Productivity Commission Inquiry
National Access Regime

Submission by Virgin Australia Airlines

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1 Executive summary

1.1 Part IIIA should continue, but with a limited role

Virgin Australia Airlines (**Virgin Australia**) believes that while (with appropriate improvements) the national access regime contained in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) should continue to provide a general "safety net" for access to bottleneck infrastructure, for significant industries with infrastructure access issues, industry-specific access regimes are required.

In the 30 years since the release of the Hilmer Report which led to the creation of Part IIIA, industry-specific access regimes have been introduced for a wide range of industries that depend on access to bottleneck infrastructure, including for the gas, electricity and telecommunications industries.

These regimes have been introduced in recognition that industries often throw up unique issues or sets of issues that are best addressed through access regimes that have been specifically designed to address them.

Part IIIA of the CCA contains a two stage access regime: a declaration stage and then a negotiate-arbitrate process.

Virgin Australia's concerns relate specifically to the operation of the declaration process in Part IIIA. Quite simply, the declaration process is too costly, slow and uncertain to provide any durable access solution in an industry with monopoly or bottleneck infrastructure.

To provide an adequate constraint on the monopoly power of bottleneck infrastructure owners, it would be necessary to have declared, and keep declared, all relevant monopoly services provided by the relevant infrastructure. This is because if an access dispute arises in relation to an undeclared service, then it is already too late to resort to Part IIIA to assist in resolving the dispute given the number of years involved in the declaration process.

While steps have been taken to streamline the declaration process and reduce the delays, even with further streamlining, Part IIIA is really only suitable for ad hoc access issues or for industries without recurring access issues.

For significant industries with recurrent access issues, the declaration process under Part IIIA is manifestly inadequate for the reasons set out in detail below.

Instead, these industries require industry-specific access regimes. These regimes can vary from complex legal and regulatory systems drawing (to a greater or lesser degree) on the principles contained in Part IIIA to more simple approaches such as legislation deeming certain services to be declared for the purposes of Part IIIA (thereby avoiding the pitfalls of the declaration process).

In this submission, Virgin Australia proposes to focus on its experience with the operation of Part IIIA in the context of the aviation industry and on changes required in order to overcome the shortfalls in the national access regime for the aviation industry.

1.2 Ineffectiveness of Part IIIA for regulating airports

Virgin Australia's experience with Part IIIA clearly demonstrates that it is largely ineffective at enhancing the prospects of access, or increased access, for access seekers and constraining airports' market power due to significant problems with the declaration process.

Virgin Australia considers that Part IIIA is an ineffective tool for access seekers because:

(a) the **time** involved in an access seeker having relevant services declared under Part IIIA;

(b) the **cost** in seeking declaration under Part IIIA, especially the cost that would be involved in seeking declaration of all airport services provided by all major airports where those airports have substantial market power; and

(c) the **uncertainty** of the outcome when seeking declaration. Even if an access seeker is prepared to invest the time and money in seeking declaration, the outcome of the process remains uncertain.

The ineffectiveness of Part IIIA as a tool for access seekers means that it is also an ineffective too for constraining the market power of major airports as major airports do not feel constrained by the threat of arbitration.

While it is Virgin Australia's experience that the negotiate-arbitrate regime that comes into operation following declaration is very effective at resolving disputes, the benefit of this regime is lost given the time and cost in seeking declaration in the first place.

1.3 Changes required to resolve access issues in the aviation industry

Virgin Australia believes that it is inappropriate for airport users to be forced to rely solely on the declaration process under Part IIIA to constrain the monopoly power of major airports in Australia. Instead, Virgin Australia proposes an airport-specific negotiate-arbitrate model (**Proposed Model**) with the following features:

(a) the model would apply to **aeronautical related services** provided at **major airports** in Australia, where:

  (i) aeronautical related services extend beyond the current regulatory definition of aeronautical services to include all services provided within a terminal and all other services used by passengers travelling on airlines; and

