17 February 2010

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By Email: economics.sen@aph.gov.au

Dear Mr Hawkins

Trade Practices Amendment (Infrastructure Access) Bill 2009

Thank you for meeting with me last week to discuss these matters and for giving us the opportunity to provide a late submission to the Committee.

Virgin Blue welcomes the opportunity to be able to provide comments to the Senate Committee in relation to the Trade Practices Amendment (Infrastructure Access) Bill 2009 ("Bill"). In general Virgin Blue supports the key principle of streamlining the administrative processes associated with regulating third party access to nationally significant infrastructure. However, in proposing a more efficient and timely process, Virgin Blue is concerned that ability for access seekers to take full advantage of the National Access Regime may be compromised.

There is no doubt that Australia's major airports are infrastructure assets of national significance. In the period from 1997 to 2002 the Commonwealth Government privatised Australia's major airports and from 1 July 2002 its policy moved to one of "light handed regulation". As part of this framework, and in recognition of the inherent monopoly power of the major airports, a key component of the Government's policy is that the generic provisions of Part IIIA will apply to airports.

As the Senate Committee will be aware, Virgin Blue sought the benefit of the National Access Regime when it applied for the declaration of the Airside Service at Sydney Airport. By way of background to the Virgin Blue experience we set out below the timing of the steps undertaken:

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- On 1 October 2002 Virgin Blue applied to the National Competition Council (**NCC**);
- On 30 June 2003 the NCC issued a draft determination that the Airside Service be declared;
- In its final recommendation dated November 2003 the NCC recommended that the Airside Services should not be declared;
- On 29 January 2004 the Parliamentary Secretary to the Commonwealth Treasurer published the designated Minister's decision to not declare the Airside Service;
- On 18 February 2004 Virgin Blue applied to the Australian Competition Tribunal (**ACT**) for a review of the Minister's decision;
- The ACT decision was handed down on 12 December 2005;
- The ACT decision was then subject to an unsuccessful appeal by Sydney Airports Corporation Limited (**SACL**) to the Full Court of the Federal Court and an unsuccessful application for special leave to appeal to the High Court;
- Following a period of negotiation with SACL in relation to the terms and conditions of access to the Airside Service, on 29 January 2007 Virgin Blue lodged a notification with the ACCC of an access dispute in relation to the Airside Service. This notification was subsequently withdrawn when the parties reached a negotiated outcome.

While the outcome that was finally achieved supported the purpose of the Regime, it was a lengthy and costly process. Therefore, Virgin Blue supports the new legislation to the extent it imposes clear timeframes for decisions made by the NCC, Designated Ministers, the Tribunal and the ACCC.

However Virgin Blue is concerned about the proposal to limit the basis for consideration of merits review. Under the Bill, in reviewing any decisions under Part IIIA, the Tribunal will be limited to the information that was before the original decision maker with only two limited exceptions.

Virgin Blue is very concerned that while this proposal may save some time, it will do so at the very high cost of significantly increasing the risk of incorrect declaration decisions. Virgin Blue believes that if the material before the Tribunal is restricted in the way proposed then there will be no opportunity for access seekers to test the positions advanced by infrastructure owners or vice versa, and that the NCC is not in a position to test the propositions advanced by the parties in the same way that the Tribunal can under the current legislation.

Declaration decisions often involve very complex questions of both fact and law. In order to be able to ensure that correct decisions are made, it is very important that the strength of the factual, economic and legal propositions advanced by parties can be properly tested. The NCC seeks submissions from, and meets with, interested parties and

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also has the power to request a person to provide it with information relevant to a declaration decision. While there is legislation that imposes penalties for misleading officers of the NCC, the NCC does not take evidence on oath, nor does it allow for cross examination of witnesses. Further, the NCC does not compel the production of relevant documents from parties.

In contrast, under the current legislation the Tribunal has the power to seek evidence in affidavit form, to allow for the cross examination of witnesses (both lay and expert) and to allow parties access to documents in the possession of other parties by issuing summonses to produce documents.

So long as the Tribunal has these powers to test the positions advanced by parties, Virgin Blue does not consider that it is necessary for the NCC to have same powers. However, Virgin Blue would be concerned if, as proposed by the Bill, these powers were not available at any level of the declaration process.

Virgin Blue's concerns are based on its experience with the declaration of the Airside Service at Sydney Airport. The NCC recommended against declaration of the Airside Service and the Minister decided not to declare it. Virgin Blue sought a review of this decision in the Tribunal and was successful in large part because of its ability in the Tribunal to cross examine witnesses and seek the compulsory production of relevant documents from the airport (as noted above, the Tribunal's decision withstood an appeal to the Full Federal Court and a special leave appeal to the High Court).

