associated with their geographical location and the absence of viable alternative transport modes. Passengers typically travel to destinations, not airports, and airlines will prefer to locate at one airport so that they may gain commercial benefits from interconnecting with other services and airlines (paragraph 84-85).

In the Sydney Airport decision, the Tribunal concluded that criterion (b) requires that it be uneconomical for someone *other than* the facility provider to develop another facility (paragraph 201). In the case of Virgin Blue's application, the question is whether it would be uneconomical for anyone other than SACL to develop a facility to provide the Airside Service.

As noted above, the Council considers that the Sydney Airport decision is authority for the view that the relevant facility required for the provision of the Airside Service is, in practical terms, the whole of Sydney Airport. The Council further considers that the Sydney Airport decision provides authority for the proposition that Sydney Airport as a whole is a natural monopoly for the purposes of criterion (b). In particular, the Council notes the following conclusion of the Tribunal:

Given the Tribunal's findings in relation to the definition of facility, would it be uneconomical for anyone to develop another facility to provide the service? The answer to this question is clearly, "yes". This is because the very powerful economies of scale and scope of [Sydney Airport] discussed above preclude anyone, even the incumbent owner and operator, from developing another facility offering the physical infrastructure and the associated rich inheritance of market attributes at [Sydney Airport] (paragraph 202).

The Council will consider any developments in the aviation and airports sectors since the Sydney Airport decision in 2000 that may lead to the conclusion that Sydney Airport no longer exhibits natural monopoly characteristics. In the absence of such developments, the Council considers that, in accordance with the Sydney Airport decision, Sydney Airport as a whole exhibits natural monopoly characteristics in satisfaction of criterion (b).

The Council notes, however, that the Sydney Airport decision considered services that required the use of facilities for international aircraft whereas the Airside Service relates to domestic aviation. The Council's preliminary view is that nothing turns on this distinction for the purposes of criterion (b) although it will consider arguments to the contrary.

The Council seeks comments on:

- *Have there been any developments in the aviation and airports sectors since the Sydney Airport decision in 2000 that may lead to the conclusion that Sydney Airport no longer exhibits natural monopoly characteristics?*
- *Are there any other reasons why the Sydney Airport decision finding that it would be uneconomic to develop another such airport should not be applied in the case of Virgin Blue's application?*

s. 44G(2)(a) - that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service

Background

The purpose of criterion (a) is to limit access regulation to circumstances where access is likely to enhance the environment for competition in a dependent market(s). Whether competition will be enhanced depends critically on the extent to which the incumbent service provider can, in the absence of access regulation, use market power to adversely affect competition in a dependent market. If the service provider has the ability and incentive to use power to adversely affect competition in a dependent market, regulated access may improve the environment for competition, offering the prospect of tangible benefits to consumers, including reduced prices and better service provision.

In assessing whether criterion (a) is satisfied, the Council must:

- define the relevant market or markets in which competition may be promoted and verify that the market(s) are separate from the market for the service to which access is sought; and
- determine if access (or increased access) would promote a more competitive environment in those additional markets. This requires an assessment of:
 - whether the incumbent has market power and the incentive to use that market power in those related markets; and
 - if the requisite market power does exist, whether there are any reasons why access would not promote competition in another market.

The application

Virgin Blue submits that access (or increased access) to the Airside Service would promote competition in, at least, the market in which domestic (both

interstate and intrastate) air passenger transport services are supplied to and from Sydney (Sydney Domestic Market).

As noted above under criterion (b), Virgin Blue submits that there is no substitute for the Airside Service, as Sydney Airport is currently the only airport that offers services allowing for the landing or taking off of aircraft in Sydney that are suitable for use by a provider of domestic air passenger transport services.

Issues for consideration

Separate market(s) from the market for the service

For the purpose of criterion (a), the Council needs to be satisfied as to the existence of 'at least one market ... other than the market for the service' in which competition would be promoted. The words 'at least one market ... other than the market for the service' require the identification of functionally distinct markets from the market for the service the subject of the application for declaration.

Market definitions are required for the application of criterion (a), both:

- to identify relevant functionally distinct markets from the market for the service; and
- to facilitate an assessment of the competition effects of declaration in those functionally distinct markets, including consideration of the related question of whether the terms of supply of the service are constrained by substitution in those distinct but related markets.

"Market" is defined in the TPA as (s.4E):

For the purposes of this Act, unless the contrary intention appears, "market" means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

In considering the question of market definition, the Council is guided by the work of the ACCC (in particular, the Merger Guidelines, June 1999), the Tribunal and the Courts in their consideration of market definition for the purposes of Part IV, as well as the Tribunal's and the Court's consideration of market definition in the context of Part IIIA.

The Tribunal has defined "market" in the following way:

A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them (if there is no close

competition there is of course a monopolistic market). Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. ... Whether such substitution is feasible or likely depends [on a number of factors] ... in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction? (Re Queensland Co-operative Milling Association Ltd (1976) 25 FLR 169 at 190).

