

of Star Alliance carriers to compete more effectively with oneworld carriers, is likely to result in a benefit to the public.

- 9.59 The Commission stated in its Draft Determination that it would be satisfied that the Corporate Agreement generated overall net public benefit only if Air NZ ceased participation in the Corporate Agreement should it enter into an alliance with Qantas, of the type described in authorisation applications A30220, A30221, A30222, A90862 and A90863, while still a member of the Star Alliance. Such a situation could reduce competition between Star Alliance carriers and Qantas.
- 9.60 Following the Draft Determination, Qantas submitted that if the Commission does grant the authorisation on the basis that it believes it is required to address the Star Alliance's lack of a partner in domestic Australia, the authorisation should lapse upon any member of the Star Alliance commencing flying domestically in Australia or forming an alliance with an airline that flies domestically in Australia.
- 9.61 The Commission considers that if a Star Alliance member started flying in Australia, it would be unlikely to become an effective competitive force during the life of the proposed authorisation. Therefore, the Commission does not see the value in imposing a condition on the authorisation as proposed by Qantas.
- 9.62 Qantas further submitted that the authorisation should be restricted to the agreement of discounts and the Commission should not authorise the agreement of fares.
- 9.63 The Commission is satisfied that the ability of participating Star Alliance members to agree on fares (on some routes) is sufficiently restricted that the detriment is minimal. The Commission is of the view that the Corporate Agreement still generates overall net public benefit, without the need for a condition as proposed by Qantas, provided that Air NZ ceased participation in the Corporate Agreement should it enter into an alliance with Qantas, of the type described in authorisation applications A30220, A30221, A30222, A90862 and A90863, while still a member of the Star Alliance.
- 9.64 On 3 September 2003, the Commission accepted a section 87B undertaking from Air NZ stating that:
- Air NZ undertakes not to participate in the Corporate Agreement upon giving effect to an alliance with Qantas of the type described in authorisation applications A30220, A30221, A30222, A90862 and A90863, or any similar alliance with Qantas involving the coordination of fares and schedules on trans-Tasman routes.
- 9.65 In light of the undertaking from Air NZ, at section 11 of this determination the Commission grants authorisation to the Corporate Agreement for a period of four years on the basis that the aviation industry is currently experiencing considerable adjustments, including structural changes, and an extended period of authorisation is not appropriate in these circumstances.

10 Commission Evaluation – Conventions Program

Effect on competition

- 10.1 As discussed at section 6, the Commission must assess the extent to which the proposed arrangements give rise to detriment to the public as a result of any lessening of competition that flows from the proposed arrangements.
- 10.2 In summary, the provisions of the Conventions Program which are the subject of the authorisation applications are as follows.

Exclusionary provisions

- 10.3 Star Alliance members participating in a joint bid invited by a convention organiser agree not to provide bids to convention organisers until such time as the organiser has rejected the collective bid. In this respect, there is a risk that the proposed arrangements are covered by the definition of exclusionary provision in section 4D of the Act regarding the supply and acquisition of these services.

Pricing arrangements

- 10.4 Under the Conventions Program, it is intended that Star Alliance members will agree to provide to convention delegates interline convention fares and/or a common discount against their published fares. There is some risk, therefore, the arrangement raises price fixing concerns under section 45A(1) of the Act.
- 10.5 The Conventions Program envisages that participating Star Alliance members will also provide travel services to convention organisers at uniform (and greatly reduced) prices.

Third-line forcing

- 10.6 Convention delegates can only obtain the discount provided under the Conventions Program if they establish they are registered delegates of the relevant convention. In effect, therefore, it is open to a participating Star Alliance member to refuse to allow the discount if the convention delegate has not agreed to acquire the services provided by the convention organiser. This may raise issues under section 47(6) or 47(7) of the Act in that this element of the proposal may be a third line forcing arrangement.

Views of the Applicant

- 10.7 The Applicant considers that the Conventions Program will not result in a substantial lessening of competition in the relevant markets. Instead, the Applicant considers that the proposed arrangements will increase competition in the markets for air passenger transport services in Australia, particularly as they will allow the Star Alliance carriers to provide effective competition against Qantas and BA.

10.8 Additionally, the Applicant argues that a number of aspects of the Conventions Program will help safeguard competition in the relevant markets, including:

- bids will be developed on a case-by-case basis at the initiation of the convention organisers, rather than as a standing arrangement between Star Alliance members;
- individual Star Alliance members may decide whether or not to participate in a particular joint bid or to develop their own bids;
- convention organisers will be able to review decisions about whether to seek joint bids based on the competitiveness of past bids when compared with bids from non-participating Star Alliance members and airlines outside Star Alliance or other alliances;
- individual Star Alliance members will not be required to provide uniform fares, but a set discount against published fares;
- there are no exclusionary provisions for convention delegates, as all Star Alliance members will continue to offer air services on generally available terms to convention delegates; and
- it is the convention organiser who elects whether or not to receive a joint bid, individual bids or a combination of both.