  (ii) major airports include at least the following airports: Sydney Airport, Melbourne Airport, Brisbane Airport, Perth Airport and Adelaide Airport;

(b) first and foremost, airlines and airports would be encouraged to commercially negotiate for the provision of airport services;

(c) in the event that the parties could not agree on the terms and conditions for the supply of aeronautical related services, users and providers would have the ability to refer the dispute to independent arbitration;

(d) in order to assist commercial negotiations and reduce the need for any arbitration:

(i) pricing and costing guidelines would be issued addressing key issues in negotiations over the provision of aeronautical related services; and

(ii) the price monitoring regime would continue (with improvements) to ensure that airlines and airports have up to date, accurate and transparent information about airports' costs and prices.

The primary benefits of this model are a reduction the cost and time incurred by both access seekers and service providers in reaching commercial agreement.

1.4 Structure of this submission

In this submission Virgin Australia:

(a) provides the relevant context for assessing the effectiveness of Part IIIA in regulating the provision of airport services;

(b) explains why Part IIIA has been ineffective in constraining the market power of major airports; and

(c) discusses the benefits of the negotiate-arbitrate model and proposes an airport-specific negotiate-arbitrate model.

2 Performance of Part IIIA in the aviation industry

2.1 Introduction

Among other things, the Terms of Reference for this inquiry ask the Commission to:

(a) examine the rationale, role and objectives of the Part IIIA access regime, and Australia's overall framework of access regulation; and

(b) assess the performance of the regime in meeting its rationale and objectives.

Despite two isolated instances of declaration, Virgin Australia considers that Part IIIA is an ineffective tool for airport access seekers because of:

(a) the **time** involved in an access seeker having relevant services declared under Part IIIA; and

(b) the **cost** in seeking declaration under Part IIIA, especially the cost that would be involved in seeking declaration of all airport services provided by all major airports where those airports have substantial market power.

These hurdles for access seekers have the consequence of making Part IIIA an ineffective tool for constraining the market power of airports.

2.2 Application of Part IIIA to airports

It has been previously acknowledged by the Government that airports are subject to the generic access provisions in Part IIIA, and there have been two instances in which services provided by airports have been declared. Sydney Airport was the relevant airport in both instances.

First, in *Sydney International Airport [2000] ACompT 1* (1 March 2000), the Tribunal declared the following services provided by Sydney Airport:

(a) 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.

(b) the service provided by the use of an area at Sydney International Airport for the purpose of enabling ramp handlers:

  (i) to store equipment used to load and unload international aircraft; and

  (ii) to transfer freight from trucks to unloading equipment and to transfer freight from unloading equipment to trucks, at the airport.

Secondly, in *Re Virgin Australia Airlines* (2006) ATPR 42-092, the Tribunal declared the "Airside Service", being:

> *a service for the use of runways, taxiways, parking aprons and other associated facilities (Airside Facilities) necessary to allow aircraft carrying domestic passengers to:*
>
> - *take off and land using the runways at Sydney Airport; and*
> - *move between the runways and the passenger terminals at Sydney Airport.*

On 18 October 2006, the Full Federal Court upheld the Tribunal's declaration of the domestic airside service (*Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) 155 FCR 124). Shortly afterwards, Sydney Airport sought special leave from the High Court to appeal the Full Federal Court's decision.

On 29 January 2007, Virgin Australia notified the ACCC of an access dispute with Sydney Airport in relation to the provision of the Airside Service.

On 2 March 2007, the High Court dismissed Sydney Airport's application for special leave to appeal from the Full Federal Court decision, stating that there were insufficient prospects of success.

On 22 May 2007, Virgin Australia withdrew its notification of the dispute having successfully negotiated a commercial settlement with Sydney Airport.

Following the very quick resolution of this dispute, neither Virgin Australia nor any other person notified any other dispute to the ACCC for the whole of the 5 year period in which the Airside Service was declared at Sydney Airport.

