Determination

Application for revocation of authorisation A90427 and substitution of authorisation A91059

lodged by

Qantas Airways Limited

Date: 19 December 2007

Commissioners: Samuel King
                Martin Smith
                Willett

Authorisation no.: A91059
Public Register no.: C2007/1730
Summary

The ACCC has decided to revoke authorisation A90427 and grant authorisation A91059 in substitution. The substitute authorisation has been granted to Qantas until 31 December 2017.

The authorisation process

The Australian Competition and Consumer Commission (ACCC) can grant immunity from the application of the competition provisions of the *Trade Practices Act 1974* (the Act) if it is satisfied that the benefit to the public from the conduct outweighs any public detriment. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

The application

Qantas has lodged an application for revocation and substitution of authorisation A90427 in relation to tariff arrangements with designated airlines that are required under Australia's air service agreements with other countries, subject to the authorisation only offering protection under certain conditions.

Background

Authorisation A90427 was granted on 20 July 1987 in perpetuity. The authorisation relates to non-IATA tariff agreements (agreements between Qantas and other airlines relating to passenger and cargo tariffs made outside the IATA tariff conferences) required under certain Air Service Agreements (ASAs) between Australia and other countries.

Assessment

The ACCC considers that there are potentially significant anti-competitive detriments by allowing tariff agreements between Qantas and foreign airlines.

However in this instance, a number of ASAs require Qantas to reach an agreement, arrangement or understanding with a competing airline in relation to the establishment of tariffs. At present there are two examples where Qantas is actively required to enter into agreements with foreign airlines under ASAs.

In these circumstances the ACCC considers that the following benefits are likely to result from the conduct:

- ensuring Australia can meet its international obligations; and
- ensuring that Qantas can open a route or continue to fly a route to a country

in the very limited circumstances where the foreign Government concerned continues to require tariff cooperation in accordance with ASAs.

The ACCC is also satisfied that the safeguards placed on the conduct are likely to limit the conduct to specific circumstances where the foreign Government expressly requires tariff cooperation and therefore limit the detriment arising from the conduct.

On balance, the ACCC considers the public benefit is likely to outweigh the public detriment.
Length of authorisation

The ACCC considers that given the time it takes to conduct air service negotiations, and that some countries maybe unwilling to remove tariff coordination clauses from the ASAs, a 10 year time limit for authorisation is appropriate.

The ACCC considers that a 10 year period for authorisation will allow the ACCC to review the arrangements at the end of the period with the possibility of the arrangements being able to be narrowed even further.

As such, the ACCC has decided to revoke authorisation A90427 and grant substitute authorisation A91059 to the arrangements until 31 December 2017.
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1. Introduction

Authorisation

1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the Trade Practices Act 1974 (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

1.2 The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’. The ACCC may ‘authorise’ businesses to engage in such conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

1.3 The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

1.4 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

1.5 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

1.6 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

1.7 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person to whom the authorisation was granted. The ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (outlined in paragraphs 1.3 to 1.6).

The application for revocation and substitution

1.8 On 7 September 2007 Qantas lodged an application for revocation of authorisation A90427 and its substitution with authorisation A91059.
1.9 Qantas is seeking authorisation to allow it to continue to give effect to tariff arrangements with designated airlines that are required under Australia’s air service agreements (ASAs) with other countries, subject to the authorisation only offering protection under the following conditions:

- in relation to bilateral agreements between Qantas and other international airlines where such bilateral requirements are actively enforced by the relevant foreign government pursuant to ASAs between Australia and another country;
- where Qantas has notified the ACCC of such a requirement and the nature of the agreement entered into;
- where there is no requirement on the airlines involved in the above agreements to actually charge the fares set out in the agreement (i.e. the airlines are free to discount below the agreed published fare level); and
- where Qantas does not instigate or proactively encourage such agreements.

1.10 Qantas is seeking authorisation for an indefinite period or, in the alternative, at least until the earlier of ten years or the date upon which Qantas advises the ACCC that applicable ASAs no longer require such conduct.

