

6. Statutory Criteria

6.1 Application A90791 was made under section 88(1) of the Act pursuant to section 91C of the Act and seeks revocation of Authorisation A90408 and the substitution of a new authorisation in specific terms described earlier. Both the Authorisation A90408 and the proposed new authorisation relate to arrangements developed between airlines for the sale of airline travel by travel agents.

6.2 Section 91C(1) of the Act provides for the Commission to make a determination in writing:

- (a) revoking the existing authorisation and granting another such authorisation that it considers appropriate, in substitution for it; or
- (b) deciding not to revoke the existing authorisation.

6.3 Under subsection 91C(7) of the Act the Commission cannot make a determination revoking an authorisation and substituting another authorisation unless the Commission is satisfied that it would not be prevented under subsection 90(6), (7), (8), or (9) from making a determination granting the substituted authorisation, if it were a new authorisation sought under section 88.

6.4 The statutory test which the Commission must apply in this case in considering whether or not it would be prevented from making a determination granting the new authorisation is set out in subsections 90(6) and 90(7) of the Act. Under these subsections, when considering an application for authorisation in relation to an arrangement, the Commission shall not make a determination granting an authorisation unless it is satisfied, in all the circumstances, that the conduct has resulted, would result, or would be likely to result, in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result. Section 4G of the Act states that for the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition.

6.5 In deciding whether to grant the new authorisation, therefore, the Commission must:

- examine the anti-competitive detriment of the conduct and the benefit to the public arising from the conduct; and
- weigh the anti-competitive detriment against the benefit to the public to determine which is greater.

6.6 Should the benefit to the public (or expected benefit to the public) outweigh the anti-competitive aspects, the Commission may grant the new authorisation which may in turn be subject to conditions.

7. Commission Assessment – Competitive Effects of the Proposed Arrangement

7.1. Market definition

7.1 The first step in assessing the competitive effects and the public benefit/detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.

Markets generally

7.2 Section 4E of the Trade Practices Act states that a market for goods or services includes other goods or services that are substitutable for, or otherwise competitive with, the first goods or services¹⁹. The courts have established that both demand and supply side substitution must be taken into account in determining the relevant market. *QCMA*²⁰ is often cited when seeking to explain how markets are defined:

A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them... Within the bounds of a market there is substitution between one product and another and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive... Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance and cost and price incentives.

It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction?

7.3 In establishing the market boundaries, the Commission seeks to include all those sources of closely substitutable products, to which consumers would turn in the event that the firm attempted to exercise market power. The Commission looks at both the demand and supply side of the market and defines up to four different dimensions:

- geographic market - which may be local, state, national or international depending on where trade occurs;
- product market - based on whether products are close substitutes for one another;
- functional market - defines at what level the conduct in question occurs, eg retail or wholesale; and

¹⁹ The Commission identifies the relevant market by determining the smallest area over which a profit maximising monopolist would impose a "small but significant and non-transitory increase in price" (SSNIP), or equivalent exercise of market power. By including all substitution possibilities, the process of market definition identifies all the sources of competition that effectively constrain the price and output decisions of the relevant entities. Market definition is not an end in itself but rather a tool of analysis. The market must be defined only to the extent necessary to determine the effect of the proposed conduct on competition.

²⁰ *Re Queensland Co-op Milling Association Ltd & Defiance Holdings Ltd* (1976) ATPR 40-012.

- temporal market, ie - what period of time does the analysis apply to? The next two years? The next ten?

7.4 If market boundaries are too narrow so that actual or potential sources of competition are excluded then the proposed conduct will appear to have greater anti-competitive effect than is actually the case. On the other hand, the market may be defined too widely to include products or geographic areas that are not close substitutes. In such circumstances the anti-competitive effects of the proposed conduct will appear to be weaker than they actually are.

7.2. The Commission's general view of air transport sector markets

Previously stated views of the Commission

7.5 The Commission has previously expressed views on markets relevant to air transport in its Determinations A90565 (Qantas and BA) of 12 May 1995, A90649/655 (Ansett Australia, Ansett International, Air New Zealand and Singapore Airlines) of 22 July 1998 and A30202 (Qantas and BA) of 10 May 2000.

7.6 In the latest of these determinations (A30202) the Commission concluded that there were three broad markets of relevance to air transport:

- passenger transport;
- freight; and
- ticket sales.

7.7 Given that IATA's arrangements relating to air cargo are subject to a separate authorisation this analysis will be restricted to passenger transport and ticket sales.

Passenger transport

7.8 The Commission has consistently stated that the most important dimensions of the passenger transport market are the geographic and product dimensions.

Geographic market

7.9 The Commission has previously held, on the basis of differences in regulatory controls, that a distinction needs to be made between domestic and international markets.

Domestic

7.10 The Commission has previously distinguished between the domestic and international markets on the basis of the different regulatory environments and the lack of competitors to Ansett and Qantas on domestic routes.

7.11 An important element of the regulatory distinction is cabotage policy which restricts the carriage of passengers between points in Australia to domestic airlines.



Government specified ownership restrictions effectively prevent foreign international carriers from operating on Australian domestic routes. Foreign persons, including foreign airlines, are allowed to have up to 100% of equity in an Australian domestic airline, unless this is contrary to the public interest. While a foreign airline is prevented under cabotage from carrying domestic passengers in Australia, it can operate a wholly owned subsidiary in the domestic market.

7.12 The Commission noted that while foreign carriers were prevented from operating in the Australian domestic market they could have a presence through code sharing with the Government allowing foreign carriers to code share to all points in Australia on Australian domestic airlines. This policy only relates to international passengers continuing their international voyages beyond their point of entry into Australia. However it does result in domestic flights carrying a mixture of international travelling passengers and domestic passengers. It also encourages linkages between international carriers and domestic carriers meaning that alliances between Australian and foreign carriers on international routes can impact on the performance of the Australian domestic market.

7.13 Following the failure of Ansett in September 2001 the Government relaxed cabotage policy as a means of achieving greater balance between supply and demand on trunk routes. United Airlines, for example, was allowed to utilise surplus capacity to carry domestic passengers between Sydney and Melbourne.

7.14 However this development was only interim. In the longer term, as long as foreign owned international carriers are precluded by cabotage policy from operating in the Australian domestic market, it would be difficult for the Commission to do other than reaffirm its previously stated view that the domestic market is distinct from the international market.

International

7.15 The Commission has consistently stated when examining international air transport passenger markets that after taking into account opportunities for indirect travel a regional approach to market definition is generally the most appropriate. Given the focus of the international air transport passenger market in this case is competition between international airlines, regardless of destination/origin, the regional approach would not appear relevant to this application.

Product market

7.16 The Commission stated in Determination A30202 that it cannot be assumed that a single air transport market exists for both economy and premium class passengers. In stating this view the Commission referred to the differences in demand characteristics and service requirements of premium class and economy class passengers and the extent to which substitute services acceptable to premium class passengers can be provided by airlines in competitive markets. The Commission also stated that it considered that in the premium class cabin the high proportion of passengers travelling under corporate contracts and within loyalty programs would effectively lock those passengers into specific airlines and make it difficult for other airline to enter that market.

7.17 The Commission reaffirms its view stated in A30202 which it considers is relevant to this application.

Sale of air travel (including ticket sales)

7.18 While the Commission has previously identified the ticket sales market as one of the markets relevant to the air transport of passengers there would appear to be a need to broaden the market definition in relation to the IATA authorisation application.

7.19 The IATA passenger agency program relates to the relationship between accredited travel agents and airlines but such agents are only one segment of the market for the distribution of air travel to consumers. Figure 6.1 below broadly shows the structure of the distribution market between the supply of the air travel product and its consumption by passengers including the different types of organisations involved and the roles they play.