Virgin Australia believes that its experience with the declaration of the Airside Service at Sydney Airport demonstrates three key points:

(a) first, that without an effective constraint on their market power, major airports will tend to exercise their power to the detriment of competition and the travelling public;

(b) secondly, that the declaration provisions in Part IIIA are not well suited to the task of constraining the market power of major airports, and suffer from a number of drawbacks as set out below; and

(c) thirdly, once an airport service is (eventually) declared and parties are able to resort to arbitration if necessary, disputes can quickly be resolved commercially without the need for a hearing before the arbitrator. The credible threat of arbitration encourages efficient commercial negotiation and does not result in parties needlessly seeking to arbitrate potential disputes.

2.3 Time involved in obtaining access under Part IIIA

The processes that an access seeker is required to follow in order to have a service declared are complex and lengthy, even with the time limits introduced into the CCA in 2010.

In relation to declaration alone there are potentially four separate decision makers to consider the matter: the National Competition Council (**NCC**), the relevant Minister, the Tribunal and the Federal Court. Further, following declaration, if an access seeker and an access provider cannot agree on the terms and conditions for access then either can seek to have the ACCC arbitrate the dispute. The ACCC's determination in relation to any such arbitration may be the subject of an application to the Tribunal for review, and the Tribunal's decision may be the subject of a further appeal (on a question of law) to the Federal Court. Therefore, even once a service is (finally) declared under Part IIIA of the CCA, if parties cannot agree on the terms and conditions for access (which is a particular problem in negotiations where one party has a substantial degree of market power), then there can be substantial additional delays before access is provided on terms other than those imposed unilaterally by the service provider.

The amendments to Part IIIA of the CCA introduced to address criticisms about its operation in relation to the timing of the declaration process will not do enough to address this issue. These amendments introduced set timeframes for the various steps involved in declaration and arbitration as follows:

(a) 180 days for the NCC to make a recommendation following a declaration application;

(b) 60 days for the designated Minister to publish his or her decision in relation to declarations (following receipt of the NCC's recommendation);

(c) 180 days for the Tribunal to make a decision under any application for review; and

(d) 180 days for the ACCC to make an arbitration determination on access disputes.

The NCC, the ACCC and the Tribunal are each permitted under Part IIIA to extend these timeframes in specified circumstances (called 'stopping the clock' in the CCA).

While the above timeframes are considerably shorter than those experienced by Virgin Australia in its application for declaration of the airside service at Sydney Airport,[1] the length of time, applying these timeframes, from an initial application to the NCC through to a binding determination of an access arbitration would still be unacceptably long for resolving an access dispute in a commercial context.

The delay involved in obtaining declaration is itself a sufficient reason to discount its application, even with the new timeframes. This is in part because the earliest time for backdating any determination in relation to the terms and conditions for access is the date of declaration.

However, if the airport subsequently refuses to offer acceptable terms and conditions, then the airline is in a very poor position because it could be a matter of years before the service is declared, and Part IIIA offers no remedy or compensation for any loss incurred by the airline in the interim as a result of the airport's exercise of market power. Therefore, if an airline waits until a problem arises in negotiations with an airport, it is already too late as any redress is years away (even if the service is successfully declared).

Further, because of the legal doubt attendant on whether a particular service will be declared under Part IIIA, there is a barrier to such disputes being settled commercially. Given that it is not possible to predict years in advance when a dispute with an airport may arise (and with which airport in relation to which service), it is not possible to proactively apply to have just those services declared under Part IIIA.

2.4 Costs involved

Further, the process under Part IIIA of the CCA is very costly for both access seekers and for access providers. In relation to the Airside Service at Sydney Airport, Virgin Australia had legal representation throughout the process, including at three separate hearings (one before the Tribunal, one before the Full Federal Court and one before the High Court), and had to provide lengthy submissions to the NCC (including expert economic reports).

