



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

Virgin Blue Airlines Pty Ltd & Others

in respect of

a joint venture between the applicants

Date: 2 November 2009

Authorisation no.: A91151,
A91152, A91172 & A91173

Public Register no.: C2009/1317

Commissioners: Samuel
Kell
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC proposes to grant authorisation for a Joint Venture between the Virgin Blue Group (Virgin Blue) and Delta Air Lines, Inc (Delta) in relation to air passenger and freight services between the United States and Australia.

On 9 July 2009 and 24 July 2009, Virgin Blue and Delta lodged applications for authorisation to give effect to a Coordination Agreement, a Cooperation Agreement and a Joint Venture Agreement (together, the Joint Venture).

The Joint Venture contemplates coordination and agreement between Virgin Blue and Delta on flights between Australia and the United States (trans-Pacific routes) in relation to a range of issues including pricing and revenue management; schedules, capacity and routes flown; and passenger sales and marketing activities.

The ACCC considers that the Joint Venture is likely to result in some public benefits.

The ACCC considers that the Joint Venture is likely to enable the applicants to compete more vigorously and effectively against the established carriers on the route. The Joint Venture is likely to allow the applicants to continue to compete on price as well as service offerings through the enhancement and expansion of the applicants' operations on the trans-Pacific routes. The ACCC also believes that any cost savings achieved by the Joint Venture are likely to be passed on to consumers given the level of competition on the trans-Pacific routes.

The ACCC accepts that public benefits of the type claimed by the applicants are a likely consequence of the Joint Venture, however, at this stage there is limited empirical information on the extent of the likely benefits in this case.

The ACCC considers that the Joint Venture is unlikely to result in any significant diminution of competition in any of the relevant markets.

While the entry of both Virgin Blue and Delta as independent competitors has greatly enhanced competition, the ACCC does not have any reason to believe that the strong competition on price and service currently evident in the markets for passenger transport will not continue under the Joint Venture.

On balance, the ACCC is satisfied that the public benefit likely to result from the Joint Venture outweighs the public detriment.

However, the ACCC notes that the extent to which these benefits are realised will depend largely on the conduct of the parties under the Joint Venture. In light of this, the ACCC proposes to grant authorisation for three years.

The ACCC will now seek further submissions from the applicants and interested parties in relation to this draft determination prior to making a final decision. The applicants or interested parties may also request a conference be held to make oral submissions on the draft determination.

Contents

1. THE APPLICATIONS FOR AUTHORISATION	1
2. BACKGROUND TO THE APPLICATION	3
THE APPLICANTS	3
The Virgin Blue Group	3
Delta Air Lines, Inc	3
THE AVIATION INDUSTRY	4
International aviation regulation	4
International aviation policy	4
Airline traffic to and from Australia	5
Co-operative arrangements in the aviation industry	6
Current economic environment	6
THE TRANS-PACIFIC ROUTES	7
Open Skies Agreement	7
Current trans-Pacific services	8
Characteristics of the routes	9
3. SUBMISSIONS RECEIVED BY THE ACCC	14
THE APPLICANTS' SUPPORTING SUBMISSION	14
INTERESTED PARTY SUBMISSIONS	14
Submissions in support of the Joint Venture	15
Submissions opposing the Joint Venture	15
Submissions that neither support nor oppose the Joint Venture	15
THE APPLICANTS' RESPONSE TO INTERESTED PARTY SUBMISSIONS	16
4. ACCC EVALUATION	17
THE MARKET	17
THE COUNTERFACTUAL	21
PUBLIC BENEFIT	25
ACCC conclusion on public benefits	39
PUBLIC DETRIMENT	39
ACCC conclusion on public detriment	53
BALANCE OF PUBLIC BENEFIT AND DETRIMENT	54
5. DRAFT DETERMINATION	56
THE APPLICATION	56
THE NET PUBLIC BENEFIT TEST	56
FURTHER SUBMISSIONS	57
ATTACHMENT A — THE AUTHORISATION PROCESS	58
ATTACHMENT B — CHRONOLOGY OF ACCC ASSESSMENT FOR APPLICATIONS A91151, A91152, A91172 AND A91173	59
ATTACHMENT C — THE TESTS FOR AUTHORISATION AND OTHER RELEVANT PROVISIONS OF THE ACT	60

List of abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	Trade Practices Act 1974
Air NZ	Air New Zealand Limited
AFTA	Australian Federation of Travel Agents
Air Pacific	Air Pacific Limited
Applicants	Virgin Blue Airlines Pty Ltd, Virgin Blue International Airlines Pty Ltd, Pacific Blue Airlines (Aust) Pty Ltd, Pacific Blue Airlines (NZ) Ltd, Delta Air Lines, Inc
ASA	Air services agreement
BITRE	Bureau of Infrastructure, Transport and Regional Economics
Delta	Delta Air Lines, Inc
Department of Infrastructure	Department of Infrastructure, Transport, Regional Development and Local Government
DIAC	Department of Immigration and Citizenship
DOT	United States Department of Transportation
DOJ	United States Department of Justice
FFC	Fifth freedom carrier i.e. an airline which is exercising fifth freedom rights - the right of an airline of one country to carry traffic between two other countries providing the flight originates or terminates in its own country
Interlining	Interlining involves the carriage of passengers and/or freight between two points using more than one airline under an arrangement which typically involves baggage check through and the honouring of tickets between airlines
IASC	International Air Services Commission
HHI	Hirschman-Herfindahl Index is a measure of market concentration
Joint Venture	Proposed agreements between the applicants which involve coordinating the following in respect of trans-Pacific routes: <ul style="list-style-type: none">▪ schedules, capacity and routes flown▪ passenger sales and marketing activities

- pricing and revenue management
- enhancement of frequent flyer and lounge program offerings
- purchasing and procurement

The applicants also propose to adopt ‘metal neutral’ revenue allocation arrangements.

LCC	Low cost carrier
Load factor	Load factors measure the percentage of seats filled on an aircraft on any given route. This is derived from dividing the number of passengers travelled by the number of seats available.
Metal neutral	The applicants submit that ‘metal neutral’ revenue allocation arrangements will make it irrelevant, from the perspective of either applicant, which applicant’s aircraft a passenger travels on.
OSA	The 2008 <i>Open Skies Agreement</i> between the Government of the United States and the Government of Australia
Open skies agreement	An agreement which provides minimal (or no) restrictions on the ability of the airlines of two countries to operate services between countries
Qantas	Qantas Airways Limited
Sector	A sector is a non-stop flight leg between two points (excluding technical stops where no passengers or cargo are picked up or dropped off)
Singapore Airlines	Singapore Airlines Limited
Tiger	Tiger Airways Australia Pty Limited
trans-Pacific routes	Consists of sectors that depart from Australia and arrive in mainland United States, and vice versa
The Tribunal	The Australian Competition Tribunal
United	United Air Lines, Inc
Virgin Blue	Virgin Blue Airlines Pty Ltd, Virgin Blue International Airlines Pty Ltd, Pacific Blue Airlines (Aust) Pty Ltd, Pacific Blue Airlines (NZ) Ltd
Yield	Airline revenue per unit of traffic. Passenger yield is airline revenue per passenger kilometre.

1. The applications for authorisation

- 1.1. On 9 July 2009 and 24 July 2009, Virgin Blue Airlines Pty Ltd, Virgin Blue International Airlines Pty Ltd, Pacific Blue Airlines (Aust) Pty Ltd and Pacific Blue Airlines (NZ) Ltd (together Virgin Blue) and Delta Air Lines, Inc (Delta) lodged applications for authorisation A91151-A91152 and A91172-A91173 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Trade Practices Act 1974* (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC's consideration of these applications is contained in Attachment B.
- 1.3. Application A91151 was made under section 88(1) of the Act to make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 1.4. Application A91152 was made under section 88(1) of the Act 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.
- 1.5. Application A91172 was made under section 88(1A) of the Act to make and give effect to a provision of a contract, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 1.6. Application A91173 was made under section 88(1A) of the Act to make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 1.7. In particular, Virgin Blue and Delta (the applicants) applied for authorisation to make and give effect to a Coordination Agreement, a Cooperation Agreement and a Joint Venture Agreement (the Joint Venture). The applicants seek authorisation for a period of not less than five years.
- 1.8. Specifically, the Joint Venture contemplates coordination and agreement between the applicants on trans-Pacific routes (those between Australia and mainland United States) in relation to:
 - schedules, capacity and routes flown
 - passenger sales and marketing activities
 - pricing and revenue management
 - enhancement of frequent flyer and lounge program offerings
 - purchasing and procurement.

- 1.9. The Joint Venture contemplates the pooling of revenue under arrangements founded on the principle of 'metal neutrality'. This means the applicants will adopt a 'metal neutral' revenue allocation model that will make it irrelevant, from the perspective of either applicant, which applicant's aircraft a passenger travels on. The model is designed to compensate each carrier fairly for its contribution to the Joint Venture.
- 1.10. The applicants submit that, at a general level, it will enable the applicants to pool the benefits and risks associated with the operation of services covered by the Joint Venture.

2. Background to the application

The applicants

The Virgin Blue Group¹

- 2.1. The Virgin Blue Group commenced operations in Australia in August 2000. The Virgin Blue Group comprises the following domestic and international brands: Virgin Blue, Pacific Blue, Polynesian Blue and V Australia.
- 2.2. Virgin Blue is the flagship carrier of the Virgin Blue Group and is based in Brisbane. Virgin Blue currently operates approximately 2800 flights a week to more than 25 Australian destinations.
- 2.3. Pacific Blue was launched in 2004. It consists of two carriers. Pacific Blue Airlines (NZ) Limited is the New Zealand-based subsidiary of the Virgin Blue Group and operates domestic services within New Zealand, as well as trans-Tasman services between Australia and New Zealand. It has hubs in Christchurch and Auckland. Pacific Blue Airlines (Aust) Pty Ltd operates services between Australia and New Zealand, Fiji, Bali, Samoa, Vanuatu, Papua New Guinea, the Cook Islands, the Solomon Islands and Tonga as a designated Australian international carrier.
- 2.4. The Virgin Blue Group also has a joint venture with the Samoan Government – Polynesian Blue. Polynesian Blue is a designated carrier of the Government of Samoa and is not a participant in the Joint Venture.
- 2.5. V Australia is the Virgin Blue Group's newest carrier. It commenced flight operations on 27 February 2009, providing non-stop Sydney – Los Angeles services three times a week. On 20 March 2009, V Australia introduced daily Sydney – Los Angeles services. In April 2009, V Australia began flying on the Brisbane – Los Angeles route three times a week. V Australia intends to begin Melbourne – Los Angeles operations twice a week on 1 December 2009. V Australia is currently operating a fleet of three Boeing 777-300ER aircraft.

Delta Air Lines, Inc²

- 2.6. Delta, a United States carrier, is the world's largest airline. Delta has hubs in Atlanta, Cincinnati, Detroit, Memphis, Minneapolis-St. Paul, New York (JFK), Salt Lake City, Amsterdam and Tokyo (Narita).
- 2.7. Delta, its Northwest Airlines subsidiary, and its regional partners operate a combined network of service to 368 destinations in 66 countries and serve more than 170 million passengers each year.
- 2.8. Delta began non-stop services on the Sydney – Los Angeles route on 1 July 2009, operating its relatively new Boeing 777-200LR aircraft.

¹ The information in this section is sourced from *Submission in support of the application for authorisation of the Virgin Blue/Delta joint venture*, 9 July 2009.

² Ibid.

- 2.9. Delta is the fourth largest operator of domestic services from Los Angeles after United Airlines, American Airlines and Southwest Airlines respectively.

The aviation industry

International aviation regulation

- 2.10. The international airline industry is highly regulated. The 1944 *Convention on International Civil Aviation* established the principle that each country has exclusive sovereignty over its airspace. This principle continues to guide the regulatory framework today.
- 2.11. International air transport cannot occur unless it is specifically authorised pursuant to a government to government bilateral air services agreement (ASA).
- 2.12. An ASA specifies the terms and conditions of airline activity between two countries. An ASA may indicate the destinations that can be served in a particular country, the permitted frequencies per week and any rights to operate via or beyond to third countries. Typically, the rights granted under an ASA can only be exercised by designated carriers of the countries that are parties to them.
- 2.13. An ‘open-skies agreement’ is one form of ASA between two countries. In essence, it is an agreement which provides minimal (or no) restrictions on the ability of the airlines of two countries to operate services between countries.

International aviation policy

Passengers

- 2.14. The Department of Infrastructure, Transport, Regional Development and Local Government (the Department of Infrastructure) advises that Government policy is to ensure that the level of aviation services is determined by market forces, not government restrictions or regulations.³
- 2.15. In its recent Green Paper, the Department of Infrastructure explained that the Government proposes to ensure that airlines can take advantage of all commercial opportunities, including consolidation opportunities and equity alliances with other international carriers [subject to competition law].⁴
- 2.16. The Green Paper also notes that Australia has been an active participant in working towards multilateral liberalisation of international aviation, recognising open skies as an aspirational goal to be sought on a case-by-case basis, where it is in the national interest.

³ The Department of Infrastructure, Transport, Regional Development and Local Government, *National Aviation Policy Green Paper, Flight Path to the Future, December 2008*, p.104.

⁴ *Ibid*, p 112.

Freight

- 2.17. Most of Australia's international freight is carried in the belly hold of passenger aircraft, but dedicated freighters are an important and growing part of the international freight business.
- 2.18. In recent times, Australia has pursued a policy of open skies for dedicated cargo services.

Airline traffic to and from Australia

- 2.19. The top ten international passenger and international freight airlines as at July 2009 are listed in Table 2.1 below. In terms of passenger carriage, Qantas Airways had the largest share of the market in July 2009 with 20.6% of the total followed by Singapore Airlines, Air NZ, Emirates and Jetstar. Their respective shares are compared with shares as at July 2008.

Table 2.1: Share of international passengers and freight travelling to and from Australia – top ten airlines⁵

Share of passengers carried			Share of freight carried		
Airline	July 08	July 09	Airline	July 08	July 09
Qantas Airways	24.2%	20.6%	Qantas Airways	21.9%	21.4%
Singapore Airlines	11.6%	9.8%	Singapore Airlines	16.1%	16.1%
Air New Zealand	9.7%	8.4%	Cathay Pacific	8.5%	9.2%
Emirates	7.1%	8.1%	Emirates	8.8%	8.5%
Jetstar	5.8%	7.2%	Malaysia Airlines	6.9%	6.2%
Pacific Blue	3.1%	6.2%	Thai Airways	5.1%	5.4%
Cathay Pacific	5.4%	5.2%	Air New Zealand	6.0%	5.4%
Thai Airways	4.6%	4.0%	Etihad Airways	1.0%	2.6%
Malaysia Airlines	4.3%	3.9%	United Parcel Service	2.6%	2.3%
Garuda Indonesia	2.0%	2.1%	Korean Air	2.3%	2.0%

- 2.20. The share of passenger traffic accounted for by Australian designated⁶ airlines has increased from 31.8% in July 2008 to 32.9% in July 2009.⁷

⁵ Bureau of Infrastructure, Transport and Regional Economics, *Aviation Statistics: International Scheduled Air Transport, July 2009*. Accessed 8 October 2009: <http://www.bitre.gov.au>.