Commission assessment

Passenger transport market

Domestic

10.9 Given the absence of a Star Alliance member competing in the Australian domestic passenger transport market, it is unlikely that the Conventions Program will have any direct competitive effect on this segment of the passenger transport market.

International

10.10 The Commission is of the view that the Conventions Program would appear to provide an opportunity for Star Alliance members to improve their offering to convention delegates and consequently improve their competitive position relative to oneworld members in the current passenger transport market environment in which a Star Alliance member does not operate domestically in Australia, particularly in the context of an alliance between Qantas and BA. This issue is examined further in the discussion on public benefits generated by the Conventions Program.

10.11 However, the Commission is also of the view that the Conventions Program has the potential to generate anti-competitive detriment primarily as a result of the requirement that participating airlines must agree on the level of discount to be applied to airfares for convention delegates. This may limit the level of discounts offered relative to a situation where each airline individually determines its own discounts.

10.12 As discussed in paragraphs 2.26 and 2.28, in 2002 convention travel accounted for 8.1 per cent of all visitors to Australia while 4.4 per cent of Australian residents travelling overseas travelled to attend conventions. On the basis of these figures, the proportion of travellers to or from Australia who are travelling in order to attend a convention represents only a small share of the total volume of passengers travelling to and from Australia. Consequently, any anti-competitive impact of the Conventions Program on the international passenger transport market as a whole is likely to be minimal.

10.13 Further, the Commission notes that a number of features of the Conventions Program are likely to further limit any anti-competitive detriment generated by the Conventions Program. These features are discussed below.

Pricing arrangements

10.14 The Commission notes that the pricing arrangements contained in the Conventions Program are limited to the requirement that participating Star Alliance members provide an agreed discount against published fares and/or agreed interline convention fares. The discounts are not static, but could vary from bid to bid. The discount could also vary across routes in the same bid. There is no requirement that the airlines' published fares to be discounted are agreed. Participating airlines may only agree on the level of discounted interline fares.

10.15 The Commission also notes that all Star Alliance members will not necessarily participate in every bid. In the event that two carriers participating in a bid operate on the same route (such as Thai Airways and Singapore Airlines on south-east Asian routes), the Commission notes that the carriers retain the ability to compete on the basis of fares and conditions, and that the proposed arrangements do not involve any revenue sharing between carriers, thus ameliorating any anti-competitive effect.

10.16 It is also relevant that under the Conventions Program, discounts only apply to published fares which account for about 40 per cent of the international passenger transport market and are generally at the higher end of fare levels. Convention delegates, especially given long lead times, could be attracted to net (discount) fares which, while not attracting the Conventions Program discount, could be expected to be considerably lower than discounted published fares.

10.17 Consequently, for the above reasons, the Commission considers that the anti-competitive effect of the pricing arrangements within the Conventions Program is likely to be limited.

Voluntary participation by carriers

10.18 The Commission notes that the proposed arrangements provide for carriers to elect whether or not they wish to participate in a joint bid, unless they are specifically requested to by the convention organiser. The Commission considers that this provision may enable carriers who feel they may be able to offer a more attractive bid separate to the joint bid to compete more effectively. The Commission considers that this provision is likely to have the effect of limiting any detriment flowing from these arrangements. The Commission notes the provision of the

Conventions Program which prescribes that if a carrier elects not to participate in a joint bid, the other carriers should not attempt to induce its participation.

Voluntary participation by convention organisers and delegates

- 10.19 The Commission notes that the proposed arrangements do not require convention delegates to purchase an airfare under the Conventions Program. Delegates are free to purchase the best fare available, whether it is a fare under the Conventions Program from a participating carrier or another type of fare from a participating Star Alliance carrier or a fare from a non-participating carrier (whether or not a member of the Star Alliance).
- 10.20 The Commission considers that without this provision the conduct would have been significantly more anti-competitive. Delegates will be able to purchase the fare that best suits their needs rather than being required to only purchase from a limited range of fares. In addition, the Commission considers that participating carriers are likely to develop fares for the joint bid that are at least as attractive as others on offer in order to attract convention traffic.

Limited information sharing

- 10.21 The Applicant submits that the Conventions Program includes various provisions to prevent unnecessary information sharing between Star Alliance members and to ensure that only the information necessary to develop and enable the joint bid to be efficiently and promptly communicated to convention organisers is to be collected. In particular, the Conventions Program prescribes that participating carriers should not discuss what they will do individually if the joint bid is not accepted, and that carriers should not engage in any discussion of possible future alterations to any carrier's fares, capacity levels or other sensitive business information.
- 10.22 The Commission considers that these provisions restricting the nature and extent of information shared between Star Alliance carriers is likely to limit the anti-competitive detriment of any such information sharing.
- 10.23 In this context, the Commission notes Qantas' concerns that the proposed arrangements may enable Star Alliance members to share price information and engage in price fixing, which may facilitate anti-competitive conduct in other areas of their businesses. The Commission notes that any information sharing between competing Star Alliance airlines beyond the scope of this authorisation could be at risk of being in breach of the Act and is not protected from legal action by the Commission or third parties.