This view of market has been accepted by the High Court in the Queensland Wire decision (*Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Ltd and Another* (1989) 167 CLR 177) and was adopted by the Tribunal in the Sydney Airport and Eastern Gas Pipeline decisions.

In relation to air transport, the Council considers it appropriate to define markets by reference to a point of origin and point of destination. This is because the thing that is bought and sold is the flight from a specific origin to a specific destination. A customer wanting a flight between two points is generally unlikely to consider a flight between two other points to be a substitute. As such, each origin/departure pair constitutes the geographic dimension of a separate market for the purposes of criterion (a). For example, markets for air travel between Sydney and Melbourne on the one hand and Sydney and Brisbane on the other need to be considered as separate for the purposes of criterion (a).

In addition, it may be the case that separate markets exist on each city pair route for different passenger types (for example, business and leisure) or on the basis of fare class (for example, business, economy and discount). It may also be appropriate to differentiate direct and multi-stop routes for the purpose of market definition⁸. Virgin Blue currently operates direct flights between Sydney and Adelaide, Brisbane, Cairns, Coffs Harbour, Gold Coast, Melbourne, Perth and the Sunshine Coast. On a one-stop basis, Virgin Blue currently operates flights between Sydney and Launceston, Hobart, Darwin, Mackay and Townsville. The Council considers that each of the direct city pair services and possibly the one-stop city pair services constitute a market for the purposes of criterion (a). The Council also considers relevant markets to exist for each air travel route into and out of Sydney regardless of whether Virgin Blue currently operates a service on that route.

Virgin Blue has defined the relevant market for the purposes of criterion (a) as '*...the market in which domestic (both interstate and intrastate) air passenger transport services are supplied to and from Sydney (**Sydney Domestic Market**)*'. The Council considers that Virgin Blue's definition aggregates a number of separate and distinct markets which can be

⁸ See ACCC determination on the Qantas/British Airways Joint Services Agreement.

delineated on a city pair basis and may be delineated on the basis of passenger type, fare class and/or as a direct/multi-stop route. Each of these separate markets is relevant for the purposes of criterion (a).

The relevant market on some routes, particularly over shorter distances for leisure passengers, may include a number of different transport modes. For example, bus or rail transport services for leisure passengers may be considered sufficiently substitutable for air travel on shorter routes such as between Sydney and Canberra. In such cases, the market would be for the provision of transport services rather than air transport services.

Virgin Blue has defined the Sydney Domestic Market by reference to passenger services only. The Council notes, however, that a significant proportion of domestic air freight is carried by passenger aircraft. Virgin Blue operates a domestic freight carrying service under the name "Virgin Blue Freight Management". The Council considers that the relevant markets for the purposes of criterion (a) include not only passenger transport services but also freight transport services. The Council notes that inter-modal substitution possibilities for freight transport markets may differ to passenger transport markets. For example, freight air transport may face a higher degree of competition from land transport on the Sydney to Melbourne route than that faced by passenger air transport on the same route.

In summary, the Council considers the relevant markets for the purposes of criterion (a) to include all markets for the transport of passengers and transport of freight on city pair routes able to be serviced by aircraft using Sydney Airport. The relevant markets may also be delineated by reference to passenger type, fare class, freight transport type and on a direct/multi-stop flight basis. Some of these markets may be limited to transport by air depending upon land and sea transport substitution possibilities.

Given the large number of markets of potential relevance to criterion (a), the Council will focus its analysis on those markets in which declaration would most likely promote competition. Criterion (a) will be satisfied if it can be demonstrated that declaration will promote competition in as little as one upstream or downstream market. For this reason, it will be unnecessary to consider the competitive effect of declaration on every upstream and downstream market.

The Council would welcome views about which passenger and freight transport markets would most likely see a promotion of competition as a result of declaration of the Airside Service under Part IIIA.

Would access promote competition?

Market power

The object of the criterion (a) requirement that declaration promote competition is to limit declaration to “bottleneck” facilities - that is, facilities to which access is essential for effective competition in a dependent market.

Whether declaration will promote competition in a dependent market will depend critically on whether the service provider has power to adversely affect competition in that dependent market. The existence of market power is a necessary (although not sufficient) condition for satisfaction of criterion (a).

The importance of market power to criterion (a) was noted by the Tribunal in the Eastern Gas Pipeline decision. The Tribunal stated the following:

Whether competition will be promoted by coverage is critically dependent on whether EGP has power in the market for gas transmission which could be used to adversely affect competition in the upstream or downstream markets. There is no simple formula or mechanism for determining whether a market participant will have sufficient power to hinder competition. What is required is consideration of industry and market structure followed by a judgment on their effects on the promotion of competition (paragraph 116).