Chronology

1.11 Table 1.1 provides a chronology of significant dates in the consideration of this application.

Table 1.1: Chronology of application for authorisation A91059

<table>
<thead>
<tr>
<th>DATE</th>
<th>ACTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 September 2007</td>
<td>Application for revocation and substitution lodged with the ACCC.</td>
</tr>
<tr>
<td>28 September 2007</td>
<td>Closing date for submissions from interested parties in relation to the substantive application for authorisation.</td>
</tr>
<tr>
<td>15 November 2007</td>
<td>Draft determination issued.</td>
</tr>
<tr>
<td>30 November 2007</td>
<td>Closing date for submissions from interested parties in relation to the draft determination.</td>
</tr>
<tr>
<td>19 December 2007</td>
<td>Determination issued.</td>
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</table>
2. **Background to the application**

The applicant

2.1 Qantas was incorporated in Queensland in 1920 and is Australia’s largest international and domestic airline.

2.2 The main business of Qantas is the transportation of passengers and air freight. In the year ended 30 June 2007, the Qantas Group carried more than 36 million passengers.¹

2.3 The Qantas flying businesses are grouped under two major brands – Qantas and Jetstar. Domestically, Qantas, QantasLink and Jetstar operate over 5,000 flights per week, servicing 57 city and regional destinations in all states and mainland territories.

2.4 Internationally, Qantas and Jetstar operate nearly 750 flights per week, offering services to 86 international destinations in 40 countries, including Australia.

**Authorisation A90427**

2.5 Authorisation A90427 was granted on 20 July 1987 in perpetuity. The authorisation relates to non-IATA tariff agreements (agreements between Qantas and other airlines relating to passenger and cargo tariffs made outside the IATA tariff conferences) required under certain Air Service Agreements (ASAs) between Australia and other countries.

2.6 Under authorisation A90427, Qantas was authorised to:

- give effect to the tariff arrangements with the IATA and non-IATA airlines listed in Attachments A and B to the determination of 20 July 1987 or to make further arrangements of a like type with those airlines, on the basis that:

  (a) any such tariff would, by its nature, stipulate the passenger fare or cargo rate, as the case may be, at a specific level or levels;

  (b) any such tariff would, by its nature, stipulate the specific conditions related to the passenger fare or cargo rates, as the case may be;

  (c) prior to implementation of same any such tariff would be formally filed where necessary with the Australian Department of Aviation for approval;

  (d) any such tariff would not be implemented until published for the information of the trade and consumers;

  (e) any such tariff agreement would not include any obligation, as between the airlines, (in contrast to any obligations which may be imposed by any Government authority either in Australia or in any other country) to comply with the agreement reached.

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¹ Qantas 2007 Annual Report p5
• make arrangements of a like type with other airlines with which Qantas at present does not have such arrangements, provided that when such agreements are proposed they are first submitted to the Trade Practices Commission for consideration.

2.7 Authorisation A90247 was granted on the condition that there is no requirement on the airlines or agents
• to charge in Australia the agreed tariffs, or
• not to advertise in Australia the tariffs they actually charge.

International aviation regulation

2.8 The international airline industry is highly regulated. International civil aviation’s main governing treaty, the 1944 Chicago Convention, established the principle that each country has exclusive sovereignty over its airspace. This principle continues to guide the regulatory framework today.²

Air Service Agreements

2.9 The Chicago Convention requires governments to create legal frameworks for the operation of international air services, which are generally negotiated on a bilateral basis.³ Specifically, scheduled international air services are operated within a legal framework pursuant to bilateral air service agreements between countries. These agreements are generally of treaty status and are enforceable in international law.⁴

2.10 There are over eight thousand ASAs in place globally. Australia has agreements with more than sixty countries covering all continents.⁵

2.11 ASAs are usually negotiated bilaterally according to the principle of ‘bilateral reciprocity’, whereby countries exchange rights on the basis of ‘equality of opportunity’. This essentially means that two countries agree to exchange equal rights of access for their own carrier(s) in the other’s market. Depending on the intentions and objectives of the various governments, ASAs can range from very restrictive to very liberal.⁶

