



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation and substitution of an authorisation

lodged by

Board of Airline Representatives of Australia Inc

in respect of

**collective bargaining on behalf of the Board of Airline Representatives of
Australia Inc member international airlines with operators of international
airports and other airport service providers**

Date: 24 March 2010

Authorisation no.: A91200

Public Register no: C2009/1967

Commissioners: Samuel
Kell
Schaper
Court
Walker
Willett

Summary

The ACCC proposes to grant authorisation to the Board of Airline Representatives of Australia Inc (BARA) to engage in collective negotiations, on behalf of its member international airlines from time to time, with the operators of the major international airports and Gold Coast Airport, the Bureau of Meteorology and Airservices Australia.

The ACCC proposes to grant authorisation for five years.

On 26 November 2009 the Board of Airline Representatives of Australia Inc (BARA) lodged application A91200 for revocation and substitution of A30232 with the ACCC (application for re-authorisation). Previous authorisation A30232 was granted on 7 July 2005 and will expire in July 2010.

BARA seeks to continue collectively negotiating on behalf of its member international airlines with the providers of essential airport services.

The ACCC considers that the collective negotiations with the operators of the major international airports, Gold Coast Airport, the Bureau of Meteorology and Airservices Australia, are likely to deliver public benefits.

In particular, the ACCC considers that the arrangements would give international airlines an improved bargaining position and improved input into pricing and non-pricing arrangements. The arrangements are also likely to continue to provide the potential for transaction cost savings for both the identified providers of essential airport services and the airlines, and a small benefit by way of more efficient infrastructure investment.

The ACCC considers that, on balance, the potential anti-competitive detriment that may result from the collective bargaining arrangements is likely to be mitigated by the following factors:

- the level of competition between airlines for essential airport services is likely to remain low
- participation in the collective bargaining arrangement is voluntary
- the proposed conduct does not involve any collective boycott activity.

The ACCC considers that the identity of other potential providers of essential airport services may affect the competitive impact of the collective negotiations. The ACCC therefore does not propose to extend authorisation with respect to such other potential providers of essential airport services that have not been identified in BARA's application.

The ACCC will now seek further submissions from interested parties on 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.

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List of abbreviations

ACCC	Australian Competition and Consumer Commission
ARFF	Aviation Rescue and Fire Fighting Services
BAC	Brisbane Airport Corporation Pty Ltd
BARA	Board of Airline Representatives of Australia Inc
BITRE	Bureau of Infrastructure, Transport and Regional Economics
BoM	Bureau of Meteorology
CUTE	Common user terminal equipment services
DITRDLG	Department of Infrastructure, Transport, Regional Development and Local Government
IATA	International Air Transport Association
LCC	Low Cost Carriers
PC	Productivity Commission
SACL	Sydney Airport Corporation Limited
QAL	Queensland Airports Limited
The Act	Trade Practices Act 1974
The Tribunal	The Australian Competition Tribunal

1. The application

- 1.1. On 26 November 2009 the Board of Airline Representatives of Australia Inc (BARA) lodged application A91200 for revocation and substitution of A30232 with the ACCC (application for re-authorisation).
- 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.
- 1.3. 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 this application is contained in Attachment B.
- 1.4. The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution. In certain circumstances, the ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place. In order for the ACCC to re-authorise conduct, the ACCC must consider the substitute authorisation in the same manner as the standard authorisation process.
- 1.5. Application A91200 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
 - 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).
- 1.6. In particular, BARA seeks to negotiate on behalf of BARA's member airlines from time to time with airport operators and providers of other essential airport services at international airports, and agree on the terms and conditions of acquisition of such services, including prices, on an airport by airport basis.
- 1.7. BARA seeks re-authorisation to represent the interests of its member airlines operating scheduled international air services. The application does not cover domestic airlines or the domestic operations of international airlines.
- 1.8. BARA seeks to collectively negotiate with the providers of essential airport services at all major international airports and Gold Coast Airport. The major international airports are Adelaide, Brisbane, Cairns, Darwin, Melbourne, Perth and Sydney. While recognising that the airport operators, Airservices Australia and the Bureau of Meteorology (BoM) will provide the majority of services, BARA submits that the providers of essential airport services can potentially vary through time.

- 1.9. BARA requests that re-authorisation extend to negotiations with other potential providers of essential airport services that may emerge in the future. BARA submits that this approach is consistent with the terms of subsections 88(10) and (13) of the Act.
- 1.10. Essential airport services are generally understood to be those essential to conduct international passengers and freight services at international airports and include:
- aircraft related services and facilities
 - passenger related services and facilities
 - staff related access services
 - essential office and operational accommodation for airlines
 - common user terminal equipment (CUTE) services
 - airline communications systems and services
 - air traffic control services
 - aviation rescue and fire fighting services (ARFF) and
 - aviation weather services.
- 1.11. BARA notes that it conducts negotiations in an open and transparent manner and has protocols for maintaining confidentiality of commercially sensitive information obtained from airport operators. BARA does not seek commercially sensitive information from its member airlines.
- 1.12. Following the conclusion of negotiations, BARA advises its members that the agreement with the airport operator is in a form that it can commend to airlines for their consideration.
- 1.13. BARA submits that participation in collective negotiations is voluntary and BARA is not seeking authorisation for collective boycott activity. BARA submits that the providers of essential airport services are not required to negotiate through BARA and BARA members are not bound by the terms and conditions negotiated by BARA.
- 1.14. BARA seeks re-authorisation for a period of five years.

