

22 April 2020

Mr G Jones
Director, Adjudication
Australian Competition and Consumer Commission
Level 35, 360 Elizabeth St
Melbourne VIC 3330

By email: gavin.jones@accc.gov.au
cc: Tessa.cramond@accc.gov.au

Dear Mr Jones

SUBJECT: Authorisation Application by Virgin Australia

Please accept this submission as a replacement for Perth Airport's previous submission dated 15 April 2020.

This new submission contains some details which are commercially sensitive to both Perth Airport and Virgin Australia.

The matters we wish to remain confidential have been redacted in this letter. Perth Airport is agreeable to the publication of the remainder of this submission.

PERTH AIRPORT SUBMISSION

Perth Airport welcomes the opportunity to provide comments on the application by Virgin Australia for an "urgent" Interim Authorisation from the ACCC under section 88 of the Competition and Consumer Act 2010, albeit we remain concerned at the lack of time provided to prepare and make these comments.

The coronavirus (COVID-19) outbreak has had a devastating impact across the aviation sector.

Airports, including Perth Airport, have not been immune to this. Airports collect the overwhelming majority of their aviation revenue on a per passenger basis.

Due the government restrictions on international and interstate travel, Perth Airport's passenger numbers have collapsed. This has led to an expected loss of up to \$120 million in revenue over the next three months alone.

Despite the enormous financial challenges we face, Perth Airport has continued to work cooperatively and constructively with our airline partners, our retail operators, our service providers and our tenants to ensure the industry can work through this crisis together.

We understand the financial pressures facing our partners as we are experiencing them ourselves.

We have been receptive to approaches by airlines, including Virgin Australia, on how we can assist their businesses in this challenging period.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

With this background in mind, our position on Virgin Australia's application can be summarised as follows:

- We support the application as it relates to capacity and revenue allocation between airlines;
- We strongly oppose the application as it relates to collective bargaining conduct.

Perth Airport endorses the submission made by the Australian Airports Association (AAA) in relation to Virgin Australia's (VA) application for authorisation. Accordingly, Perth Airport will not repeat the substance of the AAA submission but will highlight matters specific to Perth Airport.

As noted above, Perth Airport is committed to supporting all its partners, including its airline partners. COVID-19 and the resultant travel restrictions impact all parts of the aviation sector equally, not just the airlines.

Perth Airport sees considerable benefit in the Australian public having the benefit of competition in the domestic aviation market and accordingly supports reasonable actions to prevent a Qantas monopoly. However, the application by VA to collectively negotiate with airports is not a necessary or reasonable action to ensure VA's continued operation, nor is it required by Qantas.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Perth Airport is working with all of its partners, not just airlines, to understand how we can assist them to minimise the impact of COVID-19 on their business.

This approach, as evidenced above, already applies to VA, as it does to any other airline, retailer, service provider or tenant.

There is no evidence that the application for authorisation to the extent it authorises collective negotiations is necessary, nor that it results in any public benefits.

We therefore believe there is no justification for the ACCC to grant the authorisation sought with respect to collective negotiations with airports.

Lack of procedural fairness

Perth Airport has been given insufficient time to respond to this surprising application for authorisation.

The amount of time given to Perth Airport to assess the application, obtain advice and prepare a submission is wholly unreasonable.

Due to the potential adverse financial impacts upon Perth Airport of any successful collective bargaining authorisation and the detriments of the exchange of competitively sensitive information between Perth Airport's major customers, the unreasonable amount of time given by the ACCC is prejudicial to Perth Airport.

Should the ACCC proceed to make a decision to grant authorisation with respect to collective negotiations with airports without Perth Airport having a reasonable opportunity assess the application and make submissions, then Perth Airport will have been denied procedural fairness and natural justice.

Claimed benefits are theoretical and at best speculative

The claimed benefits are theoretical and at best speculative. The benefits do not meet the test of being at a level of a real chance. This alone is a sufficient basis to deny authorisation.

Authorisation if granted does not compel Perth Airport to enter into collective negotiations with VA and its competitors. Perth Airport sees no benefit in it doing so.

This is consistent with the ACCC's Perth Decision (*ACCC Objection Notice in respect of a collective bargaining notification lodged by Hertz Australia Pty Ltd on behalf of a group of car rental companies operating at Perth Airport* (16 July 2010)).

In that matter the ACCC determined that Perth Airport (which in that matter was referred to as Westralia) would not negotiate collaboratively unless there was a benefit to Perth Airport in doing so, and that as a result the authorisation would be unlikely to increase the rental operators' bargaining power:

Hertz has argued that the arrangements will produce a public benefit by providing group members with a degree of countervailing power in negotiations with Westralia which will be reflected in them being able to negotiate more favourable terms and conditions and that, given competition at the retail level, this will result in lower prices and improved levels of service for consumers.

However, given any such more favourable terms and conditions would be at the expense of Westralia. Given that the voluntary nature of the arrangements mean that Westralia can elect not to participate, or to participate in collective bargaining but not accept any less favourable terms than it would through individual negotiation with each member of the group Westralia would be unlikely to agree to a collectively negotiated arrangement that does not produce mutually beneficial outcomes.