Market power has been defined for the purposes of the TPA as the ability to profitably and sustainably raise prices above economic costs, or behave in a market in some other manner for a sustained period, without being constrained by current or potential competitors.⁹

While the existence of market power in a dependent market is necessary for the satisfaction of criterion (a), it is not sufficient. The Council, adopting the approach of Ordoover and Lehr, considers it is also necessary to demonstrate that the service provider has the incentive to use its power to adversely affect the related market. This is because in the absence of such an incentive, competition will not be promoted through declaration. As such, in order for criterion (a) to be satisfied, it must be demonstrated that the service provider has the ability and the incentive to exploit market power in a dependent market. Once this is established, it is also necessary for criterion (a) to be satisfied, to consider whether declaration will promote competition in the dependent market. The Council considers that where the service provider in question has both the ability and incentive to adversely affect competition in a dependent market, declaration will generally promote competition by addressing that market power. This may, however, not be the case where for

⁹ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 189).

example, barriers to entry in the dependent market not associated with the service provider's market power are such that declaration would not promote competition in satisfaction of criterion (a). This is discussed further below.

In considering whether a service provider has the power and incentive to adversely affect competition in a related market, the Council will consider the nature and structure of the dependent market. In doing so, the Council will consider the height of barriers to entry in the dependent market(s) unrelated to the natural monopoly and "bottleneck" characteristics of the facility (if any). The Council will also consider the degree of competition existing in the dependent market. The existence of effective competition in a market suggests that no market participant possesses power in that market. (The term "effective competition" refers to the degree of competition required for prices to be driven towards economic costs and for resources to be allocated efficiently). To assess the degree of competition in a dependent market, the Council may consider the level of prices in the market. Pricing in excess of efficient cost may be suggestive of market power.

Other matters the Council may take into account in assessing the ability and incentive to exercise market power include countervailing power, substitution constraints, market shares of competitors, the threat of new entry, contractual supply and purchase arrangements, and dynamic changes in the related market. A key issue for consideration in the case of a natural monopoly is whether the service provider is able to leverage its power as a natural monopolist so that it has the ability to exercise power in a dependent market. If it does, the service provider can be said to have the requisite power in that dependent market.

Ability to exercise market power

In the case of Virgin Blue's application, the Council will need to consider whether SACL has the ability and incentive to adversely affect competition in a downstream market. On the question of whether SACL has the requisite market power, the Council will consider various matters – a number of which were considered by the Productivity Commission (PC 2002). These matters include the following:

- The effect of any countervailing power that the airlines may have in downstream markets for city pair passenger and freight air transport. The Productivity Commission noted strongly opposing views about whether airlines had countervailing power. In its view, *'...evidence suggests that scope for competition in the aviation market and the importance of major airports to airline networks will limit (though not necessarily rule out) airline countervailing power in their dealings with the major capital city airports'* (p. xxviii).
- The elasticity of demand for domestic air travel to and from Sydney. The Productivity Commission found that:

Although the typically low proportion of airport charges in airfares and airline costs suggests low price elasticity, this will be mitigated by any potential for destination, modal and airport substitution, and the supply responses of other input providers to changes in airport charges. Airports that face more significant substitution possibilities will face more price sensitive demand (and hence have lower market power) (p.132).

The Productivity Commission concluded that Sydney Airport faced low to moderate substitution potential and had a high overall degree of market power (p.133).

- Market power in relation to particular services. Of particular relevance is the Productivity Commission's conclusion that where an airport has market power, its market power in relation to aircraft movement facilities is high.

A key issue that the Council will need to consider is the nature and degree of barriers to entry which SACL can influence in the respective downstream market under consideration. Low barriers to entry may suggest SACL has little ability to exercise market power in the relevant downstream market. Alternatively, high barriers to entry may suggest SACL has the requisite market power. The Council will consider the extent to which new entrants or prospective new entrants to the relevant downstream market were constrained in their market entry and the reasons for such constraint. It will also consider the degree of effective competition in the relevant downstream market as effective competition is indicative of the absence of market power.

The Council will also consider arguments in relation to SACL's pricing of airport services to ascertain whether such pricing is markedly higher than economic costs thus suggesting the existence of market power. Until 1 July 2002, aeronautical services provided at Sydney Airport were notified services for the purposes of the *Prices Surveillance Act 1983* (PSA). This meant that the ACCC could object to any aeronautical service price increase at Sydney Airport. The Council notes Virgin Blue's argument that SACL sought to increase aeronautical charges in October 2000 by around 130 per cent and August 2001 by significant levels. The ACCC did not object to price increases on both occasions albeit to a lesser degree than that sought by SACL. Virgin Blue submits that as the services are no longer notified under the PSA, there is a real risk, in the absence of declaration, that SACL will seek to impose unreasonable charges on Virgin Blue.

The Council notes that the Government has accepted the Productivity Commission's recommendation that price caps and prices notification for Sydney Airport be replaced by mandatory price monitoring arrangements for a probationary period of five years. The Government has stated that *'[t]he threat of possible re-regulation will encourage negotiated pricing outcomes based on efficient costs and an adequate return on capital'* (Treasurer's Press Release no 024 of 2002). The Government also stated that it would consider reintroducing price controls if the review at the end of the probationary period found that the airport had not operated in a manner consistent with

efficient pricing principles. The Council will need to consider whether the proposed regulatory arrangements together with the threat of more heavy-handed price control is a constraint on SACL's ability to exercise market power.

