



Determination

Application for Minor Variation of Authorisation A90791

Lodged by

INTERNATIONAL AIR TRANSPORT ASSOCIATION

In respect of the IATA Passenger Agency Program

Date: 16 May 2005

Public Register no. C2005/480

Commissioners: Samuel
Sylvan
Martin
Smith
Willett
King

1. The Application

- 1.1. On 11 March 2005, the International Air Transport Association (IATA) lodged an application for minor variation of authorisation A90791 under section 91A of the *Trade Practices Act 1974* (the Act).
- 1.2. IATA is the international trade association of most airlines operating international air services in the transport of passengers, mail or cargo. Its members are estimated to account for over 95% of international passenger travel to and from Australia.

Authorisation A90791

- 1.3. Authorisation A90791 was granted by the Australian Competition and Consumer Commission (ACCC) on 13 November 2002 under a determination which also revoked an existing authorisation (A90408). Both A90791 and A90408 concern the IATA Passenger Agency Program (the IPAP).
- 1.4. The IPAP provides a system for the sale and distribution of air transport through travel agencies. The IPAP is embodied mainly in resolutions passed by IATA airline members at IATA Passenger Agency Conferences. The program has three core elements:
 - an accreditation scheme which enables licensed agents to sell tickets on behalf of airlines;
 - a process of appointing agents to represent airlines; and
 - a system for managing the reporting and payment of ticket sales.
- 1.5. Authorisation A90791 was granted by the ACCC subject to two conditions, including at paragraph 10.2(3) that:

Within two years of the date this determination comes into force, entry into general concurrence by an airline is to be conditional upon the airline providing a statement of reasons to both the agency and the Executive Council Australia in relation to any agency in Australia which it refuses Traffic Documents or Carrier Identification Plates or from whom it withdraws such Documents or Plates.
- 1.6. The above condition was to be met by IATA by 5 December 2004, however, IATA failed to meet this deadline. The ACCC raised this issue with IATA and in response IATA lodged an application for minor variation.

Application for minor variation lodged on 11 March 2005

- 1.7. IATA seeks the following minor variation to authorisation A90791:
 - delete the condition contained in paragraph 10.2(3) to determination A90791; and

- insert the following substitute condition:

By 1 August 2005, the IATA Passenger Agency Conference resolution establishing and governing the IATA Passenger Agency Programme as it applies in Australia (i.e. Resolution 816) is to include a provision to the effect that IATA member airlines who have entered general concurrence in relation to Australia are to provide a statement of reasons to any IATA accredited agent in Australia, if requested by the agent to do so in writing, where the airline either declines to provide the agent with ticketing authority or carrier identification plates or from whom the airline withdraws such authority or plates.

2. Statutory Provisions

- 2.1. Section 87D of the Act defines a minor variation as a single variation that does not involve a material change in the effect of the authorisation.
- 2.2. Section 91A of the Act provides that the ACCC must, if it is satisfied that the proposed variation is a minor variation, invite submissions from interested parties. After consideration of the application and any submissions received, the ACCC may make a determination varying the authorisation or dismissing the application.
- 2.3. Section 91A(4) of the Act provides that the ACCC may grant a minor variation to an authorisation granted under section 88(1), where it is satisfied that the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation.

3. Submissions

Australian Federation of Travel Agents

- 3.1. The ACCC sought submissions from interested parties on IATA's application for minor variation. A submission was received from the Australian Federation of Travel Agents (AFTA).
- 3.2. AFTA submitted that the proposed amendment to the condition is not minor as defined in s91A of the *Trade Practices Act*. AFTA submitted that the proposed condition is not a substitution of the condition of authorisation A90791, nor does it give effect the ACCC's original intention. AFTA's submission is referred to in more detail in the ACCC's evaluation.

International Air Transport Association

- 3.3. IATA submitted that the effect of this variation is to:
 - make the requirement a stand alone requirement, rather than a condition of general concurrence;

- remove the requirement that the statement of reasons also be given to the IATA Executive Council Australia;
 - correct minor technical inaccuracies in the original condition; and
 - extend the date for compliance from 5 December 2004 to 5 August 2005 to allow the matter to be voted on by airlines at the 2005 IATA Passenger Agency Conference.
- 3.4. IATA submitted that the variation would not result, and not be likely to result, in either a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation, or a reduction in the benefit to the public that arose from the original authorisation.
- 3.5. IATA provided a further submission to the ACCC dated 13 May 2005 in response to AFTA's submission. The relevant detail of IATA's submission is covered in the ACCC's evaluation below.