2.12 An ASA specifies the terms and conditions of airline activity between two countries. The ASAs generally provide for the destinations that can be served in a particular country, and ‘beyond’ rights and the permitted frequencies per week.⁷ Typically, the rights granted under an ASA can only be exercised by the ‘designated carriers’ of the countries that are parties to them. An ASA typically requires a ‘designated carrier’ to be under the substantial ownership and control of the country designating the carrier.⁸

³ DOTARS submission
⁶ Qantas submission, p3
2.13 These bilateral ASAs normally include some provision relating to the tariffs that airlines may charge on services governed by the ASA.9

*Australian government policy*10

2.14 The Department of Transport and Regional Services (DOTARS) indicated that the Australian Government’s policy, as announced in 2000 by the then Deputy Prime Minister and Minister for Transport and Regional Services, the Hon John Anderson MP, is that the setting of tariffs for international air transport should be for the airlines’ commercial judgement, subject to compliance with the provisions of the Act and any overseas competition law that may apply.

2.15 In order to implement the Australian Government’s policy on tariffs, in negotiating ASAs the Australian Government seeks to include tariff provisions which provide that airlines will be allowed to determine their own tariffs, subject to applicable competition laws, without requiring consultation with other airlines or the International Air Transport Association (IATA), or the need for Government approval of tariffs.

2.16 DOTARS notes that in line with the policy outlined above, DOTARS does not require airlines to file tariffs for government approval in Australia. In cases where airlines do file tariffs for approval (if for example ASA provisions or their own domestic law or practice requires the airline to file tariffs with the Australian Government), the Air Navigation Regulations 1947 deem the tariffs to be approved seven days after filing.

2.17 DOTARS being the responsible authority under the ASAs, does not enforce any tariff coordination provisions in Australia’s ASAs.

2.18 DOTARS indicated that it is the Australian Government’s policy, as announced by the then Minister for Transport and Regional Services, the Hon Warren Truss MP, in February 2006 to continue the liberalisation of international air services that commenced with then Minister Anderson’s policy statement of 2000. This liberalisation includes the updating of ASA frameworks to include more modern and liberal provisions to give airlines greater commercial flexibility, including in relation to tariffs.

*Tariff clauses in ASAs*

2.19 Qantas noted that at the time authorisation A90427 was granted, the majority of Australia’s ASAs contained the following clause which required Qantas and the designated airline of a particular country to agree tariffs for air services between Australia and that country:

“Agreement on the tariffs shall, wherever possible, be reached by the designated airlines concerned through the rate-fixing machinery of IATA. When it is not possible, tariffs in respect of the specified routes shall be agreed upon between the designated airlines concerned.”

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9 DOTARS submission  
10 DOTARS submission. Unless otherwise stated, information about the Australian Government policy comes from DOTARS submission
2.20 Since authorisation A90427 was granted in July 1987, the Australian Government has actively sought to remove the above clause as part of its inter-governmental negotiations to liberalise ASAs.

2.21 The Australian Government’s preferred tariff provisions provide that parties shall allow airlines to set their own tariffs, subject to applicable competition laws and regulations.

2.22 DOTARS notes that in practice, many countries are not willing to agree to Australia’s preferred approach of allowing airlines to set their own tariffs. As a result, Australia’s ASAs include a range of tariff provisions, the content of which is generally as liberal as the other country was prepared to agree to. DOTARS indicated it is for this reason that a limited number of Australian ASAs still contain tariff coordination requirements.

