INQUIRY INTO THE PROVISIONS OF THE TRADE PRACTICES AMENDMENT (NATIONAL ACCESS REGIME) BILL 2005

SUBMISSION TO THE

SENATE ECONOMICS LEGISLATION COMMITTEE

FROM VIRGIN BLUE

August 2005

Introduction

Virgin Blue Airlines Pty Ltd (**Virgin Blue**) provides the following submission to the Senate Economics Legislation Committee (**Committee**) in relation to its inquiry into the provisions of the Trade Practices Amendment (National Access Regime) Bill 2005 (**Inquiry**).

The terms of reference for the Inquiry note that the Bill implements the Government's response to the Productivity Commission's Inquiry Report No. 17, *Review of the National Access Regime*.

Virgin Blue generally supports the amendments proposed in the Bill, particularly the amendments which provide for interim determinations (items 58 and 123) and the backdating of final determinations (items 75 and 129).

This submission deals only with the proposed amendment to the test for declaration set out in criterion (a) of section 44H(4) of the *Trade Practices Act 1974* (Cth) (**TPA**). The proposed amendment is found at item 23 of the Bill and comprises the insertion of the words "a material increase in" following the word "promote". The introductory words to section 44H(4) and the new criterion (a) would then read:

> *"The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters:*
>
> *(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service; ..."* [emphasis added]

A complementary change is also proposed to section 44G(2)(a) in item 16 of the Bill, which deals with the criteria the National Competition Council (**NCC**) must apply when determining whether to recommend a declaration.

These changes are proposed to apply, by virtue of item 117:

(a) in the case of item 16 to applications made to the NCC after the commencement of that item; and

(b) in the case of item 23 to declaration recommendations made to the designated Minister after the commencement of that item (where the applications for the recommendations were also made after that commencement).

Virgin Blue supports the view that criterion (a) should not apply where the promotion of competition would be immaterial. However, Virgin Blue is concerned that the amendments

proposed in items 16 and 23 of the Bill may leave open the possibility that they will be judicially interpreted in such a way as to require access seekers to demonstrate that access would positively result in a material, and quantifiable, increase in competition. There are two main objections to such an interpretation:

(a) if such an interpretation were adopted it would raise the bar for declaration too high; and

(b) it may require access seekers to undertake an expensive and detailed market analysis in order to be able to positively establish that there would be a resulting increase in competition.

The intention of the Government, as evidenced by extrinsic materials referred to below, is to ensure that access (or increased access) would promote competition in a material manner. It is submitted that an additional requirement (if the amended legislation was interpreted in this way) that an applicant demonstrate an actual increase in competition would be unduly onerous. In this submission, Virgin Blue proposes two alternative recommendations for criterion (a) which would address the concerns expressed by the Productivity Commission and the Government that declaration should not occur if there would not be a material promotion of competition while avoiding the possibility of access seekers being required to establish an actual increase in competition as a result of declaration.

Virgin Blue notes that in their submissions to the Productivity Commission both the NCC and the Australian Competition and Consumer Commission (**ACCC**) considered that the proposed formulation requiring that access (or increased access) promote an increase in competition was inappropriate. In the Productivity Commission's Review of the National Access Regime[1] (**PC Report**), the NCC is quoted stating:[2]

> "*A requirement that access would 'lead to a substantial increase in competition' seems to require an actual demonstration that increased competition would, in fact, occur rather than a focus on creating the conditions for increased competition ... Any introduction of a 'substantial increase in competition' requirement should be accompanied by the notion of the likelihood of such an increase.*"

The ACCC held a similar view:[3]

> "*... it is difficult to know how a decision maker could be satisfied that access (or increased access) would lead to an increase in competition that was real, or of substance. The test requires determination with certainty; there is no scope to assess the likelihood*

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1 Inquiry Report 17, dated 28 September 2001 p 163
2 PC Report, p 184
3 PC Report, p 184

or probability of an increase in competition. ... in the case of markets for essential services that display monopoly characteristics, the ACCC does not consider it would be appropriate that such a measure of materiality, particularly associated with the degree of certainty envisaged, is appropriate."