2.5 Uncertainty of outcome

The effectiveness of the current Part IIIA regime is further limited by the uncertainty of the outcome of any application for declaration. Therefore, even if an access seeker is prepared to invest the time and money in seeking declaration, the outcome of the process remains uncertain. This uncertainty acts as a major deterrent to access seekers using Part IIIA as a means for seeking access and provides further scope for airports to misuse their market power.

3 The negotiate – arbitrate framework

3.1 Virgin Australia's experience to date

Airports have substantial market power. This is due to their position as natural monopolies, with substantial barriers to entry, large sunk costs and strong economies of

[1] In that matter, the NCC process took 14 months and the Australian Competition Tribunal process took 22 months. In total, it took approximately 5 years from the time when Virgin Australia commenced its application for declaration of the Airside Service in October 2002 to the time when the High Court dismissed Sydney Airport's application for special leave.

scale. This is particularly the case with Tier 1 airports, although Virgin Australia also considers that other airports can also exercise substantial market power.

Airlines do not have countervailing power against the market power of airports. Demand for aeronautical services at airports is highly inelastic. In most cases, airlines have no choice but to use services at a particular airport as there are no available substitutes and to withdraw from an airport would mean that airlines would need to cease offering services to and from that destination, with consequent damage to their network offering.

As a result, there is an imbalance in bargaining power between airlines and airports in commercial negotiations. The current regime is not effective in addressing this issue.

Outside of situations where there is a commercial incentive for airports to reach agreement, Virgin Australia has found, and continues to find, negotiations with airports to be very difficult.

In addition to concerns regarding the pricing conduct of airports, Virgin Australia has the following concerns:

(a) negotiations with airports in relation to both price and non-price matters can be extremely protracted. Negotiations between Virgin Australia and airports often extend over many months, and, in some cases, extend over more than 12 months;

(b) there can be a lack of transparency in negotiations with airports. For example, some airports can be unwilling to share with Virgin Australia information regarding the basis for price increases which are often the subject of negotiations, which makes the negotiation of such changes extremely difficult; and

(c) airports will on occasion adopt an inflexible approach to negotiations. This includes the refusal of airports to agree to certain provisions that are common in other competitive industries, such as effective dispute resolution clauses. It also includes the imposition by airports of unreasonable or uncommercial terms. In circumstances where not reaching agreement would involve Virgin Australia ceasing to operate services to or from the airport, with resulting damage to its network and service offer and detriment to consumers, this leaves little room for negotiation.

3.2 Virgin Australia's preference for commercial negotiation

Despite the difficulties it has experienced to date, Virgin Australia considers that it is possible, and preferable, for airlines and airports to effectively negotiate commercially in relation to a range of matters. However, given the market power that major airports have in relation to the provision of airport aeronautical charges, negotiations are unlikely to be commercial unless:

(a) unusual circumstances create an incentive for airports to negotiate commercially; or

(b) there is an externally imposed "circuit breaker", such as readily available recourse to arbitration for access seekers.

Virgin Australia has consistently stated that its preference is to commercially negotiate agreements with airports. Commercial negotiation is the most efficient and flexible method of setting the terms and conditions on which airports supply, and airlines acquire, airport services.

However, as noted above negotiations between (at least) major airports and airlines have rarely been conducted on a truly commercial basis. This is due in part to the market power that major airports possess in supplying aeronautical and related services. Virgin Australia has found that it is only where unusual circumstances create an incentive for airports to negotiate commercially that they will do so. An example of where this has occurred was when the new terminal at Adelaide Airport was built. In that instance, the Airport had an incentive to negotiate commercially in relation to a new terminal agreement with Virgin Australia. This was because it was a condition of the funding of the new terminal that Adelaide Airport had executed agreements with each of Qantas and Virgin Australia.

Therefore, an incentive is needed to encourage airports to negotiate commercially in relation to the supply of these services. Virgin Australia believes that the best way to retain the efficiency and flexibility of commercial negotiation whilst providing an incentive for airports to negotiate is to provide for a "circuit breaker" where a party would have the option of quickly and easily referring a matter to independent arbitration if the parties could not agree commercially.