7.20 Any attempt to restrict the market to ticket sales only would preclude travel agents which are not IATA accredited and accordingly not able to sell tickets directly to the public. Only IATA accredited agents are able to issue tickets using neutral IATA ticket stock. Agencies which are not IATA accredited obtain tickets from accredited agents for passing on to the public. Some accredited agents (consolidators) specialise in supplying tickets to non-accredited agents. Other accredited agents as well as supplying to consumers on specific routes also wholesale to other agencies on those routes.

Figure 6.1. Distribution mechanism for the sale of airline travel to passengers

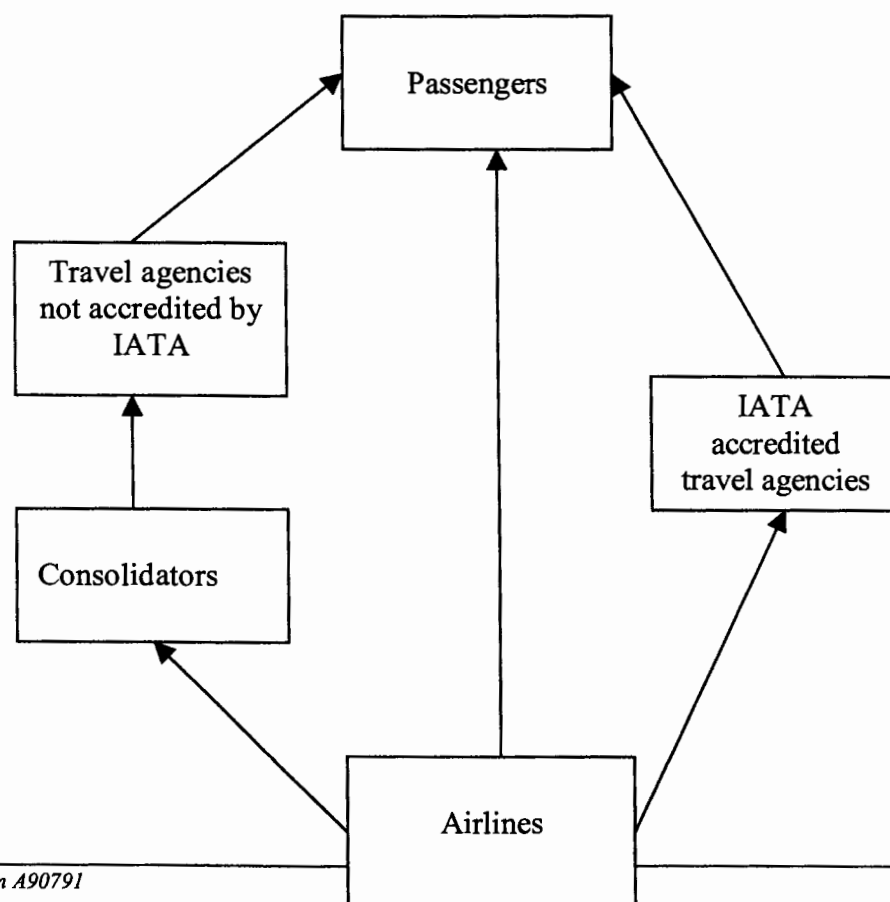


Fig 6.1 shows only the broad structure of the market. Consolidators can and do sell to the general public and to other accredited agents. Non-accredited agents may also purchase tickets direct from airlines through general sales agents.

7.21 Agents do not actually purchase seats or travel from an airline for onselling to consumers in the way that, say, that a furniture retailer purchases floor stock from a manufacturer. Rather travel agents sell air travel on behalf of airlines and remit the proceeds of the sale to the airline with a commission or margin from the sale accruing to the agent. Where a non-accredited agent sells travel by accessing the services of a consolidator or wholesaler a similar process is involved. The non-accredited agent and consolidator effectively share the commission or margin payable on the travel sale, a mode of operation facilitated by discounts and override commissions generated by the consolidator's high turnover.

Geographic market

7.22 The Commission believes that within the structure of the current IATA framework, the geographic market for the sale of air travel in both international and domestic trades to consumers located in Australia has traditionally tended to be the whole of Australia, but not outside Australia.

7.23 However with the development of internet web sales sites by both agents and airlines the geographic dimension of the air travel market boundary is becoming increasingly blurred. Visitors to Australia for example could book internal travel in Australia in advance over the internet for example to access heavily discounted domestic fares. Similarly industry portals being developed such as Zuji are accessible by consumers from any country and provide an ability to purchase travel across a wide range of airlines and international and domestic routes.

Product market

7.24 In Determinations A90649/90655 the Commission stated that it believed the product market in ticket sales included tickets sold directly by airlines to travellers as well as those sold through indirect channels (eg travel agents).

7.25 It is evident from material provided to the Commission that the airlines are active retailers in both the domestic and international travel markets. Consumers obviously see them as alternative sources of tickets to agents. Airlines are also increasingly promoting sales of their own products both through internet sales and through aggressive press advertising. There would appear little doubt that tickets sold by airlines are an important part of the airline travel product market.

7.26 As indicated above the Commission has previously indicated that it cannot be assumed that a single market exists for both economy and premium class passenger transport. A corollary of this view is that there could similarly be separate markets for the sale of air travel to economy class and business class passengers. Certainly there are agencies who specialise in corporate travel and comments have been made to the Commission that airlines actively pursue such customers and corporate accounts because of the higher revenue they generate and the repeat business they bring.

Functional market

7.27 The Commission is not aware of any changes in the distribution chain for airline tickets. In the absence of comments from the Applicant and submitters, the Commission will therefore assess the application on the basis that consumers can purchase tickets from any segment of the distribution system, including retail travel agents, airlines and package tour operators (wholesalers). The Commission continues to see consolidators as an integral part of this distribution system.

7.28 It is noted that airlines fill the role of wholesalers to the travel agent industry for air travel as well as retailing air travel in their own right.

Market shares

7.29 IATA has advised that sales handled by travel agents are estimated to account for 80-85% of international ticket sales worldwide. A guide to the sale of international air travel in Australia is provided by examining the sale of travel on Qantas which accounts for around 34% of international travel to and from Australia. IATA notes that for the year 2000 Qantas reported that 79% of its ticket sales were made through agents. On the basis of these figures it could be expected that airlines currently have around 20% of the retail market for international fares in Australia and travel agents 80%.

7.30 The domestic air travel distribution market is structured differently to the international travel market with a heavier emphasis on direct sales by airlines through call centres and web sites. Industry estimates suggest that about 50% of domestic air travel sales are made directly through airlines and 50% through agents.

7.3. Effect on competition

The nature of the arrangements

7.31 Whenever suppliers of a product or service collaborate on the distribution of those products or services to the retail market there is the potential for the arrangements to impact on competition in the retail market.

7.32 When those suppliers account for over 95% of the market, as is the case with IATA member airlines and international passenger air travel to and from Australia, the potential for anti-competitive behaviour is further heightened. When those same suppliers also compete in the retailing of the services, as is the case with airlines, an additional anti-competitive dimension is raised.

7.33 On this basis, there is always a risk of the IATA Passenger Agency Program (IPAP) giving rise to arrangements which are anti-competitive in nature.

7.34 The IPAP would seem able to be potentially anti-competitive in the markets for:

- (i) the provision of passenger airline services to and from Australia; and

- (ii) the retailing of passenger air travel both to and from Australia and within Australia.

Passenger airline services market

7.35 It is apparent that the presence of a healthy and vigorous travel agent industry in Australia is essential to achieving effective competition between airlines for business involving Australian consumers. Few airlines other than Qantas appear to advertise and promote direct sales of international travel in Australia via retail outlets, call centres and websites. While many other airlines do offer sales from websites, industry feedback suggests that sales through this medium of international travel is still in a developmental phase.

7.36 It is only travel agents which offer international travel solutions to consumers across a range of airlines. Airline involvement in direct sales is focussed on selling seats on that airline.

7.37 Any initiatives within the IPAP which disadvantaged or threatened, in whole or in part, the travel agent industry could impact on the market between airlines for the carriage of passengers.