A more appropriate test, which avoids this risk, is set out in the final section of this submission and is based on the formulation of the Australian Competition Tribunal (**Tribunal**) in the *Sydney Airport* decision, discussed below.

***Sydney Airport* test**

Virgin Blue considers that an amendment to criterion (a) may be appropriate to clarify current ambiguities about the test and to confirm and expand on the judicial interpretation that has been given to the criterion to date.

The meaning of the criterion has been considered by the Tribunal (presided over by Goldberg J) in *Re: Review of Declaration of Freight Handling Services at Sydney International Airport*[4] (***Sydney Airport***). At [106] – [107] of its reasons for decision, the Tribunal stated:

> *"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.*
>
> *We have reached this conclusion having had regard, in particular, to the two stage process of the Pt IIIA access regime. 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."*

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4 (2000) 156 FLR 10; (2000) ATPR ¶41-754; [2000] ACompT 1

This interpretation to criterion (a) is clear and provides content to the requirement that access (or increased access) promote competition. Importantly, this definition does not require access seekers to construct detailed economic models of the relevant market to establish the exact extent to which competition would be increased. Such a requirement would be likely to result in an inefficient use of resources by access seekers, infrastructure owners, the NCC and the Tribunal. Such a requirement would also result in an over-reliance on economic modelling, the results of which are inherently dependent on the assumptions adopted. Rather, the test from the *Sydney Airport* decision has improved the declaration process by providing clear guidelines which can be easily and simply applied to determine the circumstances in which competition will be promoted.

The interpretation of criterion (a) in the *Sydney Airport* decision has been applied by the Tribunal in other contexts. For example, in *Re Seven Networks Limited (No 4)*[5] the *Sydney Airport* test was applied to the interpretation of "promote competition" in ss 152ATA(6) and 152AB(2)(c) of the TPA. In that case, consistently with the *Sydney Airport* test, the Tribunal considered that it was unnecessary to conduct a detailed market analysis in order to determine whether competition had been promoted. Rather, it was sufficient to consider only a *"'working' market definition"* (see paragraph [126]) to determine whether there was likely to be a promotion of competition.

The efficient and workable definition proposed and applied by the Tribunal should be imported into the TPA, with any amendment necessary to take account of the Productivity Commission's concerns about materiality. Virgin Blue considers that these concerns would be addressed by requiring that the promotion of competition be material (see Recommendation 1 below).

Equivalence with the lessening of competition test

One of the key tests in the TPA is the test of substantial lessening of competition. This is the test used in the TPA to identify anticompetitive conduct, whether the conduct involves a merger or some other form of agreement or exclusive dealing.

By virtue of s 4G of the TPA, a "lessening of competition" includes a "preventing or hindering" of competition.

In a similar vein, if it is proposed to include a requirement for an increase in competition in the test in criterion (a), then an "increase" in competition should be defined to also include an improvement in the conditions or environment for competition. This is the basis for Recommendation 2 below which is an alternative to Recommendation 1. While Virgin Blue considers that Recommendation 2 may be acceptable, Recommendation 1 is preferable to Recommendation 2 as it involves fewer amendments to the TPA.

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5 (2005) ATPR ¶42-056 at [123]-[124]

Government's intention

As noted in the PC Report, the genesis for criterion (a) can be traced to the Hilmer Committee which considered that a right of access should be created only where *"access to the facility in question [was] essential to permit effective competition in a downstream or upstream activity"*.[6] 'Effective competition' does not require a quantitative assessment of the level of competition to be undertaken. Rather, it requires that access be a necessary precondition for creating an environment for upstream or downstream firms to compete.

The Parliamentary Secretary to the Treasurer, Mr Christopher Pearce MP, in his second reading speech for the Bill, noted that the current declaration criteria preclude declaration of a service where the relevant infrastructure and subsequent potential public benefits are not significant. Mr Pearce then noted that the current declaration criteria do not sufficiently address the situation where a declaration would result in only marginal increases in competition.

The Government response to the PC Report made clear that the proposed amendment to criterion (a) was intended to ensure that *"access declarations are only sought where the increases in competition are not trivial"*.

As noted above, Virgin Blue agrees with the proposition that the test for "promotion of competition" should not be satisfied in circumstances where declaration would lead to merely trivial improvements in competition.