Other features of the arrangements

- 10.24 The Commission notes that the proposed arrangements enable the convention organiser to determine the carriers (or combination of carriers) from which it wishes to receive bids. The Commission considers that this provision may improve the variety of options available to convention organisers to seek the most competitive and attractive bid.

10.25 Additionally, the Commission notes that joint bids will only be developed for conventions involving over 1000 delegates from at least three different countries and two different continents. This convention size and scope requirement will restrict the applicability of the Conventions Program to only large, international conventions, thus restricting any anti-competitive effect generated by the Conventions Program.

Market for the sale of air travel

10.26 The Commission notes the concerns of AFTA that the proposed arrangements may reinforce direct dealings between airlines and consumers, especially if travel agents are not able seek bids on behalf of convention organisers or access the special convention fares on behalf of delegates.

10.27 In response to AFTA's concern, the Applicant submitted that the Conventions Program would be available through both airlines and travel agents.

10.28 The Commission is of the view that, in the absence of a Star Alliance member with an established distribution network operating in the sale of air travel market in Australia, the main means by which convention delegates could access the discounts offered by participating Star Alliance airlines would be through travel agents, by quoting the particular convention code.

10.29 Consequently, the Commission would expect that travel agents will play a significant role in booking flights on behalf of convention delegates. In this context, the Commission notes again that delegates will not be required to purchase the special airfare available under the Conventions Program but can purchase any other fare available, whether directly from an airline or through a travel agent. The Commission is of the view that the Conventions Program should not have an effect on the ability of travel agents to compete in the current market environment in which a Star Alliance member with an established distribution network does not operate in the sale of air travel market in Australia. The Commission acknowledges that this situation may change in the event of a Star Alliance member entering the market and establishing its own distribution network.

Market for convention services

10.30 The Convention Program will provide a framework within which the Star Alliance will seek appointment as the official airline network for conventions which are likely to attract international delegates.

10.31 BIC is concerned that the Conventions Program may not enable all convention organisers competing for the contract to arrange a particular convention to obtain bids from the Star Alliance for delegate travel to that convention as part of their offer to the sponsoring organisation.

10.32 The Commission understands that under the Conventions Program, a joint bid is offered to a convention organiser responsible for the organisation of a convention and joint bids cannot be offered to convention organisers competing for the contract to organise a convention. Consequently, while convention organisers may raise the possibility of a discount on delegate airfares as a result of the Conventions Program

when competing for the contract to organise a convention, such a discount can only be sought once the convention organiser has been selected and is subsequently approached by the Star Alliance for consent to offer a joint bid. Therefore competition between convention organisers for contracts to organise conventions will not be distorted by the nature of the Conventions Program.

10.33 Additionally, once a convention organiser has been selected and has subsequently been approached by the Star Alliance for consent to offer a joint bid, the Commission notes that the convention organiser is able to choose whether to receive either a joint bid from the Star Alliance members (or any subset thereof) or separate bids from one or more of the Star Alliance member not participating in a joint bid, or both. Following receipt of the chosen bid, the convention organiser is then able to choose whether to accept it or not. Further, in the event that a convention organiser chooses to accept a bid, convention delegates are under no compulsion to purchase the discounted fares offered by the Star Alliance.

10.34 The Commission is of the view that the Convention Program is unlikely to have anti-competitive effect in the possible market for convention services because of the ability of convention organisers to request a bid, select the nature of that bid and then decide whether to accept or reject the bid, coupled with the ability of convention delegates to purchase any airfare on offer in competition with the discounted convention airfare offered by Star Alliance.

Conclusion

10.35 The Commission is of the view that the Conventions Program has the potential to result in some limited public detriment due to a lessening of competition from the requirement that participating airlines must agree on the level of discount to be applied to airfares for convention delegates. However, the Commission considers that this anti-competitive detriment is likely to be minimal for a number of reasons, including that:

- the Commission does not consider there is a separate market for travellers to conventions and such travellers constitute only a small share of the international air passenger transport market;
- participation in the joint bid process by Star Alliance airlines is voluntary;
- while participating airlines are required to agree on the level of discount to be applied, they are still able to compete on the fare itself and any associated terms and conditions, and may only agree on interline convention fares; and
- convention delegates are not compelled to purchase the Conventions Program fare and may purchase any other fare available.

10.36 Additionally, the Commission considers that the implementation of the Conventions Program is unlikely to have a negative impact on the ability of travel agents to compete in the current environment of the market for the sale of air travel, in which a Star Alliance member with a distribution network simply does not exist.