2. Background to the application

The applicant

- 2.1. BARA is an incorporated association and is the peak industry representative organisation for international airlines in Australia.
- 2.2. BARA represents international airlines and their interests and currently has 35 members. A list of current members is provided at **Attachment D**.
- 2.3. Under its rules, BARA permits any airline which operates scheduled air services to and from Australia (on-line carriers) or which carries on business in Australia but does not operate scheduled air services to or within Australia (an off-line carrier) to become a member of BARA.
- 2.4. BARA does not represent the interests of Australian domestic airlines in relation to the acquisition of services from third parties. However, BARA does represent the interests of international airlines in relation to services which are also used by domestic airlines – for example runways, taxiways and services provided by Airservices Australia and the BoM.
- 2.5. BARA's mission statement is:

to provide a unified voice for airlines in the promotion of the necessary commercial, legislative, administrative, social and environmental framework to facilitate the further development of a viable, efficient and safe aviation industry in Australia.

To achieve this, BARA provides a forum for member airlines to deal with common interests and issues, and represents the interests of member airlines to governments and others interested in the aviation industry.
- 2.6. BARA regularly negotiates on behalf of its member airlines and provides submissions to government, regulatory authorities and other stakeholders on behalf of its members. However, BARA does not have any actual or ostensible authority to enter into any agreements so as to bind its members.
- 2.7. BARA's members form its general assembly. The general assembly is managed by an elected executive committee, which consists of 13 members. BARA employs a full-time professional executive director who is responsible for the day-to-day affairs of BARA and who reports to the executive committee. BARA also has specialist committees dealing with airport and government charges, industrial relations, infrastructure and security matters.

The aviation industry

Overview of international aviation

- 2.8. During November 2009, fifty-one international scheduled airlines operated services to/from Australia (this includes five dedicated freight airlines but excludes airlines operating only via code share¹ arrangements).²
- 2.9. For the month of November 2009 Qantas Airways had the largest share of international passenger traffic carried to/from Australia (19.8%) followed by Singapore Airlines (10.4%), Jetstar (8.5%), Emirates (8.0%) and Air New Zealand (7.8%).³
- 2.10. Low cost carriers AirAsia X, Indonesia AirAsia, Jetstar, Pacific Blue, Polynesian Blue and Tiger Airways accounted for 18.4% of total international passenger traffic to/from Australia in November 2009, compared to 12.6% in November 2008.⁴
- 2.11. International scheduled freight traffic in November 2009 increased by 8.3% over November 2008 to 67 479 tonnes.⁵

Airports economic regulatory framework

Evolution of regulation

- 2.12. Before 1997, the Australian Government owned 22 airports which were operated as a network by the Federal Airport Corporation. In 1997 and 1998, the Australian government privatised 17 of those 22 airports.
- 2.13. In 1997, the Government established a regulatory framework to apply to private airport operators. The ACCC was given responsibility for prices surveillance of aeronautical services supplied by Adelaide, Alice Springs, Brisbane, Canberra, Coolangatta, Darwin, Hobart, Launceston, Melbourne, Perth, Sydney and Townsville airports. The ACCC's role was specified in the *Prices Surveillance Act 1983* (which has since been repealed and replaced with Part VIIA of the *Trade Practices Act 1974*) and the *Airports Act 1996*. The ACCC's role involved administering price caps, assessment of price notifications, price monitoring and quality of service monitoring. The ACCC also had a price monitoring role in relation to aeronautical related services.
- 2.14. In 2002, the Productivity Commission (PC) inquired into price regulation of airport services and recommended that price notification and price caps be discontinued for all airports (with the exception of regional air services at Sydney Airport). The PC instead recommended a 'light-handed' price monitoring approach to regulating airport services.

1 Code share arrangements refers to arrangements involving the assignment of one airline's designator code to a flight operated by another airline

² Bureau of Infrastructure, Transport and Regional Economics (BITRE), 2010, *Aviation Statistics: International Scheduled Air Transport November 2009*, BITRE, Canberra ACT.

³ Bureau of Infrastructure, Transport and Regional Economics (BITRE), 2010, *Aviation Statistics: International Scheduled Air Transport November 2009*, BITRE, Canberra ACT.

⁴ Bureau of Infrastructure, Transport and Regional Economics (BITRE), 2010, *Aviation Statistics: International Scheduled Air Transport November 2009*, BITRE, Canberra ACT.

⁵ Bureau of Infrastructure, Transport and Regional Economics (BITRE), 2010, *Aviation Statistics: International Scheduled Air Transport November 2009*, BITRE, Canberra ACT.

The Government agreed with the PC's recommendation and introduced price monitoring for Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth and Sydney airports for a five-year period, with a review of the arrangements to be conducted at the end of that period. The move from a price-regulation regime to a monitoring regime was intended to facilitate investment and innovation, while retaining a constraint on the exercise of market power by the airports in their dealings with airlines and other customers.

- 2.15. In 2002, the government also decided that airport-specific access regulation would not continue to apply although airports would be subject to the general access regime contained in Part IIIA of the TPA. When a facility is declared under Part IIIA and an access seeker is unable to negotiate a satisfactory commercial agreement for terms of access, the ACCC may be asked to arbitrate. In December 2005, the Australian Competition Tribunal ruled that domestic airside services (e.g. the use of taxiways, parking aprons and other associated facilities) at Sydney Airport be declared under Part IIIA for five years (this declaration applies to domestic airside services only and expires in December 2010).