Experience since PC Report and Government Response does not justify significantly higher hurdle

Virgin Blue does not consider that there is any need for a significant raising of the hurdle for declaration. In the PC Report released in 2001, the Productivity Commission noted that at that time "there have been only two successful declarations (one of which was an interim measure)."[7]

Virgin Blue is not aware of any change to this position since 2001. Attachment A to this submission is an extract from the NCC 2003-2004 Annual Report which sets out a summary of the declaration applications that the NCC has received and their progress.

Virgin Blue is not aware of a single dispute having been notified to the ACCC in relation to access to a declared service under Part IIIA of the TPA in the decade since the provisions were introduced into the TPA.

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6 Quoting Independent Committee of Inquiry into Competition Policy in Australia (Chairman Professor F Hilmer) 1993, *National Competition Policy: Report by the Independent Committee of Inquiry into Competition Policy in Australia*, p 266.

7 PC Report, p 159

Virgin Blue does not consider that these circumstances warrant the raising of the height of the hurdle under criterion (a) beyond requiring that access (or increased access) materially promote competition.

Recommendations

In order to provide clarity to the definition of criterion (a) in the TPA, Virgin Blue submits that the language used in the *Sydney Airport* decision should be incorporated either into section 44H(4)(a) or into a separate definition of "a material increase in competition".

Virgin Blue recommends amending items 16 and 23 to reflect the language of the *Sydney Airport* decision.

Recommendation 1.

That the test in criterion (a) be as follows:

"(a) that access (or increased access) to the service would materially promote competition in at least one market (whether or not in Australia), other than the market for the service;"

Alternatively, if the proposed wording of criterion (a) requiring promotion of a "material increase in competition", then Virgin Blue proposes that a definition of "increase in competition" be included in section 4 of the TPA in a similar fashion to the way in which s 4G defines a lessening of competition.

Recommendation 2 (in the alternative to Recommendation 1).

Insert into section 4 the following sub-section:

"For the purposes of this Act, references to an increase in competition shall be read as including references to an improvement in the environment or conditions for competition."

Table B1.1: Summary of declaration applications to the Council

Applicant	*Service*	*Council recommendation*	*Minister's decision*	*Outcome*
Australian Union of Students (April 1996)	Payroll deduction service provided by Department of Education, Employment, Training and Youth Affairs	Not to declare (June 1996)	Not to declare (August 1996)	The union applied to the Australian Competition Tribunal for a review of the Minister's decision. The tribunal determined not to declare (July 1997).
Futuris Corporation (August 1996)	Western Australian gas distribution service			The application was withdrawn.
Australian Cargo Terminal Operators (November 1996)	Qantas ramp and cargo terminal services at Melbourne and Sydney international airports (two applications)			The application was withdrawn.
Australian Cargo Terminal Operators (November 1996)	Ansett ramp and cargo terminal services at Melbourne and Sydney international airports (two applications)			The application was withdrawn.
Australian Cargo Terminal Operators (November 1996)	Particular airport services at Sydney International Airport (three applications)	To declare (May 1997)	To declare (July 1997)	The Federal Airports Corporation applied to the Australian Competition Tribunal for a review of the Minister's decision. The tribunal determined to declare the services for five years from 1 March 2000.
Australian Cargo Terminal Operators (November 1996)	Particular airport services at Melbourne International Airport (three applications)	To declare (May 1997)	To declare for twelve months (July 1997)	Services were declared from August 1997 until 9 June 1998, and since have been subject to access provisions of the *Airports Act 1996*.

(*continued*)