Passenger air travel retail market

7.38 The IPAP also has the potential to directly impact on the structure of the travel agency industry and the level of competition between retailers. The program can have this impact through its ability to influence entry to the industry by agents, agent access to travel services and airline credit, and even agency operating costs.

7.39 The ability of the IPAP to impact on the agency component of the air travel market is of particular concern given that airlines compete with agents in the sale of air travel. The Australian Federation of Travel Agents (AFTA), for example, has submitted that the IPAP restrains competition between agents and airlines. Amex has made similar observations to the EC on the program as it applies in Europe. Amex suggests the program restrains travel agents from providing efficient and effective services on behalf of their clients and hinders competition between travel agents and airlines in the distribution of passenger air transport services.

7.40 While IATA has asserted in its response to the AFTA submission that agents and airlines do not compete directly with each other the Commission is satisfied that they do compete. In very competitive airline markets there is an incentive for airlines to reduce the costs of distribution as much as possible. When an airline sells direct, rather than through an agent, it is able to either reduce the price of the ticket by up to the agent's commission or sell at the same price and obtain an additional return equal to the agent's commission or margin or part thereof.

7.41 The pace at which the development of direct sales by airlines has occurred has varied from country to country and market to market. Two airlines that have traded successfully in recent times while others have floundered have been Ryanair and Easyjet. In October 2001 Ryanair followed the initiative of Easyjet and severed all

links with travel agents, relying exclusively on its call centre and its web site²¹. Sales over the internet are reported to account for 92% of Ryanair's business. Easyjet has had a similar experience and increased online bookings from 79.4% to 90.1% over twelve months in 2001. The chief executive of Easyjet claims internet bookings allow airlines to cut costs by up to 30%²².

7.42 Australian airlines have also recognised the benefits of direct sales. The initial marketing strategies of Impulse and Virgin Blue were directed towards call centre and internet sales with Virgin Blue subsequently provided increased access to agents. Qantas on the other hand has a mixed approach. It markets low fare seats over the internet which are generally only available to travel agents with their own interactive booking engines. Qantas has also offers bonus frequent flier points to members of its loyalty program who make bookings online at the Qantas website.

7.43 The Commission understands that in Australia about 80% of international travel is sold through agents and 20% by airlines. For domestic travel about 50% is sold through agents and 50% through airlines. IATA argues that the level and stability of the international figures show that agents and airlines do not compete and effectively offer complementary services.

7.44 It is the Commission's belief that the ability of airlines to increase direct sales in international markets has probably been constrained for technical reasons. The nature of the domestic market, which is predominantly point to point and does not involve interlining, facilitates web sales and electronic ticketing. International travel by comparison often involves multiple sector travel and interlining and currently requires paper ticketing. Figures provided by IATA show that 75% of domestic travel is on electronic tickets compared to only 3% for international travel.

7.45 It would appear likely that as the technical environment improves international direct sales will increase. The propensity for such development is evident in movement in online sales in Australia over the past year. Qantas has reported²³ that online sales grew as a proportion of its total domestic sales from 10% to 20% in the past year. Virgin Blue already takes 70% of bookings online. The advent of a regional portal in the form of Zuji can be expected to increase the pressures for improving facilities for the sale of international travel online.

7.46 The Commission examines below the conduct for which authorisation has been sought in terms of the extent of its anti-competitive detriment on the above two markets. While IATA has sought authorisation for the conduct as it currently stands, and as it is amended from time to time, it is not possible in the circumstances for the Commission to assess now the detriment associated with unknown future changes to the conduct. At the most the Commission can form a view as to the potential for changes to particular conduct to give rise to competition issues.

²¹ "Ryanair makes millions by slashing fares – but bring your own sandwiches", Sydney Morning Herald, 18 December 2001.

²² "Online is big cost-cutter for airlines", Australian Financial Review, 19 December 2001.

²³ "No wonder they call it the worldwide web", Sydney Morning Herald, 26 August 2002.

Provisions for the Conduct of IATA Traffic Conferences

The views of interested parties

7.47 AFTA claims (para 9.7 of its submission) that as under the rules for the conduct of Passenger Agency Conferences (PACs) votes for resolution must be unanimous, a single vote is sufficient to defeat a resolution. AFTA asserts that the exercise or threat of exercise of veto by any one airline or group of airlines means that within the PAC the position of the national carrier in its home market is reinforced.

7.48 Responding to the AFTA claim, IATA states that the rule does give considerable leverage to an individual airline, but that is its purpose, to ensure that no airline's position on a given issue is ignored. The rule does not enhance the power of the national airline in its home market, rather it enhances the power of every individual airline member of the Conference.

7.49 AFTA assertions in relation to the contractual relationship between agents and IATA also reflect on the rules for traffic conferences. AFTA states that:

- a major source of friction between accredited travel agents and IATA is IATA's unfettered power to alter the contractual relationship (para 3.93.);
- the IPAP is not a commercial relationship between equals and the terms of the contractual relationship are non-negotiable (para 4.1.1); and
- the resolutions constituting the IPAP have been subject to unilateral change by the PAC without any real input and participation by travel agents (para 4.1.2).

7.50 AFTA disagrees with the IATA view stating that amendments to the IPAP are made only after consultation through local and/or global joint airline agent forums and the subsequent endorsement by the PAC. IATA further suggests that any agent may terminate its agreement if it is not satisfied with any changes.

7.51 IATA continues that under the IPAP airlines provide agents with substantial credit. It is the nature of principal/agent and lender/borrower relationships that the principal or lender sets the rules which govern the relationship and in that respect there is nothing out of the ordinary about the IPAP.

7.52 Amex in its observations to the EC also comments that IATA resolutions and modifications thereto are adopted unilaterally by airlines at Traffic Conferences, typically without reference to or participation from travel agents. Amex notes further that IATA resolutions are adopted and modified at closed IATA membership meetings and that travel agents do not have any right of appeal.

7.53 Flight Centre also comments that IATA decision making is unilateral with the right to change without negotiation or accountability a contract with agents. In a free market each airline would have to negotiate with distribution. Closed door decision making without accountability to anyone is not acceptable. If competitors get together it needs to be transparent.

7.54 The IATA 2002 PAConf was held in June 2002 (following the issue of the Commission's draft determination in May 2002). AFTA advised the Commission that the PAConf did not adopt the recommendations of the Global Consultative Committee (GCC) in respect of reforms to the IPAP. The recommendations comprised a package of reforms, including a revised Passenger Sales Agency Agreement, developed jointly by agents and airline over a four year period.

7.55 AFTA is critical of the arrangements which resulted in the rejection of the GCC recommendations pointing to the exclusion of agents from PAConf deliberations and the impact of the unanimity rules of proceedings which result in an effective veto being granted to all participating airlines.

The Commission's view

7.56 A difficulty for the Commission in responding to an application for authorisation of the provisions for the conduct of IATA traffic conferences as they apply to the PAConf, is that the provisions have application to all IATA traffic conferences and have been authorised in this sense under Determination A90435. Regardless of the Commission's views in responding to Application A90791 of the anti-competitive detriment and public benefits associated with the provisions as they apply to the PAConf, the conduct would still be authorised by Determination A90435.

7.57 It would appear that the Commission could only effectively respond to Application A90791 in terms of the provisions if IATA had at the same time sought revocation of the authorisation of the provisions in determination A90435 as they apply to the PAC.

7.58 To the extent that the provisions through their contribution to the overall IPAP can ultimately impact on the relevant markets the Commission will make some observations on them. These observations are seen as relevant to the ultimate form of the PAC resolutions examined below.

7.59 The Commission considers that on face value the IATA provisions for the conduct of IATA Traffic Conferences, as they apply to the Passenger Agency Program, do give airlines significant control over the agency industry, and can be potentially anti-competitive.