2.23 ASAs with the following countries still contain the above clause requiring agreement or “concurrence” between the designated airlines concerned in relation to tariffs for air passenger and cargo services between Australia and that country:

- Austria
- Japan
- Burma (Myanmar)
- Nauru
- Germany
- Netherlands
- Indonesia
- Philippines
- Italy
- Thailand

2.24 There are 9 other ASAs which contain a variation of this clause, providing for such an agreement between designated airlines, but not explicitly requiring it. These ASAs include:

- Brunei
- Korea
- Canada
- Mauritius
- Egypt
- Russia
- Hong Kong

2.25 DOTARS notes the following developments in relation to the above ASAs:

- **Austria** – air service talks held in 2005 settled a proposed amendment which will remove the tariff coordination requirement. This amendment has yet to be brought into force.

- **Korea** – air service talks held in 2007 settled a proposed amendment which will remove the tariff coordination requirement. This amendment has yet to be brought into force.

- **Mauritius** – air service talks expected to be held later this year are likely to settle text of a new ASA. Any new ASA is likely to remove tariff coordination requirements.

2.26 The presence of the above clause in ASAs requiring or permitting tariff coordination does not mean that such requirement continues to be actively enforced by the government concerned.
2.27 Qantas indicated there are two current examples of ASAs where Qantas is actively required to enter into agreements with airlines under these ASAs:

- providing concurrence to Japan Airlines and obtaining concurrence from Japan Airlines in relation to all non-IATA international tariffs between Australia and Japan; and
- submission of published tariffs from the Philippines to Australia to Philippine Airlines as part of the approval process required by the Civil Aeronautics Board.

2.28 In relation to Japan Airlines, Qantas notes that it has recently taken steps to enter into a less restrictive form of agreement, which involves both carriers issuing a “standing concurrence” notice to each other. This involves each carrier agreeing to concur to all tariffs filed by the other carrier with the Japanese Ministry of Land, Infrastructure and Transport and replaces the previous practice where Japan Airlines was privy to confidential Qantas tariff information between Japan and Australia. This arrangement could be terminated by Japan Airlines at any time.

2.29 In the case of the Philippines, Qantas notes that it is required by the Civil Aeronautics Board (CAB) to provide published tariffs from the Philippines to Australia to Philippine Airlines as part of the local approval process. This local approval process involves Qantas submitting its proposed tariffs to the Philippine CAB. Philippine Airlines then has the right to object to the proposed tariffs. If Philippine Airlines objects, Qantas must adjust and resubmit its tariffs.
3. The application and ACCC consultation

3.1 Qantas seeks revocation of authorisation A90427 and its substitution with authorisation A91059 to allow Qantas to continue to give effect to the tariff arrangements with designated airlines that are required under Australia’s air service agreements with other countries, subject to the authorisation only offering protection under the following conditions:

- in relation to bilateral agreements between Qantas and other international airlines where such bilateral requirements are actively enforced by the relevant foreign government pursuant to ASAs between Australia and another country;
- where Qantas has notified the ACCC of such a requirement and the nature of the agreement entered into;
- where there is no requirement on the airlines involved in the above agreements to actually charge the fares set out in the agreement (ie. the airlines are free to discount below the agreed published fare level); and
- where Qantas does not instigate or proactively encourage such agreements.

3.2 Qantas submits that a number of Australia’s ASAs continue to contain the following clause:

“Agreement on the tariffs shall, wherever possible, be reached by the designated airlines concerned through the rate-fixing machinery of IATA. When this is not possible, tariffs in respect of the specified routes shall be agreed upon between the designated airlines concerned.”

3.3 Qantas submits that this requires an agreement, arrangement or understanding to be reached between competing airlines in relation to the establishment of air service tariffs and, without authorisation, this conduct would be likely to breach section 45 of the Act.

3.4 Qantas submits that it recognises the importance of ensuring that authorisation A90427 is modernised and updated to reflect current practice. However, Qantas must ensure that it can continue to comply with its government-imposed obligations under Australia’s ASAs. Qantas is therefore applying for revocation of authorisation A90427 and substitution with a new authorisation under section 91C of the Act.

ACCC consultation

Prior to draft determination

3.5 The ACCC sought submissions from interested parties in relation to Qantas’ application for revocation and substitution. The ACCC received submissions from the Australian Federation of Travel Agents, the Department of Foreign Affairs and Trade, and the Department of Transport and Regional Services.