Public benefits

Views of the Applicant

10.37 The Applicant outlined a list of public benefits that it considered would arise from the proposed arrangements. These include:

- the introduction of a new product to the market;
- discounted fares for convention delegates;
- a broadening of the services able to be offered by convention organisers to delegates to include an integrated travel service at a discounted price;
- access for convention organisers to marketing and promotional material in Star Alliance publications and customer networks for convention organisers;
- low cost travel for convention organisers;
- increased efficiencies for Star Alliance members; and
- benefits to Australian trade and international competitiveness.

Commission evaluation

Introduction of a new product

10.38 The Applicant argues that the Conventions Program has been developed in response to demand for a 'global' solution of the international travel requirements of international conventions and will stimulate competition in the markets incorporating convention travel to and from Australia.

10.39 AFTA notes that the proposed arrangements may have some public benefit, particularly due to the introduction of new products. No other interested party made comments specifically in relation to this claim.

10.40 In general, the Commission is of the view that the introduction of a new product will only result in a public benefit if the product improves the situation of consumers relative to what it would have been in the absence of the new product.

10.41 The Commission considers that the Conventions Program is likely to result in a public benefit to the extent that it provides convention delegates with an additional choice in respect of selecting an airfare for travel to their convention.

Discounted airfares for convention delegates

10.42 Other than any benefit arising to customers through the introduction of a new product, the Applicant argues that convention delegates will directly benefit from the availability on all segments of travel to the convention of fare discounts that are not otherwise available. The Applicant also argues that travel costs will decrease as a result of a number of reasons including lower fares, lower costs for administering travel, less backtracking to gateways for return parts of the journey and single ticketing using multiple itineraries.

10.43 In general, the Commission considers that lower prices for consumers are likely to result in a public benefit. The Commission notes that in the case of the Conventions Program, while consumers will be offered a discounted fare, this fare may not necessarily be the lowest fare available in the relevant passenger travel market as the discount applies only to published fares, and published fare are typically relatively expensive. Consequently, the extent of any public benefit associated with reduced price airfares is likely to be limited.

10.44 However, the Commission notes that there will be a particular benefit for convention delegates who must use interline services involving fares which are not subject to special pro rate agreements between Star Alliance carriers. In the absence of the Conventions Program delegates would not be able to obtain discounts on the IATA airline fares.

Benefits to convention organisers

10.45 The Applicant argues that there are three significant benefits for organisers of international conventions, being:

- the ability to offer convention delegates discounted airfares through a single source;
- access to new marketing and promotional opportunities through Star Alliance publications and customer networks; and
- direct benefits from low cost travel for convention organisers.

10.46 The Commission agrees that there may be some benefits to convention organisers flowing from the proposed arrangements. In particular, the Commission considers that the conduct may enable convention organisers to reduce some operating costs associated with holding conferences. However, the Commission does not have sufficient evidence to give this public benefit claim much credence. It is unclear the extent to which competition in the possible market for convention services will ensure these savings are passed through to consumers. If savings are retained by convention organisers in an uncompetitive environment, public benefits would be considered to be lessened. In the absence of more information on this claimed public benefit, the Commission does not give any significant weight to this claim.

Increased efficiencies to members

10.47 The Applicant considers that the Conventions Program will enhance the existing marketing efficiencies and advantages offered by the Star Alliance to its members in competition with other airlines. In particular, the Conventions Program will enable Star Alliance members to deliver an integrated service, including fare discounts, to convention delegates and organisers.

10.48 It is not clear to the Commission, on the basis of the information before it, how the Conventions Program will enhance the existing efficiencies offered through membership of the Star Alliance. However, the Commission does accept that the Conventions Program will redress to some extent the competitive disadvantages experienced by Star Alliance members relative to oneworld members, particularly in

the context of an alliance between Qantas and BA, given the lack of an aligned Star Alliance domestic operator in Australia. Table 7.2 shows that this factor appears to be contributing to a declining Star Alliance share of the convention delegate trade. The Commission agrees with the Applicant's contention that the introduction of the Conventions Program constitutes a pro-competitive development in the context of the current passenger transport market environment in which a Star Alliance carrier does not operate domestically in Australia.

Benefits to trade and competitiveness

10.49 The Applicant contends that the proposed arrangements are likely to:

- enhance the attractiveness of Australia as a location for conventions;
- enhance the ability of Australian convention organisers to offer international conventions; and
- increase and facilitate the promotion of tourism to Australia generally.

10.50 The Commission notes that the Conventions Program is in operation outside Australia. Consequently, the implementation of the Conventions Program to apply to Australia is likely to enhance the attractiveness of Australia as a location for conventions relative to the counterfactual, by enabling convention delegates to access discounted airfares to Australia which are currently not available.