Incentive to exercise market power

On the question of whether SACL has the requisite incentive to exercise market power (assuming it has market power) to adversely affect a relevant downstream market, the Council notes the view of the Productivity Commission that SACL has an incentive to increase passenger throughput rather than leverage its power to adversely affect passenger throughput. The Productivity Commission concluded that on a per passenger basis, SACL earned substantially more revenue from non-aeronautical services than from aeronautical services and that this provided SACL with an incentive to *'temper prices for aeronautical services (particularly additional services and new entrants), improve quality and/or increase aeronautical capacity to encourage passenger growth and non-aeronautical revenue'* (PC 2002, p. 188).

This conclusion, however, was not accepted by the ACCC which expressed concern with the Productivity Commission's underlying modelling. The ACCC stated that the Productivity Commission's arguments about 'commercial incentives' *'do not stand up to empirical scrutiny'* and *'are not consistent with economic theory'* (ACCC 2001, p. 9).

The Productivity Commission also found that airports had little ability to increase passenger throughput on their own but rather adopted co-operative strategies with others, including tourism operators and airlines to increase passenger throughput. The Productivity Commission suggests that having sought and maintained such co-operative relationships, airports have less incentive to exercise market power.

Promotion of competition

In order for criterion (a) to be satisfied, it is necessary to demonstrate that declaration will promote competition in a dependent market.

Promotion of competition cannot be gauged in terms of actual outcomes – an actual increase in competition. Rather, it refers to such improvement in the opportunities and environment for competition that competitive outcomes are more likely to occur. The Tribunal stated in the Sydney Airport decision:

The Tribunal does not consider that the notion of "promoting" competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of "promoting" competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment

for competition given declaration, will be better than they would be without declaration (paragraph 106).

The Tribunal went on to say that the removal of barriers to entry in a dependent market(s) can be expected to promote competition. The Tribunal continued:

The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on “access”, which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial (paragraph 107).

This is assessed by comparing the conditions and environment for competition *with and without declaration*. The Tribunal determined in the Sydney Airport decision – and affirmed in the Eastern Gas Pipeline decision – that, as “access” refers to the right to negotiate access to a declared service, the criterion (a) assessment requires a consideration of the “future with or without” declaration (*Sydney Airport decision*, paragraph 111; *Eastern Gas Pipeline decision*, paragraph 74). In applying the “future with and without” test, the current position provides a benchmark for the future without declaration against which to assess whether declaration would promote competition.

As noted above, the Council considers *prima facie* that declaration will promote competition in a dependent market where the requisite ability and incentive to exercise market power has been established. This is because a finding of requisite ability and incentive to exercise market power will likely mean that the barriers to entry in that market result from the natural monopoly characteristics of the facility and its bottleneck position. Accordingly, in the usual case, a finding that the service provider has the ability and incentive to exercise market power to adversely affect competition in a dependent market will mean that declaration would reduce barriers to entry and promote competition in that dependent market.

This, however, may not always be the case. For example, it may be that even though the natural monopoly and bottleneck characteristics of a facility may confer market power on the service provider in a dependent market, prohibitive barriers to entry in the dependent market may nonetheless mean that the pro-competitive effects of declaration would be negligible. For example, in the Sydney Airport decision, SACL argued that declaration would not promote competition in the market for ramp handling services as there were substantial barriers to entry “...said to reside in the need to obtain a critical mass of business in order to survive, the constraint of space at the airport and the constraints of safety at the airport” (paragraphs 182-183). The Tribunal appeared to accept that substantial barriers to entry in the

downstream market for ramp handling services would mean that declaration would not promote competition. However, the Tribunal concluded that the alleged constraints of space and safety at the airport did not raise a barrier to entry in the ramp handling services market and the difficulty of building up a critical mass of business for long-term viability, although real, did not erect such an insurmountable barrier to entry as to lead it to reject the proposition that declaration would promote competition in that market.

If the Council comes to the view that SACL has the requisite ability and incentive to exercise market power to adversely affect a relevant downstream market, the Council will need to consider whether declaration will promote competition in that relevant downstream market. If SACL is found to possess the requisite degree of market power, the Council considers that in the absence of evidence to the contrary, declaration will promote competition by removing a barrier to entry arising from SACL's market power in the relevant downstream market. The Council will, however, consider any arguments in support of the proposition that even if SACL is found to have the requisite ability and incentive to exercise market power, declaration will not promote competition in the dependent market. Evidence as to the nature of the relevant downstream market and its barriers to entry may be of particular relevance on this point.

The Council seeks comments on:

- *Which passenger and freight transport city pair markets (if any) would most likely see a promotion of competition as a result of declaration of the Airside Service and why?*
- *For each such market:*
 - *To what extent does SACL have the ability and incentive to exercise market power?*
 - *What is the nature of the barriers to entry?*
 - *What is the degree of effective competition?*
 - *Do the airlines have any countervailing market power?*
 - *What substitution possibilities are there for the Airside Service?*
- *How does the price charged for the Airside Service compare with the actual cost of providing the service?*

s. 44G(2)(c) - 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**

Background

Criterion (c) is a test of materiality, placing less important facilities outside the scope of Part IIIA. The Council notes that while declaration is concerned with access to services rather than facilities, criterion (c) relates national significance to the facility providing the service.