4. ACCC Evaluation

IATA's ability to comply

- 4.1. IATA submitted that it had a lack of ability to comply with the condition, in that the rules and regulations governing the IPAP are determined by member airlines, not by IATA.
- 4.2. IATA further submitted that it has no power to change the rules applicable to any of its programs as the relevant resolutions are under control of, and can only be amended by, resolutions of member airlines participating in the IATA Passenger Agency Conference.
- 4.3. AFTA submitted that this is a disingenuous argument and it is insufficient for IATA to respond that it has no ability to comply with the condition whilst its members still take the benefit of authorisation.
- 4.4. The ACCC notes that both IATA and its members enjoy the benefit of immunity resulting from determination A90791. The ACCC considers IATA's position unacceptable. Should IATA maintain the position that member airlines are able to enjoy the benefits of authorisation (immunity from Australian competition laws) but ignore the conditions imposed in the public interest, the ACCC will cease to have confidence in the ability to grant conditional authorisation to IATA arrangements.
- 4.5. At the very least, the ACCC considers that should IATA have had any interpretation issues on the meaning and/or intention of the condition or its practical application, that it should have approached the ACCC long before the expiry of the deadline had passed (over two years since granting of authorisation A90791).

Airlines forced to deal with agents

- 4.6. IATA submitted that an airline has a right to choose whether or not it is in its commercial interests to provide plates to an agent who requests it and that to insist on a condition requiring airlines, in effect, to deal with travel agents with whom they do not wish to deal would risk contravening that important principle.
- 4.7. The ACCC accepts that an airline may have good reasons for not wishing to deal with an agent (as recognised by the wording of paragraph 10.2(3) in authorisation A90791). However, where there is a refusal or withdrawal the reasons should be transparent and obvious for consideration by the parties concerned.

Essential issue of the condition

- 4.8. IATA submitted that it understood the essence of what the ACCC was attempting to achieve with the condition is that, where an airline has entered general concurrence, if the airline decides not to grant ticketing authority to an accredited agent or withdraw any such authority, the airline should give reasons for doing so if the agent requests reasons. IATA accepted that the ACCC's intention is sensible and believes that, notwithstanding the rejection to date, it can probably achieve airline support for changes to the Passenger Agency Program as it applies in Australia to meet that objective.
- 4.9. AFTA submitted that it was not intended by the ACCC that a prerequisite for giving reasons must be a request by the agent. AFTA does not agree with the proposed substitute condition as it shifts the onus on to the agent to request reasons, rather than providing an obligation on the airline to provide them automatically.
- 4.10. The ACCC was concerned that despite an agent having satisfied the comprehensive requirements of the accreditation process and signed the IATA Passenger Sales Agency Agreement, the agent could be denied plates or have them withdrawn for an airline which has signed the general concurrence.
- 4.11. In that regard, the ACCC notes AFTA's comments that it is aware of incidences where an agent has been refused plates by Qantas on the basis that the airline has determined that the agent lacked financial viability, notwithstanding the fact that the agent had met the IATA financial criteria as part of the accreditation process.
- 4.12. The ACCC's intention in imposing the condition was that where a member airline, operating to and from Australia, has entered into general concurrence and the airline has refused or withdrawn plates from an accredited agent in Australia, that the agent would automatically be provided with reasons for the refusal or withdrawal.
- 4.13. The ACCC considers that the relationship between airlines and agents is largely controlled by IATA. It is likely that a number of agents may feel

that they are not in a position to request reasons and risk any future commercial arrangements with airlines.

- 4.14. Therefore, the ACCC is of the view that the condition proposed by IATA, as it applies to agents requesting reasons, would result, or be likely to result, in a reduction in the net benefit to the public caused by authorisation A90791.
- 4.15. However, the ACCC notes from IATA's latest submission that IATA has reconsidered its position and now considers the deletion of the requirement for an agent to request reasons from an airline is reasonable and one that will be acceptable to IATA members.