7.60 It is true, as argued by IATA, that airlines do extend credit to agents and the nature of the borrower/lender relationship is such that the lender normally determines the rules which govern the relationship. It is not clear however that these principles and this argument should apply in circumstances when all lenders are acting together. For such to be the case would be to acknowledge that it would be satisfactory, for example, for all the housing finance lenders in Australia to agree standard conditions and rules for lending to consumers.

7.61 IATA argues that agents are included in a consultation process before proposals are taken to the PAConf. At the end of the day however it is only the airlines which have a say in the final outcome. While there are appeal mechanisms at lower administrative levels of the IATA agency program, there is no mechanism available to agents to challenge resolutions which form the essential framework of the program and which at the extreme could threaten their livelihood.

7.62 IATA has emphasised that any changes to the IPAP are subject to consultation with agents through a range of local and global fora. The Commission has strong doubts over the effectiveness of such consultation measures given the outright rejection at the 2002 PConf of a package of reform measures developed and agreed by the Global Consultative Committee, a body with equal representation from airlines and agents.

7.63 IATA has commented that any agent not satisfied with changes at a conference may terminate its agreement. It would be a concern to the Commission if IATA was to show an indifference to changes to the IPAP that had such an impact on individual agents that the agents were forced to give up accreditation, a move which could have a detrimental impact on their businesses.

Resolutions of the IATA Passenger Agency Conference

7.64 For the purposes of examining competition aspects, the PConf resolutions will be grouped under four headings:

- agent accreditation
- agent appointment to represent airlines
- reporting and payment of ticket sales
- other matters

7.65 This examination of competition aspects is based on resolutions of the Passenger Agency Conference as they appear in the Passenger Agency Conference Resolutions Manual, 22nd Edition (the Manual), as lodged by IATA with Application A90791.

Agent accreditation

The views of interested parties

AFTA

7.66 AFTA claims (para 1.4) that the IATA accreditation system is inherently anti-competitive and expresses concerns at elements of the program which:

- (i) act as a restraint on travel agents providing efficient and effective services; and
- (ii) restrain competition between agents and airlines.

7.67 AFTA states that the current resolutions place an unnecessary financial burden on accredited agents putting them at a competitive disadvantage with airlines and non-accredited agents. These burdens arise from unnecessary costs and formalities and duplication between IATA accreditation and TCF supervised licensing.

7.68 Burdens referred to by AFTA include:

- outdated safety and security standards for traffic documents;
- unnecessary notification of changes of non-majority shareholders in agencies operated as registered corporations;

- the need to produce nominated documents on demand; and
- the right to demand evidence of staff ticketing qualifications and staff employment histories.

7.69 AFTA also suggests that there is considerable overlap between the process of satisfying TCF licensing requirements and IATA's accreditation requirements as well as duplicating costs with TCF compliance costs estimated at between 2% and 6% of business income.

7.70 AFTA considers (para 7.10) there is no financial reason why IATA's prudential requirements for accreditation could not be identical to the TCF financial criteria. AFTA claims that by streamlining the IATA accreditation process there would be increased competition by reason of there being possibly more accredited agents with a resulting public benefit.

7.71 IATA's response to the AFTA submission claims that AFTA does not explain how or why the IATA program restrains agents from providing efficient and effective services. The IATA system is described as facilitating accredited agents to compete for business efficiently by providing direct and efficient access to a wide range of airlines and the means to readily write tickets for travel on them.

7.72 IATA rejects AFTA's suggestion that participation in the agency program places an *'unnecessary financial burden'* on agents. The fees charged by IATA are described as modest.

7.73 IATA also contends that its prerequisites for accreditation, most importantly its minimum physical and financial security standards, are reasonable. It notes that travel agents are responsible for the safekeeping of industry traffic documents and have the benefit of utilising airline credit. Many of the conditions involve prudential obligations supporting the airlines' provision of substantial credit to agents through the program.

7.74 According to IATA its accreditation requirements do not duplicate the TCF licensing scheme. The TCF provides protection to the consumer in the event of an agent ceasing business, whereas the IATA agency program provides a level of protection to airlines in the same circumstances. Unlike the TCF requirements, the requirements for IATA accreditation extend beyond financial criteria to cover matters such as staff training, security of stock and security of premises. As well the TCF and IATA have worked together to minimise the extent of overlap between their respective evaluation processes and the resulting administrative burden on agents.

Aviation Credit Solutions (ACS)

7.75 ACS underwrites financial guarantees required of travel agents by IATA as part of the IPAP and by the TCF as part of its licensing scheme. ACS is concerned that a proposed IATA consumer protection plan which would obviate the need for guarantees to IATA could raise competition issues including a lessening of competition in respect of ACS style products.

Qantas

7.76 Qantas indicated that as part of the process of offering plates to agencies who are accredited it undertakes its own financial checks on the agents.

Travel Compensation Fund

7.77 The TCF submits that there are two different philosophies between the TCF and IATA with the former providing consumer protection while the latter is a trade indemnity program. The TCF encourages client accounts for the protection of client monies compared with the IATA preference for hard financial tests.

7.78 There is not supposed to be overlap between IATA accreditation and the TCF scheme. For IATA where exposure occurs it is limited to the air travel cost. For a travel agent exposure extends also to full holiday packages including land content.

Flight Centre Limited

7.79 Flight Centre believes there is duplication of systems of licensing and financial accreditation between IATA and State/TCF Insurance etc. TCF should be the single financial approval body with IATA and not State licensing.

Consolidated Travel (Vic) Pty Ltd

7.80 Consolidated considers that it is quite easy to become a travel agent resulting in some agents who are not as reputable as the industry would like. An accredited agent requires the ability to handle the extra administrative burden.

7.81 Consolidated conducts its own credit checks on its customer agents. This is because agents who could fulfil the prudential requirements of the licensing application may not be able to fulfil those requirements some time later.

Company X

7.82 Company X considered that the terms and conditions of accreditation were dated and restricted commercial freedom. That said the nature of the industry is such that it needs a measure of control. The rules for IATA accreditation are onerous, often requiring extensive training without any real reason.

Amex

7.83 Amex has made comments to the EC referring to the accreditation standards contained in Resolution 814 and applicable to the EEA.

7.84 Amex suggests that airlines have an unfair competitive advantage due to their ability to restrain competition from travel agents through IATA Resolutions. Travel agents cannot avoid Resolution 814 because for most of them IATA accreditation is essential. Accredited agents are thereby subject to a set of complex obligations imposed by IATA without any realistic alternative (since there is no realistic economic alternative for most travel agents to IATA accreditation).

7.85 Amex considers Resolution 814 unreasonably burdens travel agents both through the accreditation process and through restraints imposed on travel agents once accredited. Onerous requirements cited include detailed financial disclosure, regulation of the number and qualifications of employees at the travel agency, regulated hours of operation, security arrangements and disclosure of ownership details.

7.86 IATA has commented that the passenger agency program (particularly accreditation requirements) is tailored to local conditions. While this is true at the detailed level and remittance periods for example may vary from one country to another, the overall structure and objectives of the program are the same. Many of the individual accreditation provisions cited by Amex as onerous in Europe were similarly cited by AFTA in Australia.

The Commission's view

7.87 It would appear to the Commission that the ability of a travel agency to be IATA accredited and to issue tickets to the public would give an agency an advantage in the air travel market. This advantage is recognised by Dr Michael Trethaway in his submission supporting Application A90791. Dr Trethaway states that:

The IATA accreditation has a franchise value which signals to consumers that the agent is able to sell tickets to a wide range of airlines and that the agent has undergone a rigorous approval process regarding matters of fiduciary responsibility.

Thus the IATA process provides a prospective agent with access to both a wide range of sellers (airlines) as well as a recognised franchise value with an enormous market of consumers.

7.88 Accordingly IATA's process for gaining accreditation and the conditions which must be abided by to retain accreditation are important factors in determining entry to and the size and scope of a major and critical segment of the air travel sale market. It is estimated that accredited agents are responsible for about 60% of international air transport retail sales in Australia with non-accredited agents and airlines each accounting for around 20%.