3.6 All submissions received by the ACCC support the granting of a substitute authorisation to Qantas.
3.7 Copies of public submissions are available from the ACCC website (www.accc.gov.au) by following the ‘Public Registers’ and ‘Authorisations Public Registers’ links.

Following the draft determination

3.8 On 15 November 2007 the ACCC issued a draft determination in relation to the application for revocation and substitution. The draft determination proposed to revoke authorisation A90427 and grant authorisation A91059 in substitution until 31 December 2017.

3.9 Qantas indicated to the ACCC that it supports the draft determination issued by the ACCC.

3.10 No submissions were received from interested parties in response to the draft determination.
4. **The net public benefit test**

4.1 Under section 91C of the Act, the ACCC may revoke an existing authorisation and grant another authorisation in substitution for the one revoked, at the request of the person to whom the authorisation was granted or another person on behalf of such a person.

4.2 In order for the ACCC to grant an application to revoke an existing authorisation and grant a substitute authorisation, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process (as outlined in Chapter 1).

4.3 Under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.

**Application A91059**

4.4 Application for revocation and substitution A91059 was made to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in sections 90(6) and 90(7) of the Act.

4.5 In respect of the making of and giving effect to the arrangements, sections 90(6) and 90(7) of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and
- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision concerned was given effect to.

**Application of the tests**

4.6 The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.\(^\text{11}\)

4.7 However, the Tribunal has previously stated that regarding the test under section 90(6):

\[\text{[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society.}\]

\(^{11}\) *Australian Association of Pathology Practices Incorporated [2004] ACompT 4; 7 April 2004*. This view was supported in *VFF Chicken Meat Growers’ Boycott Authorisation [2006] AcompT9* at paragraph 67.
Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.\footnote{12}

4.8 Consequently, given the similarity of wording between section 90(6) and (90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

**Definition of public benefit and public detriment**

4.9 Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

\[\text{...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements \ldots the achievement of the economic goals of efficiency and progress.}\footnote{13}

4.10 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

\[\text{...any impairment to the community generally, any harm or damage to the aims pursued by society including as one of its principal elements the achievement of the goal of economic efficiency.}\footnote{14}

**Future with-and-without test**

4.11 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.\footnote{15}

4.12 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

**Length of authorisation**

4.13 The ACCC can grant authorisation for a limited period of time.\footnote{16}

\footnotetext{12}{Re Association of Consulting Engineers, Australia (1981) ATPR 40-2-2 at 42788. See also: Media Council case (1978) ATPR 40-058 at 17606; and Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review (1981) ATPR 40-200 at 42,763, 42766.}

\footnotetext{13}{Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.}

\footnotetext{14}{Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.}

\footnotetext{15}{Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.}

\footnotetext{16}{Section 91(1).}
5. **ACCC evaluation**

5.1 The ACCC’s evaluation of the proposed arrangements is in accordance with the net public benefit test outlined in Chapter 4 of this determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the proposed arrangements.

**The market**

5.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

5.3 The application concerns non-IATA tariff agreements required under certain ASAs between Australia and other countries.

5.4 Qantas submits the relevant area of competition is the provision of international air passenger and cargo services.

5.5 The ACCC does not consider it necessary for this application to define the market, as the outcome of the assessment would not be affected.

**The counterfactual**

5.6 As noted in Chapter 5 of this determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the ‘future with-and-without test’.

5.7 Qantas submits that the future without the proposed conduct involves Qantas not being able to operate or market fares to international destinations where governments mandate the proposed conduct.

5.8 DOTARS submits that compliance with relevant ASA provisions is a key requirement for airlines to operate and/or market international air services. Failure to comply with relevant provisions of an ASA could result in a government to whose country an airline is operating a service taking steps to revoke or limit the approvals held by that airline to operate/market in that country.