In identifying infrastructure of national significance, the Council has regard to the following matters listed in s. 44G(2)(c):

- (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.*

A facility need only satisfy one of these benchmarks.

The application

In its application, Virgin Blue submits that there is little question that Sydney Airport is of national significance in satisfaction of criterion (c). In support of its submission, Virgin Blue noted:

- (a) the comments of the Tribunal in Re Sydney International Airport when considering the same question with regard to Sydney Airport, namely that it is “beyond doubt that the facility is of national significance” (para 207) (although the Tribunal in that matter was more concerned with the freight operations carried out through Sydney Airport);*

(b) *the data on passenger traffic and aircraft movements through Sydney Airport set out in [its application]; and*

(c) *the comments of SACL that*¹⁰:

- (i) *Sydney Airport is one of the major employers in Sydney, directly providing 33,500 jobs and a further 33,000 jobs through flow-on effects; and*
- (ii) *Sydney Airport generates approximately \$3.5 billion in economic benefits to the Sydney region and a further \$3.8 billion in flow-on effects in New South Wales (Virgin Blue 2002, p. 10).*

Issues for consideration

The Sydney and Melbourne International Airports application related to services provided by international freight handling facilities at those airports. In those matters, the Council considered national significance from the perspectives of:

- the volume and value of international trade dependent on the facility;
- strategic importance in the international air freight chain; and
- implications for the performance of industries reliant on international air freight (NCC 1997, pp.37-43).

The Council also found that considerations of national significance should take into account the location of a facility. Thus, the Council believed that the relevant facilities acquired greater significance because of their co-location with other facilities at Sydney and Melbourne Airports.

The Tribunal confirmed this view with respect to Sydney Airport in the Sydney Airport decision where it stated:

The evidence before the Tribunal ... make [sic] 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 that the facility provided by SIA is of national significance for the purpose of s44H(4)(c) (paragraph 208).

¹⁰ SACL publication titled "Facts at a glance" dated September 2001

The Council considers that the Sydney Airport decision provides authority for the proposition that the whole of Sydney Airport is of national significance in satisfaction of criterion (c). The Council will, however, consider submissions to the contrary. Developments in the aviation and airports sector since the Sydney Airport decision in 2000 and arguments distinguishing the decision from the facts under consideration in the Virgin Blue application may be of particular relevance.

The Council seeks comments on:

- *Whether there are any reasons why Sydney Airport as a whole should not be considered of national significance in satisfaction of criterion (c).*

s. 44G(2)(d) - that access to the service can be provided without undue risk to human health or safety

Background

The rationale for criterion (d) is that declaration should not occur where access or increased access to a service provided by a facility may pose a legitimate risk to human health or safety.

Some facilities require a degree of spare capacity to provide appropriate safety margins. In addition, access to facilities may need to be governed by conduct codes and operational guidelines. For a service to be declared, access must be possible without compromising system and operational integrity and safe scheduling or timetabling must be feasible.

The existence of relevant safety regulations may suffice to satisfy criterion (d) where these regulations deal appropriately with any safety issues arising from access to the facility under consideration. Alternatively, criterion (d) may be satisfied where it is possible to address any safety concerns raised by access to the service through the terms and conditions on which access is provided.

The application

Virgin Blue submits in its application that it is unaware of any reason why access to the Airside Service cannot be provided without undue risk to human health or safety (p. 11).

Issues for consideration

Criterion (d) does not specifically refer to increased access but to access generally. If access is currently being provided, this should not be automatically construed as evidence that access is occurring safely. It is still necessary for the Council to be satisfied that access can be provided without undue risk to human health or safety (*Sydney Airport decision*, paragraph 211).

A further point to note is that although criterion (d) refers to “access to the service”, the Council takes this to mean access to the relevant facility for the purpose of providing the declared service.

In the Sydney and Melbourne airports Part IIIA declaration applications, the Council considered (among other things) the nature of existing safety regulations, the potential for accidents given the manner in which access would be provided and the extent to which access would add to congestion on freight aprons. The Council concluded that access would not pose additional safety concerns to those risks that may already exist (NCC 1997, pp. 44-51).

In considering criterion (d) in relation to Sydney Airport in the Sydney Airport decision, the Tribunal concluded that the significant potential for accidents of serious dimensions on aprons and surrounding areas could be addressed by including appropriate terms and conditions for the provision of access to any ramp handler.

In the case of Virgin Blue’s application, the Council will need to consider whether access to Sydney Airport as a whole for the purpose of providing the Airside Service raises health or safety concerns. If it does, the Council will need to consider whether these concerns can be addressed through the terms and conditions of access.