Table B1.1 continued

Applicant	*Service*	*Council recommendation*	*Minister's decision*	*Outcome*
Carpentaria Transport (December 1996)	Queensland rail services, including above-rail services	Not to declare (June 1997)	Not to declare (August 1997)	Carpentaria applied to the Australian Competition Tribunal for a review of the Minister's decision. It then withdrew the application for review.
Standardised Container Transport (February 1997)	New South Wales rail track services (Sydney to Broken Hill)	To declare (June 1997)	Deemed not to be declared due to expiry of the 60-day limit (August 1997)	Standardised Container Transport applied to the Australian Competition Tribunal for a review of the Minister's decision. It then withdrew the application for review following successful access negotiations.
New South Wales Minerals Council (April 1997)	New South Wales rail track services in the Hunter Valley	To declare (September 1997)	Deemed not to be declared due to expiry of the 60-day limit (November 1997)	The New South Wales Minerals Council applied to the Australian Competition Tribunal for a review of the Minister's decision. It then withdrew the application for review following the certification of the New South Wales Rail Access Regime.
Standardised Container Transport (July 1997)	(1) Western Australia's rail track services, (2) arriving/ departing services, (3) marshalling/shunting service, (4) marshalling/shunting access, (5) fuelling service (five applications)	To declare the rail track service; not to declare other services (November 1997)	Not to declare any of the five services (January 1998)	Standardised Container Transport applied to the Australian Competition Tribunal for review of the Minister's decision. The application for review was withdrawn following successful access negotiations.
Robe River (August 1998)	Hamersley rail track services			The Federal Court decided that the service was not within part IIIA of the Trade Practices Act (June 1999). The Federal Court decision was appealed. Robe withdrew the application for declaration before the Full Federal Court hearing. The appeal was stayed.

(continued)

Table B1.1 continued

Applicant	*Service*	*Council recommendation*	*Minister's decision*	*Outcome*
Normandy Power Pty Ltd, NP Kalgoorlie Pty Ltd and Normandy Golden Grove Operations Pty Ltd (Normandy) (January 2001)	Electricity services provided through Western Power's south west electricity networks			Western Power and Normandy settled the broader commercial dispute between them and agreed to discontinue court proceedings seeking to prevent the Council from considering Normandy's application for declaration. Normandy withdrew its application for declaration.
Freight Australia (May 2001)	Rail track services provided through Victoria's intrastate rail network	Not to declare (December 2001)	Not to declare (February 2002)	Freight Australia applied to the Australian Competition Tribunal for a review of the Minister's decision. It then withdrew the application for review. The Victorian Government is reviewing the Victorian rail access regime to consider alternative arrangements that would account for the concerns raised by Freight Australia and other parties.
Portman Iron Ore Limited (August 2001)	Rail track services provided through the Koolyanobbing–Esperance rail track			The application was withdrawn.
AuIron Energy Limited (November 2001)	Rail track services provided through the Wirrida–Tarcoola rail track	To declare (July 2002)	To declare (September 2002)	In October 2002, APT (operator of the rail track) applied to the Australian Competition Tribunal for a review of the Minister's decision. In March 2003, the tribunal set aside the Minister's decision on the procedural basis that there was no probative material before it that could affirmatively satisfy the matters in s44H(4) of the Trade Practices Act.

(*continued*)

Table B1.1 continued

Applicant	*Service*	*Council recommendation*	*Minister's decision*	*Outcome*
Virgin Blue Airlines Pty Ltd (October 2002)	The use of runways, taxiways, parking aprons and other associated facilities necessary to allow aircraft carrying domestic passengers to: (1) take off and land using the runways at Sydney Airport; and (2) move between the runways and the passenger terminals at Sydney Airport (airside service)	Not to declare (November 2003)	Not to declare (January 2004)	Virgin Blue applied to the Australian Competition Tribunal for a review of the Minister's decision. At the time of publication of this annual report, the tribunal matter is ongoing.
Services Sydney Pty Ltd (March 2004)	A service for the transmission of sewage via Sydney Water's Sydney Sewage Reticulation Network from the customer collection points to the interconnection points (transmission services) A service for the connection of new trunk main sewers owned and operated by Services Sydney to the exiting Sydney sewage reticulation network at the interconnection points (interconnection service)	Issues paper was released in April 2004. Public submissions closing date was 4 June 2004. At the time of publication of this annual report the matter was being considered.		
Fortescue Metals Group Ltd (June 2004)	A service described as the use of the facility, being that part of the Mount Newman railway line that runs from a rail siding that will be constructed near Mindy Mindy in the Pilbara to port facilities at Nelson Point in Port Hedland, and is approximately 295 kilometres long; and the Goldsworthy railway line that runs from where it crosses the Mount Newman railway line to port facilities at Finucane Island in Port Hedland, and is approximately 17 kilometres long	At the time of publication of this annual report the matter was being considered.		