5.9 The ACCC considers that absent authorisation Qantas would be unable to comply with the requirement in certain ASAs for tariff agreement between designated airlines where the requirement is actively enforced by the country concerned. The ACCC considers that in those circumstances it may lead to Qantas being unable to operate or market fares to such countries.

**Public detriment**

5.10 Qantas submits that there will be no competitive detriment flowing from the tariff agreements. It considers the substitute authorisation is likely to result in no detriment to the public for the following reasons:
authorisation A90427 has been in effect since July 1987, permitting these kinds of agreements to take place. Qantas submits that during this time there has been no detriment to competition in the market for international air passenger and freight services. Qantas notes that competition in this market has increased substantially and has seen airfares reduce significantly in real terms since 1987;

- in accordance with authorisation A90427, there is no requirement on the airlines involved in the agreements to actually charge the fares set out in the agreement. In this regard Qantas notes that airlines are free to discount below the agreed published fare level; and

- it would be a condition of the substituted authorisation that Qantas will not instigate or encourage such agreements.

5.11 Qantas further submits that the substitute authorisation will enhance competition for the provision of international air services as it will ensure that Qantas continues to operate or market fares to international destinations where governments mandate the proposed conduct.

ACCC’s view

5.12 Agreements between Qantas and competing airlines in relation to passenger fares and cargo rates for international services to certain destinations can lead to significant detriments to customers in terms of higher fares and rates, depending on the specific market or route concerned.

5.13 In this instance, however, a number of ASAs require Qantas to reach an agreement, arrangement or understanding with a competing airline in relation to the establishment of air service tariffs.

5.14 The ACCC notes that it is not Australian Government policy to enforce tariff agreement or cooperation clauses in ASAs and Qantas would not be required by the Australian Government to agree fares.

5.15 The ACCC further notes that even though tariff agreement or cooperation is required or permitted in some ASAs, this does not mean that in practice the requirement continues to be actively enforced by the foreign Government concerned. This is apparent from Qantas’ experience, who only reports two examples of foreign Governments actively requiring some form of tariff agreement or cooperation.

5.16 The ACCC notes that there is no requirement on the airlines involved in the agreement to actually charge the fares set out in the agreement and that the airlines are free to discount below the published fare level.

5.17 While the ACCC accepts that airlines could and would discount below the agreed published fares in economy class, there is no information to suggest that the agreed published fares are not used to a significant extent in the market, in particular for premium classes. In addition, the ACCC considers that even if the agreed published fares were not used to a significant extent they would still serve as benchmarks or reference points for other fares.
5.18 The ACCC considers that there would be significant detriments where an agreement was to be entered into in accordance with the ASA but where the Government does not actively require such an agreement.

5.19 The ACCC notes in that regard the important safeguards placed on the conduct, which are likely to limit the detriment resulting from the conduct:
- it only applies to bilateral agreements, that is the agreement cannot take place between Qantas and airlines from two or more countries;
- Qantas cannot instigate the agreement;
- the requirement in the ASA has to be actively enforced by the foreign Government concerned; and
- Qantas has to notify the ACCC that it has been required to enter into some form of agreement with a foreign airline and must provide the ACCC with details of the nature of that agreement.

5.20 The ACCC considers that Qantas should notify it of the foreign government requirement and to provide details of the nature of the agreement within 30 days of the agreement being entered into.

**Public benefit**

5.21 Qantas submits that in its experience IATA tariff coordination conferences have, to date, fulfilled the requirement remaining in certain ASAs of agreement or concurrence for most countries. Qantas notes however, there are still a few countries where the applicable aeronautical authorities mandate that airlines obtain bilateral agreement or concurrence from the applicable home carrier where:
- there are ancillary issues that may or may not fall within the conduct covered by the IATA Authorisations; or
- the IATA process is regarded as being inappropriate, either because it is too slow or the agreement involves a bilateral fare product; or
- relevant governments require additional concurrence before certain published tariffs can be filed with the relevant aeronautical authorities.

5.22 Qantas submits that it continues to need authorisation for this type of conduct as:
- in the Japan example, either party can revoke its standing concurrence at any time; or
- in the case of the other ASAs which contain this requirement, a government could change its current approach and require concurrence between the competing airlines.