⁶ The Qantas group, Pacific Blue (4.0% - excludes services operated under New Zealand designation) and V Australia (1.1%) contributed to the Australian airline share in July 2009. See Bureau of Infrastructure, Transport and Regional Economics, *Aviation Statistics: International Scheduled Air Transport, July 2009*. Accessed 8 October 2009: <http://www.bitre.gov.au>.

⁷ Ibid.

- 2.21. Low cost carriers AirAsia X, Indonesia Air Asia, Jetstar, Pacific Blue, Polynesian Blue and Tiger Airways accounted for 16.3% of total international passenger traffic to/from Australia in July 2009 compared to 10.4% in June 2008.⁸
- 2.22. International scheduled freight traffic in July 2009 decreased by 4.6% from July 2008 to 60 230 tonnes. Inbound freight traffic decreased by 7.9% while outbound freight traffic increased by 1.3%.

Co-operative arrangements in the aviation industry

- 2.23. There are a number of different types of co-operative arrangements between airlines.
- 2.24. **Marketing alliances** offer the consumer the benefits of broader networks, more seamless travel and expanded loyalty programs. However, the airlines in a marketing alliance generally continue to offer fares, schedules and services independently. Further, airlines within the same marketing alliance may compete with each other on the same route.
- 2.25. Examples of marketing alliances include the major airline alliances of oneworld, Star Alliance and SkyTeam.
- 2.26. **Integrated alliances** typically involve a high degree of integration of the airlines concerned, including coordination of fares, schedules, service levels and yield and capacity management.
- 2.27. **Codesharing** is another form of coordinated behaviour that can occur within both integrated alliances and marketing alliances, as well as outside of such alliances.
- 2.28. Codesharing allows carriers to use their brand to sell tickets on flights that are operated by a different carrier. Although the individual flight is maintained, staffed and scheduled entirely by the carrier that owns and operates the aircraft, the flight is listed on the schedules of multiple carriers. This allows multiple carriers to sell seats on the same flight through their own ticketing system, with each carrier using its own designator code and flight number to refer to the same flight.
- 2.29. **Interline agreements** are arrangements between carriers designed to facilitate passengers travelling on itineraries that involve multiple carriers.
- 2.30. Interlining operates through the reservation or ticketing system of the carriers in the agreement. Interline agreements allow a customer to purchase separate flights from multiple carriers in one transaction and with one ticket.

Current economic environment

- 2.31. The Department of Infrastructure notes that the global aviation industry is currently facing serious challenges. Following a recent period of record high fuel prices, global

⁸ Ibid.

economic conditions have deteriorated significantly and created conditions of reduced demand, excess capacity and increasing pressure for industry consolidation.⁹

- 2.32. The Department of Infrastructure notes that in response to these difficult economic conditions, there has been an increasing trend towards consolidation and alliances among international airlines. The Department expects this trend to intensify in the future as airlines seek to meet the global challenges of difficult economic conditions and states that it is vital that Australia's airlines have the opportunity to participate in this global rationalisation where it provides strategic and commercial advantages.¹⁰

The trans-Pacific routes

- 2.33. Trans-Pacific refers to travel over the Pacific Ocean, and in this case refers to travel specifically between Australia and mainland United States. trans-Pacific services generally involve non-stop flight segments of over 12 000 km and in excess of 14 hours travelling time. There are also a limited number of intermediate stopover points between the two countries, including Hawaii and Fiji.
- 2.34. One of the key consequences of the geography involved is that there are relatively few city-pairs available to carriers. This means that all routes connect on the east coast of Australia and the west coast of the United States, leading to a consolidation of operations in hubs such as Los Angeles, San Francisco and Sydney.
- 2.35. There are currently four direct city-pairs offered between Australia and the United States:
- Sydney – Los Angeles
 - Sydney – San Francisco
 - Melbourne – Los Angeles
 - Brisbane – Los Angeles
- 2.36. Sydney – Los Angeles offers the greatest number of frequencies.

Open Skies Agreement

- 2.37. On 14 February 2008, Australia and the United States concluded the Open Skies Agreement (OSA), allowing all Australian and American owned carriers to provide unlimited direct services between the two countries. The exception is Air NZ, which can provide unlimited direct services by combining rights established under the United States-New Zealand and the Australia-New Zealand Open Skies arrangements.
- 2.38. Under the OSA, the carriage of traffic over domestic sectors is reserved for national carriers. The agreement only allows the beyond carriage of genuine international traffic between international gateways (for example, Qantas' own traffic between Los Angeles

⁹ The Department of Infrastructure, Transport, Regional Development and Local Government, *National Aviation Policy Green Paper, Flight Path to the Future, December 2008*, p.105.

¹⁰ *Ibid*, p.112.

and New York).¹¹ This means international airlines depend on commercial arrangements with domestic carriers in order to effectively serve beyond international gateway markets.

Current trans-Pacific services

Passengers – direct services

- 2.39. There are currently four carriers offering direct flights between four city-pairs between Australia and mainland United States.
- 2.40. Qantas is the largest provider of capacity on the trans-Pacific routes. It codeshares on the United States domestic network of its oneworld alliance partner, American Airlines (American). American codeshares on Qantas' trans-Pacific services and Australian domestic network.
- 2.41. United Airlines (United) has been operating trans-Pacific services for 24 years. United is the largest operator at Los Angeles and San Francisco airports, meaning that it offers more flights from each of those airports than any other carrier. United is part of the Star Alliance.
- 2.42. Virgin Blue (through V Australia) and Delta are new entrants on the routes. Virgin Blue commenced trans-Pacific services on 27 February 2009 while Delta commenced trans-Pacific services on 1 July 2009.

Passengers – indirect services

- 2.43. There are also a number of indirect one-stop routes, largely provided by non-Australian and non-United States owned carriers.
- 2.44. Passengers can travel between Australia and the United States via New Zealand and Canada.
- 2.45. As noted above, United is a member of the Star Alliance with Air NZ and Air Canada. Through these codeshare arrangements, United together with the two other Star Alliance members is able to offer, between them, 12 trans-Pacific city-pairs between the North American gateway ports of Los Angeles, San Francisco and Vancouver and Sydney, Melbourne, Brisbane and Auckland (including one-stop services to Brisbane, Melbourne and Auckland).
- 2.46. Air NZ and United have been granted antitrust immunity by the United States Department of Transportation (DOT) in relation to international services between the United States and New Zealand and the South Pacific region. However, the immunity granted is not effective for unrestricted coach-class fares or any business or first-class fares for local United States point-of-sale passengers flying non-stop between Los Angeles and Auckland and Los Angeles and Sydney.

¹¹ Air Transport Agreement between the Government of the United States and the Government of Australia, 1944, Annex I, section 1.

- 2.47. Air NZ has, at times, operated direct services between Sydney and Los Angeles between November 1994 and April 2003.
- 2.48. As at December 2009 Air NZ will operate 18 return services between New Zealand and mainland United States, 12 direct between Auckland and Los Angeles, one indirect via the Cook Islands and five direct between Auckland and San Francisco.¹²
- 2.49. Passengers can also travel from Australia to mainland United States via Hawaii, Fiji and Tahiti, however they only account for a small share of trans-Pacific passengers. Services via Asia, such as Singapore, Taiwan and China, also only account for very minimal market share given the substantially inconvenient routings involved.

Freight

- 2.50. Freight, or air cargo, is carried between Australia and the United States via a mix of dedicated air freighter services and in the cargo hold of passenger jets.
- 2.51. Freight is carried on both direct and indirect flights, with a large amount of freight being transported via intermediate points in Asia.
- 2.52. Qantas is the major carrier of freight between Australia and the United States. United, FedEx and United Parcel Services (UPS) are also major market players. The applicants submit that they are currently small suppliers of air freight services on trans-Pacific routes.
- 2.53. Data from the Bureau of Infrastructure, Transport and Regional Economics (BITRE) shows that in February 2009, Qantas had a combined inbound/outbound air freight tonnes and carrier market share of 42%. UPS had a share of 19%, followed by FedEx (15%) and United (12%). V Australia had 4% of the market share.¹³

Characteristics of the routes¹⁴

- 2.54. In 2008/09 there were 938,601 passengers carried by airlines between Australia and the United States, where the point of origin or destination of the passengers was in the United States or Australia. Resident departures made up 53% of passenger traffic and foreign visitor arrivals 47%. Table 2.2 below shows the traffic shares of airlines on the route, including airlines offering indirect services between Australia and the United States.
- 2.55. Airlines offering direct services, which provide the opportunity to travel between Australia and the United States without intermediate stopovers, accounted for the majority of passengers with 81.1% of passenger traffic.

¹² Virgin Blue Group and Delta, *Submission in support of the application for authorisation of the Virgin Blue/Delta joint venture*, 9 July 2009, p.27.

¹³ Virgin Blue Group and Delta, *Submission in support of the application for authorisation of the Virgin Blue/Delta joint venture*, 9 July 2009, p.32.

¹⁴ The information presented below was provided by the Department of Infrastructure, Transport, Regional Development and Local Government and was sourced from passenger card data collected and compiled by the Department of Immigration and Citizenship.

Table 2.2: Passenger traffic to and from Australia with a point of origin or destination in the United States, by airline, 2008/09.¹⁵

Airline	No. of Passengers	Share of passengers
Direct flights to mainland United States		
Qantas	490,635	52.3%
United Airlines	162,028	17.3%
V Australia	31,476	3.4%
Direct flights to Hawaii		
Jetstar International*	51,300	5.5%
Hawaiian Airlines*	25,409	2.7%
Total (mainland and Hawaii)	760,848	81.1%
Indirect flights		
Air New Zealand	66,919	7.1%
Singapore Airlines	15,763	1.7%
Air Pacific	14,678	1.6%
Cathay Pacific	11,369	1.2%
Emirates	7,358	0.8%
China Airlines	4,996	0.5%
Korean Airlines	4,739	0.5%
Malaysian Airlines	4,141	0.4%
Air Canada	4,063	0.4%
Other	43,727	4.7%
Total	177,753	18.9%
Total all flights	938,601	100.0%

*Jetstar International and Hawaiian Airlines fly direct between Australia and Hawaii. Hawaiian Airlines provides indirect flights to mainland United States via Hawaii.

- 2.56. There were only three airlines offering direct services to the United States mainland in 2008/09 being Qantas, United and V Australia. Passengers travelling on airlines offering direct services to the United States mainland accounted for 73.0% of passenger traffic on the route.
- 2.57. The 2008/09 figures do not fully reflect the current market position of Delta which entered the route on 1 July 2009, or V Australia which entered on 27 February 2009.

¹⁵ Source: Information provided by the Department of Infrastructure, Transport, Regional Development and Local Government sourced from passenger card data collected and compiled by the Department of Immigration and Citizenship.

Monthly statistics produced by the BITRE show that in July 2009, V Australia accounted for 12.4% of passenger traffic to/from mainland United States, and Delta accounted for 6.9%.^{16,17}

Journey purpose

2.58. Tables 2.3 and 2.4 show that in 2008/09 business passengers accounted for 21.8% of traffic on the trans-Pacific routes. Such passengers in the main preferred to use United States mainland direct flights which carried nearly 80% of all business passengers. The same United States mainland direct flights accounted for 67.5% of leisure passengers.

Table 2.3: Passenger traffic to and from Australia with a point of origin or destination in the United States, by purpose of journey by airline, 2008/09.¹⁸

Airline	Journey purpose by number of passengers			
	Business and convention	Holiday and VFR	Other	Total
Direct flights to mainland United States				
Qantas	118,825	320,210	51,600	490,635
United	38,943	107,160	15,924	162,028
V Australia	5,082	24,248	2,147	31,476
Direct flights to Hawaii				
Jetstar International	4,024	42,548	4,728	51,300
Hawaiian Airlines	2,917	20,203	2,288	25,409
Indirect flights	34,514	119,447	23,792	177,753
Total (No.)	204,305	633,817	100,479	938,601
Total (%)	21.8%	67.5%	10.7%	100.0%

¹⁶ Bureau of Infrastructure, Transport and Regional Economics, *Aviation Statistics: International Scheduled Air Transport, July 2009*. Accessed 8 October 2009: <http://www.bitre.gov.au>.

¹⁷ Note that these figures only include airlines carrying passengers directly from Australia to the United States, that is, Qantas, United Airlines, V Australia, Delta, Jetstar International and Hawaiian Airlines.

¹⁸ Source: information provided by the Department of Infrastructure, Transport, Regional Development and Local Government sourced from passenger card data collected and compiled by the Department of Immigration and Citizenship.

Table 2.4: Passenger traffic to and from Australia with a point of origin or destination in the United States, by purpose of journey by airline share, 2008/09.¹⁹

Airline	Journey purpose by number of passengers			
	Business and convention	Holiday and VFR	Other	Total
Direct flights to mainland United States				
Qantas	58.2%	50.5%	51.4%	52.3%
United	19.1%	16.9%	15.8%	17.3%
V Australia	2.5%	3.8%	2.1%	3.4%
Direct flights to Hawaii				
Jetstar International	2.0%	6.7%	4.7%	5.5%
Hawaiian Airlines	1.4%	3.2%	2.3%	2.7%
Indirect flights	16.9%	18.8%	23.7%	18.9%
Total	100.0%	100.0%	100.0%	100.0%

- 2.59. Table 2.5 below shows that business passengers constituted a larger percentage of passengers on flights operated by Qantas and United than on direct flights operated by other airlines on the route. For example only around 16% of passengers on V Australia were business passengers compared to around 24% for Qantas and United Airlines.

¹⁹ Source: Information provided by the Department of Infrastructure, Transport, Regional Development and Local Government sourced from passenger card data collected and compiled by the Department of Immigration and Citizenship.

Table 2.5: Passenger traffic to and from Australia with a point of origin or destination in the United States, by purpose of journey for passengers on each airline, 2008/09.²⁰

Airline	Journey purpose by number of passengers			
	Business and convention	Holiday and VFR	Other	Total
Direct flights to mainland United States				
Qantas	24.2%	65.3%	10.5%	100.0%
United	24.0%	66.1%	9.8%	100.0%
V Australia	16.1%	77.0%	6.8%	100.0%
Direct flights to Hawaii				
Jetstar International	7.8%	82.9%	9.2%	100.0%
Hawaiian Airlines	11.5%	79.5%	9.0%	100.0%
Indirect flights	19.4%	67.2%	13.4%	100.0%

²⁰ Source: Information provided by the Department of Infrastructure, Transport, Regional Development and Local Government sourced from passenger card data collected and compiled by the Department of Immigration and Citizenship.