Current regulatory arrangements

- 2.16. The ACCC is required to monitor the prices, costs and profits of Adelaide, Brisbane, Melbourne, Perth and Sydney airports with regard to the supply of aeronautical services and facilities.⁶
- 2.17. On 16 December 2009, the Government released its National Aviation Policy White Paper. The paper outlines the policy settings and long-term approach the Government has taken to achieve its goals for the aviation industry. The document includes a number of proposals to the economic regulation of Australian airports:
- Continuation of the existing airport monitoring regime for Adelaide, Brisbane, Melbourne, Perth and Sydney airports, with a full review by the PC in 2012;
 - Introduction of a self-administered monitoring regime for other airports, to initially apply to Canberra, Darwin, Gold Coast and Hobart airports. Additionally, although not required by legislation, Cairns Airport will also be encouraged to participate in the scheme; and
 - Encouraging self-reporting for domestic terminal leases.
- 2.18. Declaration 91 under s. 95X of the TPA declares the provision of aeronautical services and facilities to regional air services by Sydney airport to be notified services. This requires Sydney Airport to notify the ACCC if it intends to increase the price of such services.
- 2.19. Apart from regional air services provided by Sydney Airport, airports are not subject to price caps and are not required to notify the ACCC before increasing prices.

⁶ This role is pursuant to Direction 29 of s. 95ZF of the Act.

- 2.20. Part 8 of the Airports Act provides for the ACCC to monitor quality of service at certain leased airports.
- 2.21. The ACCC issues an annual report covering prices monitoring, financial reporting and quality of service monitoring for the five major airports.

Overview of Australia's international airports

- 2.22. The Department of Infrastructure, Transport, Regional Development and Local Government (DITRD LG) categorises each international airport according to the facilities available. The following airports are designated international airports:
- Major International: Adelaide, Brisbane, Cairns, Darwin, Melbourne, Perth, Sydney
 - Restricted Use International: Avalon, Broome, Canberra, Coffs Harbour, Gold Coast, Hobart, Learmonth, Lord Howe Island, Newcastle, Port Hedland, Townsville
 - Alternate International: Avalon, Canberra, Coffs Harbour, Gold Coast, Learmonth, Port Hedland, Townsville, Alice Springs, Kalgoorlie, Launceston, Rockhampton, Tindal
 - International Non-Scheduled Flight: Horn Island
 - External Territory International: Norfolk Island, Christmas Island, Cocos (Keeling) Island.
- 2.23. BARA has sought authorisation to extend to all the major international airports and Gold Coast Airport.

Table 2.1 International Passenger Traffic Through Selected Australian International Airports⁷

Airport	Percentage of Passengers for year ended November 2009
Sydney	43.6%
Melbourne	20.9%
Brisbane	17%
Perth	11.3%
Gold Coast/Coolangatta	2.5%

⁷ Bureau of Infrastructure, Transport and Regional Economics (BITRE), 2010, *Aviation Statistics: International Scheduled Air Transport November 2009*, BITRE, Canberra ACT.

Adelaide	2.1%
Cairns	1.7%
Darwin	0.8%

2.24. With regard to freight traffic for November 2009, BITRE reports that Sydney airport accounted for 50.0% of air freight traffic, followed by Melbourne (26.3%), Brisbane (11.3%) and Perth (8.1%).⁸

Airservices Australia

2.25. Airservices Australia is a statutory monopoly established under the *Air Services Act 1995*. It is a commercial authority responsible for a range of functions, including providing air traffic control management and related airside services to the aviation industry.

2.26. Airservices Australia is a significant organisation within the Australian aviation industry – in 2007-2008 airways revenue was \$707.3 million.⁹

2.27. Airservices Australia provides the following aviation services:

- airport rescue and fire-fighting (ARFF)
- terminal navigation – air traffic control services provided at an airport to aircraft in close proximity to that airport and
- en-route navigation – air traffic control services provided to aircraft travelling through Australian air space but not within terminal navigation range.

2.28. Airservices Australia is required to notify the ACCC of proposed increases to the prices of these declared services.

2.29. In 2004, Airservices Australia proposed a long-term, five year approach to pricing arrangements. The proposal contained in the price notification was developed following consultations with major airlines and representative bodies, including Qantas, Virgin Blue, BARA and International Air Transport Association (IATA). The ACCC did not object to price increases proposed by Airservices Australia and prices being maintained at the current levels for ARFF services. BARA's submission indicates that Airservices Australia is currently consulting with airlines about new prices for its services (see paragraph 4.23 below).

Bureau of Meteorology

2.30. The Bureau of Meteorology (BoM) is Australia's national weather, climate and water agency. The BoM provides observational, meteorological, hydrological and

⁸ Bureau of Infrastructure, Transport and Regional Economics (BITRE), 2010, *Aviation Statistics: International Scheduled Air Transport November 2009*, BITRE, Canberra ACT.

⁹ Airservices Australia, Annual Report 2007-2008, p. 33.

oceanographic services and undertakes research into science and environment related issues in support of its operations and services.

