PRODUCTIVITY COMMISSION

REVIEW OF THE NATIONAL ACCESS REGIME

QANTAS GROUP SUBMISSION ON DRAFT REPORT

JULY 2013

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1. Introduction

Qantas Airways Limited (Qantas) welcomes the opportunity to review the Productivity Commission's (PC) Draft Report into the National Access Regime (Draft Report) and provide further comment.

While Qantas' views differ from those of the PC on a number of issues, which have been well-canvassed in the various reviews conducted by the PC on regulation of airport services between 2001 and 2011 and the current review of the national access regime, Qantas welcomes the PC's findings in relation to:

- Draft Finding 3.2 – that "both vertically integrated and vertically separated infrastructure service providers can, under some circumstances, have an ability and incentive to engage in monopoly pricing of access" and that "access regulation can provide benefits by covering both vertically integrated and vertically separated service providers";

- Draft Recommendation 8.2 – amending the definition of "anyone" in paragraphs 44G(2)(a) and 44H(4)(b) of the *Competition and Consumer Act 2010* (Cth) (CCA) to exclude the incumbent service provider;

- Draft Recommendation 9.1 – if the designated Minister does not publish a decision on a declaration recommendation within the 60 day time limit, this should be deemed as acceptance of the National Competition Council's recommendation; and

- Draft Finding 9.1 – Retaining the merits review arrangements under the Part IIIA of the CCA.

In this submission, Qantas has not commented on every aspect of the Draft Report, but has instead focussed its comments on the need for a credible National Access Regime and the, more particularly, the need for an industry-specific regime for airports.

2. Market Power of Airports

Qantas continues to be concerned with the conclusion of the PC (at page 28 and repeated at page 268 of the Draft Report) that:

> *"…while some airports have considerable market power arising from barriers to entry and limited substitutes, this market power is somewhat constrained by commercial opportunities and pressures. Further, as airports are vertically separated, they are unlikely to have an incentive to deny access to their major customers – the airlines."*

It is difficult to reconcile how the PC can recognise the "considerable" market power of airports such as Sydney Airport, Brisbane Airport, Perth Airport and Melbourne Airport and yet find a "somewhat" constraint is sufficient to balance this power, particularly in a dual till environment where airports are able to avoid price monitoring of the commercial side of their business.

Qantas also questions the statement that airports will not deny access to airlines. While airports may not directly deny access they can and do use strategies (such as deferring capital works) to 'encourage' airlines to agree to uncommercial terms. Examples of this conduct have been included in Qantas' various submissions since 2006 and are also detailed in the Australian Competition Decision *Re Virgin Blue Airlines Pty Ltd.*[1]

As Qantas discussed in its submission to the PC in February 2013, core airports in Australia exhibit the same 'natural monopoly characteristics' as other infrastructure facilities that are subject to industry-specific regulation – infrastructure-intensive, network facilities with large fixed costs (and low marginal operating costs) that are uneconomical to duplicate and are used by many users with little if any countervailing bargaining power. Yet the primary rationale for not introducing industry-specific regulation for core Australian airports appears to be that such regulation will interfere with light handed regulation and be more intrusive than such regulation.

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[1] *Re Virgin Blue Airlines Pty Ltd* [2005] ACompT 5 (12 December 2005)

3. Need for a National Access Regime

In Qantas' experience, a robust access regime to help ensure an effective commercial relationship and negotiations between monopolistic infrastructure owners and users is essential.

Part IIIA forms an indispensable part of the "light handed" regulatory regime that applies to core Australian airports. Unless an industry-specific regime is introduced for airports, it is the only real option available to airport users when negotiations with airports break down and airports seek to rely on their monopoly position to unilaterally impose prices or other terms of access. However, Part IIIA is only a credible threat in circumstances where satisfaction of the declaration criteria remains a reasonable possibility. Therefore, care should be taken to ensure that amendments to Part IIIA do not result in declaration becoming a practical impossibility.

Rather than potentially supplanting the price monitoring regime for airports (as the PC suggests at page 174 of the Draft Report), a readily accessible Part IIIA regime is a core component of the Governments stated price monitoring regime, and has been since the introduction of light handed regulation in 2002.

Although the Draft Report highlights (at page 57) that there have been comparatively few applications for declaration under Part IIIA, the possibility of seeking declaration of a particular airport's facilities is something that Qantas looks at with reasonable regularity and, in 2004, Qantas joined Virgin Blue in its application to declare the airside services at Sydney Airport.