Virgin Australia's experience with the declared Airside Service at Sydney Airport, where it was able to quickly and commercially resolve its dispute once the threat of arbitration became available, has confirmed its belief in the benefits of this model.

3.3 Proposed airport-specific negotiate-arbitrate model

In its Issues Paper, the Commission states that it has previously found that the current approach of a national access regime operating in tandem with industry-specific regimes has significant advantages.[2] The Commission also asks what variations could be made to the negotiate-arbitrate model to better address access disputes.

In this context, Virgin Australia proposes a light handed negotiate-arbitrate model (**Proposed Model**) with the following features:

(a) the model would apply to **aeronautical related services** provided at **major airports** in Australia, where:

  (i) "aeronautical related services" extend beyond the current regulatory definition of aeronautical services to include all services provided within a terminal and all other services used by passengers travelling on airlines; and

  (ii) major airports include at least the following airports: Sydney Airport, Melbourne Airport, Brisbane Airport, Perth Airport and Adelaide Airport;

(b) first and foremost, airlines and airports would be encouraged to commercially negotiate for the provision of airport services;

(c) in the event that the parties could not agree on the terms and conditions for the supply of aeronautical related services, users and providers would have the ability to refer the dispute to independent arbitration; and

(d) in order to assist commercial negotiations and reduce the need for any arbitrations:

  (i) pricing and costing guidelines would be issued addressing key issues in negotiations over the provision of aeronautical related services; and

[2] Commission Issues Paper p4

(ii) the price monitoring regime would continue (with improvements) to ensure that airlines and airports have up to date, accurate and transparent information about airports' costs and prices.

Virgin Australia provides more detail of its proposed model in Attachment 1.

Virgin Australia notes that this is very similar to the negotiate-arbitrate model that it proposed to the Commission in 2006 and 2011. Virgin Australia continues to believe that this model provides a more appropriate regime for the regulation of airport access and could be introduced without the need for major legislative reform.

Virgin Australia considers that such a regulatory model would have significant benefits for the industry as it would lead to fully informed commercial negotiations between major airports and airlines and any resort to arbitration would be minimised through the provision of costing and pricing guidelines which would provide the parties with greater certainty as to the outcome of the arbitration.

The arbitration process should also provide for interim determinations and backdating of final determinations to ensure that there are no commercial benefits to any party from delaying the arbitration process.

3.4 Virgin Australia's Proposed Model will not result in excessive arbitration

The Commission has previously expressed a concern that if an airport-specific negotiate-arbitrate model were introduced, parties would view arbitration as the default process for setting prices (see, for example p 91 of the Commission's 2006 report).

However, as Virgin Australia has previously pointed out, a well-designed negotiate-arbitrate model can have the opposite effect and actually enhance the environment for commercial negotiations.

Since the Commission's 2006 report, there have been developments that allay the Commission's concerns and demonstrate how a negotiate-arbitrate model can enhance commercial negotiations. The experience with the declared Airside Service at Sydney Airport has been salutary.

The original dispute between Virgin Australia and Sydney Airport that led to the application for declaration was resolved by negotiation between the parties a matter of weeks after the final avenues of legal appeal against the declaration of the relevant service had been exhausted by Sydney Airport.

Further, there were no other disputes notified to the ACCC in relation to the Airside Service for the 5 year period it was declared. Clearly declaration did not lead to a situation where parties preferred arbitration to commercial negotiation. If this was the case in relation to the major aeronautical service at Sydney Airport, Virgin Australia cannot see any reason why the same position would not apply for other aeronautical related services at other major airports.

The background to any negotiate-arbitrate regime is that if parties behave in a reasonable, commercial manner, there need be no arbitration. This is the ideal situation and Virgin Australia's preferred approach to the negotiation of terms and conditions for the provision of aeronautical related services. The aim of arbitration is to act as a 'circuit breaker' in the event that commercial negotiations fail (and it may be necessary on rare occasions to resort to such a circuit breaker). However, the conduct of arbitrations is not

the only valuable element of such a regime. It is the *threat* of arbitration that would provide parties with an incentive to negotiate on a reasonable, commercial basis.