Conditioning general concurrence

- 4.16. IATA submitted that general concurrence is the world wide facilitative mechanism by which IATA member airlines authorise the IATA Director-General to appoint accredited agents as agents for the airlines. IATA further submitted that while general concurrence can be limited to specific areas of the world many airlines sign general concurrence on a global basis.
- 4.17. IATA submitted that whether an accredited agent has been appointed individually or through general concurrence, the agent must obtain the airline's authority before it can issue tickets on that airline.
- 4.18. IATA was of the view that there were two problems with the original condition. First, that making general concurrence conditional, given its global nature, is not feasible. Second, that the condition may be interpreted as only applying to airlines who actually enter general concurrence in relation to Australia after 5 December 2004. IATA indicated that if this were the case it would constitute two separate classes of airline members - existing members to whom the condition does not apply, and new members to whom the condition would apply.
- 4.19. AFTA submitted that general concurrence is a country by country mechanism and is published either nationally or for regions but not globally. AFTA submitted, therefore, that the term "world wide facilitative mechanism" used by IATA in its submission is misleading. AFTA made reference to the schedule regarding general concurrence published by IATA in the Travel Agent's Handbook applicable to Australia, which states:

"The following Member Airlines have deposited a statement of general concurrence with the Agency Administrator for the appointment of Accredited Agents in Area 3 in accordance with the provisions of Section 4 of the Passenger Sales Agency Rules - SWP".

AFTA submits that in this instance general concurrence is limited to Area 3 only.

- 4.20. The ACCC is of the view that notwithstanding debate over whether general concurrence is a world wide facilitative mechanism or not, the ACCC's intention in imposing the condition was for member airlines operating to and from Australia who have entered into general concurrence to provide

reasons to accredited agents when refusing or withdrawing plates from those agents. In this regard the proposed substitute condition which in part states:

“IATA member airlines who have entered general concurrence in relation to Australia are to provide a statement of reasons to any IATA accredited agent in Australia...”

captures the intent of applying to member airlines who have entered general concurrence and would not result, or be likely not to result, in a reduction in the net benefit to the public caused by authorisation A90791.

- 4.21. The ACCC is of the view that the second issue raised by IATA, that the condition could be interpreted as only applying to airlines who actually enter general concurrence in relation to Australia after 5 December 2004, would be unlikely to be interpreted by IATA this way given the context of the determination.
- 4.22. Further, if there were any interpretation issues the ACCC would have expected IATA to have sought clarification within the two years in which it had to comply with the condition. Nonetheless, the ACCC accepts that the proposed condition as it applies to general concurrence would not result, or be likely not to result, in a reduction in the net benefit to the public caused by authorisation A90791.

The meaning of agency

- 4.23. IATA submitted that the condition refers to providing reasons to ‘*any agency in Australia which it refuses...Carrier Identification Plates*’ and that significantly the condition does not refer to accredited agents. IATA submitted that interpreted literally this means that as a condition of general concurrence a member airline must give reasons to any agent, accredited or not, who asks for plates and is refused.
- 4.24. AFTA submitted that it is clear that the IPAP is applicable to accredited travel agents. AFTA made reference to the definition of “Accredited Agent” which appears in Resolution 816:
- “(sometimes referred to as an ‘Agent’) means a Passenger Sales Agent whose name is entered on the Agency List.”*
- 4.25. AFTA submitted that the condition that an airline must give reasons to an agent can only refer to an IATA accredited agent.
- 4.26. The ACCC considers that when the condition is read in the context of determination A90791 (IPAP), “agency” refers to accredited agent. Notwithstanding this, the ACCC accepts IATA’s proposed condition to include reference to *IATA accredited agents* would not result, or be likely not to result, in a reduction in the net benefit to the public caused by authorisation A90791.