Previous authorisation A30232

2.31. On 7 July 2005 the ACCC granted authorisation to BARA for five years:

- to allow BARA, on behalf of itself and its member international airlines, to negotiate with airport operators; the BoM; and Airservices Australia in relation to the provision of airport services at designated international airports, and agree on terms and conditions of acquisition of those services, including price, on an airport by airport basis; and
- for BARA and its member international airlines to enter into and give effect to the contracts, arrangements or understandings between BARA, its members and the operators of international airports; the BoM; and Airservices Australia for the provision of airport services at designated international airports on an airport by airport basis.

2.32. BARA is seeking re-authorisation for the same substantive conduct as previously authorised except that:

- BARA seeks to extend negotiations to include Gold Coast Airport
- there has been some change to the description of essential airport services, including the addition of ‘airlines communications systems’ and
- BARA seeks flexibility under the authorisation to negotiate on behalf of its member airlines with parties not already identified in the application, but who may potentially become providers of essential airport services in the future.

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.

BARA's supporting submission

- 3.2. Broadly, BARA submits that the proposed collective bargaining arrangements will result in more efficient capital, price and service quality outcomes. Moreover, BARA submits that re-authorisation of the collective bargaining arrangements will benefit not only airports and airlines, but also the public by virtue of more economically efficient management and utilisation of essential airport services.
- 3.3. BARA submits that the proposed collective bargaining arrangements are unlikely to result in a public detriment because participation is voluntary by all parties and authorisation is not sought for boycott activities.
- 3.4. BARA notes that since the collective bargaining arrangements were granted authorisation in 2005, it has engaged in numerous negotiations over the provision and pricing of essential airport services. BARA submits that the intended benefits of the authorisation are being realised.

Interested party submissions

- 3.5. The ACCC sought submissions from 92 interested parties potentially affected by the application, including airports, airlines, Airservices Australia, the BoM, government departments and aviation industry associations.
- 3.6. A brief summary of the public submissions received from interested parties follows. The submissions can be broadly grouped into three categories: those that support re-authorisation of the conduct; those that neither support nor oppose re-authorisation of the conduct; and those that oppose re-authorisation of the conduct.

Submissions supporting re-authorisation

- Each of **United Airlines, South African Airways, Etihad Airways** and **Air Pacific** separately submit that the negotiations undertaken by the applicant have resulted in improved commercial outcomes for airlines and that, under the terms of the existing authorisation, BARA has been in a position to present to the suppliers of aeronautical and aeronautical related services, a collective view of the services and facilities required by airlines.
- **Westralia Airports Corporation Pty Ltd (Perth Airport)** submits that BARA provides benefits to the negotiation process including technical expertise and experience, advocacy for airlines with limited services to Perth Airport, and substantial time and cost savings by limiting the need to visit a wide range of

international head offices. Perth Airport also submits that BARA provides it with the opportunity to respond to the aggregate or consolidated view of airlines.

- **Adelaide Airport** supports the application for re-authorisation, although it noted that the inclusion of domestic airlines in price negotiations would be preferable.
- **Sydney Airport Corporation Limited (SACL)** does not oppose re-authorisation and notes that cost savings have resulted from collective negotiations, which may be passed on to end users. SACL submits that re-authorisation would not diminish the significant competitive tensions which it believes exists between airports in negotiations with airlines.
- **Australia Pacific Airports (Melbourne) Pty Ltd (Melbourne Airport)** supports re-authorisation of the arrangements, however, it notes some concern in relation to the new class of services entitled 'Airline communications systems.' Melbourne Airport submits that authorisation should be limited to the airlines internal operational communications and specifically exclude negotiations in areas such as value adding services (i.e. Wi-Fi internet).
- **Brisbane Airport Corporation Pty Ltd (BAC)** supports the application for re-authorisation but does not consider it is appropriate for BARA to be involved in bilateral negotiations between BAC and airlines in relation to airline specific facilities.

Submissions that neither support nor oppose re-authorisation

- **Darwin International Airport** submits that BARA does not have coverage of any international airlines currently operating at Darwin International Airport but that if it did, Darwin International Airport would not object to BARA's coverage.
- **Airservices Australia** submits that it has no comment to make in relation to the application.
- The **Australian Airports Association** submits that it is not in a position to present a unanimous or consistent viewpoint on the application.
- **Cairns Airport Pty Ltd (Cairns Airport)** does not object to the application for re-authorisation.

Submissions opposing re-authorisation

- **Queensland Airports Limited (QAL)** submits that it opposes the inclusion of Gold Coast Airport in the application for re-authorisation. QAL submits that the inclusion of Gold Coast Airport would have no support from its airline partners, would add no value to its existing negotiation and consultation processes and would add complexity to what it submits have proven to be straight forward, mutually beneficial arrangements between the airport and the airlines.

BARA's response to interested party submissions

3.7. BARA provided a response to interested party submissions on 28 January 2010.

- 3.8. BARA submits that it does not negotiate terms and conditions of discretionary services offered by individual airlines, such as leases for airline specific lounges for commercially important passengers.
- 3.9. BARA submits that the example of Wi-Fi internet access highlighted by Melbourne Airport relates to a discretionary service not directly related to the provision of a safe and efficient international air transport service (although it notes that the role of individual communications systems can change over time).
- 3.10. In relation to the concerns raised by BAC, BARA submits that it will participate in negotiations only if all affected parties consent to its involvement.
- 3.11. In response to QAL's objection to the Gold Coast Airport being included in the application for re-authorisation, BARA submits that the proposed re-authorisation does not restrict the currently preferred commercial strategy of Gold Coast Airport and does not require the airport operator to negotiate with BARA. BARA submits that instead, re-authorisation would allow BARA to participate in negotiations if it were to be viewed as beneficial by all parties at some time in the future.
- 3.12. The views of the applicants and interested parties are further outlined in the ACCC's evaluation of the conduct 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.