3. Submissions received by the ACCC

- 3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

The applicants' supporting submission

- 3.2. Broadly, the applicants submit that the Joint Venture will enable them, as new entrants, to effectively compete and grow their presence on the trans-Pacific routes. The applicants submit that they will be better able to maintain existing routes and introduce further trans-Pacific routes and frequencies faster than would otherwise be the case absent the Joint Venture, particularly in respect of direct services. This in turn will:
- mean customers will be offered greater choice and convenience
 - facilitate lower fares as a result of new capacity supported by the Joint Venture, the removal of double marginalisation incentives and the achievement of cost savings
 - result in sustained effective price and product competition on trans-Pacific routes in the medium to long term and
 - facilitate increased tourism and employment in aviation and other sectors.

Interested party submissions

- 3.3. The ACCC sought submissions from approximately 40 interested parties potentially affected by the application, including other airlines, dedicated freight carriers, travel agents, government departments, consumer groups and tourism and aviation industry associations.
- 3.4. The ACCC received submissions from the following interested parties:
- Air New Zealand Limited (Air NZ)
 - Air Pacific Limited (Air Pacific)
 - Australian Federation of Travel Agents (AFTA)
 - Department of Infrastructure, Transport, Regional Development and Local Government (Department of Infrastructure)
 - International Air Services Commission (IASC)
 - Patric Barry (a US airline consultant)
 - Qantas Airways Limited (Qantas)

- Singapore Airlines Limited (Singapore Airlines)
 - Tiger Airways Australia Pty Limited (Tiger)
 - Tourism Australia
 - United Air Lines, Inc (United)
- 3.5. The views of the applicants and interested parties are outlined in the ACCC's evaluation of the Joint Venture in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter.
- 3.6. A brief summary of the public submissions received from interested parties follows. The submissions can be broadly grouped into three categories – those in support of the Joint Venture, those that oppose it, and those that neither support nor oppose it.

Submissions in support of the Joint Venture

- 3.7. AFTA submits that it has no marked concerns with the Joint Venture. AFTA considers the Joint Venture may result in increased convenience for passengers and efficiency gains and cost savings for the applicants.

Submissions opposing the Joint Venture

- 3.8. Air NZ does not consider the Joint Venture will lead to additional services or lower fares. Air NZ submits that in the absence of the Joint Venture giving rise to additional services, there is no consumer benefit in terms of greater convenience. Air NZ also notes that there are operational and network reasons why all four competitors need to depart Los Angeles within a short space of time. Because there are constraints on entry to the trans-Pacific routes, Air NZ considers the increase in market concentration from the Joint Venture will lead to higher prices.
- 3.9. Air Pacific submits that the Joint Venture will likely not result in the pro consumer claims outlined in the applicants' supporting submission.
- 3.10. Mr Patric Barry submits that the Joint Venture will be anti-competitive and will enable the applicants to raise prices and lower service quality standards.
- 3.11. Tiger submits that the Joint Venture will distort competition both on international and domestic services. Tiger considers the Joint Venture will give the applicants the ability to reduce flights and seat numbers, and use their increased market power to raise prices and prevent new entrants from entering the market.

Submissions that neither support nor oppose the Joint Venture

- 3.12. The IASC does not argue in support of or against the proposed authorisation. The IASC submits that V Australia appears to have stimulated very low fares on the trans-Pacific routes. The IASC considers that gaining access to extensive behind-gateway networks would substantially improve the competitive position of V Australia and Delta; however this could be achieved without a joint venture.

- 3.13. The Department of Infrastructure notes that the post-Joint Venture scenario will be one where three comparably sized airline groupings will be in competition in a contestable market in which any other Australian or United States international airline could commence services.
- 3.14. Qantas states that without a strong relationship with a major United States domestic carrier, the trans-Pacific routes may be marginal for an Australian airline. However Qantas notes that its commercial arrangements with American do not involve joint planning of routes, capacity and pricing. Qantas queries whether the claimed efficiencies will be possible through the Joint Venture without capacity being reduced on the Sydney – Los Angeles route.
- 3.15. Singapore Airlines does not indicate whether it supports or opposes the Joint Venture, but considers the trans-Pacific routes should be opened up to more competition.
- 3.16. Tourism Australia notes that there are potentially tourism related public benefits arising from the proposed Joint Venture, however one disadvantage of less competition between the applicants may be reduced advertising and marketing.
- 3.17. United does not indicate whether it supports or opposes the Joint Venture. United notes that post-Joint Venture, V Australia/Delta will displace it as the second largest carrier of passengers on the trans-Pacific routes.

The applicants' response to interested party submissions

- 3.18. The applicants provided a response to interested party submissions on 21 August 2009.
- 3.19. In response to Air NZ's submission, the applicants claim that the Joint Venture will optimise the carriers' joint offering, achieve cost savings and mitigate the risks involved in introducing new routes and frequencies. The applicants reiterate that the introduction of new direct services under the Joint Venture, such as those where there are no current direct services, or where there is limited or no competition, will provide customers with greater choice and convenience.
- 3.20. The applicants submit that the Joint Venture would enable them to optimise their network to service point-to-point and onward traffic, provide a wider choice of arrival and departure times, and operate the most appropriate sized aircraft for scheduled flights according to demand.
- 3.21. The applicants reiterate the benefits arising from the Joint Venture over a standard codeshare arrangement. These arguments are outlined in greater detail below in Chapter 4.
- 3.22. In response to Tiger's submission, the applicants claim that the operation of trans-Pacific services does not provide Virgin Blue with any specific network-wide advantage in respect of its domestic air services, with the majority of air passenger traffic in Australia being primarily domestic-only traffic.

4. ACCC evaluation

4.1. The ACCC's evaluation of the Joint Venture is in accordance with tests found in the following sections of the Act:

- section 90(8) of the Act which states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.
- sections 90(6) and 90(7) of the Act which 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 in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) 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 was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
 - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(5A) 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 were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

The market

4.3. 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.

4.4. The applicants submit that the relevant areas of competition are:

- the markets for the supply of passenger flights, both direct and indirect, between Australia and the United States and

- the market for the supply of air freight services between Australia and the United States.
- 4.5. The ACCC has previously identified three broad product dimensions in respect of applications for authorisations relating to air transport:
- passenger transport, recognising a distinction between business and leisure travellers on long haul routes as appropriate
 - freight transport
 - the sale of air transport.

International passenger transport

- 4.6. The applicants' provision of passenger transport services overlap with respect to the transportation of passengers between Australia and the United States (trans-Pacific routes). As noted above, Virgin Blue currently operates services between Sydney and Los Angeles, and Brisbane and Los Angeles; with Delta Air Lines currently operating flights between Sydney and Los Angeles.

Product dimension

- 4.7. The ACCC has previously identified separate product markets for business and leisure travellers on long haul routes.²¹
- 4.8. The ACCC considers that limitations in both demand and supply side substitutability warrant separate product markets for business and leisure travellers on the trans-Pacific routes.
- 4.9. In particular, the ACCC considers that business travellers are generally not price sensitive. Business travellers are, however, more sensitive to other factors such as time, flexibility, connectivity, convenience and comfort. Sensitivity to these factors is more pronounced on long haul routes. The trans-Pacific routes may be characterised as long haul.²²
- 4.10. In contrast, the ACCC considers leisure travellers to be more price sensitive, and relatively less concerned about factors such as travel time, fare flexibility and comfort. The ACCC notes that in general, the premium class sections of the aircraft are occupied by business travellers and most leisure travellers fly economy class. Where business travellers fly economy they are likely to pay higher fares as a result of either late bookings or flexibility requirements.

²¹ See for example ACCC determination for applications A30226 and A30227 lodged by Qantas and British Airways in relation to their Joint Service Agreement (2005); and ACCC determination for applications A91097 and A91098 lodged by Air New Zealand Ltd and Air Canada (2009).

²² Travel from Australia to mainland United States involves minimum travel times of approximately 13 hours and 25 minutes (approximate flying time from Sydney to Los Angeles).

- 4.11. The ACCC therefore considers there to be limited demand side substitutability between the type of service offerings required by business travellers and the service offerings acceptable to leisure travellers. Business travellers generally do not personally incur expenditure and are less likely to find service offerings at lower fares involving longer timeframes for travel and less comfort and convenience, a viable substitute. Additionally, due to their relatively greater sensitivity to price, leisure travellers are unlikely to consider more expensive service offerings aimed at the business traveller to be a viable substitute in the event of an increase in economy level fares.
- 4.12. In terms of supply side substitutability, the ACCC considers that airlines would need to substantially alter aspects of their economy service offerings to meet the requirements of business travellers, especially in the area of cabin configuration. The significant costs likely to be associated in undertaking such an exercise suggests limitations in ready supply side substitutability with respect to passenger transport services for business and leisure travellers. This is consistent with the ACCC's assessment and analysis in its determination concerning applications for authorisation A30226 and A30227 lodged by Qantas and British Airways²³
- 4.13. Recent developments in long haul sectors are consistent with the concept of separate markets for business and leisure passengers. British Airways has recently introduced all-business class flights between London and New York²⁴. In May 2009 Qantas announced that it was scrapping first class on certain long haul routes including Sydney – San Francisco because of reduced demand in the face of the economic downturn.²⁵
- 4.14. As noted above, information provided by the Department of Infrastructure (which sourced passenger card data collected and compiled by the Department of Immigration and Citizenship) indicates that in the 12 months ending 30 June 2009, business travellers accounted for 21.8% of travellers on the trans-Pacific routes, while leisure travellers accounted for 67.5% of travellers on the routes.²⁶
- 4.15. The ACCC considers that separate product markets for business travellers and leisure travellers are warranted in assessing the impact on competition of the Joint Venture taking into account the following:
- the substantial proportion of business travellers, in addition to leisure travellers on the trans-Pacific routes and
 - the limitations in demand and supply side substitutability for leisure and business travellers, taking into account in particular the long haul nature of the trans-Pacific routes.

Geographic dimension

- 4.16. The ACCC has previously adopted a regional approach in defining the geographic scope of the market for leisure travellers, and a city-pairs or point-to-point approach in

²³ ACCC Qantas and British Airways Restated Joint Services Agreement Final Determination A30226-30227, 8 February 2005, see pp 60-61.

²⁴ “British Airways launches all business class flights to New York”, WAtoday.com.au, 29 September 2009.

²⁵ “Qantas scraps first-class on long-haul flights”, SMH, 25 May 2009.

²⁶ Passengers travelling for business and convention purposes were identified as business travellers, and passengers travelling for holiday and ‘visiting friends and relatives’ were identified as leisure passengers.

defining the geographic scope of the market for business travellers.²⁷ Leisure travellers are more price sensitive and therefore more likely to substitute different destinations in target areas on the basis of price and are also more likely to accept indirect routes that may involve longer travel time but less expensive fares. Business travellers are more time sensitive and are likely to have specific non-substitutable destinations. They are likely to choose the shortest route to their destination and are less likely to consider indirect options, which involve additional time, to be a viable substitute.

- 4.17. On long haul routes airlines service demand from two passenger groups (business and leisure travellers) whose demand in terms of destination is driven by different factors (sensitivity to price and flexibility of destination and route). The ability of airlines to respond to a SSNIP in either of these markets through supply side substitution is constrained by the need (in general) to service both passenger groups with a single aircraft. While it could be argued that it is possible to make a supply side response to a SSNIP through variations in fare types for each fare class within each of the cabins, this in effect equates to the yield management overview which every flight is subject to where volumes of seats made available in each fare at a range of prices are determined by demand over time for seats on those flights. As noted above, there is little opportunity in response to a SSNIP to readily change aircraft configurations to increase the volume of economy seats at the expense of premium seats or vice versa.
- 4.18. On the basis of the factors discussed above, the ACCC considers that the relevant areas of competition affected by the Joint Venture with regard to the provision of international passenger transport services are markets for:
- (i) passenger air transport for leisure travellers between Australia and the United States and
 - (ii) passenger air transport for business travellers on a city-pairs basis between Australia and the United States.

Freight transport

- 4.19. No information has been provided which suggests that the ACCC should depart from the view adopted in previous analyses that different types of freight represent different freight segments rather than different markets. The availability of indirect route options suggests that the geographic dimension is unlikely to be narrower than a regional market.
- 4.20. The ACCC considers that for the purposes of assessing the Joint Venture with regard to the provision of freight transport services, it would be appropriate to consider a market for freight transport services on a regional basis, that is, between Australia and the United States.

²⁷ ACCC determination for applications A30226 and A30227 lodged by Qantas and British Airways in relation to their Joint Service Agreement (2005).

Sale of air transport

- 4.21. The ACCC has previously recognised a separate market for the sale of air transport which includes tickets sold directly by airlines to travellers, as well as those sold through indirect channels, such as travel agents.²⁸
- 4.22. The applicants submit that the Joint Venture will involve the joint allocation, planning and management of marketing arrangements.
- 4.23. The ACCC notes that no submissions were received raising concerns in the market for the sale of air transport.
- 4.24. The ACCC considers that competition concerns are unlikely to arise in this market given the wide range of mechanisms for ticket purchases available to consumers. While airlines do sell directly to the public and the applicants would be involved in joint marketing of their services, there is strong competition in the sale of air travel from travel agencies (online and in shop fronts) as well as increasingly from the internet through global portals such as Zuji and Expedia.

Conclusion on relevant markets

- 4.25. On the basis of the issues outlined above, the ACCC considers that the relevant markets for assessing the Joint Venture are the markets for:
- (i) passenger air transport for leisure travellers between Australia and the United States
 - (ii) passenger air transport for business travellers on a city pairs basis between Australia and the United States and
 - (iii) air freight transport services between Australia and the United States.

The counterfactual

- 4.26. 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 conduct for which authorisation has been sought.²⁹
- 4.27. 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 operate if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

²⁸ For example ACCC IATA Passenger Agency Program Final Determination A90408, 13 December 2002; ACCC Qantas and British Airways Restated Joint Services Agreement Final Determination A30226 – A30227, 8 February 2005.

²⁹ *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.

- 4.28. In the absence of authorisation being granted, the applicants submit that they would not give effect to the Joint Venture. In this event, the applicants state that they would continue to operate their existing interline and marketing agreements, along with a more limited codeshare arrangement.
- 4.29. The applicants claim that they have not made any specific decisions to date regarding the ongoing scope and nature of their respective trans-Pacific operations in the event that authorisation is not granted. They state that in the event authorisation is not granted, they will assess at that time the ongoing operational and financial performance of the trans-Pacific services and adjust them as commercially appropriate.
- 4.30. In assessing the counterfactual, the ACCC has considered the following factors.