Further, the ACCC acknowledged that collective bargaining was unlikely to influence the terms and conditions of access, as Perth Airport would only be likely to negotiate collectively if there was a benefit to it from doing so:

Given the voluntary nature of collective bargaining arrangements, the ACCC has also recognised that opportunities for collective bargaining to influence contract terms and conditions will generally only arise if both sides are likely to benefit from collectively negotiating an outcome.

That is to say, where the target of a proposed collective bargaining group has the option of continuing to deal with members of the group individually, there would be no incentive for the target to agree to a collectively negotiated outcome unless the collectively negotiated agreement was going to achieve a better outcome for it than negotiating individually with each group member.

The ACCC also noted that even if Perth Airport did collectively negotiate, the rental operators would be unlikely to secure a better deal:

As noted, collective bargaining arrangements can operate successfully where they produce mutually beneficial outcomes for the target and the bargaining group. However, in this case, Westralia has strong viable alternatives to dealing with the collective bargaining group, including dealing with the members of the bargaining group individually. In contrast, if the car rental companies want to provide rental services to customers at Perth airport they have no commercially viable alternative to dealing with Westralia. Given this, the ACCC considers that the car rental companies are unlikely to be able to secure a better deal from Westralia through collective negotiation unless there is an offsetting efficiency or other gain to Westralia that motivates them to offer the car rental companies a better deal. [Emphasis added]

Perth Airport does not consider that it would derive any benefits from collectively negotiating with the proposed cartel, and has no intention of doing so. Therefore, the benefits asserted by the applicants, cannot arise. In fact, if the ACCC were to grant an authorisation, this would lead to the airlines sharing what would otherwise be commercial in confidence contractual terms individually agreed with each airline given their specific requirements.

Given this, and the ACCC's clear position on this in the Perth Airport Notification, there is clearly no basis for the ACCC to allow the authorisation, at least with respect to Perth Airport.

Benefits are not exclusively from authorisation

The ACCC must give little weight to the claimed benefits to the extent that they exist as such benefits are likely to arise in the counter-factual. As the ACCC is aware the ACCC must assess the options for achieving claimed benefits and given appropriate weighting to future benefits not achievable in any other less anti-competitive way.

In *Re Sea Swift*, the Tribunal stated that:

A public benefit arises from a proposed acquisition if the benefit would not exist without the acquisition or if the acquisition removes or mitigates a public detriment that would otherwise exist. If a claimed public benefit exists, in part, in a future without the proposal, the weight accorded to the benefit may be reduced appropriately

Application by Sea Swift Pty Limited [2016] ACompT 9 at [42] (*Sea Swift*).

In this case, Perth Airport is already working with all of its partners – airlines, retailers, service providers, tenants – to ensure we all have a fair chance of minimising the impact of COVID-19 on our businesses and, importantly, to protect jobs. Accordingly, the claimed benefits exist in the counter-factual and therefore must be given little, if any, weight.

Benefits are not of substance

The claimed benefits must be of substance: see *Re Qantas Airways Limited* (2005) ATPR 42-065 at [205]; see also *Sea Swift* at [46].

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Against this context Perth Airport estimates that variable fees payable by VA constitute more than [REDACTED] of the total revenue received from VA and therefore only [REDACTED] related to fixed fees/payments. On this basis the ACCC must rigorously assess the material and substance of any savings VA asserts may flow from its negotiations with Perth Airport.

Further the lack of facts, quantification and explanation by VA of the claimed benefits means that the ACCC cannot reached the level of satisfaction required by the statute of the likely benefits. To conclude otherwise would be wholly unreasonable and contrary to law.

Uncertain scope of the conduct

The conduct sought to be authorised is merely: “joint negotiations (including collective bargaining) with airports in relation to (but not limited to) infrastructure use and fee relief.”

This not clearly defined and limited conduct. It is inclusive of negotiations in relation to infrastructure, but not limited to such issues.

This leaves the obvious unanswered question of what else is VA seeking to negotiate with Perth Airport. Furthermore, there is no detail provided on what “fees” it is seeking relief from.

For the ACCC to grant authorisation the conduct must be clearly defined and sufficiently certain to allow the ACCC to assess the benefits and detriments that likely flow from the conduct. As the scope of the conduct is uncertain the ACCC cannot properly apply the statutory test and therefore cannot grant authorisation.

Incomplete application

Perth Airport has been provided a redacted version of the application. Whilst there are few redactions in terms of volume, considering the scant detail provided in the application and the lack of facts, the degree of redaction is material to affected parties’ assessments of VA’s claims. Furthermore, in the sole two paragraphs dealing with collective bargaining with airports, one entire sentence is redacted. Accordingly, Perth Airport expects the opportunity to assess the complete application and to be able to make submissions on the complete application.

Perth Airport thanks the ACCC for seeking and considering these comments. Our officers are available to the ACCC at any time to further discuss this submission, to clarify any points, or answer any questions you may have.

The best point of contact going forward would be our General Manager Corporate Affairs, Matt Brown, who can be reached on [REDACTED] or on [REDACTED]

Yours sincerely,



Brian Periera
CHIEF FINANCIAL OFFICER