10.51 As discussed at paragraph 2.22 above, information collected by the Sydney Convention & Visitors Bureau indicates that convention delegates spend significantly more on goods and services than other travellers. To the extent that the Conventions Program enhances Australia's attractiveness as a location for conventions, and to the extent that convention delegates consume goods and services while in Australia, the Commission considers that the proposed arrangements may result in some benefit to the public.

10.52 In respect of the Applicant's claim that the implementation of the Conventions Program will enhance the ability of Australian convention organisers to offer international conventions, the Commission agrees that this is likely to be the case relative to the counterfactual. To the extent that convention delegates consume goods and services while in Australia, some benefit to the public is likely to be generated.

10.53 The Commission also notes the Applicant's argument that the proposed arrangements will increase tourism to Australia generally. The Commission considers that this may be the case, to the extent that international conventions are held in Australia and convention delegates elect to holiday in Australia immediately before or after the convention, or choose to return to Australia for a holiday following attending a convention there.

Conclusion

10.54 The Commission considers that public benefits will be generated by the Conventions Program including:

- an increase in the range of fares available to convention delegates and particularly those delegates requiring interline fares, who would otherwise not have access to discount fares;
- an increase in the ability of Star Alliance carriers to compete more effectively with oneworld carriers; and
- increased spending by convention delegates visiting Australia resulting from the enhancement of Australia as a location for conventions.

Balance of public benefits and anti-competitive detriments

10.55 The Commission must be satisfied that the proposed conduct results in a benefit to the public that outweighs any detriment to the public constituted by any lessening of competition arising from the conduct. There must also be a nexus between the claimed public benefits and the conduct for which authorisation is sought.

10.56 As discussed above, the Commission considers that there is the potential for a small amount of detriment flowing from the effect on competition of the proposed arrangements. However, the Commission is of the view that this anti-competitive detriment will be minimal for several reasons including:

- participation in the joint bid process by Star Alliance airlines is voluntary;
- while participating airlines are required to agree on the level of discount to be applied, they are still able to compete on the fare itself and any associated terms and conditions, and may only agree on interline convention fares; and
- convention delegates are not compelled to purchase the Conventions Program fare and may purchase any other fare available.

10.57 Additionally, the Commission considers that the implementation of the Conventions Program is unlikely to have a negative impact on the ability of travel agents to compete in the current environment of the market for the sale of air travel, given the Star Alliance has a limited local distribution network.

10.58 The Commission considers that the proposed arrangements are likely to result in public benefit, particularly arising from:

- an increase in the range of fares available to convention delegates;
- an increase in the ability of Star Alliance carriers to compete more effectively with oneworld carriers; and
- increased spending by convention delegates visiting Australia resulting from the enhancement of Australia as a location for conventions.

10.59 In particular, the Commission is of the view that in the current market environment, in which a Star Alliance carrier does not operate domestically in Australia and the domestic passenger transport market is dominated by a oneworld carrier, any enhancement of the ability of Star Alliance carriers to compete more effectively with oneworld carriers is likely to result in a benefit to the public.

- 10.60 The Commission stated in the draft determination that it would be satisfied that the Conventions Program generated overall net public benefit only if Air NZ ceased participation in the Conventions Program should it enter into an alliance with Qantas, of the type described in authorisation applications A30220, A30221, A30222, A90862 and A90863, while still a member of the Star Alliance. Such a situation could reduce competition between Star Alliance carriers and Qantas.
- 10.61 Following the Draft Determination, Qantas submitted that if the Commission does grant the authorisation on the basis that it believes it is required to address the Star Alliance's lack of a partner in domestic Australia, the authorisation should lapse upon any member of the Star Alliance commencing flying domestically in Australia or forming an alliance with an airline that flies domestically in Australia.
- 10.62 The Commission considers that if a Star Alliance member started flying in Australia, it would be unlikely to become an effective competitive force during the life of the proposed authorisation. Therefore, the Commission does not see the value in imposing a condition on the authorisation as proposed by Qantas.
- 10.63 Qantas further submitted that the authorisation should be restricted to the agreement of discounts and the Commission should not authorise the agreement of fares.
- 10.64 The Commission is satisfied that the ability of participating Star Alliance members to agree on fares is restricted to interline convention fares, which will result in minimal detriment. The Commission is of the view that the Conventions Program still generates overall net public benefit without the need for a condition as proposed by Qantas, provided that Air NZ ceased participation in the Conventions Program should it enter into an alliance with Qantas, of the type described in authorisation applications A30220, A30221, A30222, A90862 and A90863, while still a member of the Star Alliance.
- 10.65 On 3 September 2003, the Commission accepted a section 87B undertaking from Air NZ stating that:
- Air NZ undertakes not to participate in the Conventions Program upon giving effect to an alliance with Qantas of the type described in authorisation applications A30220, A30221, A30222, A90862 and A90863, or any similar alliance with Qantas involving the coordination of fares and schedules on trans-Tasman routes.
- 10.66 In light of the undertaking from Air NZ, at section 11 of this determination the Commission grants authorisation to the Conventions Program for a period of four years on the basis that the aviation industry is currently experiencing considerable adjustments, including structural changes, and an extended period of authorisation is not appropriate in these circumstances.