Performance on the trans-Pacific routes

- 4.31. The Department of Infrastructure notes that the Global Financial Crisis is causing all airlines to carefully examine their operations. It cites the International Air Transport Association's (IATA) June 2009 industry financial forecast, which estimates a global loss of US\$9 billion.
- 4.32. The IASC also notes that the aviation industry has been operating in some of the most difficult economic circumstances for many decades. It goes on to observe that V Australia entered the United States route, its first, in February 2009 in the midst of this protracted economic downturn.
- 4.33. In its first four months of operation, V Australia delivered an underlying EBIT loss of \$64 million. Including one off costs for foreign exchange and start up costs, the EBIT loss was \$124 million. V Australia's overall load factor for the initial four months of operation was 62.3% but it has subsequently increased to 75% in July 2009.³⁰
- 4.34. However, Virgin Blue CEO Brett Godfrey has recently stated to the National Aviation Press Club that 'V Australia's utilisations are up, loads are improving, and as sure as night follows day, yields will follow loads.'³¹
- 4.35. The ACCC has examined confidential information regarding the applicants' financial performance to date and forecasts going forward.
- 4.36. Based on the information currently available, the ACCC expects that in the absence of the Joint Venture, both Virgin Blue and Delta would continue to offer trans-Pacific services, at least in the short term.

Routes and frequencies

- 4.37. The applicants submit that, notwithstanding the continuing operation of their existing cooperation agreements, their ability to compete against the incumbent carriers without the joint venture will be considerably weakened. More specifically, the applicants consider that:

³⁰ Virgin Blue Holdings Limited, Preliminary Final Report for the year ended 30 June 2009.

³¹ Travel Today, *Godfrey: V Australia to lead the way*, Thursday 17 September 2009, p.1.

- the overall competitiveness and attractiveness of each applicant's offer will remain limited due to their narrow network (in terms of routes and frequencies) and other issues such as limited flexibility to respond to changes in directional passenger flows and levels and changes in demand
 - the applicants will have a significantly reduced ability and incentive to take the risk of introducing new routes and frequencies or expanding current operations, particularly new direct routes. As a result, the applicants will be less able to develop a broad network that is comparable to, and could effectively compete with, Qantas' and United's networks. In such an event, it is less likely that such network-based competition will occur
 - even in the event that the applicants continue to seek to develop a broader Trans-Pacific network over time, they would be considerably slower in their ability to achieve this objective. As such the consumer will be less likely to see the benefits of this deeper network-based competition, outlined above, in the short to medium term.
- 4.38. Air NZ notes that the applicants have at various points suggested the Joint Venture will result in new services, new services occurring sooner than would have otherwise been the case and that the Joint Venture will help preserve existing services. In light of this, Air NZ states that it is difficult to identify what the applicants claim the factual and counterfactual entail, and hence how they differ.
- 4.39. Air NZ considers that the counterfactual may involve either the status quo or alternatively, a reduction in services by the applicants.
- 4.40. In response, the applicants state:
- Air New Zealand's characterisation of the relevant counterfactual as constituting either the 'status quo' or alternatively, 'a reduction in services' is not appropriate. It is not appropriate to assume a static point of comparison, since the proper focus is on what constitutes the likely or probable outcome in the foreseeable future with and without the authorisation. Such analysis takes into account the underlying commercial and economic circumstances in which the authorisation is sought...In brief, the counterfactual involves the implementation of more limited forms of cooperation.
- 4.41. The applicants consider that absent the Joint Venture the likely outcome in the near term will be either the existing schedule or a reduced schedule.
- 4.42. The applicants' submissions regarding their ability to compete against the incumbent carriers are discussed under Public Benefit.

Existing cooperation agreements

- 4.43. The applicants state that in the absence of the Joint Venture, they would continue to implement on a more limited basis some of the terms of their existing interline, codeshare and marketing agreements.
- 4.44. The ACCC notes that the applicants also have a number of other codeshare and interline agreements which are relevant to the trans-Pacific routes. These are set out below.

- Virgin Blue currently has a codeshare agreement with United Airlines whereby the United code is displayed on certain Virgin Blue flights. The Virgin Blue code does not appear on any United flight. The ACCC understands that this codeshare is due to end later this year.³²
- V Australia currently has a unilateral interline agreement with Virgin America.
- Virgin Blue currently has a unilateral interline agreement with Alaska Airlines.
- Virgin Blue currently has a bilateral interline agreement with Continental.
- Virgin Blue currently has a bilateral interline agreement with Virgin Atlantic (VS).
- Virgin Blue currently has a bilateral interline agreement with Delta on their respective domestic networks, but the parties do not currently interline on their trunk routes. The parties have also concluded a codeshare agreement, pursuant to which the V Australia codeshare will appear on Delta's United States-domestic flights beyond Los Angeles, Delta will code share on intra-Australia and Trans-Tasman services operated by Virgin Blue and/or Pacific Blue, and Delta and V Australia also will codeshare on each other's United States-Australia services. That codeshare agreement has not yet been implemented, although various regulatory approvals have been received from the United States authorities.
- Virgin Blue recently announced a unilateral codeshare agreement that allows Virgin Blue to code on Emirates' trans-Tasman flights (Sydney to Auckland and Christchurch only). Emirates does not codeshare on V Australia.
- Delta maintains interline relationships with 157 carriers around the world, including Qantas, United, American, and V Australia.
- Delta has a codeshare relationship with the Virgin Blue carriers.
- Delta also maintains an important strategic codeshare relationship with Alaska Airlines, which supports and feeds Delta's west coast international services, including Los Angeles – Sydney and future Joint Venture trans-Pacific services.

Conclusion on counterfactual

4.45. Based on the information currently available, the ACCC considers that the most likely counterfactual will involve a situation where:

- Virgin Blue and Delta continue to operate independently and compete on the trans-Pacific routes at least in the short term
- the applicants continue to implement on a more limited basis some of the terms of their existing interline, codeshare and marketing agreements.

³² <http://www.flightglobal.com/articles/2009/08/13/331025/virgin-blue-to-end-codeshare-partnership-with-united.html>.

- the applicants continue to implement their existing cooperation agreements with a range of other airlines, apart from Virgin Blue's codeshare arrangement with United which is due to end later this year.³³

Public benefit

4.46. 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:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.³⁴

4.47. The applicants submit that the Joint Venture:

- enables them, as new entrants, to effectively compete and grow their presence on the trans-Pacific routes in a way not facilitated by a codeshare and
- promotes the public policy objectives underpinning the Open Skies Agreement.

4.48. More specifically, the applicants state that they will be better able to maintain existing and introduce further trans-Pacific services (routes and frequencies) faster than would be the case absent the Joint Venture (particularly in respect of direct services). The applicants submit that this in turn:

- means customers travelling between Australia and the United States will be offered greater choice and convenience
- facilitates lower fares on the trans-Pacific as a result of:
 - new capacity supported by the Joint Venture
 - the removal of 'double marginalisation' incentives and
 - the achievement of cost savings
- results in sustained effective price and product competition on trans-Pacific routes in the medium to long term and
- will facilitate increased tourism and employment in aviation and other sectors.

4.49. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

³³ <http://www.flightglobal.com/articles/2009/08/13/331025/virgin-blue-to-end-codeshare-partnership-with-united.html>.

³⁴ *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.

Enabling the applicants to effectively compete and grow their presence on the trans-Pacific routes

- 4.50. The applicants submit that the Joint Venture positions them to more effectively compete on the trans-Pacific routes on a long term basis. The applicants' key argument in this respect is that the Joint Venture allows them to replicate the network advantages of the incumbent carriers on the routes.
- 4.51. The applicants consider that Qantas' strong position on the trans-Pacific routes is a result of its established presence, extensive long-haul infrastructure, deep network of routes and frequencies on trans-Pacific routes and deep penetration into both Australian and United States domestic markets. They note that Qantas' participation in the oneworld alliance, and its codeshare and interlining relationship with American, give it the ability to sell a broad range of city-pair connections that it could not offer unilaterally. The applicants add that American's decision to not operate its own aircraft to Australia means that it directs significant amounts of United States feeder traffic onto Qantas' trans-Pacific services.
- 4.52. The applicants consider that a key competitive strength of United' trans-Pacific offering is the connections it provides customers from its Los Angeles and San Francisco hubs to its extensive domestic network, given that more than 60% of Australia-United States passenger traffic flows beyond or from behind the United States west coast gateway cities. The applicants also note that United is a member of the Star Alliance and together with Air NZ and Air Canada, is able to offer 12 trans-Pacific city-pairs.
- 4.53. The applicants submit that a key issue for carriers on the trans-Pacific routes is the need for access to effective beyond domestic and trans-Tasman networks. They state that the need for this access is a result of two factors.
- (1) Aircraft range limitations mean that passengers are generally required to travel through gateway points. Where a significant number of passengers are travelling to destinations other than those gateway cities, it is important for carriers to be able to offer these additional city-pair connections. The applicants consider that it is particularly important for Australian carriers to have access to a strong United States domestic network because they estimate that 60% of Sydney – Los Angeles traffic travels beyond Los Angeles. In contrast, the applicants believe that a carrier flying on trans-Pacific routes with a comprehensive United States domestic network but no Australian domestic network is better able to service a significant proportion of the market because of the relative concentration of the population on the east coast of Australia.
 - (2) 'Dual destination' traffic. Because of the length of the trip and the crossing of multiple time zones, a significant proportion of North Americans visit both Australia and New Zealand in the one trip, usually passing into one country outbound and home via the other country.
- 4.54. The applicants note that the incumbent carriers on the trans-Pacific routes have well established domestic and trans-Tasman networks.

4.55. More generally, the applicants consider that having a strong United States and Australian domestic network (beyond the trans-Pacific gateway points) and being able to service the traffic originating from either end equally well enables a carrier to better manage load factors and yields to cope with the inevitable changes in demand on either side of the Pacific caused by currency depreciation or other factors.

4.56. The Department of Infrastructure notes that:

The proposed joint venture, if approved, is likely to result in a situation in which three comparably sized airline groupings – oneworld (Qantas/American Airlines), Star Alliance (United Airlines/US Airways/Air Canada/Air New Zealand) and V Australia/Delta Airlines – all with domestic feeder networks on at least one side of the Pacific, would be competing in a contestable environment in which any other Australian or United States international airline (and some other third-party carriers) could immediately commence services should they choose to do so.

4.57. The IASC states that:

The incumbent carriers, Qantas and United, are well established, with Qantas in particular operating the majority share of capacity on the route. This provides it with substantial competitive power with a large frequency advantage, supported by strong behind gateway services through its extensive Australian domestic network and arrangements with American Airlines in the United States.

4.58. The IASC goes on to say:

The Commissioners note the extensive behind-gateway networks which V Australia and Delta would gain access to as part of the proposed arrangements. These would be important to achieving competitive access to traffic originating from or destined for behind-gateway points. However, the Commission notes that this access could be achieved independently of other aspects of the arrangements planned by the applicants.

4.59. Qantas agrees that:

The Australia-United States route has unique features which make it efficient for an Australian airline to partner with a United States airline to offer a ‘network to network’ proposition. In fact, without a strong relationship with a major United States domestic carrier, the route may be marginal for an Australian airline.

4.60. However, Qantas goes on to state that:

While Qantas and American Airlines have a strong commercial arrangement, each makes independent decisions in relation to routes, capacity and pricing on codeshare routes. There is no agreement that Qantas will ‘operate all trans-Pacific sectors and American operate all domestic United States sectors.’

4.61. Air Pacific states that it is a proponent of airline competition and observes that:

Through codeshare arrangements and frequent flyer participation, airlines have the ability to work together yet not become so close that consumer choice is challenged. Air Pacific utilizes these marketing tactics to compete on numerous routes in the Pacific and we hope that other airlines would see fit to use the accepted levels of alliance coordination to operate in the competitive market.

4.62. Air NZ notes that:

The applicants’ application to the DOT in relation to codesharing states that the parties have entered into a ‘comprehensive’ codesharing arrangement, and goes on to say that additional

codesharing will make the carriers more competitive for trans-Pacific traffic. The codeshare forms part of the counterfactual.

Any benefits arising from an increased availability of online connections (ie on a single code) will also arise from the codeshare agreement and will thus occur in the counterfactual.

Even if it could be said that the feed from each carrier's domestic network to the other's trans-Pacific service will support additional services (bearing in mind there is only so much feed to be distributed ie to the extent that Delta feeds a passenger to a LAX-SYD Virgin flight then that is one less it can feed onto its own flight) then Air NZ believes that support would also occur in the counterfactual under the codeshare.

- 4.63. The applicants argue that the public benefits flowing from the Joint Venture cannot be achieved solely with standard forms of airline cooperation (such as codesharing outside an alliance) because parties to such arrangements continue to have an incentive to maximise their own economic benefit. As such, these parties are unwilling to reduce the profitability of their own operations and will seek to individually profit maximise within the scope of the codeshare through:
- operating on the routes and with the frequencies that each carrier perceives to provide the greatest potential for profit, such that codeshare partners will often end up competing head to head (in some cases, flying 'wing-tip' to 'wing-tip')
 - channelling passengers onto their own aircraft regardless of whether their codeshare partner may offer a better routing or more convenient timing.
- 4.64. The applicants consider that under a 'metal neutral' integrated alliance where the airlines share the revenue, the airlines have an incentive to focus on maximising the benefits for the alliance parties as a whole. As such, the carriers will seek to win the passenger's booking for the alliance by creating a joint network with the best spread of routes frequencies and the most competitive fares. With the alignment of financial incentives, carriers that are part of the 'integrated alliance' will drive to grow and optimise the convenience and scope of their overall product offering.
- 4.65. The applicants submit that the overall result in the integrated alliance (not achieved under standard codeshare) is the optimisation of the joint network offering such that it is more attractive to potential customers and more competitive – leading to overall increased passenger loads across the network and subsequently lower average seat costs.
- 4.66. In support of their argument, the applicants refer to the integrated alliance between Northwest Airlines and KLM. Before receiving antitrust immunity, Northwest did not provide daily service from any of its domestic network hubs to KLM's Amsterdam hub. The applicants claim that as a result of its immunised integrated alliance, Northwest provided multiple frequencies from both of its primary hubs, Minneapolis/St. Paul and Detroit, and also added service from other United States cities. The applicants note that on the four daily services and 1200 seats that Northwest/KLM operates between Detroit and Amsterdam, only a small number of passenger journeys originate in Detroit or Amsterdam. The majority of passengers on these services are connecting passengers moving to points beyond or behind the joint venture partner's hubs. The applicants argue that this demonstrates the potential of 'metal neutral' joint venture alliances to grow and sustain new service far beyond the levels that either partner could offer individually.

