Chairman
Chief Executive Officer

Sydney Airport
Corporation Limited

5 August 2005

Mr Peter Hallahan
Secretary
Senate Economics Legislation Committee
Suite SG 64
Parliament House
Canberra ACT 2600

Dear Mr Hallahan

Inquiry into the provisions of the Trade Practices Amendment (National Access Regime) Bill 2005

Sydney Airport Corporation Limited ("**SACL**") appreciates the opportunity to provide a submission to the Senate Committee's inquiry into the provisions of the Trade Practices Amendment (National Access Regime) Bill 2005 ("**Bill**").

SACL operates Sydney (Kingsford Smith) Airport under a long term lease from the Commonwealth. Sydney (Kingsford Smith) Airport is Australia's busiest international and domestic airport, providing services to approximately 56 passenger airlines and freight carriers. In the year ended 30 June 2005, SACL catered for 28.2 million passenger movements.

SACL's comments in regard to the Bill relate to the following matters:

1. the backdating of arbitration decisions;
2. the proposed amendments to the competition test;
3. the provision of pricing principles; and
4. the provision of an overriding objects clause.

1. Backdating of Arbitration Decisions

The origins of, and rationale for, the backdating provisions proposed in Item 75 of the Bill are not apparent from either the Productivity Commission's Review of the National Access Regime or the Government's response to that review. While the telecommunications access regime in Part XIC of the Trade Practices Act 1974 ("**TPA**") contains an ability for access determinations to be implemented prior to the date of the determination, it is not apparent that any assessment has been undertaken to justify their inclusion in Part IIIA of the TPA.

SACL considers that the possibility of backdating ACCC determinations to either the date of declaration or the date negotiations commenced does not sit easily with any goal of providing investment certainty, and thereby promoting "*economically efficient... investment in the infrastructure by which services are provided*" as stated in the Bill. In this regard, SACL would expect that, unless applied equally to both access providers and access seekers, the backdating provisions may provide a distorted incentive for access providers to agree to uncommercial arrangements rather than risk being subject to the uncertainties of a lengthy arbitration process, the results of which would be able to be imposed retrospectively.

As a practical matter, we would also note that, it will often be difficult to determine the date on which negotiations commenced. This is particularly the case in the context of complex and ongoing commercial relationships.

2. Competition Test

SACL supports the amendment to the declaration threshold to require that a service not be declared unless the Minister (or Tribunal on appeal) is satisfied that it would promote a material increase in competition.

The administrative costs, disincentive effects on investment and risks of regulatory error all dictate that access intervention is only warranted in circumstances where the Minister is affirmatively satisfied that those costs and distortions will outweighed by a material increase in competition.

While SACL notes that the current judicial approach requires an increase in competition which is 'non trivial', we believe it is important to specifically set out the requirement for a material increase in competition in the legislation.

3. Pricing Principles

SACL supports the introduction of pricing principles to provide direction to the regulator in arbitrating access disputes. SACL believes that this will assist in mitigating the risk currently faced by infrastructure providers (and their investors) that inconsistent approaches may be adopted by the regulator in individual arbitrations, and that the weighting attached by the regulator to competing goals may be applied in an inconsistent manner. For example, without clearly articulated pricing principles, there exists the potential for the regulator to focus on expedient short-term outcomes, such as lower access prices without proper regard to the need to establish economically efficient charges that allow a return commensurate with risk and are consistent with the longer-term public benefit.

SACL considers that the proposed pricing principles should be given effect through a subordinate instrument to the TPA, rather than be set out in the legislation itself. This will provide greater flexibility for the principles to be fine tuned as regulatory practice develops. However, while we note that the

principles would be expected to be based on those suggested by the Productivity Commission in its report on the National Access Regime, SACL considers it important that the Bill be amended so that infrastructure providers and the Productivity Commission must be provided with the opportunity to have input into, and comment on, the pricing principles before they are implemented.

SACL also considers that the Bill should be amended to make it clear that:

- the purpose of the pricing principles is to provide guidance to the regulator as to the upper and lower boundaries of what may be considered a reasonable price or set of prices for the services subject to arbitration;
- if the arbitrator finds that the prices proposed by the infrastructure provider are within the range of reasonable prices calculated in accordance with the pricing principles, the arbitrator should accept the proposed pricing rather than seeking to impose alternative prices; and
- if the arbitrator finds that the prices proposed by the infrastructure provider are outside the range of reasonable prices calculated in accordance with the pricing principles, the arbitrator should only make the adjustments necessary to bring the prices within that range.

This would reduce the potential for the access regime to be used as a means of regulatory gaming rather than to address genuine concerns over pricing as a barrier to access.

SACL's proposed approach would also reduce the potential for regulatory error, as it recognises that the infrastructure provider is generally best placed to establish appropriate charges, and does not place the regulator in the role of expert responsible for determining charges from first principles.

SACL also believes that the Bill should be amended to specify that the arbitrator cannot introduce additional considerations or conditions in the course of the arbitration than those identified by the parties to the dispute. Otherwise, there exists a risk that the regulator may impose additional terms through the arbitration that would not be expected to arise from a commercially negotiated outcome.

4. The Proposed Objects

SACL supports the proposal to include as an overriding object of Part IIIA the promotion of economically efficient operation and use of, and investment in, infrastructure. However, SACL also believes that the current inquiry provides an opportunity for the Committee to propose amendments to the Bill that would ensure that the access regime cannot be used in a manner beyond its intended purpose and legitimate role.

SACL believes that the access regime has a clear role where an infrastructure provider has an incentive to deny access or deny access on genuine commercial terms (for example, where the provider is vertically integrated) which, without intervention, is likely to distort competition in an upstream or downstream market. However, SACL believes that the access regime should not be capable of being used as a de facto tool of price regulation, or as a means of denying or frustrating commercial outcomes, in circumstances where:

- the infrastructure provider is not vertically integrated and has no incentive to deny or limit access to the bottleneck facility;
- there is no evidence of denial of access or increased access having been sought and not granted;
- there is no indication that monopoly power has been exercised inappropriately in setting charges; and
- the service or facility is subject to prices control, oversight or monitoring (particularly where the existing price regulatory regime provides clearly articulated consequences if the infrastructure provider acts inconsistently with that regime).

Without such clarification, SACL believes that the access regime will increasingly be sought to be used as a means of imposing pure price regulation on infrastructure providers, rather than securing access by promoting negotiated commercial outcomes. In this regard, SACL believes that the Government's policy intention is, and should remain, to facilitate an environment which encourages commercial outcomes, reserving heavy-handed regulatory intrusion into infrastructure pricing only for circumstances in which it is clearly warranted.

Overall, SACL considers that the amendments to the access regime are an important step in reducing the level of regulatory risk faced by infrastructure owners and investors and promoting investment. However, SACL does consider that further amendment is required to better define and guide the role of the regulator/arbitrator in access disputes, to discourage outright regulatory gaming, and to ensure that the provisions are not used as a price regulatory tool in the absence of true access concerns.

Yours sincerely

Max Moore-Wilton, AC
Chairman and Chief Executive