11 DETERMINATION

- 11.1 On 11 April 2002 Air New Zealand Limited (Air NZ) (the Applicant) lodged, on behalf of all members of the Star Alliance¹⁷, applications for authorisation A30209 and A30210 with the Commission. On 26 April 2002, the Applicant lodged further applications for authorisation A30211, A30212 and A30213 with the Commission.
- 11.2 Applications A30210 and A30212 were made under section 88(1) of the Act for an authorisation to make and give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect of substantially lessening competition within the meaning of section 45 of the Act.
- 11.3 Applications A30209 and A30211 were made under section 88(1) of the Act for an authorisation to make and give effect to a contract, arrangement or understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the Act.
- 11.4 Application A30213 was made under section 88(8) of the Act for an authorisation to engage in conduct that constitutes or may constitute the practice of exclusive dealing.
- 11.5 The Applicant seeks authorisation of the guidelines for implementation of the Star Joint Corporate Agreement (the Corporate Agreement) and the Star Alliance Conventions Plus Program (the Conventions Program).
- 11.6 Under the Corporate Agreement, participating Star Alliance members may offer a consenting organisation discounts on published fares or corporate net rates on some or all of the routes that are travelled by the employees of the corporation. It is proposed that Star Alliance members participating in such an offer would be able to collect and exchange the information required to develop the offer, and will not make competing independent offers, unless the joint offer is withdrawn or rejected.
- 11.7 Under the Conventions Program, participating Star Alliance members may offer a consenting convention organiser discounts on published fares and/or interline convention fares for purchase by convention delegates. It is proposed that Star Alliance members participating in such an offer would be able to collect and exchange the information required to develop the offer, and will not make competing independent offers, unless the joint offer is withdrawn or rejected.
- 11.8 The Applicant also requested interim authorisation of the proposed arrangements. On 22 May 2002 the Commission denied this request. However the Commission noted that its decision to deny interim authorisation should not be taken as a guide to the final outcome of the authorisation applications.

¹⁷ The other members of the Star Alliance at time of writing were Air Canada, All Nippon Airways Co Limited, Asiana Airlines, Inc., Austrian Airlines Österreichische Luftverkehrs AG, British Midland Airways Limited, Lauda Air Luftfahrt AG, Deutsche Lufthansa Aktiengesellschaft, Compania Mexicana de Aviación, Polskie Linie Lotnicze LOT, SA de CV, Scandinavian Airlines System, Singapore Airlines Limited, Spanair, Thai Airways International Public Company Limited, Tyrolean Airways, United Air Lines Inc, US Airways, Inc. and VARIG SA.

11.9 On 30 May 2003 the Commission issued a draft determination proposing to authorise the proposed arrangements for a period of four years, subject to Air NZ offering, and the Commission accepting, an undertaking pursuant to section 87B of the Act which stated that:

- 1) Air NZ would cease participation in the Corporate Agreement upon entering into an alliance with Qantas of the type described in authorisation applications A30220, A30221, A30222, A90862 and A90863; and
- 2) Air NZ would cease participation in the Conventions Program upon entering into an alliance with Qantas of the type described in authorisation applications A30220, A30221, A30222, A90862 and A90863.

11.10 The Commission accepted an undertaking of this nature from Air NZ on 3 September 2003.

11.11 In light of the undertaking from Air NZ, for the reasons outlined in this determination, the Commission is satisfied that:

- the proposed arrangements for which authorisation is sought under subsection 88(1) of the Act in respect of provisions which may be exclusionary provisions would be likely to result in such a benefit to the public that they should be allowed to be made and given effect to;
- the making of the arrangements and the giving effect to the provisions of the arrangements which might substantially lessen competition (within the meaning of section 45 of the Act) for which authorisation is sought under subsection 88(1) of the Act:
 - would be likely to result in a benefit to the public; and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements; and
- the proposed conduct that constitutes or may constitute exclusive dealing for which authorisation is sought under subsection 88(8) of the Act is likely to result in such a benefit to the public that it should be allowed to take place.

Determination

11.12 The Commission grants authorisation to applications A30209, A30210, A30211, A30212 and A30213 for a period of four years.

The effective date of determination

11.13 This decision is subject to any application to the Australian Competition Tribunal (the Tribunal) for its review.

11.14 This determination is made on 4 September 2003. If no application for review of the determination is made to the Tribunal, it will come into force on 26 September 2003. If an application is made to the Tribunal, the determination will come into force:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review: or
- where the application is withdrawn – on the day on which the application is withdrawn.