Traffic Documents

- 4.27. IATA submitted that the condition requires reasons to be given where the relevant airline refuses *Traffic Documents* or withdraws *Traffic Documents* and that the term is not defined. Further, IATA submitted that airlines do not issue traffic documents to accredited agents, they either issue Carrier Identification Plates or more commonly a ticketing authority. IATA, therefore, proposed that the substitute condition should include the term *ticketing authority* instead of *traffic documents*.
- 4.28. AFTA submitted that contrary to IATA's submission there are definitions of 'Traffic Documents' within the IATA resolutions. AFTA submitted that for example resolution 866 has a definition for the term.
- 4.29. The ACCC notes that the term traffic document is defined in Resolution 866 (Definitions of Terms used in Passenger Agency Programme Resolutions) as:
- "TRAFFIC DOCUMENTS means the following forms issued manually, mechanically or electronically for air passenger transportation over the lines of the Member or Airline and for related services, whether or not they bear a pre-printed individual Member's identification:*
- (a) Carriers' own Traffic Documents - Passenger Ticket and Baggage Check forms, Automated Ticket/Boarding Passes, Miscellaneous Charges Orders, Multiple Purpose Documents, Agents Refund Vouchers and On-Line Tickets supplied by Member to Accredited Agents for issue to their customers, and*
- (b) Standard Traffic Documents - as defined."*
- 4.30. Notwithstanding the above, the ACCC accepts IATA's proposed change to include reference in the condition to *ticketing authority* instead of *traffic documents* would not result, or be likely not to result, in a reduction in the net benefit to the public caused by authorisation A90791.

Executive Council Australia

- 4.31. IATA submits that the proposal to also give reasons to the Executive Council is a fundamental problem for the following reasons. First, such disclosure to the Executive Council may be defamatory or damaging to the business of the agent, depending on the reasons given.
- 4.32. Second, the fact that the ticketing authority was refused would be disclosed to competitors of the agents concerned, being the other agent members of the Executive Council, and this may be sensitive commercial information.
- 4.33. Third, if an airline were to provide reasons for refusing ticketing authority to any particular agent it would be disclosing confidential, commercially sensitive information to its competitors on the Executive Council.
- 4.34. Fourth, there is nothing the Executive Council could do with information unless there was a change to the resolutions governing that body.

- 4.35. AFTA acknowledged that notification to the Executive Council is not without its potential problems, but that this in itself should not be the basis for IATA's non-compliance with the condition. AFTA submitted that the problems identified by IATA could be resolved if the members of the Executive Council could be governed by a code of conduct which would impose obligations of confidentiality, or to have the notification lodged with the Travel Agency Commissioner or the Chief Executive Officer of AFTA. AFTA strongly supported the concept that reasons for refusal or withdrawal should be given to a third party.
- 4.36. The ACCC saw the requirement for airlines to give reasons to the Executive Council Australia as a safeguard to protect the competitive interests of agents. The ACCC would be concerned if restrictions were placed on agents thereby limiting their ability to copy reasons to third parties.
- 4.37. The ACCC sought clarification from IATA on this issue. In its response of 12 April 2005, IATA stated that it is not seeking to place any restriction on agents passing to third parties statements of reasons provided to them by a member airline, if the agent wishes them to do so. Rather, that IATA is seeking only to remove the obligation to provide reasons to the Executive Council Australia. IATA regards the issue of disclosure as an individual matter for each agent, as it is with any other correspondence.
- 4.38. The ACCC notes that IATA submitted in its response to AFTA's submission, that it believes that the giving of reasons to the Travel Agency Commissioner is a sensible solution to this issue and one that is likely to be acceptable to its members. As a result, even though such action is not being sought by the ACCC, IATA has included it in the amendments to be considered by the Passenger Agency Conference at its June meeting.
- 4.39. In light of the above, the ACCC is satisfied that an agent who receives a statement of reasons pursuant to the proposed condition would be freely able to share those reasons with a third party.
- 4.40. On this basis, the ACCC accepts IATA's proposal to remove from the condition the obligation for member airlines to provide reasons to the Executive Council Australia would not result, or be likely not to result, in a reduction in the net benefit to the public caused by authorisation A90791.

Date for compliance

- 4.41. IATA submitted that the next Passenger Agency Conference is due to be held in June 2005 and requested that the date for compliance of the proposed substitute condition be extended to 1 August 2005.
- 4.42. AFTA submitted that it has considerable concern that the current condition either in its current form or as amended by the ACCC, will not be adopted by IATA members.