5.23 Qantas notes that the then Trade Practices Commission in its 1987 determination, accepted that there was substantial public benefit in enabling Qantas to comply with the terms of Australia’s ASAs with other countries to facilitate travel to and from Australia. Qantas further notes that key to this determination was the fact that fares agreed under the authorised conduct were not made compulsory for the airlines or their agents. Qantas submits that this position is unchanged.
Submissions

5.24 DFAT submits that Australia as a signatory to bilateral ASAs has obligations under international law to facilitate their implementation. That is, Australia is obliged to ensure that Qantas as the designated airline under these treaties may comply with the tariff clauses. A failure by Australia to honour its obligations under our bilateral ASAs could adversely affect our standing in the international community and could have international law consequences, including an international case brought against Australia.

5.25 DFAT notes comments by the then-Minister for Transport and Regional Services, the Hon Warren Truss MP that “international air transport is a key driver of the Australian economy. It provides access to markets for our exports and is crucial for servicing and growing the tourism industry”. 17

5.26 DFAT notes that Australia has ASAs requiring designated airlines to agree tariffs with a number of key trading partners, in particular Japan, Germany, Indonesia, Thailand and the Philippines. DFAT submits that limitations on or disruptions to air services to these countries arising from non-conformity with ASAs would adversely affect Australia’s trading interests.

5.27 DOTARS submits that compliance with relevant ASA provisions is a key requirement for airlines to operate and/or market international air services. Failure to comply with relevant provisions of an ASA could result in a government to whose country an airline is operating a service taking steps to revoke or limit the approvals held by that airline to operate/market in that country.

ACCC’s view

5.28 The ACCC notes the submission by DFAT that Australia as a signatory to bilateral ASAs has obligations under international law to facilitate their implementation. The ACCC accepts there is likely to be a benefit in ensuring that Australia is able to meet its international obligations.

5.29 The ACCC notes the submission by DOTARS that failure to comply with relevant provisions of an ASA could result in a government to whose country an airline is operating a service taking steps to revoke or limit approvals held by that airline to operate/market in that country.

5.30 The ACCC considers that there is a benefit to the public in ensuring that Qantas can open a route or continue to fly an existing route to a country in the limited circumstances where the Government continues to require tariff cooperation as a condition of operation, in accordance with ASAs. The ACCC accepts this would assist in protecting Australia’s trading interests, in these limited circumstances.

5.31 While DFAT has noted a number of ASAs with such requirements for tariff agreements the ACCC again emphasises that very few, at present only two, foreign Governments actively require such agreements.

17 media release dated 21 February 2006
5.32 The ACCC considers that for as long as the clause remains in certain ASAs it is possible (but not necessary) that such requirement for tariff agreement may be enforced. In this regard the ACCC considers there is a benefit in a simple process allowing Qantas to comply with foreign Government requirements if and when it is made.

**Balance of public benefit and detriment**

5.33 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit that will outweigh any public detriment.

5.34 In the context of applying the net public benefit test at section 90(8)\(^1\) of the Act, the Tribunal commented that:

…”something more than a negligible benefit is required before the power to grant authorisation can be exercised.”\(^2\)

5.35 The ACCC considers that there are potentially significant anti-competitive detriments by allowing tariff agreements between Qantas and foreign airlines.

5.36 However in this instance, a number of ASAs require Qantas to reach an agreement, arrangement or understanding with a competing airline in relation to the establishment of tariffs. At present there are two examples where Qantas is actively required to enter into agreements with foreign airlines under ASAs.

5.37 In these circumstances the ACCC considers that the following benefits are likely to result from the conduct:

- ensuring Australia can meet its international obligations; and
- ensuring that Qantas can open a route or continue to fly a route to a country in the very limited circumstances where the foreign Government concerned continues to require tariff cooperation in accordance with ASAs.