- 4.67. The ACCC accepts the views of the applicants and interested parties that access to behind-gateway traffic is important for carriers competing on the trans-Pacific routes.
- 4.68. Accordingly, the ACCC considers that arrangements which facilitate such access are likely to result in a public benefit by enabling carriers to effectively compete and grow their presence on routes such as the trans-Pacific.
- 4.69. The ACCC also accepts, as a general principle, the applicants' claim that an integrated alliance can create financial incentives for alliance partners to optimise their joint network offering such that it is more attractive to potential customers. The ACCC considers that such arrangements are likely to result in a public benefit where they enable the alliance partners to compete more effectively.
- 4.70. The key question is whether the Joint Venture is necessary to deliver these public benefits in this case. In particular, the ACCC has carefully considered the extent to which the Joint Venture is likely to deliver these public benefits over and above the applicants' existing cooperation agreements.
- 4.71. The ACCC has been provided with details of the codeshare arrangement to be implemented in the absence of the Joint Venture on a confidential basis. As publicly stated by the applicants in their submission dated 30 September 2009, reciprocal codeshare services under this agreement will be limited to a much smaller number of cities than under the Joint Venture. More specifically, the applicants state that the Joint Venture will result in the creation of new online service connections in more than 6500 city-pairs. In light of this, the ACCC considers that the Joint Venture is likely to result in some public benefit by providing consumers with greater network opportunities than under the applicants' existing cooperation agreements.
- 4.72. The ACCC accepts the applicants' claim that under an integrated codeshare supported by the Joint Venture, both parties will have an incentive to route passengers via the most direct trans-Pacific routes irrespective of which airline is the operator of the route. As noted by the applicants, a passenger flying from Los Angeles to Brisbane on Delta under a limited codeshare would be routed through Sydney to maximise Delta's revenue, while the Joint Venture would incentivise Delta to put the passenger on V Australia's direct service to Brisbane. In this way, the ACCC considers that the Joint Venture is likely to result in some public benefit by providing consumers with more efficient routings. The ACCC also considers that this may facilitate improved loads for the applicants which in turn may create opportunities for expanding the direct trans-Pacific services offered.
- 4.73. The ACCC notes the applicants' references to the alliance between Northwest Airlines and KLM.
- 4.74. It is clear that the network traffic flows in that case have facilitated a greatly expanded service by the alliance partners. However, the ACCC notes that there are a number of significant differences between the Northwest/KLM scenario and the current matter, including the relatively greater density of the routes in that case, the relatively greater potential for network linkages to arise from Northwest's and KLM's hubs (relating to catchment areas and demographics), the similar positioning of the two carriers in their

respective home countries (including product offering) and the incentives created by KLM's existing ownership interest in Northwest.

- 4.75. As such, the ACCC considers that the Northwest/KLM alliance provides limited guidance in the present case.
- 4.76. The ACCC notes that the information available does not clearly substantiate the extent to which network advantages are likely to arise as a result of the Joint Venture. In particular, the ACCC notes that Delta does not have a significant presence at either Los Angeles or San Francisco, which are the two key hubs on the United States west coast for trans-Pacific flights.
- 4.77. Delta itself states it is only the fourth largest operator of domestic services from Los Angeles after United, American and Southwest Airlines (a low cost carrier). The information available to the ACCC indicates that Delta does not offer direct flights from Los Angeles to a number of key United States destinations including San Francisco. The ACCC understands that Delta relies heavily on its codeshare arrangements with Alaska Airlines to service destinations on the west coast of the United States.
- 4.78. The ACCC acknowledges that this issue appears less pronounced at the Australian end of the routes where Virgin Blue has a significant network behind the current gateways of Sydney and Brisbane. However, as noted by the applicants themselves:

A carrier flying on trans-Pacific routes with a comprehensive United States domestic network but no Australian domestic network is better able to service a significant proportion of the United States-Australia market because of the relative concentration of the population on the east coast of Australia. For example, the Australian gateway city airports of Sydney, Melbourne and Brisbane are within a few hours driving distance of approximately 60% of the entire national population (with Sydney alone accounting for 26% of the national population).

- 4.79. On balance, the ACCC considers that the Joint Venture may result in some public benefit by facilitating the more efficient and effective integration of the applicants' trans-Pacific services with Australian and United States domestic networks and thereby enhancing competition on the routes over the longer term. This may occur in at least two ways.
- As previously noted at least 60% of passengers start or end their journeys beyond Los Angeles or San Francisco. For these customers an important aspect of competition is the offer of seamless travel beyond these cities. Qantas and United have well integrated arrangements and systems to offer such services. The ACCC considers that the Joint Venture will be likely to enhance the capability of the applicants to compete for these customers.
 - More efficient and effective integration of trans-Pacific services with Australian and United States domestic networks is likely to reduce the risk associated with adding capacity to trans-Pacific services (including commencing services on new city-pairs). Any such increased capacity would likely benefit consumers travelling between city-pairs and those travelling beyond.

Promoting the objectives of the Open Skies Agreement

- 4.80. As discussed in Chapter 2, the Open Skies Agreement (OSA) implemented on 14 February 2008 allows carriers of both Australia and the United States to operate unrestricted capacity on routes between any point or points in either country.
- 4.81. The Department of Infrastructure states that:
- There are now no economic regulatory barriers for any current or future Australian or US international carrier to enter the market. In addition, airlines of ten other countries (New Zealand, Canada, Fiji, Cook Islands, Germany, Switzerland, India, Macau, Indonesia and Taiwan) also currently have access to the Australia-US market, albeit some with the restriction that the flight must operate from its home country.
- 4.82. A key policy rationale behind the introduction of the OSA was the Australian Government's desire to introduce further and sustained competition on what it considers to be one of Australia's most important air routes.³⁵
- 4.83. While the applicants consider their entry has gone a considerable way to promoting this objective, they believe that the Joint Venture best achieves the key objective of the OSA. The applicants claim it does this by enabling them to develop a deeper, co-ordinated and integrated trans-Pacific passenger network to better rival and more effectively and comprehensively compete with the incumbent airlines on a long term basis.
- 4.84. Singapore Airlines considers the trans-Pacific route should be further liberalised and opened up to carriers other than those in Australia and the United States, particularly in the event the Joint Venture leads to fewer service frequencies or higher fares.
- 4.85. Tiger Airways denies that the mere entry of the applicants on the route has promoted the objectives of the OSA. Tiger notes the limitations of the OSA in prohibiting potential competitors, such as fifth freedom operators, from operating services on the route. Tiger submits that authorisation should not be granted without unlimited market access under a full and comprehensive open skies arrangement.
- 4.86. The ACCC agrees with the applicants that their entry on the route has gone a considerable way to achieving the objectives of the OSA.
- 4.87. As noted above, the ACCC considers that the Joint Venture is likely to improve the applicants' access to behind-gateway traffic and therefore, facilitate network benefits. As discussed below, the ACCC also considers that the Joint Venture will provide incentives to provide a broader spread of routes and frequencies. To the extent that this enables the applicants to compete more effectively on the routes, the Joint Venture is likely to result in some public benefit by promoting the objectives of the OSA.

Routes and frequencies

- 4.88. The applicants submit that the Joint Venture supports the introduction and continuation of new trans-Pacific services, because it facilitates the sharing of commercial risk between the airlines. As such, the applicants claim they are more able to consider

³⁵ Commonwealth House of Representatives, *Ministerial Statements*, Monday 18 February 2008, p.534.

launching services which, unilaterally, they would not be able either in the short term or at all, particularly in the current economic climate. The applicants also consider that the Joint Venture is likely to result in overall higher load factors than could be achieved with purely codeshare and interline agreements.

- 4.89. The applicants note that they have not yet been able to discuss in detail the routes and frequencies that may be offered under the Joint Venture. However, the Joint Venture Agreement specifically contemplates that the applicants will jointly examine the commencement or expansion of services on a number of city-pairs. A list of these city-pairs has been provided to the ACCC on a confidential basis, along with a number of further routes that Virgin Blue has also confidentially identified as potentially enabled by the Joint Venture.
- 4.90. Further, the applicants note that if launched, these routes would result in new or increased direct services between city-pairs that are not currently served, are serviced only by Qantas, or are serviced predominately by indirect services through Sydney.
- 4.91. Air NZ notes that the confidentiality of potential new routes makes it difficult for third parties to comment on any impact the Joint Venture may or may not have in that regard. Nevertheless, Air NZ makes the following observations:
- (a) As acknowledged by the Applicants, the distance between Australia and North America means direct services can only be offered between a limited number of ports. Operational constraints preclude services to Adelaide, which Air NZ believes in practice leaves SYD, MEL and BNE as Australian ports, with LAX and San Francisco (**SFO**) being the only realistic US ports to service ex-Australia (in light of these operational constraints and also having regard to catchment size and network feed).
 - (b) All three viable ports in Australia already have flights to LAX, and SYD also has services to SFO, which realistically leaves BNE-SFO and MEL-SFO as candidates for direct routes not currently available to the travelling public.
 - (c) Given Qantas' greater network presence in Australia, and American Airlines' presence in the US, Air NZ believes it is reasonable to expect that if there was commercially sustainable demand for a BNE-SFO or MEL-SFO service – or any other route for that matter – Qantas/American Airlines would have instituted such a service already.
 - (d) Finally, while Delta offers a handful of services from domestic US points to SFO, it does not have a hub at SFO and so comparatively speaking cannot offer a great deal in terms of feed from the US mainland – feed and city 'presence' being key factors influencing the viability of such services.
- 4.92. In response, the applicants submit that Brisbane-San Francisco and Melbourne-San Francisco are not the only viable new direct services that can be launched by the applicants. They argue that Air NZ misses the fundamental point that the economics of the metal neutral Joint Venture facilitates new routes and services that could not, or are much less likely, to be introduced or maintained by a carrier acting unilaterally.
- 4.93. The applicants also disagree with Air NZ's argument that because Qantas has not commenced a service then that service is not likely to be viable. The applicants note that Qantas has an economic incentive to route passenger through its current hub of Los Angeles, where its codeshare partner American Airlines has a strong presence, rather than introduce new point-to-point services. Secondly, the applicants, particularly Virgin Blue, consider that they have a lower cost base than the incumbent carriers, which

means services that would not be viable for Qantas or United may be viable for the applicants.

4.94. In relation to new frequencies, Air NZ notes:

The claims about the financial difficulties facing the airlines on the routes and the recent increases in capacity are inconsistent with an assertion that the alliance increases the prospect of yet further additional frequencies. As the applicants acknowledge at section 4.5 of their submission, 'additions of capacity are relatively large compared to the annual rate of growth on the route. That is, it is not possible to easily increase or decrease seat capacity in increments matched to small changes in demand.

To operate an additional daily service would require at least two extra aircraft, and services on a less than daily frequency tend to be sub-optimal.

4.95. In response, the applicants state that there is no commercial or other requirement which necessitates that frequency increases can only be effected through introducing additional daily services. As to the claim that current financial conditions mean that the applicants are unlikely to increase frequencies, the applicants note that the very purpose and effect of the Joint Venture is to optimise their joint offering, achieve cost savings and mitigate the risks involved in introducing new routes and frequencies.

4.96. The ACCC notes the applicants' claim that by facilitating enhanced cooperation and the integration of their domestic networks with the trans-Pacific routes, the Joint Venture may increase overall passenger levels and improve the fare mix on the applicants' flights. This in turn may enable the applicants to extend services on existing trans-Pacific routes (particularly Brisbane and Melbourne) and to introduce new trans-Pacific services.

4.97. To the extent that the Joint Venture delivers these outcomes, the ACCC considers that it is likely to result in some public benefit through an increased number of routes and frequencies between Australia and the United States.

Greater choice and convenience

4.98. The applicants submit that as a result of the new routes and frequencies the Joint Venture is expected to create, customers will benefit from increased choice and convenience by giving them a wider choice of destinations, direct routings, and arrival/departure times. They claim this will result from better allocation of capacity to routes, the greater overall capacity, new non-stop city-pairs and co-ordination of schedules, including connections.

4.99. In combination, the applicants claim this will provide customers with greater choice and further options to optimise travel routings to provide overall reduced flying and transit times. Additionally, it will facilitate the ability of the applicants to quickly reaccommodate passengers in the event that flights are cancelled or delayed for operational reasons – minimising the extent of any inconvenience.

4.100. AFTA submits that increased consumer convenience, as a result of better scheduling from the Joint Venture, may spark greater interest in the trans-Pacific route, creating demand and increased frequencies. AFTA also submits that the Joint Venture may result in more streamlined ticketing, efficient scheduling and better alignment of beyond gateway flight times for popular routes.

- 4.101. Air NZ argues that the applicants offer no evidence to substantiate the assertion that the alliance will lead to a wider choice of arrival and departure times. Air NZ notes that:
- the applicants already have well spread flights leaving Sydney
 - there are operational and network reasons that drive departure times, which will persist in the factual
 - there is invariably less scope to remove wingtip to wingtip flying on long haul routes, if for no reason other than the fact there tend to be far fewer flights to adjust.
- 4.102. In response, the applicants submit that while it is important for carriers to have effective beyond networks, this does not mean that it is necessary for every trans-Pacific flight to be scheduled at a time to maximise onward connections as long as there exists sufficient point-to-point passenger traffic between city-pairs.
- 4.103. The applicants state that while they have not yet been able to coordinate scheduling, the Joint Venture would enable them to optimise their network to service both point-to-point and onward traffic, providing a wider choice of arrival and departure times.
- 4.104. In terms of scheduling of on-traffic connections, it is not apparent to the ACCC that the volume of traffic coming off the trunk routes is likely to be sufficient to alter the schedules of individual domestic services, especially at the United States end where multiple destinations are promulgated. In Australia the high frequency of flights beyond hubs, (eg on the Sydney-Melbourne-Brisbane triangle) means that it may not be necessary to change Virgin Blue's domestic schedules to improve connectivity.
- 4.105. To the extent that the Joint Venture facilitates this network optimisation, the ACCC considers that some public benefit may arise through providing consumers with greater choice and convenience, in particular through the streamlining of ticketing and baggage handling.

Lower fares

- 4.106. The applicants submit that the introduction of their new capacity on trans-Pacific routes has already had a profound effect on the competitive structure and levels of competition, introducing new levels of product and price competition.
- 4.107. The applicants submit that the Joint Venture will continue to facilitate lower fares on trans-Pacific routes as a result of new additional capacity supported by the Joint Venture, the removal of 'double marginalisation' incentives and the facilitation of cost savings.