7.89 The IATA accreditation process can therefore potentially constitute a significant barrier to entry to the air travel sales market. However in the absence of any submissions, from an industry with nearly 5,000 agencies, that the accreditation process has proven to be an entry barrier in practice it would be difficult for the Commission to conclude that the IATA accreditation process and rules, *in their current form*, are an impediment to market entry. IATA has provided statistics showing that over the three year period 1998 to 2000 applications for accreditation were made in respect of 468 agencies. Twenty applications were withdrawn. None were rejected. The Commission also notes that IATA has in place an appeal mechanism for parties aggrieved on accreditation matters.

7.90 The Commission has received a number of submissions, including from AFTA, the national travel agent industry association, that aspects of the accreditation process and rules are unnecessary and cumbersome. It is further claimed that the

efficiency of accredited travel agents is affected to the extent that they are disadvantaged when competing with airlines in the air travel sales market.

7.91 It would be a matter of major concern to the Commission if IATA accreditation was negatively impacting on the performance of the travel agent industry which traditionally operates on low margins and is particularly vulnerable following the events of September 2001 and the demise of Ansett Australia. From the Commission's perspective the travel agent industry plays an important role in facilitating competition between airlines. Any deterioration of substance in the Australian travel agent industry could be to the benefit of Australian national airlines with their highly developed local distributions systems and even ultimately be reflected in decreased competition in airline services to and from Australia.

7.92 For similar reasons the Commission would also be concerned if IATA accreditation impeded the ability of agents to compete with airlines.

7.93 Given the dependence *to date* of airlines on agents for the effective distribution of their product (around 80% of international air travel is sold through agents) it seems unlikely that airlines would utilise the IATA process to deliberately impede the efficiency of agents. It is after all in the interests of airlines for the agent system to function smoothly. If IATA accreditation has reached the point where it has become an impediment to efficient agency operation, as claimed by the agent industry, it is likely that this position has been reached by evolution rather than intent.

7.94 That said it is also clear that some airlines are actively and aggressively pursuing distribution mechanisms which are based on call centre and web sites to the exclusion of travel agents. Such approaches enable airlines to compete on prices net of agent margins. The evolution of airline web sites and industry portals is likely to see an acceleration of this approach.

7.95 A common theme of interested parties is that IATA accreditation conditions are onerous and cause inefficiencies and increased costs. IATA has suggested that little evidence has been supplied by interested parties to support these claims, but it is not clear to the Commission what IATA's expectations are of the type of evidence that would be required, especially from individual agents, to support such claims. While the Commission is not in a position to be able pass judgement on the impact of the conditions or whether they are reasonable, given the consistency of agent comments, the extensiveness of the list of conditions and the level of complexity and detail involved in conditions, the Commission considers that it is possible that the conditions are onerous and causing inefficiencies and increased costs.

7.96 If the conditions did prove to be onerous and cause inefficiencies and increased costs it is likely that they having a detrimental effect on the public through their impact on the financial performance of agents and their ability to compete with airlines in the sale of air travel.

7.97 It seems to the Commission that a systematic review exercise would need to be undertaken across a reasonable cross section of the agency industry if a true assessment of the impact of accreditation on the operations of agents is to be determined.

7.98 It is not the Commission's task when considering competition aspects of the IATA accreditation process to examine whether the conditions the subject of inefficiency claims can be justified. The credit risk management rationale behind the financial and prudential criteria, for example, are more appropriately considered as benefits of the conduct.

7.99 If there was wide spread and unnecessary duplication between the national TCF/licensing scheme (embodied in legislation) and the IATA accreditation scheme it would be open to the Commission to conclude that agencies were being subjected to processes which increased their cost structures and affected their financial performance and competitive position.

7.100 The Commission recognises that IATA accreditation and TCF licensing do have different objectives. IATA looks to protect airlines for credit extended to agents and TCF looks to protect consumers against agent failure. Differences in objectives would not necessarily appear to justify redundancy if there is genuine overlap at a procedural level.

7.101 In terms of this application and the conduct for which authorisation is sought the Commission is restricted to consideration of the impact of any overlap by IATA with the TCF regime, rather than vice versa. It is possible that any overlap could be more appropriately addressed at the TCF level.

7.102 Any duplication is restricted to IATA accredited agents. There are some 5,000 odd licensed agents in Australia of which only just over 2,000 are IATA accredited. For non accredited agents the TCF/licensing scheme is the only form of regulation and a major means of providing protection to consumers for agent failure.

7.103 The Commission acknowledges that IATA and the TCF have recognised that there is scope for rationalisation of the collection of financial information between the two organisations and have taken steps to reduce work loads for accredited agencies. It is also apparent that while IATA's requirements do go beyond those of the TCF, especially in relation to regular monitoring, it is the belief of a number of interested parties that such action is warranted. The Chief Executive Officer of the TCF, for example, expressed a preference for moving to the IATA level of testing. Flight Centre believed there should be a single financial approval body with IATA and TCF. There is even some suggestion that neither the TCF nor IATA processes are totally satisfactory. Consolidated Travel runs credit checks on agent customers and Qantas does its own checks on newly accredited agencies before issuing plates.

7.104 AFTA has identified direct costs imposed upon agents by the TCF and IATA as burdens on agents. For a single agency location there is an initial TCF payment of around \$8,100 (of which \$3,000 is rebateable) and an annual renewal fee of the order of \$200. Extraordinary levies may be imposed from time to time to replenish the TCF Fund. The application fee payable when seeking IATA accreditation is \$1,315 with an annual fee thereafter of \$165. The majority of the direct costs therefore seem to come from the TCF rather than IATA and are not to cover operating costs but to establish the compensation fund.

7.105 Some 25% of accredited agents, as a result of IATA's assessment of their financial position are required to post a bond or provide security to IATA. The

average amount of security required is \$33,333. IATA's security requirements can be met through an insurance bond for which IATA advises the average cost is around \$600 per annum.

7.106 The Commission notes that consumer funded protection schemes designed to provide compensation variously to consumers, agents and airlines for business failure are being examined both by IATA and AFTA. The implementation of such schemes could be expected to impact on the form of both the IATA accreditation program and the TCF/licensing arrangements. The schemes could also give rise to competition concerns if their designs incorporated conduct of an exclusive dealing nature. This could arise, for example, if a condition of IATA accreditation was subscription to protection insurance with a particular company. [IATA has stated that if its protection plan is implemented it will through a special IATA traffic conference rather than through the IPAP.]

7.107 The Commission also notes that at the request of the Ministerial Council on Consumer Affairs, the Centre for International Economics (CIE) conducted a National Competition Policy review of the National Cooperative Scheme for the Regulation of Travel Agents. The CIE's findings, contained in a report issued in March 2000, are still the subject of government consideration. It is also possible that the impact of the events of September 2001 on the TCF could see a review of the current compensation arrangements for consumers. If such a review was to occur any resultant action could impact on the form not just of TCF/licensing arrangements but also on IATA accreditation.

7.108 In responding to the Draft Determination IATA stated that:

- IATA has worked hard over the years to develop conditions which are appropriately prudential, not unduly burdensome on accredited agents and take account of TCF criteria;
- the accreditation criteria have been adapted to local conditions and agents have been widely consulted in establishing those criteria;
- the cost of compliance is not high especially when the level of credit extended by airlines to accredited agents is taken into account; and every recommendation made to the General Assembly South West Pacific had been implemented by the Assembly.

7.109 AFTA notes that until 2001 agents only had two delegates votes out of a total of 13 votes on the General Assembly South West Pacific. AFTA also drew attention to the decision by the Assembly to implement seven day remittances for BSP against the recommendations of the agent delegates of the Executive Council Australia.