4. ACCC evaluation

4.1. The ACCC's evaluation of the proposed conduct is in accordance with tests found in:

- 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

4.1. 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.

4.2. BARA submits that there are two separate but related markets relevant to the application for re-authorisation – the market for the provision of essential airport services and the market for air transport.

- 4.3. In considering BARA's 2004 application for authorisation (A30232), the ACCC considered there to be two broad product dimensions in markets of relevance to that application, that is, the primary market(s) for the supply of airport services and markets for air transport. The ACCC considers that these broad market dimensions continue to be relevant to the current application.
- 4.4. However, as set out in the ACCC's 2005 determination (A30232), the ACCC is of the view that it is not necessary to comprehensively define the relevant markets. In this respect, it is the ACCC's view that its assessment will not be overly affected by possible variations in precise market definition.
- 4.5. A broad overview of the relevant markets, including market characteristics, is set out below.

The supply of airport services

- 4.6. With respect to the markets for the supply of essential airport services, BARA submits that:
- airlines are consumers in these markets
 - airport operators have a high degree of market power in the provision of essential airport services
 - essential airport services are abundant. There is no rivalry in consumption and prices do not play an allocative role
 - competition between airlines for essential airport services remains low.¹⁰
- 4.7. The ACCC notes that currently the providers of essential airport services include major international airports (see list at paragraph 2.22 above), Airservices Australia and the BoM.
- 4.8. The ACCC considers that there is likely to be low supply and demand side substitutability possibilities for the services provided by the major international airports.
- 4.9. As set out in its 2005 determination (A30232), the ACCC considers that generally the major international airports operate as monopoly providers in geographically and functionally distinct markets.
- 4.10. The ACCC accepts that generally the major international airports have significant market power. In its Airport Monitoring Report 2008-09 the ACCC states that

The price-monitored airports have significant market power given the size of barriers to entry. The extent to which the airports can exercise this market power would depend on a range of factors. For example, elasticities of demand vary across the airports (with Adelaide Airport and

¹⁰ BARA provides as a possible exception to this statement the provision of runway slots at Sydney Airport. However, the applicant goes on to note that capacity constraints and allocation of landing slots at Sydney Airport is dealt with through a legislated demand management scheme.

Sydney Airport at opposite ends of the spectrum), and some major airports might face competition at the margin from secondary airports.

Nevertheless, the countervailing power of airlines in negotiating terms and conditions of access to the major airports is generally low. Most airlines cannot create a credible threat to withdraw from negotiations, nor do they appear to rely on Part IIIA and government intervention to necessarily condition the behaviour of airports.¹¹

- 4.11. The ACCC notes that both Airservices Australia and the BoM are currently the sole agencies for the respective services they provide.
- 4.12. BARA submits that the providers of at least some of the essential airport services at each airport could potentially vary through time, or additional providers could arise given changing circumstances. BARA submits for example that many airport operators now provide CUTE services, which were previously provided by the airlines. BARA also notes that additional providers may emerge due to increased government mandated security requirements.

Air transport markets

- 4.13. The conduct sought to be authorised by BARA may have flow on effects for competition in air transport markets. The ACCC has previously identified three broad product dimensions in respect of applications for authorisation relating to air transport: passenger transport; freight transport and the sale of air travel.¹² In the context of BARA's application, the ACCC considers that the markets for international passenger transport and freight transport are likely to be relevant.
- 4.14. BARA submits that:
- passenger transport and freight transport are the only markets relevant to this application and that these markets are generally competitive
 - BARA's activities do not relate to or affect its members' activities in air transport markets.
- 4.15. The ACCC has previously accepted separate product markets for business travellers and leisure travellers on long-haul routes.¹³
- 4.16. With regard to freight markets, the ACCC has previously accepted that different types of freight represent different market segments rather than different types of markets, and the availability of indirect route options renders a regional market approach appropriate.¹⁴

¹¹ Australian Competition and Consumer Commission, Airport Monitoring Report 2008-09 Price, Financial Performance and Quality of Service Monitoring, p 39.

¹² See, for example, ACCC Determination for applications lodged by Virgin Blue Airlines Pty Ltd & Others dated 10 December 2009.

¹³ See ACCC Draft Determination for applications lodged by Qantas Airways Limited and British Airways Plc dated 4 February 2010.

¹⁴ See, for example, ACCC Determination for applications lodged by Virgin Blue Airlines Pty Ltd & Others dated 10 December 2009.

- 4.17. The ACCC considers that while this approach to market definition is appropriate, its assessment of the application for re-authorisation is not dependent on a precise definition of the relevant markets for air transport.