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4 January 2002

JOINT STAR CORPORATE AGREEMENT

This memorandum provides guidelines for the operation of the Joint STAR Corporate Agreement program of fare reductions for corporate customers. These guidelines are designed to ensure compliance with applicable competition laws by limiting the participating carriers' activities to what is necessary for the success of the joint undertaking, avoiding spillover into areas in which the carriers may compete with each other, and ensuring that the Star corporate fare reduction ("incentive") programs comply with restrictions imposed by particular jurisdictions. (At the present time, and until further notice, (1) corporations with headquarters/principal place of business in Australia or New Zealand are not eligible for participation in Joint Corporate Agreement in Star fare reduction programs, and (2) where a corporation's headquarters/principal place of business is in Japan, then no steps beyond that provided for in Section I.A. below may be taken until ANA has formally advised the designated Star personnel that ANA has determined that it is prepared to go forward with the proposal.)

The guidelines are organized in the following manner. The first and second sections provide guidance with respect to submitting and developing Star Alliance bids to corporations, wherever they may be located. The third section sets forth guidelines for the Joint STAR Corporate Agreement incentive programs; these guidelines depend

principally on the geographic location of the point of sale (POS) of the corporate travel qualifying for the incentive. The final section contains generally applicable guidance as to permissible access to information generated by the Joint STAR Corporate Agreement.

I. Procedures for Bids

- A. The Joint STAR Corporate Agreement participants should obtain at the outset the corporation's consent to receive a joint bid and should have written documentation of that consent. So long as the fact of the request is documented and the documentation is in the hands of both parties, it does not matter who drafts it: thus, the Joint STAR Corporate Agreement may prepare and send to the corporation a letter memorializing the corporation's request for a proposal from the Alliance or from any subset of the Alliance.

- B. The Joint STAR corporate agreement participants should make it clear that the corporation can receive either a joint bid from the Alliance (or any subset thereof) or separate bids from one or more of its members not participating in the joint Alliance bid. If the corporation chooses to receive a joint bid, the carriers participating in that bid, while it is outstanding, will not make (even at the request of the corporation) independent bids in competition with the joint bid in which they are participating. Once a joint bid is withdrawn or rejected, however, the corporation may request and receive individual offers from the carriers that participated in the joint bid, and the corporation should be informed of this fact in advance.

- C. Once a corporation has requested a joint bid and the bid has been submitted to the customer for consideration, the participating carriers may refuse to accede to a request by the corporation for separate bids during the pendency of the negotiations with the corporation concerning the bid. However, as soon as the customer has clearly and unequivocally rejected the joint bid, the participating airlines may determine individually whether to accede to any requests for individual bids.
- D. Because there is always a possibility that a Joint STAR Corporate Agreement proposal will be declined and the customer subsequently will want separate bids from one or more Alliance members, the Joint STAR Corporate Agreement participants should strictly avoid any discussion of what they will do individually if the joint offer is not accepted. Specifically, no carrier should disclose whether or not it will make a separate offer, and the terms of such an offer should not be discussed.
- E. If a single carrier has submitted an individual bid to a corporation and in the course of that process persuades the corporation also to consider a Star bid, the single carrier bid must remain on the table, unchanged, during the period in which the Star bid is being developed for consideration by the corporation. The single carrier will not change the terms of its initial bid to compete with the Star offer, and it will honor the terms of its initial bid if the corporation rejects the Star bid and seeks to accept the individual bid. If the single carrier has only approached the

corporation but has not yet submitted an individual bid, and the corporation requests a Star bid, the carrier will not submit an individual bid until the corporation has considered and rejected the Star bid.

- F. Each Joint STAR Corporate Agreement participant should be free to decide whether or not it wants to participate in a particular joint proposal. If one (or more) of the carriers decides not to participate in a joint bid, the other carriers should not attempt to induce its participation.

II. Developing the Joint Bid

- A. Once the customer agrees to receive a joint bid, then the Star carriers participating in the joint bid may collect and exchange the information required to develop the joint bid. Each joint bid should be treated as a separate project. Discussion and the exchange of information with respect to each project should be limited to what is necessary to carry out that project. As set forth below, there are some specific topics that the participants should take particular care to avoid, but the general principle remains that only necessary information should be exchanged.
- B. The Joint STAR Corporate Agreement carriers should not engage in any discussion of possible future alterations to any carrier's fares, including fare conditions and other terms of sale, or to any carrier's capacity levels, or exchange any other sensitive business planning information not necessary to the joint offer.

- C. As part of the Joint STAR Corporate Agreement program, the Alliance members will offer customers discounts off business or other published fares on some or all of the routes that are traveled by the employees of the customers. In order to arrive at these discounts, the participating airlines will obviously need to discuss the percentage reductions they are willing to offer and how these compare with what is available to the corporation in terms of either published or unpublished fares from individual Star carriers or from competitors. But discussions about Star carrier unpublished fares made available to other customers, or about any likely future fare offers, published or unpublished, even where such fares will be in practice the basis on which the discounts to the corporation will be calculated, are not necessary to the preparation of the joint bid and thus should be avoided.
- D. Similarly, corporate customers may want a Star bid with firm net corporate rates, at least on some routes, not merely a bid that offers discounts off published fares that may change. In order to arrive at a joint offer of corporate net rates, the participating airlines will have to discuss what rates each is willing to offer to the customer and how these compare with what is otherwise available to that customer. But again these discussions do not have to involve any discussion of what other unpublished individual carrier fares may be, or what any future fares, published or unpublished, may be; the Joint STAR Corporate Agreement

carriers should limit their discussions of fares to the net corporate fares that are to be offered to the particular customer that is the recipient of the particular joint bid.