The Council seeks comments on:

- *Will access or increased access to the whole of Sydney Airport for the purpose of providing the Airside Service involve any risks to health and safety?*
- *To the extent that access may give rise to health and safety concerns, what (if any) regulation of such health or safety matters currently exists?*
- *If access may give rise to increased health or safety risks, could these risks be satisfactorily addressed through the terms and conditions of access between SACL and the access seeker?*

s. 44G(2)(e) - that access to the service is not already the subject of an effective access regime

Background

Infrastructure services already covered by an “effective access regime” cannot be declared for access under Part IIIA. The main purpose of criterion (e) is to allow State or Territory governments to develop industry-specific access regimes compliant with the Competition Principles Agreement that apply to the exclusion of Part IIIA.

The term “effective access regime” is not defined in the TPA. Some guidance as to its meaning can be found in s.44G(3) which provides that when considering whether an access regime established by a State or Territory amounts to an effective access regime, the Council must apply the relevant principles in the Competition Principles Agreement. In addition, in the Sydney Airport decision, the Tribunal discussed the meaning of the term “effective access regime” as follows:

The expression “effective access regime” is not defined in the Act but it is apparent from s 44H(5) that it is a reference to a regime for access to a service or a proposed service established by a State or Territory that is a party to the Competition Principles Agreement which the Commonwealth Minister has decided is an effective access regime for the service or proposed services: ss. 44M and 44N (paragraph 217).

Nonetheless, it is possible that a State or Territory access regime that has not been the subject of a decision regarding its effectiveness by the Commonwealth Minister, and a Commonwealth or private access regime may constitute an “effective access regime”. The Explanatory Memorandum to the *Competition Policy Reform Bill 1995*, which enacted Part IIIA, stated:

An effective access regime could be a regime established under other Commonwealth legislation; for example, the [then] access regime for the Moomba-Sydney gas pipeline (paragraph 177).

The application

Virgin Blue submits that there is no access regime relating to the Airside Service which satisfies the criteria for an “effective” access regime within the meaning of s. 44G(2)(e).

Virgin Blue notes in its application that even though the landing rights at Sydney Airport are governed by the Sydney Airport slot management scheme¹¹, the scheme does not govern all the terms and conditions of access to the Airside Service (such as landing and apron parking fees) and as such, does not satisfy the criteria for an effective access regime (p. 11).

Virgin Blue also notes that pursuant to the lease of Sydney Airport from the Commonwealth to SACL, SACL is required to operate the Sydney Airport site as an airport and provide access to the airport by intrastate, interstate and international air transport¹². However, Virgin Blue submits that this obligation does not provide any access rights to third parties, such as a right to have an access dispute determined by an independent arbitrator, and as such would not amount to an effective access regime within the meaning of Part IIIA the Act (p. 12).

Issues for Consideration

There is no State or Territory access regime covering Sydney Airport that has been determined as effective under sections 44M and 44N of the TPA.

The Council will need to consider whether the Sydney Airport slot management scheme, which was established under Commonwealth statute, and/or the terms of SACL's lease for Sydney airport requiring access to air transport, amount to an effective access regime for the purposes of criterion (e). The Council notes the Productivity Commission's discussion in which it expressed the view that although such provisions provide for access to the airport by aircraft operators, they do not provide for the determination of the terms and conditions of access; nor do they provide for access by other airport users (PC 2002, p.63).

The Council also notes the discussion by the Productivity Commission that long-term domestic terminal lease arrangements entered into prior to privatisation between the FAC and Qantas and Ansett, required the airlines to make available two gates at their Sydney Airport terminals for new entrants (PC 2002, p.63). The Council understands, however, that all third party access rights to areas leased under domestic terminal lease arrangements were extinguished (at the latest) on 30 October 2000. The Productivity Commission also discussed private access arrangements pursuant to general airport 'conditions of use' (PC 2002, p.63).

Part IIIA provides no legislative indication of how to assess the effectiveness of Commonwealth and private access regimes. In considering the effectiveness of such a regime, the Council will have regard to:

- whether outcomes produced by the regime are efficient;

¹¹ *Sydney Airport Demand Management Act 1997* and related regulations.

¹² See clause 3 of the *Airport Lease for Sydney (Kingsford-Smith) Airport*.

- the legal enforceability of the regime by all interested persons; and
- whether the regime reflects the principles embodied in clause 6 of the Competition Principles Agreement.

The Council seeks comments on:

- *The nature and operation of existing access arrangements for Airside Services at Sydney Airport including the slot management scheme, access provisions of the Sydney Airport site lease and general airport conditions of use.*
- *Do any of these arrangements amount to an effective access regime for the purpose of criterion (e) taking into account the three factors noted above?*

s. 44G(2)(f) - that access (or increased access) to the service would not be contrary to the public interest

Background

Criterion (f) requires the Council to be satisfied that access (or increased access) to the service would not be contrary to the public interest. The term “public interest” is not defined in the TPA, and is difficult to define with any great specificity. This is partly because conceptions of the public interest can change over time as community attitudes change.

The public interest criterion does not constitute an additional positive requirement which can be used to call into question the result obtained by the application of criteria (a) to (e). Criterion (f) accepts the results derived from the application of (a) to (e), but enquires whether there are any other matters which lead to the conclusion that declaration would be contrary to the public interest (Eastern Gas Pipeline decision, paragraph 145).