7.110 Overall, the Commission considers that while the claimed burdens and costs associated with conforming to IATA's accreditation requirements have not been demonstrated the nature of the required analysis is such that this was not likely to have occurred within the context of a response to the authorisation application. The true position as to burdens and costs will not be apparent until a comprehensive review exercise has been undertaken.

7.111 The Commission also considers that in the absence of a review and given the consistency of concerns raised both in the Australian context and overseas at this area of the IPAP it cannot conclude that the claimed burdens and costs do not exist and are not impinging on the financial performance and competitive position of agents.

7.112 If the financial performance and competitive position of agents is being significantly affected by IATA's accreditation requirements, at a time when airlines are increasingly competing in the retail air travel market and the financial position of many agents remains under threat, it is likely that those requirements are resulting in a lessening of competition and a detriment to the public.

Agent appointment to represent airlines

7.113 There are two elements of the IPAP which are relevant to the process of appointing an agent to represent airlines. Those elements are the signing of the Passenger Sales Agency Agreement, the standard agreement between agents and airlines appointing agents to sell tickets on those airlines, and the allocation of (ticket) plates by airlines to agents.

The views of interested parties

AFTA

7.114 AFTA submits that there is no other current element of the IPAP which has caused greater dispute between IATA and travel agents than the standard contractual document, the Passenger Sales Agency Agreement (PSAA).

7.115 AFTA submits that the PSAA is an imposed document and agents do not have an opportunity to negotiate its terms. The extent of agents' contractual obligations is not defined. The PSAA binds travel agents to IATA rules and resolutions and therefore obligations which may and in fact do come into existence after the execution of the contract.

7.116 AFTA draws attention to PSAA paragraph 2.1(b) which imports in the contractual relationship:

"2.1(b) Such Rules, Resolutions and other provisions as amended from time to time are deemed to be incorporated in this agreement and made part hereof and the Carrier and the Agent agree to comply with them."

7.117 AFTA states that it is only by reference to a large (and to the lay agent – generally incomprehensible) body of documents that the agent will know by which rules and regulations it is bound.

7.118 AFTA notes that IATA, in conjunction with the United Federation of Travel Agents Associations (UFTAA) and the European Council for Travel Agents Associations (ECTAA) has established a Global Consultative Committee to initiate and evaluate changes to the IPAP and in particular to draft a new PSAA and to make recommendations to the IATA Passenger Agency Conference.

7.119 IATA in response notes that the PSAA does not apply in isolation but is tied in to the Sales Agency Rules (Resolution 816 in Australia) and other resolutions comprising the IPAP. In a later submission IATA advised that the Global Consultative Committee had endorsed a new PSAA which would be on the agenda for consideration at the 2002 IATA Passenger Agency Conference in June 2002.

7.120 IATA says that while the PSAA applies to all agents participating in IATA's Passenger Agency program anywhere in the world, it is necessary to tailor the program to local conditions to take account of regional differences. IATA submits that changes to the resolutions which govern the IPAP are only made after consultation with agency representatives on local and/or global joint airline agent forums.

7.121 Subsequent to the issue of the Commission's Draft Determination on this matter on 13 May 2002 the IATA 2002 PAConf considered the recommendations of the Global Consultative Committee in respect of reforms to the Passenger Agency Program, including a revised PSAA. Airline delegates at the PAConf rejected the new PSAA recommended by the GCC and provided a revised version of the new PSAA (Working Paper 3 of Agenda Item G2.1) to the agent delegates of the GCC for their consideration. The agent representatives of the GCC would not accept the PAConf amendments and the PAConf was subsequently adjourned on this item.

The Commission's view

7.122 The Commission understands that IATA and agents globally have been renegotiating the form of the PSAA. However at this stage for the purposes of this authorisation application the Commission is restricted to responding to the PSAA as it was embodied in Resolution 824 as constituted at the date of application. If a new PSAA had been adopted within the period of the Commission's consideration of the application the Commission would have given consideration to a request by the applicant to include the new agreement within the current authorisation application. In the event this did not occur.

7.123 The Commission considers that the PSAA is effectively a header agreement and any substantive anti-competitive detriment of the IPAP would be drawn from the rules and resolutions to which travel agents are bound by the PSAA rather than any content of the PSAA itself.

7.124 That said there is still a concern, similar to that expressed above by the Commission in relation to the IATA provisions for the conduct of traffic conferences, that the agreement is a vehicle for providing airlines as a group with significant control over the agency industry. When these powers extend to future resolutions of whatever content the Commission could be expected to recognise an anti-competitive potential in relevant markets regardless of IATA defences of consultation mechanisms where ultimately agents have little power.

7.125 The failure of the PAConf, to date, to endorse the recommendations of the GCC has prompted AFTA to submit that the Commission should impose a range of additional or alternative conditions. The suggestions included that the IPAP and the BSP should be jointly managed by representatives of agents and airlines in equal

numbers with an independent chairman for a period of two years. At the end of the period management of the IPAP and the BSP should be opened up to competition.

7.126 When the Commission decides to make authorisation subject to conditions, the inclusion of conditions is normally directed towards achieving an outcome of net public benefit. The conditions suggested by AFTA would result in an effective and wholesale restructuring of the conduct for which authorisation was sought. If the Commission believed that changes at such a level were required it would be more likely to deny authorisation than attempt to modify the conduct through conditions.

7.127 The Commission notes that merely obtaining accreditation and entering the PSAA is not sufficient for an agent to represent IATA airlines. As stated in the IATA Statement of Facts, an accredited agent cannot act as an appointed agent for a member airline which has not deposited a general concurrence unless it has been provided with a certificate for appointment by that airline's ticketing authority. This involves connection to an automated ticketing system or delivery of the airline's carrier identification plate.

7.128 If individual airlines are able to refuse to appoint agents, regardless of accreditation and the PSAA, then it could be possible for airlines to act in an anti-competitive manner in the air travel distribution market. IATA states that for the 70 airlines participating in the BSP in Australia, 49 have signed a general concurrence in relation to Australia, meaning all accredited agents can represent them. The airlines cited as signing the general concurrence included Air New Zealand, ANA, Ansett, JAL, Qantas, Singapore Airlines and United Airlines.

7.129 Qantas has indicated to the Commission that it has always offered plates to all agencies which are accredited. It has also said that it undertakes its own financial checks on agents (even though it has signed the general concurrence). This raises the question of the position of any agent who is refused plates by an airline. There is no appeal or review mechanism for such cases. From the Commission's perspective it would seem reasonable for an agent who has been through the comprehensive IATA process for accreditation and entered the PSAA to have reasonable expectations of appointment by an airline.

7.130 IATA has stated in a response to the Commission that it does not interfere in the market, dictating which agents will have what ticketing authority from which airlines. That is for the market for to decide (i.e. for each airline to decide independently).

7.131 While the Commission would agree with the principle of a seller being able to choose to whom he sells in a normal market, it is not convinced that the principle has equal application in this case where entry to the market is heavily controlled by the airlines and agents must satisfy strict financial and other criteria.

7.132 AFTA has advised the Commission of a case where an Australian consolidator has been denied plates by a carrier in general concurrence for a period of over two years. The Commission is concerned that such practices offer a means for airlines to manipulate the structure of the travel distribution market to their competitive advantage and the detriment of the public.

7.133 Denying a major consolidator access to plates could be an impediment to other agents selling travel on that airline and seems illogical on pure revenue grounds according to the testimony of Mr Trethaway. At para 3.5.5 of Mr Trethaway's statement supporting the IATA application it is stated that:

Airlines are a sector operating on relatively thin profit margins, and the industry has high operating leverage – meaning that fixed costs of a flight are high. Thus the ability to sell even a few tickets on an incremental basis through an authorised agent somewhere else in the world can provide significant benefits to the carriers serving Australia.

7.134 It would seem to the Commission that a few tickets sold on an incremental basis in Australia can provide similar significant benefits.

