General Counsel
Brett Johnson

19 October 2006

Ms Jill Irvine
Productivity Commission
PO Box 80
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Dear Ms Irvine

Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146

As you will no doubt be aware, on 18 October 2006, the Full Federal Court (French, Finn and Allsop JJ) dismissed the application by Sydney Airport Corporation Limited for judicial review of the decision of the Australian Competition Tribunal ('the Tribunal') to declare domestic airside services at Sydney Airport.

A copy of the judgment is attached.

The Full Federal Court considered the proper construction of s44G(2)(a) and s44H(4)(a) of the *Trade Practices Act* (Act) and found that the test which should be applied is much simpler than that actually applied by the Tribunal[1]. Rather than looking at whether declaration would promote competition, the question is simply whether access or increased access would promote competition. So, in the airport context the question becomes: is access to an airport essential in order to promote competition in another market? That is a much simpler question with a much simpler answer.

The Full Federal Court also makes a number of key points which are worth noting in light of the Productivity Commission's (PC) current inquiry into arrangements for the price regulation of airport services.

Fully Commercial Negotiations with Airports Not Possible

As major airports in Australia are monopolies, airports and airport users are not on an even playing field making it impossible for a 'fully commercial environment' to exist.

An airport is not equivalent to a Westfield shopping centre. If a store owner cannot agree commercial terms with a Westfield, they can simply rent space in an alternative shopping centre or elsewhere. Airport users do not have this option. To put it simply, there is no where else in Sydney to land a commercial aircraft other than Kingsford Smith Airport. Airport users simply have no alternative. Simply, the major airports are natural monopolies.

This lack of commercial environment and subsequent inability to negotiate with an Airport was recognised by the Tribunal and acknowledged by the Full Federal Court. The Tribunal concluded that 'airlines do not have any effective countervailing power' and in the absence of declaration[2]:

> *we are satisfied that any commercial negotiations in the future as to the non-price terms and conditions on which the airlines utilise the facilities and related services at Sydney Airport are likely to continue to be protracted, inefficient, and may ultimately be resolved by the use of*

[1] *Sydney Airport Corporation Limited v ACT* [2006] FCAFC 146 at paras 81 - 84.

[2] *Re Virgin Blue Airlines Pty Ltd* [2005] ACompT 5 at paras 515 and 477 and cited in *Sydney Airport Corporation Limited v ACT* [2006] FCAFC 146 at paras 63 – 64.

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> *monopoly power producing outcomes that would be unlikely to arise in a competitive environment.*

It followed in the Tribunal's view that declaration of the airside service would promote competition in the downstream market by providing an independent dispute resolution procedure – ACCC arbitration – that would prevent the airport's controller from continuing to misuse its monopoly power.

It is clear that, when dealing with a monopoly service provider of essential infrastructure like an airport, fully commercial negotiations are simply not possible and competitive outcomes cannot be achieved without the parties having some recourse to binding dispute resolution when negotiations fail. It is against this background that Qantas suggests the PC's use of fully commercial negotiations as a starting point is misconceived.

Evidence of Abuse of Monopoly Power Not Essential

The approach of the Federal Court emphasises the fundamental issue with which the PC should also be concerned: namely, whether or not access to a facility is essential for competition in another market.

The Federal Court states[3]:

> *the essential notion to be derived from the Hilmer Report, the outline of the legislation issued by COAG, the Explanatory Memorandum and the Competition Principles Agreement is that it is necessary for the fact of access (in its ordinary meaning) to be relevant to effective competition in another market (upstream or downstream)*.

Simply put, major airports in Australia are monopolies and access to airports is essential for competition by airlines in the domestic and international aviation markets.

The PC has, to paraphrase Draft Recommendation 4.1, recommended that a clear signal be given that a price inquiry should occur if there is strong evidence of significant misuse of power. As well as offering nothing by way of credible constraint, that approach runs contrary to the conceptual approach of the Federal Court. In particular, the Federal Court held[4]:

> *… to the extent that the found denial or restriction acts as a focal point or governor of the enquiry as to the promotion of competition contemplated by s44H(4)(a) the section would be acting more like a remedy for a wrong rather than as a public instrument for the more efficient working of essential facilities in the economy.*

Over-emphasising the need for evidence of systematic abuse of market power[5] by airports means that the PC's draft recommendations do not address the fundamental issue created by airports' market power and the obviously 'essential' nature of services they provide to competition in other markets. The PC's approach is inconsistent with Parliament's approach to access regulation in Australia – as elaborated by the Federal Courts careful analysis[6] - and fails adequately to recognise the monopoly power of major airports.

Based on this decision, it is clear that the prospect of airport services being declared under Part IIIA of the Act is greatly improved. However, this does not reduce the inefficiencies inherent in Part IIIA which have been recognised by the PC.

Qantas believes that the PC should now be very comfortable recommending the Core Principle recommended by Qantas in its Submission dated 21 July 2006 and its Response dated October 2006 to the PC's Draft Report. This Core Principle is that:

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[3] *Sydney Airport Corporation Limited v ACT* [2006] FCAFC 146 at para 37.
[4] *Sydney Airport Corporation Limited v ACT* [2006] FCAFC 146 at para 78.
[5] Draft Report pXII
[6] *Sydney Airport Corporation Limited v ACT* [2006] FCAFC 146 at paras 3 - 39.

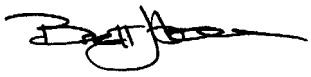
"Airports and airport users must engage in commercial negotiation of terms and conditions of access to services:

- in good faith with full and transparent information exchange;
- supported by binding independent dispute resolution in the event that agreement cannot be reached."

Should the PC not recommend adoption of the Core Principle, Qantas will be a position of being forced into pursuing declaration under Part IIIA of the Act – clearly a second best result given the unique opportunity available to the PC.

Please do not hesitate to contact me or Jill Henderson (02 9691 5799) if you have any questions.

Yours sincerely



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