The application

Virgin Blue submits that in relation to the application for declaration of the Airside Service, declaration would be in the public interest due to the competition that would be promoted through declaration (including in the Sydney Domestic Market). Virgin Blue knows of no reason why declaration would be contrary to the public interest.

Issues for consideration

The Council’s approach to criterion (f) is to focus on the effects of declaration on the welfare of the community as a whole. A key public interest consideration is the net impact of declaration on economic efficiency. Consideration of the net effect of declaration on efficiency encompasses a consideration of the regulatory costs of declaration, including administrative and compliance costs for businesses and the costs of “regulatory failure”. For example, declaration in inappropriate circumstances could undermine price signals, innovative activity or the incentives for investment.

The Council will also consider a broad range of other public interest matters under criterion (f). While no attempt to list public interest considerations can be exhaustive, matters which might be considered include the following open-ended list of items in clause 1(3) of the Competition Principles Agreement:

- ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or of a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

Other relevant matters may include impending access regimes or arrangements, national developments and the desirability for consistency across access regimes, relevant historical matters and privacy.

In the case of Virgin Blue's application, the Council notes that the Commonwealth Government has acted on the recommendation of the Productivity Commission inquiry and price caps and prices notification for Sydney Airport have been replaced with mandatory price monitoring arrangements for a probationary period of five years. The Government's support of light-handed price regulation at Sydney Airport may suggest that such regulation is preferred from a public interest perspective. The Treasurer stated in his press release (no. 024 of 2002) that:

The Government is conscious of the costs that would arise from a highly prescriptive regulatory process and considers that it is the parties affected that are best placed to determine [commercial matters] in a manner that suits their operational particular needs.

It may be argued that the degree and effect of regulation which would flow from declaration of the Airside Service may not be considered 'light-handed regulation' and therefore contrary to the public interest. However, the Government supports the Productivity Commission's recommendations that Part IIIA should apply to airport services (including those at Sydney Airport) suggesting that the application and operation of Part IIIA to airports is consistent with the public interest.

A further issue relates to the five year price monitoring probationary period for Sydney Airport. The Government accepted five years as an appropriate time frame toward the end of which there would be an independent review to

assess the need for continued price regulation. The Treasurer stated that *'[s]ufficient time needs to be given for the airports and stakeholders to bed down a commercially negotiated operating environment'*. An issue for the Council is whether declaration would undermine, in a manner contrary to the public interest, the light-handed regulatory arrangements supported by the Government by effectively not giving them a chance to work.

The Council seeks comments on:

- *The net impact on efficiency of declaration of the Airside Service taking into account competitive gains as well as the regulatory costs which would flow from declaration.*
- *Whether the approach to price regulation taken by the Productivity Commission and the Government suggests that declaration of the Airside Service may be contrary to the public interest.*
- *Whether there are any other reasons why declaration of the Airside Service may be contrary to the public interest.*

Duration of declaration

Background

Section 44H(8) requires that every declaration include an expiry date. This can be a specified future date and/or can involve an event which may occur in the future. The period of declaration will vary according to the circumstances of each application.

In considering the appropriate duration of a declaration, the Council has regard to the importance of long term certainty for businesses. Given the nature of facilities under consideration, some access seekers may require declaration as a pre-condition to embark on significant investment, substantial developments or long term contractual commitments. The Council also considers that declaration should apply for a sufficient period to be able to influence the pattern of competition in relevant upstream or downstream markets.

Against these considerations must be balanced the potential for technological development, reform initiatives (such as changes in legislation governing access to the relevant service) and future market evolution. All these factors may have implications for the monopoly characteristics presently associated with a service or other industry. A change in relevant factors may mean that a service that meets the criteria for declaration today may not do so in the future.

Further, the Council considers that access regulation governing services, including the question of access itself, should be reviewed periodically. At the end of a period of access, the need for regulation can be reviewed.

The Council notes that declaration does not constrain the parties from negotiating access rights that continue beyond the period of the declaration.

The application

Virgin Blue's application did not specify the duration of the declaration sought.

Issues for consideration

In considering the duration for declaration of the Airside Service the Council will consider a wide range of factors including any plans to develop another

major Sydney airport, or to extend the Sydney Airport site, or facilities on the existing site. Other relevant factors include technological changes, and developments and innovations in relevant markets.

The Council seeks comments on:

- *What is an appropriate duration for any declaration of the Airside Service and why?*
- *Are there any reasonably foreseeable factors which may materially affect the Council's assessment of Virgin Blue's application? What is the time frame for the realisation of such factors?*

Appendix A – Sections 44F & 44G of Part IIIA

Section 44F: Person may request recommendation

- 44F(1) [Written application to Council] The designated Minister, or any other person, may make a written application to the Council asking the Council to recommend under section 44G that a particular service be declared.
- 44F(2) [Council must act] After receiving the application, the Council:
- (a) must tell the provider of the service that the Council has received the application, unless the provider is the applicant; and
 - (b) must recommend to the designated Minister:
 - (i) that the service be declared; or
 - (ii) that the service not be declared.
- 44F(3) [Application not in good faith] If the applicant is a person other than the designated Minister, the Council may recommend that the service not be declared if the council thinks that the application was not made in good faith. This subsection does not limit the grounds on which the Council may decide to recommend that the service not be declared.
- 44F(4) [Consideration of alternative facilities] In deciding what recommendation to make, the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the Council may decide to recommend that the service be declared or not be declared.
- 44F(5) [Withdrawal of applications] The applicant may withdraw the application at any time before the Council makes a recommendation relating to it.