By way of example only, a key issue before both the NCC and the Tribunal was the purpose and effect of the airport's change from levying charges for the service based on the weight of the aircraft to per passenger charges. An important part of Virgin Blue's case was that this change was inefficient and anti-competitive as it significantly commercially disadvantaged a low cost airline such as Virgin Blue compared with a full service airline such as Qantas. Before the NCC and the Tribunal, Sydney Airport maintained that this change was pro-competitive and efficient. While Virgin Blue put a series of submissions to the NCC in relation to the competitive effects of this change, the NCC was not persuaded that it would have a greatly different impact on low cost airlines as opposed to full service airlines (see para 6.271 of the NCC Final Recommendation).

However, before the Tribunal, Virgin Blue was able to obtain copies of the airport's internal strategy documents, and was also able to cross examine relevant decision makers in relation to the context and purpose behind this change in charging structure.

The airport's internal documents and the cross examination revealed that Qantas, a full service airline, was a strong supporter of the move to per passenger charging because it knew that it would give Qantas a competitive advantage over Virgin Blue, its rival.

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A SACL Board Strategy Paper obtained on summons noted that:

> *Qantas continues to be extremely keen that a domestic PSC be introduced. It has recognised informally that the potential exists for SACL to derive more revenue from a PSC than the weight-based equivalent, but has no difficulties with this. The main reasons for Qantas' enthusiasm for the PSC are that it can be passed directly to passengers, becoming a variable cost while Qantas would be unlikely to adjust airfares, and because it could strengthen their commercial position relative to Virgin Blue.*
>
> (see *Re Virgin Blue* [2005] ACompT 5 at [183])

Under cross examination, Mr Greg Timar SACL's General Manager, Aviation Business Development conceded that SACL:

> *well understood that Qantas was happy to pay on a per passenger basis even if it involved Qantas paying more because Qantas knew that the per passenger charge would hurt Virgin Blue much more than it would hurt Qantas.*
>
> (See *Re Virgin Blue* [2005] ACompT 5 at [214])

The Tribunal ultimately held (at paragraph [14] of the reasons for decision):

> *We are satisfied that SACL has misused its monopoly power in the past, and that, unless the Airside Service is declared, competition in the dependent market will continue to be affected. In particular, we are satisfied that SACL has misused its monopoly power by the manner in which, and the reasons for which, it changed the basis for its charge for providing the Airside Service in July 2003 from an aircraft's maximum take-off weight ("MTOW") basis to a charge on a per-passenger basis ("known as the Domestic PSC"). This change adversely affected low cost carriers such as Virgin Blue as against full service airlines such as Qantas. Further, the evidence disclosed that SACL chose a passenger-based charge "because Qantas preferred it". At the time the basis for this charge was altered, SACL knew that it would impact more adversely on Virgin Blue than on Qantas.*

Without the Tribunal's processes and powers that allowed it to obtain relevant internal documents and cross examine witnesses, Virgin Blue considers that it would have been significantly more difficult (perhaps even impossible) to persuade the Tribunal on this important point.

Under the Bill, these powers would not be available to parties as the Tribunal would be effectively restricted to only considering the information and documents before the original decision maker (presumably the NCC).

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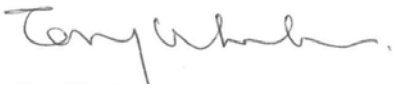
In order to address the concerns identified above, Virgin Blue considers that clauses 11, 12, 14, 15, 34, 35, 42, 43, 44, 46, 47, 51, 53, 55, 56, 66, 67, 68 of Schedule 1 of the Bill and proposed subsection 44ZZOAA(7) in clause 70 of Schedule 1 of the Bill should be deleted. Consequential amendments would need to be made, for example to clause 72(4) of Schedule 1 of the Bill dealing with the timing of the application of amendments.

In conclusion, airports are infrastructure of national significance and the ability to seek declaration to be able to access binding arbitration where commercial negotiations cannot be successfully concluded forms a critical part of the Commonwealth Government's light handed regime. Virgin Blue supports the proposal to introduce certain and efficient timeframes for the making of decisions throughout the process but such efficiency should not compromise the purpose of the access regime or limit the ability to obtain a just outcome.

Thank you again for the opportunity to comment on the proposed legislation. We would be happy to provide any additional information the Committee may wish to seek.

Yours sincerely



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