The counterfactual

- 4.18. 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.¹⁵
- 4.19. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.
- 4.20. BARA has authorisation to engage in collective negotiations until July 2010. BARA submits that if re-authorisation is not granted, it would cease collective negotiation activities from July 2010.
- 4.21. SACL submits that there is unlikely to be an appreciable increase in competition between airlines if the application for re-authorisation is declined.
- 4.22. The ACCC previously considered that, absent authorisation, BARA would not engage in collective negotiations and airports would negotiate with airlines individually, to the extent that this is possible. As a result, a number of international airlines may be required to accept standard terms and conditions posted by the airports if they were to land at those airports. The ACCC considers that this remains the most likely counterfactual.
- 4.23. With respect to Airservices Australia, the ACCC notes that Airservices Australia is required to consult with government, commercial, industrial, consumer and other relevant bodies in the performance of its functions and the exercise of its powers. Building on Airservices Australia’s 2004 long term pricing agreement, BARA submits that Airservices Australia is currently consulting with airlines about new prices for its services. BARA submits that Airservices Australia has indicated an intention to hold prices at current levels for around 18 months in response to the impact of the global financial crisis on airline travel.
- 4.24. In light of this, the ACCC considers that absent authorisation, Airservices Australia would undertake consultations with international airlines on an individual basis.

Public benefit

- 4.25. 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:

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

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹⁶

- 4.26. BARA submits the collective bargaining arrangements will deliver public benefits, including:
- meaningful improvement in commercial outcomes
 - transaction cost savings
 - more efficient infrastructure investment.
- 4.27. BARA submits that continued collective negotiations with Airservices Australia and BoM will result in public benefits.
- 4.28. BARA also submits that since authorisation was granted in 2005, the public benefits claimed are being realised.
- 4.29. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Input into contracts

- 4.30. BARA considers that its collective bargaining arrangements are capable of generating meaningful improvement in commercial outcomes over the provision and pricing of essential airport services. For example the phasing in of price increases, and improvements to many non-price issues such as the provision of fairer indemnities and other terms of contract and other legal issues.
- 4.31. BARA submits that its presence in negotiations limits the ability for airports to provide different information to individual airlines, and provides BARA with the ability to offer a collective view when reviews of pricing arrangements or other issues occur. BARA notes that it conducts negotiations in an open and transparent manner. BARA submits that the confidentiality of commercially sensitive information obtained from airport operators is preserved. BARA also submits that, under the negotiation process undertaken by it, it does not seek commercially sensitive information from its member airlines.
- 4.32. A number of airline interested parties submit that negotiations undertaken by BARA resulted in improved commercial outcomes for airlines.
- 4.33. Melbourne Airport notes that engaging in collective negotiations with BARA has ensured that the views of all airlines, not just the largest operators, are given proper voice not only during the period of contract negotiation but also on an ongoing basis.
- 4.34. Perth Airport submits that BARA is able to provide technical expertise to evaluate the pricing models used in the negotiation process, and submits that BARA is in a position

¹⁶ *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.

to better understand the broader capital requirements and traffic forecasts and engage with Perth Airport in a meaningful way.

- 4.35. BARA submits that the ability for it to negotiate on behalf of airlines as a collective provides airlines with an increased bargaining position, though not to the extent of a substantial level of countervailing market power. SACL submits that airlines are able to credibly exercise countervailing power which puts pressure on airports to put forward the best deal they can in an effort to avoid airlines diverting business away to another airport provider, even if only for a limited time period.
- 4.36. The ACCC considers that collective bargaining arrangements can result in benefits to the public by facilitating improvements in the level of input a party has in their contractual negotiations. This improved input provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, for example by addressing common contractual problems in a more streamlined and effective manner.
- 4.37. The ACCC has generally accepted that the enhanced level of input into the negotiation process results from:
- the relatively greater bargaining power of the collective (achieved through the aggregation of their influence in the negotiation)
 - improvements to the individual's access to information and resources and
 - the provision of a mechanism through which productive contractual discussions between the collective and their target can be achieved.
- 4.38. In the context of BARA's application for re-authorisation, the ACCC considers that collective negotiations by BARA with the major international airports, and Gold Coast Airport, may result in a small improvement in the bargaining position of airlines. The ACCC accepts it will provide a more streamlined process for exchanging information and negotiating common charges and other non-price issues.
- 4.39. Some major airlines submit that the collective bargaining arrangements have resulted in increased input into the pricing terms and arrangements, and other non-price issues, with major airlines.
- 4.40. The ACCC considers that the collective negotiation arrangements are likely to continue enabling the airlines to achieve increased input into contracts, and to the extent that the negotiations lead to efficiency gains, this would give rise to a public benefit. Further, while any savings on airport service charges achieved by BARA members are likely to be small and difficult to separately identify amongst other fee structures that apply to passenger airfares, they may be passed on to consumers, resulting in a public benefit. .
- 4.41. The ACCC notes that the arrangements are voluntary and the major international airports and the Gold Coast airport, are not required to negotiate with BARA. It would be open for airports to negotiate with airlines on an individual basis if that is their preference (see paragraphs 4.103 - 4.116).