Section 44G: Limits on the Council recommending declaration of a service

- 44G(1) [Access undertakings] The Council cannot recommend declaration of a service that is the subject of an access undertaking in operation under section 44ZZA.
- 44G(2) [Council to be satisfied of matters] The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:
- (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;

- (b) that it would be uneconomical for anyone to develop another facility to provide the service;
 - (c) 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;
 - (d) that access to the service can be provided without undue risk to human health or safety;
 - (e) that access to the service is not already the subject of an effective access regime;
 - (f) that access (or increased access) to the service would not be contrary to the public interest.
- 44G(3) [Effective access regimes] In deciding whether an access regime established by a State or Territory that is a party to the Competition Principles Agreement is an effective access regime, the Council:
- (a) must apply the relevant principles set out in that agreement; and
 - (b) must not consider any other matters.
- 44G(4) [Council to follow Minister's decision] If there is in force a decision of the Commonwealth Minister under section 44N that a regime established by a State or Territory for access to the service is an effective access regime, the Council must follow that decision, unless the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or the relevant principles set out in the Competition Principles Agreement.

Appendix B – Competition Principles Agreement (extract)

- 6(2)** The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:
- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or
 - (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.
- 6(3)** For a State or Territory access regime to conform to the principles set out in this clause, it should:
- (a) apply to services provided by means of significant infrastructure facilities where:
 - (i) it would not be economically feasible to duplicate the facility;
 - (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and
 - (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and
 - (b) incorporate the principles referred to in subclause (4).
- 6(4)** A State or Territory access regime should incorporate the following principles:
- (a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.
 - (b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.
 - (c) Any right to negotiate access should provide for an enforcement process.
 - (d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.
 - (e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.
 - (f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.
 - (g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

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- (h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.
 - (i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:
 - (i) the owner's legitimate business interests and investment in the facility;
 - (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
 - (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
 - (iv) the interests of all persons holding contracts for use of the facility;
 - (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;
 - (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;
 - (vii) the economically efficient operation of the facility; and
 - (viii) the benefit to the public from having competitive markets.
 - (j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:
 - (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
 - (ii) the owner's legitimate business interests in the facility being protected; and
 - (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.
 - (k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.
 - (l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.
 - (m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.
 - (n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.
 - (o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.
 - (p) Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other co-operative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any

aspect of access and a single forum for enforcement of access arrangements.

References

- ACCC (Australian Competition and Consumer Commission) 2002, *Determination Pursuant to Section 192 of the Airports Act 1996 – Application by Virgin Blue In Respect of Certain Terminal Services at Melbourne Airport*, March.
- 2001, *Price Regulation of Airport Services – Submission in Response to the Productivity Commission’s Draft Report*, October.
- 1999, *Determination Pursuant to section 192 of the Airports Act 1996 – Delta Car Rentals Request for determination – Statement of Reasons*, April.
- 1998, *Draft guide to Section 192 of the Airports Act – Declaration of airport services*, October.
- Anderson, the Hon. J., Minister for Transport and Regional Services and Costello, the Hon. P., Treasurer 2002, *Productivity Commission Report On Airport Price Regulation*, Joint Press Release, no. 024, 13 May.
<http://www.treasurer.gov.au/tsr/content/pressreleases/2002/024.asp>
- Australian Union of Students decision* [1997] ACompT 1 (28 July 1997).
- Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 (4 May 2001).
- Hamersley Iron Pty Ltd v National Competition Council and others* (1999) ATPR 41-705
- Hilmer Review (Independent Committee of Inquiry into National Competition Policy) 1993, *National Competition Policy*, AGPS, Canberra, August.
- NCC (National Competition Council) 1997, *Application for Declaration of Certain Airport Services at Sydney and Melbourne International Airports: Reasons for Decision*, 8 May.
- Ordovery J. and Lehr W. 2001, ‘Should coverage of the Moomba-Sydney pipeline be revoked?’, in National Competition Council, *Final Recommendation on the Application for Revocation of the Moomba to Sydney Gas pipeline and the Dalton to Canberra lateral*, November 2002, <http://www.ncc.gov.au/pdf/ReGaMoRe-007.pdf>
- Productivity Commission (PC) 2002, *Price Regulation of Airport Services*, Report no. 19, AusInfo, Canberra.
- Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Limited* (1989) 167 CLR 177.
- Sydney International Airport* [2000] ACompT 1 (1 March 2000).
- Virgin Blue 2002, *Application for declaration under part IIIA of the Trade Practices Act 1974 of certain services provided by Sydney Airport*, October, <http://www.ncc.gov.au/pdf/DEAiVi-001.pdf>.