Terms and conditions of access negotiated on a commercial basis have clear benefits over an outcome determined by arbitration, including:

(a) certainty of outcome, as terms are agreed by the parties. This also gives the parties the potential to negotiate flexible terms and conditions;

(b) speed of outcome, as even the most efficient arbitration processes take time; and

(c) cost savings, as costs associated with arbitration are avoided.

The Commission has previously acknowledged the benefits of a negotiate-arbitrate model. For example, in its review of the National Gas Access Regime, the Commission stated:[3]

> 'In certain circumstances, an effectively designed negotiate–arbitrate framework can encourage commercial negotiation and innovation, and reduce regulatory compliance costs relative to the Gas Access Regime, while still providing a regulatory mechanism to prevent service providers from attempting to deny access to, or extract monopoly rents from, access seekers. For large users, there are benefits from greater flexibility in the terms and conditions of access that can be achieved through commercial negotiations.'

In addition, the publication of pricing and costing guidelines, as discussed above, would provide guidance to both the access seeker and the access provider as to the likely arbitrated outcome. This would provide an incentive to negotiate without resorting to arbitration, while limiting the access provider's ability to exercise any monopoly power, knowing that if it were to do so the access seeker would likely resort to arbitration. The Commission acknowledged the effect of pricing principles in its review of the National Access Regime:[4]

> 'Without pricing principles, negotiation can be somewhat unguided – at least until such time as arbitrated precedents are established. This could take a long time. From this perspective, pricing principles would be a particularly important adjunct to speedy negotiation during the early stages of an access regime.'

In conclusion, Virgin Australia considers that any concerns that a negotiate-arbitrate model may lead to excessive arbitration are misplaced. Given the absence of any other identified constraint, a negotiate-arbitrate model of the sort proposed by Virgin Australia offers the best outcomes for airports, airlines, the travelling public and society as a whole.

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3 Productivity Commission, *Review of the Gas Access Regime*, Productivity Commission Inquiry Report No 31, 11 June 2004 at p 335.

4 Productivity Commission, *Review of the National Access Regime*, Productivity Commission Inquiry Report No 17, 28 September 2001 at p 201.

Attachment 1: Virgin Australia's proposed negotiate-arbitrate model for the aviation industry

1.1 Proposed model

Virgin Australia's Proposed Model has the following features:

(a) the model would apply to **aeronautical related services** provided at **major airports** in Australia, where:

(i) "aeronautical related services" extend beyond the current regulatory definition of aeronautical services to include all services provided within a terminal and all other services used by passengers travelling on airlines; and

(ii) major airports include the following airports: Sydney Airport, Melbourne Airport, Brisbane Airport, Perth Airport and Adelaide Airport;

(b) first and foremost, airlines and airports would be encouraged to commercially negotiate for the provision of airport services;

(c) in the event that the parties could not agree on the terms and conditions for the supply of aeronautical related services, users and providers would have the ability to refer the dispute to independent arbitration; and

(d) in order to assist commercial negotiations and reduce the need for any arbitrations:

– pricing and costing guidelines would be issued addressing key issues in negotiations over the provision of aeronautical related services; and

– the price monitoring regime would continue (with improvements) to ensure that airlines and airports have up to date, accurate and transparent information about airports' costs and prices.

Virgin Australia notes that this is very similar to the negotiate-arbitrate model that it proposed to the Commission in 2006 and 2011. Virgin Australia continues to believe that this model provides a more appropriate regime for the regulation of airport access and could be introduced without the need for major legislative reform.

Virgin Australia considers that such a regulatory model would have significant benefits for the industry as it would lead to fully informed commercial negotiations between major airports and airlines and any resort to arbitration would be minimised through the provision of costing and pricing guidelines which would provide the parties with greater certainty as to the outcome of the arbitration.