7.135 The Commission notes that the utilisation of a standard agreement and the current appointment system, especially where the general concurrence provisions are applied, are likely to result in a broader representation of airlines by individual agencies than would otherwise be the case. Broader representation is likely to lead to increased competition between airlines in the air travel market.

7.136 In summary the Commission considers that the ability of airlines who have entered IATA's general concurrence arrangements to refuse, without good reason, plates to agents who have satisfied IATA's accreditation criteria appears unreasonable and could have an anti-competitive impact especially in the air travel market.

Reporting and payment of ticket sales

The views of interested parties

AFTA

7.137 AFTA acknowledges major benefits flowing from the BSP but notes that in the absence of any alternative to the BSP it is important that the regulations governing agents' participation are fair and reasonable.

7.138 IATA has responded that the extent to which agent participation in the BSP is regulated reflects the extent of credit provided by carriers and the potential for loss from stolen or fraudulently issued tickets.

7.139 AFTA is also critical of an amendment to BSP settlement procedures which increased the reporting frequency required by travel agents in respect of the BSP program from bi-weekly to weekly. IATA responded that in response to comments from agents IATA agreed a package of measures which included:

- a seven day extension of the average BSP credit terms for domestic agents;
- improved refund times by airlines in processing refunds to agents
- rollout of an improved version of net remit arrangements to self ticket on more than 30 carriers.

7.140 AFTA claims that provisions within IATA resolutions could lead, where there is a dispute between an accredited agent and a single IATA member, to the agent

having its accreditation terminated and exclusion from the BSP. IATA responded that there are appeals processes available to agents and under Resolution 816 a dispute between one airline and an agent will not be used to declare an agent in default, with this position reinforced at para 8.8 of the BSP Manual for agents.

7.141 AFTA also suggests that because non-IATA members can access the BSP those non-IATA airlines obtain the benefit from the group boycott provisions of the BSP without the reciprocal obligations of IATA membership. IATA comments that the inclusion of non-IATA airlines provides additional choice for agents and consumers and those airlines are subject to the same obligations as IATA members.

Travel.com.au

7.142 Travel.com.au comments that it can be cheaper for an agent to obtain tickets from a consolidator, especially if they are more efficient at the administration problems associated with the BSP which can be onerous.

7.143 Travel.com.au notes that most difficulties associated with the BSP arise from the automatic debiting of agents' accounts. Airlines can make a mistake and debit the full price of a ticket, say \$6,000 rather than the actual price of \$2,000. It is an involved and lengthy process to correct errors and get the money back. The accumulation of such errors can involve large sums of money and have a significant impact on agents. Some agents prefer to deal with consolidators for this reason. Consolidators are large enough to acquit an error to customer agents and wear the shortfall from the BSP error until it is rectified.

Flight Centre Limited (FCL)

7.144 FCL considers refunds from the BSP difficult and time consuming to follow up, particularly if there is a dispute with the airline involved. FCL refunds the consumer up front and carries the risk of the refund until payment is received from the airline. The agent will usually take 90 days to receive a refund. Where the refund is not settled it may take longer. This is particularly a problem with full fares such as those purchased by business customers. If a customer makes a booking with an airline directly a credit can be given.

7.145 The BSP does not function as a commercial arrangement. The attitude is taken that the agent is wrong even if it is right. Common examples are:

- Where money is withdrawn from the agent's account, the onus is on the agent to validate what the BSP has withdrawn and chase up what is disputed;
- Agents are charged fees for late submission of documents even when there is a BSP error;
- If the airline or BSP has made a date entry error on the BSP, then the BSP takes no responsibility, and the agent must prove the error to the BSP, even though they are representing the same airline. The responsibility is then on the agent to raise the ACM which is paid 90 days later.

- A one week turnaround for a phone response to a customer service issues is unacceptable;
- Cancellation charges are charged to the customer if he/she changes or cancels a booking prior to departure even if the seat is sold to someone else.

7.146 FCL advised that there are different remittance periods around the world, eg monthly in South Africa, bi-monthly in the United Kingdom and weekly in Australia and Canada. FCL would advocate a monthly remittance as the present situation poses cash flow problems and has cost FCL about \$3 million per annum in profits.

Consolidated Travel (Vic) Pty Ltd

7.147 BSP negotiations are an issue for the industry. If an agent sells a net fare of \$1,500 that ticket will have a gross value of around \$3,000, but only \$1,500 will be remitted to the BSP.

7.148 If the transaction is rejected by the BSP the BSP defaults to the gross value of the ticket (less 9% agents commission) which is deducted from remittances to the agent. The agent has to wear the financial liability until the mistake or dispute is resolved.

7.149 Consolidated Travel can absorb rejections given its size, but some smaller agents cannot and this is why many agents do not want to be involved with the BSP or accreditation.

Company X

7.150 Company X is concerned that information derived from the BSP can be misused. Each airline has access to information for fares sold on its flights. An airline can walk into an agency and talk about how much of its business is sold and to which customers. Airlines can use this information to go direct to business customers and by-pass agents.

The Commission's view

7.151 In its draft determination the Commission expressed the view based on information available at the time that the IATA BSP system seemed likely to be having an anti-competitive impact. A number of key agents had drawn attention to the inability of the system to accommodate in an efficient manner refunds and transactions involving errors/disputes. In both circumstances it was claimed there was a financial imposition placed upon agents until the matter was resolved which could involve lengthy periods. It was claimed that the accumulated impact of such transactions combined with the extensive period of time involved in resolving such matters could be a disincentive to agents to seek accreditation or be involved with the BSP. For these reasons it was suggested that many agents, especially smaller agents which cannot afford to absorb the holding back of funds, prefer to operate through consolidators.

7.152 The Commission noted that in the case of refunds this situation could leave agents at a disadvantage compared with airlines who can refund from direct sales

without going through the BSP. The Commission also notes that to operate successfully the BSP system requires input from two parties, the agent and the airline. The agent submits details of ticket sales and funds received to the BSP. The airline checks the data and either confirms transactions or raises queries.

7.153 The Commission observed that while the IATA BSP system has comprehensive rules, procedures and records relating to how agents interact with the BSP there are no requirements or records in relation to how airlines interact with the BSP. It would be possible, for example, for an airline to consistently make errors, be tardy in responding to agent input and ineffectual in resolving disputes, etc, to the detriment of agents (and consumers) without notice or recourse.

7.154 The above considerations were important factors in the Commission deciding to include a condition in the draft determination to achieve a greater focus on the performance of airlines in dealing with the BSP.

7.155 IATA provided the Commission with further information in response to the draft determination which allayed some of its concerns. The Commission noted in particular that there was data from the BSP which showed low error rates in the processing of net remit tickets with airlines responsible for only a very small portion of those errors.

7.156 IATA also claimed that the balance of funds held at any point in time by agents would be in excess of funds owed to agents due to errors, regardless of default values. Agents did not dispute this claim.

7.157 IATA also undertook to make changes to the BSP Manual for Agents as applied in Australia which would address the concerns of agents and provide greater accountability by airlines (Appendix 4 to IATA submission of 31 July 2002). Importantly these measures would also allow the monitoring of standards embodied in Resolution 824r which states that IATA members shall ensure refunds:

- on unused traffic documents are made or authorised no later than the remittance date after the refund application is lodged; and
- on partly used traffic documents within two months of application.

7.158 Agents have commented on the impact on the agent industry of the reduction in the remittance period. Ultimately the money taken from consumers by agents for air travel, less any commission, belongs to the airlines. There would appear to be no good argument why agents should have prolonged access to these funds. Losses claimed by agents in relation to the reduced remittance period are presumably a result of reduced earnings on "working capital". Airlines could also benefit from such earnings. The Commission would only have concerns if remittance period reductions threatened the viability of agents. No material provided to the Commission has suggested this is the case.

7.159 As to the misuse of information derived from the BSP it seems to the Commission that an airline, regardless of the BSP, would as part of its normal business requirements need to be aware of the identity of travellers flying on their aircraft and their fare types. Indeed it would be expected that most business travellers

would also be members of loyalty schemes which would rely on access to such data. Under these circumstances while there may be a moral question as to the behaviour of airlines in “poaching” customers from agents, there would not appear to be competition issues attributable to the BSP.