- E. As part of the process of tendering each joint bid, the participating carriers will typically make a presentation to the prospective customer that demonstrates the advantages of the Star program over the programs offered by individual carriers. For purposes of developing this presentation, the participating carriers may, as provided for in subsections C and D above, exchange information about the terms of existing contracts one or more of them has with the prospective customer. A copy of each such presentation should be kept in the files relating to that customer or prospective customer.

III. Guidelines for Implementation of Star Incentive Programs

This section provides guidance on the three basic types of incentive programs (volume-based, market-share, and fixed-fare) that may be offered to corporate customers for the purpose of enabling them to achieve fare reductions for employee business travel. The guidance for each particular type of incentive depends principally on the geographic location of the POS of the corporate travel qualifying for the incentive. (The term "EU home country" refers to Germany, Austria, Norway, Sweden and Denmark; all other EU countries are "non-home countries".)

There are two major exceptions to the principle of basing the guidance on the country of the POS of the qualifying travel. (1) POO in EU Home Country. If the point

of origin (POO) of qualifying travel is an EU home country, then the guidance for permissible incentives for such travel is that given in subsections A.2, B.2, C.2 and D below, even if the POS of the travel is not in an EU home country. Consult counsel before departing from this guidance. (2) Canada-related travel. Where more than 20% of a corporation's qualifying travel is to, from, through or within Canada, treat all qualifying travel of that corporation pursuant to subsections A.2, B.2, and C.2, or consult counsel for possible exceptions.

Generally applicable guidance: (1) Contract term. Regardless of the incentive program applied, the Joint STAR Corporate Agreement contract should either be for one year, or, in the case of a multi-year contract, should contain a provision permitting the corporation to terminate at the end of each year upon 60 days' notice. (2) Exclusivity. In addition, in EU home-country markets and Canada, Alliance members may not include exclusivity commitments in the Star corporate contracts or treat "preferred carrier" status so that it is equivalent to an exclusivity obligation.

A. Incentives Based on Volume (Joint Bonus, Front-End and Back-End Incentives)

1. *POS in U.S., EU Non-Home Countries, Brazil, Singapore, Japan, and all other countries not elsewhere specified in these guidelines.*

With respect to qualifying travel with POS in these countries, volume-based incentives are generally permissible. (See, however, special restrictions in subsection A.3 below relating to UK POS qualifying travel.) The incentives may be tailored to the particular

corporation being approached; different incentives may be offered to different customers with respect to such travel.

2. *POS in EU Home Countries and Canada.* Where the POS of the travel qualifying for the incentive is in one of these countries, volume-based incentives are permissible, provided that the following guidelines are observed:

- Bonus targets and minimum commitments necessary to qualify for the incentives must not be based on an increased purchase threshold compared to a previous reference period (*i.e.*, a "growth" or "loyalty" bonus is not permitted).
- The reference period for the incentives must not exceed six months. (This limitation does not apply to Canada POS qualifying travel.)
- Bonus targets and minimum commitments for qualifying travel with POS in EU home countries must be based on an objective scale where the threshold levels for a given discount rate are broadly consistent for all corporate customers in that country (*i.e.*, the threshold levels for a given discount rate should not deviate by more than 10%). For qualifying travel with POS Canada, the same incentive scale must be offered in the first instance to all customers but may be modified in individual

customer negotiations. The scale should be set so that the discount at each level does not exceed the incremental profits expected to be generated (to avoid the risk that it may be challenged as loyalty-based).

- Bonus targets and minimum commitments should not be calculated by the Star carriers using a methodology that incorporates an estimated share of the corporate customer's total travel (i.e., the volume incentive should not be a disguised market-share requirement: see subsection B below).

3. *POS in United Kingdom.* Where the POS of the qualifying travel is in the UK, EU non-home country guidelines apply to incentives that are calculated on the basis of the total volume of ex-UK travel of the corporate customer. However, if incentives are calculated on the basis of travel volume on specific city pairs, country pairs, or a group of city pairs or country pairs, then legal counsel should be contacted if either of the following conditions apply:

- The combined Star share on the city pairs or country pairs for which the incentive is offered is (i) 40% or more; and (ii) there are two or more other carriers/alliances on the pair; or
- The combined Star share on the city pairs or country pairs for which the incentive is offered is 50% or more.