The arbitration process should also provide for interim determinations and backdating of final determinations to ensure that there are no commercial benefits to any party from delaying the arbitration process.

1.2 Aeronautical Related Services

Virgin Australia has also proposed a new definition for "aeronautical related services", as set out below. It recommends the Commission consider this new definition as a measure that could be implemented even independent of the negotiate-arbitrate model proposed.

It is Virgin Australia's experience that airports can manipulate the allocation of services as either aeronautical or non-aeronautical to ensure maximum profitability, eg:

(a) in some circumstances airports attribute a very high proportion of investments to aeronautical services in order to be able to recover costs through aeronautical charges;

(b) in other circumstances, airports class services that they consider to be highly profitable on a stand-alone basis as non-aeronautical. Because of this, airports can price these services at any level they choose without the need to be accountable for those prices. A good example of this is the classification of services at Sydney Airport, Brisbane Airport and Adelaide Airport. Each of these airports classifies a significant proportion of roads into the airport as 'aeronautical assets' for the purposes of their asset base used in the calculation of their rate of return and the price for aeronautical services. This allows these airports to make returns on these assets in circumstances where they would not be reasonably able to directly charge passengers for the use of those assets. This has the effect of increasing aeronautical charges. However, these airports can charge users for car parking, and classifying car parking stations as non-aeronautical assets allows them to charge as they choose for these services.

Virgin Australia considers that the simplest and most effective way to deal with this problem is to adopt a pragmatic approach to the scope of services covered. Adopting too narrow a definition would simply result in airports seeking to recover revenue that they cannot obtain from the defined services from other services which are required by airlines in order to provide civil aviation services at the airport.

Therefore, Virgin Australia proposes that the relevant services for the Proposed Model should be aeronautical related services, which would include everything within a terminal, including retail, and all other services used by passengers travelling on airlines. This would include the services provided by airports in which airports have market power. This definition would include things like public car parking and staff car parking, but would exclude retail and office space which is outside the terminal but built on airport land, such as has occurred at Brisbane and Canberra Airports.

The expanded definition should also include services provided by airports to third party suppliers to airlines. Monopoly charges levied on such third party suppliers (eg fuel companies, caterers) are inevitably passed on to airlines through increased prices.

1.3 Identity of the arbitrator

Given the issues that are likely to be involved in any dispute over the provision of aeronautical related services (eg asset valuations, the impact of charging structures, efficiency of pricing levels), Virgin Australia considers that the ACCC would be well placed to conduct the independent arbitrations due to its:

(a) general experience in conducting arbitrations in relation to disputes over access to monopoly infrastructure; and

(b) specialised experience in relation to the pricing of aeronautical services through the price monitoring work that it does and the work that it performed under the previous price notification and price cap regime.

Virgin Australia notes that if the ACCC were to be the chosen arbitrator, then it may be possible to implement Virgin Australia's proposed negotiate-arbitrate model though the deemed declaration of aeronautical related services at major airports.

However, Virgin Australia would also be satisfied if the independent arbitrator under the proposed model was to be another person or body, so long as they satisfied the key criteria of independence and relevant experience.

1.4 Pricing and costing guidelines

While the threat of arbitration may be a significant incentive for parties to negotiate commercially, if the ACCC were to issue guidelines addressing key costing and pricing issues, then parties would be better informed about the likely outcome of any arbitration. This additional certainty would assist in negotiating commercial outcomes without the need for formal arbitration.

In relation to airports, Virgin Australia considers that guidelines prepared by the ACCC on the following issues would greatly assist parties in commercial negotiations:

(a) the valuation of airport assets, including:

  (i) how an initial asset value should be determined;

  (ii) how that value should be adjusted over time, including guidance on depreciation rates and whether the asset value should be indexed for inflation;

  (iii) the time at which charging should commence for new increments to capacity;

(b) the allocation of costs between aeronautical and non-aeronautical services and other cost measurement issues; and

(c) the parameters or methods for estimating the WACC that the ACCC considers would be appropriate.