Increased capacity

- 4.108. The applicants state that the introduction of additional capacity has resulted in lower fares (including greater numbers of promotional fares). They submit that by enabling the applicants to maintain capacity and introduce further capacity on trans-Pacific routes (including more direct capacity on routes other than Sydney-Los Angeles), the

Joint Venture will drive lower fares (including promotional fares) than would exist in the counterfactual.

4.109. The Department of Infrastructure states:

Since the increase in competition in the Australia-US market, there has been a significant reduction in the cost of available airfares. While the reductions can be partially attributed to the general slowdown in demand for air travel brought about by the global financial crisis, the increase in competition is clearly a significant factor.

4.110. Similarly, the IASC states:

V Australia's entry appears to have stimulated very competitive air fares on the United States route, as well as bringing consumer a welcome additional choice of carrier. However, both V Australia and the incumbent carriers have presumably been responding not only to the more competitive environment associated with V Australia's entry, but also in part to the weaker demand for air services generally as a result of the protracted economic downturn. Delta's recent entry to the route has further intensified competitive pressures in difficult economic circumstances.

4.111. Qantas notes the applicants have stated that it is not their intention to reduce capacity. However, Qantas queries whether the claimed efficiencies will be possible through the Joint Venture without capacity being reduced on the Sydney-Los Angeles route.

4.112. Based on the applicants' public submission, Air NZ does not believe that the alliance will lead to lower fares. Conversely, Air NZ argues that the applicants have failed to properly address the potential for price increases. More specifically, Air NZ notes:

There are currently four carriers operating direct services and the applicants are seeking approval for two of those carriers to (among other things) fix prices. While in many situations an effective increase in concentration will not lead to an increase in price (eg where there is constraint from new entry) Air NZ does not believe that the applicants have evidenced why that is the case under the alliance. The applicants' suggestion that the market is a difficult one to enter sustainably is relevant in this regard.

4.113. The ACCC notes that increased capacity does not automatically mean lower fares since airlines can also remove capacity to achieve a better balance between supply and demand to maintain fares. In this regard, the ACCC notes Qantas' decision to remove capacity from routes to the United States in April 2009.³⁶

4.114. However, it is clear that fares on the trans-Pacific routes have reduced dramatically in 2009. The Centre for Asia Pacific Aviation (CAPA) notes that the standard fare settled around AUD1300-1500 return ex Australia or USD800 ex United States in April 2009.³⁷ CAPA notes that these are around half of the fare levels available in 2008.

4.115. The ACCC agrees with the Department of Infrastructure and the IASC that the fare levels in 2009 are likely to have resulted from a combination of increased capacity on the routes and global economic conditions (particularly a weak United States economy).

³⁶ *Qantas Announces Revised Profit Forecast and Major Response to Deterioration in Trading Conditions*, 15 April 2009.

³⁷ *Asia Pacific Aviation Outlook 2009*, April 2009, p.270.

4.116. The ACCC accepts that the Joint Venture would facilitate the ability of the applicants to jointly adjust, upwards or downwards, capacity on the routes. Such a flexibility in relation to capacity can lead to higher fares as well as lower fares. Accordingly the ACCC does not believe that it can be assumed that the Joint Venture will give rise to a public benefit in the form of lower fares through increased capacity. However (as discussed later) the ACCC considers that Virgin Blue in particular has been a vigorous price competitor and innovator on the trans-Pacific routes and there is no information at this stage to suggest that the Joint Venture would give it any incentive to depart from this approach, which has been a feature of the wider Virgin Blue Group over time.

Removal of ‘double marginalisation’ incentive

4.117. The applicants submit that an integrated alliance such as the Joint Venture removes the ‘double marginalisation’ incentive and therefore, enables lower fares to be offered to customers.

4.118. The applicants state that in codesharing arrangements the parties continue to have an incentive to maximise their own economic benefit, which means that they will both seek to operate routes and frequencies which provide the greatest potential individual profit and will channel passengers onto their own aircraft regardless of whether the codeshare partner offers a better routing or more convenient timing. A carrier will also ordinarily seek a profit margin on the passengers they put on their respective codeshare partner’s aircraft, which in turn will be seeking a profit on the seat they are selling to the booking carrier – this is termed ‘double marginalisation’.

4.119. The applicants submit that the effect of this double marginalisation is to increase fares compared with the position under an integrated ‘metal neutral’ alliance. In support of their arguments, the applicants cite a 2003 United States study which found that the elimination of ‘double marginalisation’ incentives can lead to fare decreases of approximately 16%.³⁸

4.120. Air NZ submits that the applicants’ discussion regarding double marginalisation does not contain any ‘netting off’ of a price rise that might flow from two independent competitors being authorised to fix price.

4.121. The ACCC’s understanding of double marginalisation is that it occurs where suppliers of vertically related or complementary products each enjoy a degree of market power and independently charge a price which includes a mark-up over their costs, and do not take account of the impact on the other firm’s profit. The net result is both higher prices and lower profits than if the two firms coordinated their pricing, for example, through vertical integration or a joint venture.

4.122. The ACCC considers double marginalisation could be a potential problem where fares on complementary flight segments of an itinerary are set independently by different carriers on those segments, for example, by V Australia on the trans-Pacific segment and by Delta on the domestic United States segment of a single trip. The 2003 United States study cited by the applicants above relates to this type of interlining situation and finds that there are benefits from price coordination of complementary flight segments.

³⁸ J.K. Brueckner, ‘International Airfares in the Age of Alliances: The Effects of Code-Sharing and Antitrust Immunity’ in *Review of Economics and Statistics* (2003) 85.

4.123. The ACCC considers this situation is not applicable to the coordination of prices on competing routes, that is, trans-Pacific flights operated by V Australia and Delta. The applicants claim that double marginalisation occurs under codesharing on these routes because where, for example, Delta sells codeshare seats on a V Australia trans-Pacific flight, both airlines will impose a markup and the resulting fare will be higher than Delta would charge on its own flights. Similarly, V Australia will charge a higher price on Delta codeshare flights than on its own flights. However, the consumer can choose to buy a seat on each flight direct from the operating airline, who will determine their prices subject to the state of competition in the market. The ACCC notes that under the proposed Joint Venture there will be one less competitor in the market.

4.124. The study cited by the applicants specifically states that:

It is important to note that this paper does not investigate the effect of airline cooperation on fares for another important type of international itinerary: one involving nonstop travel on a single carrier between international gateway airports. On such routes, alliance partners often provide overlapping service, and in this situation, cooperation may result in collusive behaviour, which leads to a higher rather than a lower fare. This outcome contrasts with the interline case, where the pursuit of higher profit leads cooperating carriers to reduce the fare.³⁹

4.125. There may be some elimination of double marginalisation to the extent that the Joint Venture partners individually coordinate the price of their relevant domestic sectors with the Joint Ventures' trans-Pacific sector on a single ticket. However where a trip involves a domestic sector in each country which are not coordinated by the Joint Venture parties, some double marginalisation would seem likely to remain.

4.126. Delta has indicated that it utilises cooperation arrangements with other United States carriers such as Alaska Airlines in relation to services on the west coast. The ACCC notes that Delta would have no control over the revenue management systems of these cooperation partners and therefore no control over their fares. On those domestic routes where this is the case, it is not clear to the ACCC how the claimed elimination of double marginalisation would arise.

4.127. The ACCC is not persuaded about the extent to which the Joint Venture would eliminate double marginalisation and deliver a public benefit of lower fares in this case.

Cost savings

4.128. The applicants submit that lower fares will be driven by cost savings and efficiencies arising from the Joint Venture. The applicants have submitted to the ACCC on a confidential basis the cost savings that are likely to arise from the Joint Venture.

4.129. In their public supporting submission, the applicants note that the key cost saving arising from the Joint Venture is through the maximisation of load factors, which will enable lower average seat costs.

4.130. The applicants note that the competitive constraint imposed on them by Qantas and United Airlines, the continued threat of entry (or re-entry) afforded by the OSA and the applicants' lack of market power, ensures cost savings and efficiencies generated by the

³⁹ Ibid, p.106.

Joint Venture will be passed on to consumers through strong price and service based competition on trans-Pacific routes.

- 4.131. The ACCC accepts that the Joint Venture would be likely to result in cost savings for the applicants. The ACCC notes that the recently established levels of competition on the trans-Pacific routes is likely to mean that any such cost savings would be passed on to consumers.

Sustained effective price and product competition on trans-Pacific routes in the medium to long term

- 4.132. The ACCC considers this public benefit claimed by the applicants is the same public benefit addressed under *Enabling the applicants to effectively compete and grow their presence on the trans-Pacific routes*. Therefore, this issue has already been considered by the ACCC and will not be repeated here.

Increased tourism

- 4.133. The applicants submit that one of the key constraints on trans-Pacific tourism growth has been a lack of available seats and relatively high seat prices.
- 4.134. The applicants submit that, notwithstanding the forecast current short term decline in overall tourism levels due to the Global Financial Crisis, United States/Australia tourism is likely to increase in the long run as a result of the Joint Venture.
- 4.135. Tourism Australia submits that Delta's entry has opened up United States eastern seaboard markets that may not have previously had easy access to trans-Pacific services. Tourism Australia considers that the Joint Venture may make access to the trans-Pacific route easier for those living in cities such as Boston or Atlanta, which have sophisticated travel populations.
- 4.136. Tourism Australia notes that the recent drop in fares on the trans-Pacific route means Australia is starting to compete with Europe as a holiday destination in the minds of United States travellers.
- 4.137. AFTA submits that V Australia's recent release of \$777 return airfares to Los Angeles sparked a lot of interest by Australian travellers in the trans-Pacific route in general
- 4.138. The ACCC accepts that there is a public benefit in increased tourism resulting from additional capacity and lower fares on the routes. However, the ACCC considers that any such public benefit already results from the entry of V Australia and Delta on the routes, and any additional benefit from the Joint Venture is likely to be limited.

Additional employment

- 4.139. The applicants submit that the Joint Venture is likely to result in additional direct and indirect employment.

the growth of V Australia's operation will create additional employment opportunities both within the carrier and in its immediate service providers (airports, caterers etc). Traditional employment will also be created in the tourism sector and associated industries. This increased employment

will occur at a national level as well as in those areas where direct services are launched or expanded.

- 4.140. Based on the information currently available, the ACCC is not persuaded that any significant increase in employment is likely to arise as a result of these particular elements of the Joint Venture.

ACCC conclusion on public benefits

- 4.141. The ACCC considers that the Joint Venture is likely to result in some public benefits in the form of:

- more efficient and effective integration of the applicants' trans-Pacific services with their Australian and United States domestic networks which leads to route connectivity benefits for consumers and more sustainable competition on the routes
- enhanced route coverage and schedules and
- potential cost savings which are likely to be passed on to consumers as a result of competition on the trans-Pacific routes.

- 4.142. While the ACCC considers that these public benefits are a likely consequence of the Joint Venture, there is limited empirical information on the extent of the likely benefits in this case. The extent to which the public benefits in this matter are realised depends on the conduct of the applicants under the Joint Venture.

- 4.143. If the benefits claimed by the applicants are not realised then the ACCC would consider this as a basis for reviewing the authorisation. In addition, should the applicants seek re-authorisation of the Joint Venture then the ACCC would look closely at the extent to which these benefits had been realised during the period of authorisation.

Public detriment

- 4.144. Public detriment is not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.⁴⁰

- 4.145. The applicants submit that the Joint Venture will not result in anti-competitive detriment. The applicants' reasons for reaching this view are summarised below.

- As new entrants on the trans-Pacific routes, the Joint Venture will assist the applicants entry, and continued survival and growth, and will have a pro-competitive effect on what has until recently been a virtual duopoly.
- The applicants have limited incentive and ability to remove capacity from the trans-Pacific routes. The Joint Venture does not give the applicants the incentive to

⁴⁰ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

remove capacity where even together they will be relatively small players in the market. Any reduction in capacity would result in passengers shifting to Qantas or United Airlines and a loss of competitive positioning by diminishing the scope of the network routes and frequencies the applicants offer in competition to Qantas and United.

- The purpose of the Joint Venture is to enable the applicants to maintain existing capacity and develop new routes, schedules and frequencies in order to more effectively compete against the incumbent carriers' alliances.
 - With their recent entry, the applicants are without the established market advantage held by Qantas and United Airlines. The applicants predict that by December 2009, their aggregate seat capacity share for direct flights on all trans-Pacific routes will be 29% in comparison to predicted shares for Qantas at 50% and United Airlines at 21%. On the basis of city pair capacity shares, the applicants either do not have a presence at all or V Australia is the only competitor to Qantas having direct flight capacity shares in excess of 65% on those routes.
 - Upon commencement of the Joint Venture, the applicants will continue to vigorously compete with Qantas and United Airlines, in addition to the range of carriers providing indirect services. The applicants note that Air NZ maintains the right and capacity to re-introduce direct services between Australia and the United States.
 - There are a large number of alternative air freight/cargo providers, including Qantas, United Airlines, UPS and FedEx, as well as those carriers that fly via Asia. The applicants are currently small suppliers of air freight/cargo services on the trans-Pacific routes.
- 4.146. The principal public detriment raised by interested parties in the ACCC's public consultation process is that the Joint Venture will lead to higher prices and a reduction in capacity on the trans-Pacific routes.
- 4.147. The IASC submits that the Joint Venture is far reaching and involve extensive co-operation including price and revenue management. The IASC also submits that, on the face of it, the arrangements seem to have potential to result in some weakening of competition compared with the current situation on the route, although the IASC notes the applicants argue the arrangements will strengthen their competitive presence and public benefits will be generated such as through the ability to co-ordinate scheduling and develop new sectors which might not otherwise be possible operating independently.
- 4.148. Qantas submits that if approved, the Joint Venture will result in co-ordination between two new entrants both of whom are individually regarded by Qantas as vigorous and effective competitors who state they are committed to the route on a long term basis. Qantas also queries whether the claimed efficiencies will be possible through the Joint Venture without capacity being reduced on the Sydney-Los Angeles route.
- 4.149. Singapore Airlines submits that if a partnership between the applicants leads to fewer flights and options than were planned, or the possibility of higher fares, and the

purview of consumer choice is constrained, the application should be reconsidered or the route opened up to even more competition to the ultimate benefit of the consumer.

- 4.150. Air NZ submits that the applicants have not sufficiently addressed the prospect of fare increases as a result of an increase in market concentration, which is particularly relevant in a market which they maintain is difficult to enter on a sustainable basis.
- 4.151. Tiger Airways submits that the Joint Venture would lead to reduced competition causing fare prices to increase and reductions in flights and seat numbers.