7.160 In summary the Commission considers that while there are inequities in how the BSP interacts with agents and airlines, on the basis of information provided to the Commission by IATA, and after taking into account the holding of airlines funds by agents, the impact of errors and refunds is unlikely to impact on the performance of agents. The Commission notes that IATA has committed to introduce measures to address perceived inequities and the concerns of agents which will provide for the first time feed back on the performance of individual airlines in dealing with the BSP. On the basis of the information provided and assuming the commitments made by IATA are implemented, the Commission does not consider that the BSP component of the IPAP gives rise to anti-competitive detriment.

Decisions of the General Assembly South West Pacific

7.161 The General Assembly consists of one representative from each eligible member and of each airline participating in a BSP in the countries concerned. The Assembly can initiate its own recommendations to the Passenger Agency Conference. It is also empowered to make final decisions in respect of the following provisions of the IPAP in South West Pacific:

- qualifications for accreditation and retention of IATA accredited agents;
- procedures for processing applications for accreditation of applicants;
- conditions for payment of commission and provision of beneficial services to accredited agents; and
- notice of change of ownership or legal status of agents.

7.162 All decisions must be consistent with the terms of the PSAA and Resolution 816.

7.163 Assembly powers may be delegated to an Executive Council for each country. The Executive Council for Australia consists of twelve members, six being representatives of airlines and six being from the travel agent industry or an agent association. Decisions of the council are taken by a simple majority vote with the voting result to be included with recommendation to the Passenger Agency Conference or the Assembly.

The Commission's view

7.164 Neither the applicant nor interested parties have commented specifically on the Assembly or the Council. To the extent that the two bodies must operate within the framework of the PSAA and Resolution 816 and effectively have an administrative role in relation to relevant areas of IATA's activities, the

Commission's comments in relation to the substantive areas above should be taken to apply here.

7.165 The Commission does note that airlines hold the balance of power in both the Assembly and the Council. While there is equal representation between airlines and agents at the Council level, agents by themselves cannot achieve any move from the status quo.

Other matters

7.166 In the course of their submissions some parties raised matters which fall outside the conduct groupings referred to above. Such matters are considered in this section.

Commissions

7.167 AFTA has commented that the commission being paid to agents in many markets is being reduced by airlines to levels which do not reflect the cost of agents' services. IATA has submitted that commission levels are a matter for individual airlines and agents.

7.168 The Commission notes that as long as airlines are dependent on agents to achieve distribution of their product it would seem in the interest of airlines to ensure agents are remunerated at levels which ensure they are sustainable. Ultimately from the Commission's perspective the negotiation of commissions is not a part of the conduct for which authorisation has been sought.

Information

7.169 AFTA has said that it believes passenger name record data is being sold by CRS providers to airlines amongst others. IATA has said it is not in a position to comment. The Commission's view is that this is a matter outside the scope of the conduct for which authorisation has been sought.

Electronic ticketing

7.170 AFTA has claimed that the increased use of electronic tickets has the potential to make paper tickets, together with the stringent IATA security requirements for agents who hold ticket stocks, redundant. IATA has responded that the bulk of tickets issued remain paper tickets and security is still required for electronic ticketing equipment.

7.171 The Commission notes that there still appears to be a need for security in some form or other even with the advent of electronic ticketing. Whether the current security requirements are fair and reasonable is another question.

7.172 AFTA has indicated concern about restricted travel agent access to electronic tickets. Ansett did not allow consolidators to issue domestic electronic tickets and as a result non-IATA agents were not able to arrange an electronic ticket for domestic travel on Ansett.

7.173 IATA has responded that it is a matter for each airline to determine its own electronic ticket strategy. It is not a matter that involves IATA or the IATA Passenger Agency Program.

7.174 Flight Centre has raised similar comments in relation to restricted agent access to fare types such as student fares (available only to Student retailers), ethnic fares (only available from specific ethnic agents) and airline internet fares (not available to agents).

7.175 The Commission considers that this is not a matter that relates to the application and that it is generally up to each airline how it distributes its product. However the Commission notes that there could hardly be greater evidence of the fact that airlines and agents and agents are in competition with one another then denying agents access to sectors of the travel market, i.e. reserving part of the market for airlines. The more this occurs the greater the consideration may need to be given to the extent to which the IPAP restricts agents in the travel market from competing with airlines.

7.176 The Commission sees this issue as quite distinct from the earlier identified issue of airlines potentially withholding plates. The latter involves an agent being denied access to a segment of the market which is available to other accredited agents.

Global Consultative Committee

7.177 AFTA has indicated that IATA in conjunction with UFTAA and ECTAA has established a Global Consultative Committee to initiate and evaluate changes to the IPAP and to draft a new PSAA.

7.178 The Commission is limited at this time to considering the conduct put before it in the IATA application. Any initiative flowing from the Global Consultative Committee will not become potentially relevant to the current application until it is reflected in the resolutions of the Passenger Agency Conference including Resolution 824 which relates to the Passenger Sales Agency Agreement.

Commission payable on government business

7.179 Paragraph 9.6 of Resolution 816 makes specific rules for the payment of commission to agents on sales to agents. IATA states that while these provisions suggest that agents may not tender for government business in Australia these rules are no longer applied in practice and airlines in Australia are free to reach agreement with agents on the kind of business on which commission is to be paid. IATA indicates that the rules became redundant when IATA dismantled its machinery for enforcing tariff and commission resolutions.

7.180 The Commission notes that if the provisions of paragraph 9.6 were enforced as they read they could have the impact of impeding agents from tendering for government business. Given that IATA has described the provisions as no longer having application in Australia the Commission cannot understand why they have not been revoked.

7.181 IATA advised in its response to the draft determination that paragraph 9.6 was formally removed at the 2002 IATA Passenger Agency Conference.

7.4. Summary of findings

7.182 On the basis of its examination of relevant markets, consideration of submissions from interested parties and the applicant, and an examination of resolutions contained in the Resolutions Manual, the Commission has formed the view that the IATA Passenger Agency Program has an ongoing potential to have an anti-competitive impact on the markets for the:

- (i) provision of passenger airlines services to and from Australia; and
- (ii) retailing of passenger air travel both to and from Australia and within Australia.

7.183 The potential for anti-competitive impact draws from the fact that the predominance of suppliers of the product of airline travel have conjoined to control the manner in which that product is distributed to consumers through agents, a process which currently accounts for 80% of sales of international air travel.

7.184 Appendix B identifies the particular resolutions in the Resolutions Manual which the Commission considers involve matters where, depending on the content of the resolution at any point in time, there could be an anti-competitive impact on the above markets.

7.185 Resolutions which are identified as having a potential to be anti-competitive have been allocated that status for reasons including whether they can potentially impact on entry and continued presence in markets, act as an impediment to competition and affect the adequacy of appeal and grievance mechanisms.

7.186 While a number of resolutions have been identified as having the potential to impact on competition in relevant markets the Commission identified two primary areas where the current form of resolutions and/or their administration raises concerns.

(1) Agency accreditation

7.187 The Commission agrees with the comments made by AFTA that the accreditation process can act as a constraint on travel agents providing efficient and effective services and can restrain competition between agents and airlines.

7.188 However the extent to which the accreditation program is currently having an anti-competitive impact is not clear to the Commission. IATA claims that the conditions are appropriately prudential and not unduly burdensome. On the other hand there is a consistency in critical comment from agency industry parties.

7.189 Given the significance of the process overall for gaining and retaining accreditation within the IPAP the Commission considers a review of that process, as it applies in Australia, in the context of credit risk management for airlines and the impact of the process on the efficiency of agents, would be justified. The Commission would look to this review to identify whether the agency accreditation system unnecessarily constrains agents.