Transaction cost savings

- 4.42. BARA submits that since authorisation was granted in 2005, airports have experienced considerable transaction cost savings as a result of collective negotiations. Airports continue to negotiate with BARA, which indicates that airport operators are achieving such cost savings.
- 4.43. BARA submits that airlines have also experienced cost savings, in particular savings of management time and the need to engage lawyers and consultants. BARA submits that many international airlines have limited management and resources present in Australia and the collective negotiations have meant that such airlines have been able to better utilise their resources.
- 4.44. Further, BARA submits that collective bargaining enables airlines, both small and large, to participate in negotiations about services at Australian airports at significantly less cost than each airline would incur to participate in its own rights. The collective bargaining process removes the need for airlines to replicate effort and, therefore, reduces total industry transaction costs.
- 4.45. A number of airlines note that collective negotiations through BARA reduced transaction costs through savings in resources and staff time that would otherwise have to be allocated to the detailed review of commercial agreements and proposed aeronautical infrastructure developments.
- 4.46. SACL submits that collective negotiations with BARA have eliminated the need to be extensively engaged in separate negotiations with individual airlines, leading to cost savings in diverted staff time and other ancillary costs such as legal and consultancy fees. SACL also submits that, where airlines do not have a significant management presence in Australia, savings can be made that are associated with cross border negotiations.
- 4.47. Perth Airport notes that the process of aeronautical price negotiations is complex and time consuming. Perth Airport submits that if it were to negotiate with each airline individually, this process would be even longer and delay the implementation of necessary infrastructure.
- 4.48. The ACCC notes that absent authorisation, some airlines, particularly those with a small presence in Australia, may not engage in individual negotiations with airports and therefore be required to accept standard terms and conditions.
- 4.49. The ACCC considers, however, that those airlines with a smaller presence in Australia who do choose to negotiate through BARA have, and are likely to continue to, experience significant transaction costs savings through the collective bargaining arrangements. Absent re-authorisation, the ACCC accepts that such airlines may incur considerable costs to send their own expert representatives to Australia or recruit additional legal, financial and economic resources in Australia in order to conduct individual price and contract negotiations with airport operators.
- 4.50. The ACCC accepts that negotiations around airport charges may be complex and time consuming, and the ability for BARA to engage in collective negotiations will result in savings to airlines.

- 4.51. The ACCC previously accepted that airport operators would also experience significant transaction cost savings, albeit the magnitude of which would vary between airports. Operators of large airports with a high volume of international traffic from a large number of airlines would experience greater transaction cost savings than smaller international airports serviced by fewer international airlines.
- 4.52. The ACCC accepts generally that, for airports, significant transaction cost savings are likely to result from the ability to engage in one negotiation round instead of multiple rounds with each airline.
- 4.53. Overall, the ACCC considers that the proposed arrangements are likely to result in public benefits of substance in the form of transaction cost savings. The ACCC considers that in competitive international passenger transport and freight transport markets, these benefits are likely to be passed on to end consumers.

Efficient infrastructure investment

- 4.54. BARA notes that many essential airport services are provided by airports jointly for all airlines and consumed by airlines in a non-rivalrous way. BARA submits that the collective bargaining arrangements mean it is able to provide an industry view about airport services, to which the service provider can then respond. BARA submits that if each individual airline was required to provide information or negotiate on these jointly consumed services, there would be contradictory views regarding prices, services and contractual terms.
- 4.55. BARA submits that collective negotiations by it allow airlines to present a collective view regarding their infrastructure needs and that infrastructure plans satisfying the needs of all airlines may then be developed. BARA submits that airports, therefore, have more certainty as to infrastructure requirements and this in turn may lead to timelier infrastructure investment.
- 4.56. Perth Airport submits that BARA provides a collective view on infrastructure requirements and forward projections of passenger numbers.
- 4.57. BARA submits that its activities to date have continued, and can continue, to provide a mechanism for an aggregate view from all airlines on infrastructure needs.
- 4.58. The ACCC considers that collective negotiations by BARA enable airlines to present an aggregate view on their infrastructure needs. This may assist airport operators in developing infrastructure investment plans that satisfy the interests of all airlines, including airlines with a small presence in Australia. It is conceivable that inefficiencies may arise in circumstances where a service provider attempted to consolidate and respond to the individual requests or concerns of airlines in relation to infrastructure investment.
- 4.59. The ACCC accepts the collective bargaining arrangement may provide greater certainty to airport operators and this in turn may facilitate timely infrastructure investment, compared to a situation without collective negotiations.

- 4.60. The ACCC considers that the proposed arrangements may deliver the potential for a small benefit in this respect.

Airservices Australia and the BoM

- 4.61. BARA submits that a public benefit would also result in allowing BARA to continue collective negotiations with Airservices Australia and the BoM, and that the same commercial, transaction cost and infrastructure improvement benefits can be achieved.
- 4.62. The ACCC considers that public benefits are likely to continue to result from collective negotiations with Airservices Australia and BoM, particularly with regard to bargaining position and transaction cost savings.

ACCC conclusion on public benefits

- 4.63. The ACCC accepts that the collective bargaining arrangements are likely to result in the following public benefits:
- improved bargaining position of airlines resulting in improved input into pricing and non-pricing arrangements
 - transaction cost savings
 - the potential for a small benefit through more efficient infrastructure investment.

Public detriment

- 4.64. Public detriment is also 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.¹⁷

- 4.65. BARA submits that the anti-competitive detriment generated by the proposed arrangements is low and consistent with the ACCC's findings in the 2005 authorisation.
- 4.66. BARA submits that the supply of essential airport services has changed little and since the arrangements were previously authorised BARA continues to participate in price negotiations in the same transparent manner.
- 4.67. Collective bargaining refers to an arrangement under which two or more competitors in an industry come together to negotiate terms and conditions, which can include price, with a supplier or customer.
- 4.68. Generally speaking, competition between individual businesses generates price signals which direct resources to their most efficient use. This is often referred to as allocative efficiency. Collective agreements to negotiate terms and conditions can interfere with

¹⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

these price signals and accordingly lead to allocative inefficiencies. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.