- 4.43. AFTA submitted that the ACCC should mandate to IATA that the appropriate resolution be passed at the June 2005 Passenger Agency Conference and be given immediate effect.
- 4.44. AFTA noted at paragraph 3.2 of IATA's submission, that IATA does no more than state it "can probably" achieve airline support for the changes required by the ACCC as a condition of authorisation.
- 4.45. AFTA submitted that there is a risk that if a resolution is not passed at the June 2005 Passenger Agency Conference, then it will not be considered again until mid 2006, with an effective date of 1 January 2007. AFTA submitted that a delay of this magnitude would not be acceptable.
- 4.46. As noted above, the ACCC expects compliance with conditions of authorisation. The ACCC is not prepared to accept further delays of significance in compliance with the relevant condition in this matter and considers that delays beyond 1 August 2005 would be unacceptable.

Conclusion

- 4.47. Subject to the discussion below, the ACCC considers the proposed variations are capable of being considered under the minor variation process.
- 4.48. The ACCC considers that the proposed changes to the condition by IATA would not result, or be likely not to result, in a reduction in the net benefit to the public caused by authorisation A90791, providing that the giving of a statement of reasons to an agent is automatic. The ACCC therefore proposes to vary the substitute condition proposed by IATA to this effect.
- 4.49. On the basis of the above conclusion, the ACCC did not consider it necessary to examine the merit of further changes proposed by AFTA.

5. Determination

The application

- 5.1. On 11 March 2005, IATA lodged an application for minor variation of authorisation A90791 under section 91A of the *Trade Practices Act 1974*.
- 5.2. Authorisation A90791 was issued by the ACCC on 13 November 2002 as part of a determination which also revoked an existing authorisation (A90408). Both A90791 and A90408 concern the IATA Passenger Agency Program which provides a system for the sale and distribution of air transport through travel agencies.
- 5.3. IATA seeks the following minor variation to determination A90791 lodged in its application of 11 March 2005:
- delete the condition contained in paragraph 10.2(3) to determination A90791; and
 - insert the following substitute condition:

By 1 August 2005, the IATA Passenger Agency Conference resolution establishing and governing the IATA Passenger Agency Programme as it applies in Australia (i.e. Resolution 816) is to include a provision to the effect that IATA member airlines who have entered general concurrence in relation to Australia are to provide a statement of reasons to any IATA accredited agent in Australia, if requested by the agent to do so in writing, where the airline either declines to provide the agent with ticketing authority or carrier identification plates or from whom the airline withdraws such authority or plates.

The statutory test

- 5.4. Subject to the discussion below, the ACCC considers the proposed variations are capable of being considered under the minor variation process.
- 5.5. Pursuant to section 91A(4) of the Act, for the reasons outlined in section 4 of this determination the ACCC concludes that the minor variation would not result, or would be likely not to result, in a reduction to the extent to which the benefit to the public recognised in authorisation A90791 outweighs any detriment to the public identified in authorisation A90791, providing that the giving of a statement of reasons to an agent is automatic.

Conduct authorised

- 5.6. Pursuant to section 91A(3) of the Act, the ACCC makes a determination varying authorisation A90791 as follows:
- delete the condition contained in paragraph 10.2(3) to determination A90791; and

- insert the following substitute condition:

By 1 August 2005, the IATA Passenger Agency Conference resolution establishing and governing the IATA Passenger Agency Programme as it applies in Australia (i.e. Resolution 816) is to include a provision to the effect that IATA member airlines who have entered general concurrence in relation to Australia are to provide a statement of reasons to any IATA accredited agent in Australia, where the airline either declines to provide the agent with ticketing authority or carrier identification plates or from whom the airline withdraws such authority or plates.

- 5.7. This determination is made on 11 May 2005. If no application for review of this determination is made to the Australian Competition Tribunal (Tribunal) in accordance with section 101 of the Act, this determination will come into force on 2 June 2005.
- 5.8. If an application for review is made to the Tribunal, this determination will come into force:
 - a) Where the application is not withdrawn - on the day on which the Tribunal makes a determination on the review and grants authorisation; or
 - b) Where the application for review is withdrawn - on the day on which the application is withdrawn.