Effect on competition

Nature and extent of the Joint Venture

- 4.152. The Joint Venture for which the applicants are seeking authorisation provides for the coordination and agreement between the applicants on the trans-Pacific routes in relation to schedules, capacity and routes flown; passenger sales and marketing activities; pricing and revenue management; enhancement of frequent flyer and lounge program offerings; purchasing and procurement; and sharing of passenger revenues. The applicants submit that the revenue sharing arrangement contemplates the pooling of revenue founded on the principle of 'metal neutrality', making it irrelevant, from the perspective of either Virgin Blue or Delta, which of Virgin Blue or Delta's aircraft a passenger travels on.
- 4.153. Set out below is an assessment of the extent to which the Joint Venture is likely to result in a lessening of competition in each of the relevant markets identified above.

International passenger transport markets

Market for leisure travellers

Market concentration

- 4.154. Given that the applicants' Joint Venture includes price coordination and revenue sharing, the ACCC considers it appropriate to examine, among other factors, combined Virgin Blue and Delta market shares, to assess the extent of any competition detriment in the relevant markets.
- 4.155. As noted above, the ACCC considers that the geographic scope of the market for leisure travellers is regional because leisure travellers are (i) more likely to substitute different destinations in target areas on the basis of price and (ii) are also more likely to accept indirect routes that may involve longer travel time but less expensive fares. Accordingly, the market for leisure passengers includes carriers offering indirect services on the trans-Pacific routes, in addition to carriers providing direct services. Table 3.1 below sets out airline market share figures for both direct and indirect services between Australia and the United States for the 2008/09 financial year, on the basis of information provided by the Department of Infrastructure.

Table 3.1. Leisure travellers – airline market shares 2008/09⁴¹

Airline	No. of Passengers	Share of passengers
Qantas	490,635	52.3%
United Airlines	162,028	17.3%
V Australia	31,476	3.4%
Jetstar*	51,300	5.5%
Hawaiian Air*	25,409	2.7%
Air New Zealand	66,919	7.1%
Singapore Airlines	15,736	1.7%
Air Pacific	14,678	1.6%
Cathay Pacific	11,369	1.2%
Emirates	7,358	0.8%
China Airlines	4,996	0.5%
Korean Airlines	4,739	0.5%
Malaysian Airlines	4,141	0.4%
Air Canada	4,063	0.4%
Other	43,754	4.7%
<i>All flights</i>	<i>938,601</i>	<i>100.0%</i>

*Jetstar and Hawaiian Airlines fly direct between Australia and Hawaii. Hawaiian Airlines provides indirect flights to mainland United States via Hawaii.

- 4.156. Market share data for the 2008/2009 financial year does not include Delta figures given that Delta commenced operations on the trans-Pacific route in July 2009. Delta currently operates on the Los Angeles – Sydney route. The data also only includes four months of operations on the route by V Australia. As noted above, monthly statistics produced by BITRE show that for July 2009, V Australia accounted for 12.4% of passenger traffic to/from the mainland United States and Delta accounted for 6.9%.

⁴¹ Information from the Department of Infrastructure, Transport, Regional Development and Local Government, based on passenger numbers.

4.157. Due to the limited historical data available to calculate market shares, for the purpose of analysis, the applicants have submitted projected capacity shares⁴² of each carrier for the period beginning December 2009⁴³, for direct services to mainland United States and on an aggregate basis. Table 3.2 sets out projected capacity shares as submitted by the applicants. While indirect services are excluded from Table 3.2, the ACCC notes that the figures can provide some guidance on market concentration.

Table 3.2: Projected capacity shares (direct routes) on an aggregate basis⁴⁴

Projected direct flight capacity share: Australia – mainland United States as at December 2009	
Airline	Percentage
Qantas	50%
United	21%
Virgin Blue	21%
Delta	8%
Total	100%
Virgin Blue/Delta combined	29%

4.158. The ACCC notes that, assuming airlines have similar passenger loads, based on the projected capacity shares, a combined Virgin Blue and Delta will have a market share of 29% compared with Qantas at 50% and United at 21%.

4.159. In addition to Delta, Virgin Blue, Qantas and United, the ACCC notes that there are a number of other competitors with smaller market shares offering indirect services on the trans-Pacific route (see Table 3.1 above).

⁴² Based on seat capacity.

⁴³ December 2009 was used for this purpose as by this time Delta would have completed its entry (there are normally some ‘ramp up’ service fluctuations in the first six months of operation).

⁴⁴ Source: Virgin Blue Group Network Planning using APGdata and ACA data. APGdata is a tool produced by Seabury Airline Planning Group which summarises airline schedule data sourced through their website. ACA provides schedule data on slot filings which includes aircraft configuration. See Virgin Blue, Delta *Submission in Support of the Application for Authorisation of the Virgin Blue/Delta Joint Venture* 9 July 2009 <http://www.accc.gov.au/content/index.phtml/itemId/881766/fromItemId/278039/display/application>.

- 4.160. The ACCC considers it likely that most ex Australia passengers flying to Hawaii do not travel beyond Hawaii on the basis that it is primarily a leisure destination and approximately 80% of Jetstar and Hawaiian Air passengers are leisure travellers.
- 4.161. Access to mainland United States from Australia is also available through indirect services over Asia using airlines such as Singapore Airlines and Cathay Pacific. The ACCC notes, however, that the market shares held by such carriers are relatively small in comparison to the direct carriers.
- 4.162. Air New Zealand submits it does not believe its indirect services impose any material constraint on the carriers offering direct services.
- 4.163. Data obtained from the Department of Infrastructure indicates that approximately 70% of leisure travellers travelling to the United States choose to travel on direct services. This suggests that the characteristics of the route are such that leisure passengers have a strong preference for flying on direct services from Australia to mainland United States.
- 4.164. On the basis of the above, the ACCC considers that indirect carriers may pose some, albeit limited, competitive constraint on the applicants.

Barriers to entry

- 4.165. Previous assessments by the ACCC indicate that barriers to entry and expansion are relatively high in the aviation sector.⁴⁵ The ACCC considers that this remains true for the trans-Pacific routes.
- 4.166. Industry reports support the view that barriers to entry in the global passenger airlines industry are high, identifying a number of factors as presenting barriers to entry:
- investment in aircraft, plant, technology, labour and equipment
 - government regulations and licensing requirements
 - establishing a reputation for good performance in relation to safety and timely arrival.⁴⁶
- 4.167. The ACCC considers in particular that the regulatory environment may present a significant barrier for new entrants seeking to provide direct services between Australia and the United States. While the Open Skies Agreement has facilitated the entry of the applicants, it limits the routes to Australian and United States carriers. More specifically, the National Aviation Policy Green Paper states that:

One of the few competitive rights Australia does have is access to the trans-Pacific routes between Australia and the US. The Australian Government has made it clear that it has no

⁴⁵ ACCC determination for applications A30226 and A30227 lodged by Qantas and British Airways in relation to their Joint Service Agreement (2005)

⁴⁶ IBISWorld Industry Report *Global Passenger Airlines* 11 February 2009

immediate plans for additional third country access to the route at this time to allow V Australia a reasonable opportunity to establish its operations.⁴⁷

- 4.168. The ACCC has examined confidential internal documents provided by the applicants which relate to the Open Skies Agreement.
- 4.169. The limitations of the Open Skies Agreement are recognised by interested parties. For example, Tiger Airways submits that
- the limited nature of the Open Skies Agreement ... allows only specific Australian and United States airlines to be granted services between the two countries with other potential carriers, including 5th freedom operators remaining prohibited from operating services on the routes.
- 4.170. The ACCC also considers that the geography of the routes involved represents an additional factor contributing to barriers to entry and expansion. In particular, the distance and travel time involved necessitates the use of specialised long-range aircraft to service the routes. The applicants submit that these types of aircraft are not part of many carriers' fleets due to their specialised nature and the fact that their use is optimised on long-haul routes such as those across the Pacific.
- 4.171. In addition, possible limitations in the availability of domestic feeds may constitute another factor deterring expansion by other airlines in relation to the provision of direct services between Australia and mainland United States. In this regard, Air NZ submits that:
- Air NZ is not a potential entrant on the SYD-LAX route: as the applicants note, feed is important to support trans-Pacific services and Air New Zealand has no domestic Australian or US operations, no meaningful domestic Australian feed and is reliant on other carriers to feed its outbound US services.
- 4.172. In addition, the ACCC notes that there are no examples of sustained successful entry for direct services on the trans-Pacific routes in the past five years.
- 4.173. On the basis of the factors discussed above, the ACCC is of the view that barriers to entry on the trans-Pacific routes are relatively high.

Virgin Blue's role as a vigorous and effective competitor

- 4.174. The ACCC's inquiries suggest that Virgin Blue plays a role in driving price competition and innovation in the market.
- 4.175. With regard to airfares, the ACCC notes that while the Global Financial Crisis has impacted on travel demand and prices, the entry of Virgin Blue into the trans-Pacific route in February 2009 (when the global financial crisis was well advanced), coincided with a significant reduction in fares. In a press release dated 8 April 2009, Virgin Blue stated fares on the route had dropped 54% as a result of new competition and a new entrant with V Australia being a catalyst for more affordable air fares:

⁴⁷ The Department of Infrastructure, Transport, Regional Development and Local Government, *National Aviation Policy Green Paper, Flight Path to the Future, December 2008*, p 106. Accessed 31 August 2009: <http://www.infrastructure.gov.au>

In the past few weeks since its inception, V Australia has received resounding support both for its in-flight services, products and people, as well as the affordable fares it introduced to the market. Compared to the same time last year, trans-Pacific fares have dropped 54%, a direct result of competition and a new player in the game.

Virgin Blue Group Chief Executive, Brett Godfrey said, “We are again pleased to be a catalyst for more affordable fares on this previously duopolistic market.

Already we are aware of people who have now flown V Australia between the US and Australia, be it for business or pleasure, who up until now, weren’t able to do so and of that, we are very proud.

...The flight offers seamless connections with V Australia’s interline partner Delta Airlines to over 25 destinations in North America, including a quick and easy connection from LA to New York’s JFK airport.

V Australia BNE-LAX fares start from \$999 for a return economy flight, \$1777 for a Premium Economy return flight and \$5999 for a Business Class return flight.⁴⁸

- 4.176. Table 3.3 below sets out a sample of return airfares on the Sydney – Los Angeles route as obtained from Webjet Limited through their website: <http://www.webjet.com.au/>. Webjet is a company listed on the Australian Stock Exchange and a travel agent and licensed member of The International Air Transport Association (**IATA**). The prices set out in the table below suggests that Virgin Blue prices aggressively, with its available airfares on average, appearing lower than Qantas, United and Delta airfares for economy class fares.

⁴⁸ Virgin Blue press release, *V AUSTRALIA LAUNCHES SECOND TRANS-PACIFIC ROUTE, Inaugural flight takes off from “Bris Vegas” to Los Angeles*, Wednesday 8 April 2009
http://www.virginblue.com.au/AboutUs/Media/NewsandPressReleases/P_008372.htm

Table 3.3 Quoted lowest economy class air fares on SYD/LAX route for next 6 months⁴⁹

Lowest return fare available from Webjet on 23 September 2009, for travel on the 23 rd of the month indicated with return 8 days later					
Departure month	V Australia	Delta	United	Qantas	Cheapest other
Oct 2009	\$1,236	\$1,118	\$1,382	\$1,680	\$1,382(1)
Nov 2009	\$1,136	\$1,692	\$2,528	\$1,680	\$1,382(1)
Dec 2009	\$1,770	\$2,622	\$2,622	\$2,656	\$2,408(1)
Jan 2010	\$1,222	\$1,264	\$2,116	\$1,608	\$1,382(1)
Feb 2010	\$1,290	\$2,454	\$1,488	\$1,456	\$1,382(1)
Mar 2010	\$1,364	\$2,266	\$2,266	\$2,300	\$1,382(1)
<i>Average</i>	<i>\$1,336</i>	<i>\$1,903</i>	<i>\$2,067</i>	<i>\$1,897</i>	<i>\$1,553</i>

(1) Korean Air

- 4.177. Tables 3.4 and 3.5 below sets out a comparison of airfares on a one way basis for each of the Sydney-Los Angeles and Los Angeles – Sydney routes as obtained from the Webjet and Expedia websites (<http://www.expedia.com.au/>) respectively. The Expedia website was used for one way Los Angeles – Sydney fares as these were not obtainable from Webjet. Expedia.com.au is operated by Expedia, Inc., an online travel company based in the United States. The tables below similarly show available on- average economy class one-way airfares for Virgin Blue as being lower than that of Qantas, United and Delta.

⁴⁹ Source: <http://www.webjet.com.au/>

Table 3.4 Quoted lowest one way economy class air fares on SYD/LAX route for next 6 months.⁵⁰

Lowest fare available from webjet.com.au on 19 October 2009 for travel on the 23 rd of the month from Sydney to Los Angeles (Australian dollars)					
Departure month	V Australia	Delta	United	Qantas	Cheapest other
Nov 2009	\$829	\$1,453	\$1,732	\$1,632	\$1,556(1)
Dec 2009	\$1,293	\$1,954	\$2,175	\$2,264	\$1,556(1)
Jan 2010	\$699	\$1,636	\$1,917	\$1,795	\$983(2)
Feb 2010	\$699	\$1,576	\$1,732	\$1,762	\$675(2)
Mar 2010	\$699	\$1,453	\$1,732	\$1,752	\$675(2)
Apr 2009	\$799	\$1,636	\$1,917	\$1,731	\$1,337(2)
<i>Average</i>	\$836	\$1,618	\$1,868	\$1,823	\$1,130

(1) Korean Air; (2) Air Pacific

⁵⁰ Source: <http://www.webjet.com.au/>

Table 3.5 Quoted lowest one way economy class air fares on LAX/ SYD route for next 6 months.⁵¹

Lowest fare available from expedia.com on 19 October 2009 for travel on the 23 rd of the month from Los Angeles to Sydney (United States dollars)					
Departure month	V Australia	Delta	United	Qantas	Cheapest other
Nov 2009	\$524	\$2,203	\$1,700	\$1,693	\$921(1)
Dec 2009	\$550	\$2,203	\$1,703	\$1,687	\$1,361(2)
Jan 2010	\$1978	\$2,203	\$1,703	\$1,693	\$832(3)
Feb 2010	\$468	\$2,203	\$1,463	\$1,693	\$742(3)
Mar 2010	\$468	\$2,203	\$1,703	\$1,693	\$742(3)
Apr 2009	\$474	\$2,203	\$1,111	\$1,693	\$754(4)_
<i>Average</i>	\$743	\$2,203	\$1,564	\$1,692	\$892

(1) China Airlines (2) JAL (3) Air Pacific (4) Air NZ

4.178. The ACCC recognises that the airfares appearing on sites such as Webjet and Expedia may not reflect all levels of discounting, fare matching, promotions, conditions and restrictions attached to fares, and fares available over different periods taking into account the process of yield management. However, the ACCC also considers that the airfare data available from Webjet do represent an important indicator of airline pricing – that is, the lowest price airfares made available to individual consumers seeking at a point in time to book travel through the Webjet website where the travel would occur over the next six months.