5.38 The ACCC is also satisfied that the safeguards placed on the conduct are likely to limit the conduct to specific circumstances where the foreign Government expressly requires tariff cooperation and therefore limit the detriment arising from the conduct.

5.39 On balance, the ACCC considers the public benefit is likely to outweigh the public detriment.

**Length of authorisation**

5.40 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

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\(^1\) The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

\(^2\) Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.
5.41 In this instance, Qantas seeks authorisation for an indefinite period, or at least until the earlier of ten years or the date upon which Qantas advises the ACCC that applicable ASAs no longer require such conduct.

5.42 DOTARS have noted that it is a product of the nature of the bilateral system governing international aviation that global reform moves at the speed of the slowest moving members of the international aviation community. DOTARS submits that it is for this reason that a limited number of Australia’s ASAs still contain tariff coordination requirements, despite the Australian Government’s policy to eliminate such practices.

5.43 The ACCC considers that given the time it takes to conduct air service negotiations, and that some countries may be unwilling to remove tariff coordination clauses from the ASAs that a 10 year time limit for authorisation is appropriate.

5.44 The ACCC considers that a 10 year period for authorisation will allow the ACCC to review the arrangements at the end of the period with the possibility of the arrangements being able to be narrowed even further.

5.45 As such, the ACCC has decided to revoke authorisation A90427 and grant substitute authorisation A91059 to the arrangements until 31 December 2017.
6. **Determination**

**The application**

6.1 On 7 September 2007 Qantas lodged an application A91059 with the Australian Competition and Consumer Commission (the ACCC). Pursuant to section 91C of the Act the application was lodged to revoke authorisation A90427 and substitute it with a new authorisation to:

- make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

6.2 In particular, Qantas seeks the revocation of authorisation A90427 and its substitution with authorisation A91059 to allow Qantas to continue to give effect to the tariff arrangement with designated airlines that are required under Australia’s air service agreements with other countries, subject to the authorisation only offering protection under the following conditions:

- in relation to bilateral agreements between Qantas and other international airlines where such bilateral requirements are actively enforced by the relevant foreign government pursuant to ASAs between Australia and another country;
- where Qantas has notified the ACCC of such a requirement and the nature of the agreement entered into;
- where there is no requirement on the airlines involved in the above agreements to actually charge the fares set out in the agreement (i.e. the airlines are free to discount below the agreed published fare level); and
- where Qantas does not instigate or proactively encourage such agreements.

**The net public benefit test**

6.3 For the reasons outlined in Chapter 5 of this determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.

6.4 The ACCC therefore revokes authorisation A90427 and grants authorisation A91059 in substitution to allow Qantas to make or give effect to the substitute arrangements described below.

**Conduct for which the ACCC grants authorisation**

6.5 The ACCC revokes authorisation A90427 and grants substitute authorisation A91059 to Qantas to:
(i) make and give effect to new bilateral tariff arrangements with designated airline(s) of a country; and

(ii) give effect to the existing bilateral tariff arrangements with Japan Airlines and Philippine Airlines that are referred to in para [2.27];

6.6 only where:

(a) the bilateral tariff arrangement is required under Australia’s air service agreement (ASA) with the relevant country;

(b) the relevant foreign government actively enforces the requirement in the ASA that the designated airlines of each country enter into such bilateral tariff arrangements; and

(c) Qantas has provided the ACCC with details of the foreign Government requirement and a summary of the terms of the bilateral tariff arrangement entered into within one month of any such bilateral tariff arrangement being entered into (or in the case of arrangements referred to in 6.1 (ii) above Qantas has provided the information at the time of the application for authorisation);

6.7 and the bilateral tariff arrangement:

(d) does not require Qantas and the designated airline(s) to actually charge the fares set out in the bilateral tariff arrangement (ie. the airlines are free to discount below the agreed published fare level); and

(e) was not instigated or encouraged by Qantas.

6.8 The ACCC grants substitute authorisation until 31 December 2017.

Date authorisation comes into effect

6.9 This determination is made on 19 December 2007. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 10 January 2007.