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By email

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Dear Mr Channing

Virgin Blue Airlines Pty Ltd & Ors - applications for authorisation A91151-A91152 and A91172-A91173

We refer to your email of 26 November 2009, enclosing a late submission from Hubert Horan.

Mr Horan expresses a range of views in objecting to the Commission's Draft Determination. Mr Horan's submission is argumentative, repetitious, demonstrably incorrect in many respects and repeatedly mischaracterises the Commission's reasons and the Applicants' authorisation case.

Given the Applicants detailed substantiation of the public benefits of the joint venture, the Applicants do not propose to respond to Mr Horan's objections and assertions. However, the Applicants do make the following general observations in relation to Mr Horan's submission.

Firstly, Mr Horan simply incorrectly applies the public benefit test that applies in the case of authorisations. For example:

- Mr Horan dismisses the (accepted) increased competitiveness of Virgin Blue and Delta under the joint venture as a private benefit. This is simply wrong. The ability for Virgin Blue and Delta to offer competitive integrated domestic connections for travellers is the clearest public benefit. (*re Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; *re 7-Eleven Stores* (1994) ATPR 41-357 at 42, 677; *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385 at 391-392 and *Re Qantas Airways Limited* [2004] ACompT 9 at 185)

- Mr Horan appears to consider that some form of economic modelling or quantification is required to demonstrate "that public benefits significantly exceed risks of public detriment".[1] The Commission

[1] This view is clearly incorrect Modelling exercises, as contemplated by Mr Horan, in which benefits and detriments are quantified and given a numerical value to be weighed against each other are rightly treated with a deal of scepticism given the highly assumption dependant nature of such exercises. They are not required. (Re Qantas Airways Limited [2004] ACompT 9 at 201-209; ACCC Authorisation Guide, [5.61])

examined a wide range of evidence including QSI analysis, internal commercial route modelling, third-party analysis, business plans, financial data, internal communications and board papers. The Commission also conducted meetings with regulatory and commercial staff from both Applicants. The Applicants submit that the Commission's investigation has been extensive and is more than sufficient to satisfy itself of the Applicants' case in respect of both anti-competitive detriment and public benefits.

The Applicants' public benefits case has been fully substantiated. Furthermore, there is no relevant detriment to offset or weigh against those benefits, as the joint venture is only likely to enhance competition, not undermine it. (A point impliedly accepted by Mr Horan in parts of his submission).

Secondly, Mr Horan claims there are no demonstrated network benefits under the joint venture not otherwise achievable through code sharing. This is a most curious claim from a person of Mr Horan's experience. The evidence before the Commission clearly demonstrates that:

- Virgin Blue lacks deep access to US routes, [CONFIDENTIAL INFORMATION REDACTED]; and
- Virgin Blue will gain access to a much larger range of code share routes and preferentially priced inventory under the joint venture.

To support his erroneous claim, Mr Horan surprisingly trivialises double connect travellers, referring to travel from Kalgoorlie to Pensacola. The substantial cumulative volume of double connect travel available under the joint venture is well established. [CONFIDENTIAL INFORMATION REDACTED].

Thirdly, aside from these basic errors, Mr Horan makes the extravagant claim, without any support, that the joint venture will result in a restoration of a duopoly on the trans-Pacific service. There is simply no basis to suggest that there would be a return to the pre Open Skies duopoly. Suggestions that United will exit the route are fanciful and inconsistent with United's own public statements. United's chief executive and chairman, Glenn Tilton, recently stated that the trans-Pacific routes are "a hugely significant market for [United] and we are in that market for the long haul".[2]

Mr Horan's claims in relation to competition on trans-Pacific routes are internally inconsistent and lack any coherence. He repeatedly and emotively characterises the legitimate commercial joint venture as "collusive" and contends that it will result in a lessening of competition, but then refers to the increased competitiveness of Virgin and Delta and the risk that this will lead to the demise of United (presumably through enhanced competition).

The Applicants trust that this letter fully addresses Mr Horan's erroneous arguments. Given the matters outlined above, the Commission should give no weight to Mr Horan's late submission.

Yours faithfully
Gilbert + Tobin

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[2] Matt O'Sullivan, 'United's stand on Pacific route' in *The Sydney Morning Herald* (30 October 2009).