4.179. Information available to the ACCC also suggests that Virgin Blue is an innovator in the United States market. Examples of Virgin Blue’s innovative behaviour are:

- Virgin Blue introduced for the first time affordable unrestricted fares in both directions on the trans-Pacific routes. In its press release of 20 July 2009, Virgin Blue noted that while one-way fares are not new to the arena, V Australia is the first airline to offer one-way fares across all of its fare brackets to the United States, including its lowest lead-in fares. The press release noted that V Australia offered one-way International Economy tickets from just \$579, which was approximately 70% lower than the lowest one-way fare offered by competitor airlines at that time.⁵²

⁵¹ Source: <http://www.expedia.com.au/>

⁵² http://www.virginblue.com.au/AboutUs/Media/NewsandPressReleases/P_009232.htm

- Virgin Blue has engaged in heavy promotional activities for its services on the trans-Pacific route. In particular, it appears to have been the first in Australia to market business class fares as an advance purchase.⁵³
- Since commencing operations in February 2009, V Australia has won two awards placing it as best in their categories, firstly an in-flight entertainment award (21st Annual World Airline Entertainment Association Avion Awards) and 'Best Business Class' in the e-Travel Blackboard 2009 Readers Choice Awards.⁵⁴

4.180. The ACCC considers that on the basis of the factors noted above, Virgin Blue is a vigorous and effective competitor in the passenger transport market for leisure travellers on the trans-Pacific routes.

Impact of the Joint Venture

4.181. The information available suggests that Virgin Blue is a vigorous and effective competitor in this market, both in terms of price as well as innovation. The ACCC also notes that barriers to entry and expansion on the trans-Pacific routes are high.

4.182. The important question to be answered therefore is whether or not V Australia will continue to be a vigorous and effective competitor in the market when operating in tandem with Delta under the Joint Venture.

4.183. While there is a risk that V Australia's influence as a vigorous and effective competitor may reduce, especially when V Australia's partner is a traditional full service airline, the ACCC believes that the history of Virgin Blue, and more recently V Australia, suggests that it is unlikely that V Australia would depart substantially from its current operating model. The ACCC notes in this respect that Delta has entered the route with new state of the art aircraft that are compatible with V Australia's operating model and that network airlines in the US have shown a preparedness to adapt their operations as a result of strong competition from low cost carriers in their domestic market.

4.184. The ACCC also considers that the Joint Venture is likely to enhance the ability of V Australia and Delta to compete vigorously and effectively against the incumbent carriers Qantas and United. The ACCC notes in particular that even after the joint venture Qantas will hold a 50% share of capacity operating in the direct services segment of the route.

Market for business travellers

Market concentration

4.185. As noted above, the ACCC considers that the appropriate geographic dimension for examining the impact on competition in the market for business travellers is a city-pairs market. Accordingly, the competitors in this market are carriers offering the most direct services between city pairs in Australia and the United States.

⁵³ <http://www.theaustralian.news.com.au/business/story/0,28124,25025067-36418,00.html>

⁵⁴ http://www.virginblue.com.au/AboutUs/Media/NewsandPressReleases/P_010482.htm

4.186. Due to the limited historical data to calculate market shares, for the purpose of analysis, the applicants have submitted projected capacity shares⁵⁵ of each carrier for the period beginning December 2009⁵⁶, for direct services to mainland United States on a city-pair basis. Table 3.4 below sets out projected capacity shares as submitted by the applicants.

Table 3.6 – projected capacity shares on a city-pair basis⁵⁷

Projected direct flight capacity share (city-pair) as at December 2009				
Airline	Sydney – Los Angeles	Sydney – San Francisco	Melbourne – Los Angeles	Brisbane – Los Angeles
Qantas	43%	37%	67%	70%
United	21%	63%	0%	0%
Virgin Blue	20%	0%	33%	30%
Delta	16%	0%	0%	0%
Total	100%	100%	100%	100%
Virgin/Delta combined	36%		33%	30%

4.187. Assuming similar loads are achieved by the airlines, Table 3.6 indicates that on a city-pairs basis, a combined Virgin Blue and Delta will have a market share of 36% on the Sydney – Los Angeles route compared with Qantas at 43% and United at 21%.

4.188. Market concentration on the other routes will either remain unchanged, or if Delta decides to enter, will increase the size of a combined Virgin Blue and Delta.

4.189. The overlap of the applicants’ operations with respect to the provision of passenger transport services for business travellers therefore arises on the Sydney – Los Angeles route.

⁵⁵ Based on seat capacity.

⁵⁶ December 2009 was used for this purpose as by this time Delta would have completed its entry (there are normally some ‘ramp up’ service fluctuations in the first six months of operation).

⁵⁷ Source: Virgin Blue Group Network Planning using APGdata and ACA data. See Virgin Blue, *Delta Submission in Support of the Application for Authorisation of the Virgin Blue/Delta Joint Venture* 9 July 2009 <http://www.accc.gov.au/content/index.php/ml/itemId/881766/fromItemId/278039/display/application>.

Barriers to entry

4.190. The ACCC considers that the conclusions drawn at paragraphs 4.165 - 4.173 above with respect to barriers to entry similarly apply to the passenger transport market for business travellers.

Virgin Blue's role as a vigorous and effective competitor

4.191. Similarly to the market for leisure passengers, the ACCC considers that Virgin Blue is a vigorous and effective competitor in the market for business travellers.

4.192. Table 3.7 below sets out a sample of business class airfares on the Sydney – Los Angeles route as obtained from Webjet through their website: <http://www.webjet.com.au/>. The prices set out in the table below suggests that Virgin Blue's available airfares on average appear lower than Qantas, United and Delta fares.

Table 3.7 Quoted lowest business class air fares on Sydney-Los Angeles route for next 6 months⁵⁸

Lowest return fare available from Webjet on 24 September 2009, for travel on the 23 rd of the month indicated with return 8 days later					
Departure month	V Australia	Delta	United	Qantas	Cheapest other
Oct 2009	\$6,188	\$6,322	\$13,157(1)	\$9,322	\$6,512(2)
Nov 2009	\$6,264	\$9,450	\$6,323(3)	\$10,604	\$5,756(4)
Dec 2009	\$6,440	\$6,322	\$6,586	\$10,090	\$5,756(4)
Jan 2010	\$6,440	\$6,322	\$6,586	\$6,850	\$6,512(2)
Feb 2010	\$6,440	\$6,422	\$12,890	\$10,598	\$6,512(2)
Mar 2010	\$6,440	\$6,422	\$6,586	\$10,604	\$6,512(2)
Average	\$6,369	\$6,877	\$8,688	\$9,678	\$6,260

(1) No price available on Webjet. Price sourced from United Airlines website which indicated only one seat left for sale: <http://www.unitedairlines.com.au/core/english/index.html>. (2) Korean Air. (3) No price on Webjet. Price sourced from United Airlines website. (4) Asiana.

4.193. The ACCC considers that Virgin Blue is also an innovator in the market for business travellers, noting for example the awards it has won for its business class services and the introduction of advance purchase business class fares (see paragraph 4.179 above).

⁵⁸ Source: <http://www.webjet.com.au/>

Impact of the Joint Venture

- 4.194. Similar to the conclusions drawn with respect to the market for leisure travellers, the ACCC considers that the Joint Venture is unlikely to lead to a reduction in price and service competition in the market for business travellers on the Sydney-Los Angeles route.
- 4.195. The ACCC similarly also considers that the Joint Venture may enhance the ability of the applicants to compete more effectively against Qantas and United in this market.

Market for freight transport services between Australia and the United States

- 4.196. The applicants' submission to the ACCC indicates that the applicants are currently small suppliers of freight services between Australia and the United States. As indicated above, V Australia only accounts for 4% market share. No market share figures have been provided for Delta.
- 4.197. The ACCC notes that there are a number of other competitors in the market for freight transport including major players such as Qantas, United, FedEx, and United Parcel Services. The ACCC considers that the existence of other competitors in the market is likely to pose a competitive constraint on the applicants.

ACCC conclusion on public detriment

- 4.198. On the basis of currently available information, the ACCC considers that it is unlikely that the Joint Venture will result in any significant diminution of competition in the respective markets for international passenger transport for (i) trans-Pacific leisure travellers; and (ii) business travellers on the Sydney – Los Angeles route:
- on the basis of material before it there is no reason to believe that the strong competition on price and service currently evident in the market from the entry of V Australia and Delta will not continue under the Joint Venture;
 - the Joint Venture is likely to enhance the ability of the applicants to compete more vigorously and effectively against the more established operators on the route.
- 4.199. The ACCC considers that the Joint Venture is unlikely to impact the market for freight transport services between Australia and the United States given the competitive constraint likely to be posed by the various other competitors in the market.

Balance of public benefit and detriment

- 4.200. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the Joint Venture is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.201. In the context of applying the net public benefit test in section 90(8)⁵⁹ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.⁶⁰
- 4.202. For the reasons outlined in this chapter the ACCC considers that the Joint Venture is likely to result in some public benefits in the form of:
- more efficient and effective integration of the applicants' trans-Pacific services with their Australian and United States domestic networks which leads to route connectivity benefits for consumers and more sustainable competition on the routes
 - enhanced route coverage and schedules and
 - potential cost savings which are likely to be passed on to consumers as a result of competition on the trans-Pacific routes.
- 4.203. While the ACCC considers that these public benefits are a likely consequence of the Joint Venture, there is limited empirical information on the extent of the likely benefits in this case. As noted earlier, the extent to which the public benefits in this matter are realised depends on the conduct of the applicants under the Joint Venture.
- 4.204. If the benefits claimed by the applicants are not realised then the ACCC would consider this as a basis for reviewing the authorisation. In addition, should the applicants seek re-authorisation of the Joint Venture then the ACCC would look closely at the extent to which these benefits had been realised during the period of authorisation.
- 4.205. On the basis of currently available information, the ACCC considers that it is unlikely that the Joint Venture will result in any significant diminution of competition in the respective markets for international passenger transport for (i) trans-pacific leisure travellers; and (ii) business travellers on the Sydney – Los Angeles route:
- on the basis of material before it there is no reason to believe that the strong competition on price and service currently evident in the market from the entry of V Australia and Delta will not continue under the Joint Venture
 - the Joint Venture is likely to enhance the ability of the applicants to compete more vigorously and effectively against the more established operators on the route.

⁵⁹ 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.

⁶⁰ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

4.206. On balance, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment. The ACCC is therefore satisfied that the relevant statutory tests are met for authorisation to be granted.

5. Draft determination

The application

- 5.1. On 9 July 2009 and 24 July 2009 Virgin Blue and Delta lodged applications for authorisation A91151-A91152 and A91172-A91173 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91151 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act to:
- make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.3. Application A91152 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act 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.
- 5.4. Application A91172 was made using Form A, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1A) of the Act to:
- make and give effect to a provision of a contact, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 5.5. Application A91173 was made using Form B, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsection 88 (1A) of the Act to:
- make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 5.6. In particular, Virgin Blue and Delta seek authorisation for a joint venture agreement in relation to air passenger and freight carriage services between Australia and mainland United States.
- 5.7. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

- 5.8. For the reasons outlined in Chapter 4 of this draft determination, the ACCC is satisfied that the conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

- 5.9. The ACCC is satisfied that the conduct for which authorisation is sought are likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 5.10. The ACCC therefore **proposes to grant** authorisation to applications A91151-A91152 and A91172-A91173 for three years.

Further submissions

- 5.11. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.
- 5.12. As noted above, if the benefits claimed by the applicants are not realised then the ACCC would consider this as a basis for reviewing the authorisation. In addition, should the applicants seek re-authorisation of the Joint Venture then the ACCC would look closely at the extent to which these benefits had been realised during the period of authorisation.

Attachment A — the authorisation process

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.

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 anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

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.

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

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.

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.

Attachment B — chronology of ACCC assessment for applications A91151, A91152, A91172 and A91173

The following table provides a chronology of significant dates in the consideration of the applications by Virgin Blue and Delta.

DATE	ACTION
9 July 2009	Applications for authorisation A91151 & A91152 lodged with the ACCC.
24 July 2009	Applications for authorisation A91172 & A91173 lodged with the ACCC.
5 August 2009	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
21 August 2009	Submission received from the applicants in response to interested party submissions.
13 August 2009	The ACCC requests further information from the applicants.
28 August 2009	The applicants provide additional information.
2 September 2009	
10 September 2009	The ACCC requests further information from the applicants.
21 September 2009	The applicants provide additional information.
30 September 2009	The applicants provide additional information.
7 October 2009	The applicants provide additional information.
9 October 2009	Meeting between the ACCC and the applicants.
16 October 2009	The applicants provide additional information.
2 November 2009	Draft determination issued.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

- (1) The Commission shall, in respect of an application for an authorization:
 - (a) make a determination in writing granting such authorization as it considers appropriate; or
 - (b) make a determination in writing dismissing the application.
- (2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.
- (5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision would result, or be likely to result, in a benefit to the public; and
 - (b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:
 - (i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and
 - (ii) the provision were given effect to.
- (5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:
 - (a) that the provision has resulted, or is likely to result, in a benefit to the public; and
 - (b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.
- (6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

- (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;
- (b) the proposed covenant were given, and were complied with; or
- (c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

- (a) make a determination granting:
 - (i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - (ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - (iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - (iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- (b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

- (a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):
 - (i) a significant increase in the real value of exports;

- (ii) a significant substitution of domestic products for imported goods; and
- (b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. 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 but the test under section 90(8) is not so limited.⁶¹

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

[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. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.⁶²

Consequently, when applying either test, the ACCC can take most, if not all, public 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.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.⁶³

Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future⁶⁴

⁶¹ *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.

⁶² *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.

⁶³ Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.⁶⁵

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation⁶⁶. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.⁶⁷ The Act limits applications for minor variation to applications for:

... a single variation that does not involve a material change in the effect of the authorisation.⁶⁸

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.⁶⁹ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.⁷⁰

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.⁷¹ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.⁷²

⁶⁴ Section 88(10).

⁶⁵ Section 88(6).

⁶⁶ Section 90(10A)

⁶⁷ Subsection 91A(1)

⁶⁸ Subsection 87ZD(1).

⁶⁹ Subsection 91B(1)

⁷⁰ Subsection 91B(3)

⁷¹ Subsection 91C(1)

⁷² Subsection 91C(3)