- 4.69. The ACCC has previously identified that the anti-competitive effect of collective bargaining arrangements constituted by lost allocative efficiencies is likely to be more limited where the following four features are present:
- the current level of negotiations between individual members of the group and the proposed counterparty(s) on the matters to be negotiated is low
 - participation in the collective bargaining arrangement is voluntary
 - there are restrictions on the coverage and composition of the bargaining group
 - there is no boycott activity.

Current level of negotiations and competition between BARA members

4.70. Where the current level of individual bargaining between members of a proposed bargaining group and the target is low, the difference between the level of competition with or without the collective arrangements may also be low.

4.71. BARA submits that competition between airlines for essential airport services is low.

4.72. BARA further submits that essential airport services are abundant and that

[t]his is due to the fact that Australian aviation infrastructure experiences relatively few capacity constraints... there is little or no ability for one airline to obtain a commercial advantage over another airline through its use of those abundant services.

4.73. For example, BARA submits that the master plans submitted by privatised airports recognise the need for expansion to accommodate growth but do not forecast capacity constraints in the medium term in the sense that the necessary infrastructure improvements cannot occur before the expected increases in traffic volumes.

4.74. SACL submits that there is unlikely to be an appreciable increase in competition between airlines if the application for re-authorisation is declined. SACL submits that:

This is partly because the nature of aviation is that planes simply must land at airports; airport charges must form part of all airlines' cost structure. In our view, the likelihood that airlines compete on the basis of an airport charge is very low. Rather, our experience is that airlines compete on the basis of price and service to win passengers. Airport charges are simply a necessary component of participation in the aviation industry. Our experience is that obtaining the lowest possible airport charges would be relevant to airlines' downstream pricing but they do not compete on this basis.

4.75. BARA also submits that, if an airline considers it could improve its commercial outcomes given its specific circumstances, that airline may pursue that matter individually. BARA has no involvement in individual negotiations or knowledge of the outcomes of any such negotiations.

- 4.76. The ACCC considers that the fact that airlines use the same infrastructure, in general absence of capacity constraints, would tend to limit the degree of competition between airlines for the acquisition of airport services, in particular as it relates to quality and service.
- 4.77. While the list of essential airport services identified at paragraph 1.10 above is not exhaustive, BARA submits that in terms of the scope of the services covered, essential airport services do not extend to discretionary services offered by an individual airline. BARA submits that essential airport services, sometimes referred to as ‘operational’ services and facilities, are those services necessary to conduct safe and efficient international passenger and freight air transport services. BARA notes that some of these services may be provided specifically to one airline (e.g. office space at an airport for airline staff) while others are common use (e.g. runways and terminals). BARA submits by way of example that it does not negotiate terms and conditions of leases for airline specific lounges for commercially important passengers as they are a discretionary service offered by an individual airline.
- 4.78. Melbourne airport has raised a concern about value adding services forming part of the services with respect to which BARA may collectively negotiate. Melbourne Airport submits that if the ACCC decides to grant authorisation for BARA to collectively negotiate on behalf of international airlines, that it should impose a condition to specifically exclude BARA being able to negotiate with respect to the provision of value adding services to a target’s customers (for example, Wi-Fi internet access).
- 4.79. BARA submits that the example highlighted by Melbourne airport relates to a discretionary service not directly related to the provision of safe and efficient international air transport services. BARA submits however that the role of individual communication systems can change over time. BARA submits that what is currently a discretionary communications service may become an essential service in the future if it becomes the new platform for operations at the airport.
- 4.80. The ACCC notes that the collective negotiations may impact competition in downstream air transport markets where they involve services with respect to which international airlines would ordinarily compete. For example, airlines may compete on the level of services offered to customers with regard to the quality and range of facilities offered at lounges. Collective negotiations relating to the acquisition of such services may have an impact on competition in downstream markets by resulting in a standardisation of the customer offerings made available by the airlines. The ACCC notes however that the collective negotiations are unlikely to result in competition detriment in downstream markets given BARA’s submissions that its application for collective negotiations do not extend to discretionary services not directly related to the provision of safe and efficient international air transport services.
- 4.81. The ACCC notes in particular, BARA’s submissions that the scope of the essential airport services for which collective bargaining authorisation is sought is limited to those services necessary to conduct safe and efficient international passenger and freight air transport services, and does not extend to discretionary services offered by individual airlines. BARA’s submission further indicates that services such as Wi-Fi internet access identified by Melbourne Airport is a discretionary service falling outside the scope of essential airport services the subject of BARA’s application.

- 4.82. Accordingly, the ACCC considers that the proposed collective negotiation would be limited to those services involving a low level of competition between airlines, and as such, it is unnecessary to impose the carve-out conditions suggested by Melbourne Airport. The ACCC considers the collective negotiations undertaken by BARA would be unlikely to result in any detriment to competition in downstream air transport markets.
- 4.83. However, notwithstanding such limitations on the scope of essential airport services the subject of BARA's application, the ACCC notes that the application does not set out a complete list of the services intended to be covered. There is therefore potential for some uncertainty regarding other new services, not currently identified, falling within the scope of essential airport services. This uncertainty is compounded to some extent by BARA's request that authorisation be granted to unidentified providers. Accordingly, the ACCC does not consider it appropriate to grant authorisation to enable BARA to collectively negotiate with providers of essential airport services other than those specifically identified. This issue is outlined further at paragraphs 4.90 - 4.96 below.

Voluntary participation in the collective bargaining arrangements

- 4.84. BARA submits that the underlying principle of the application for re-authorisation is the strictly voluntary nature of the arrangements. In particular, BARA submits that:
- providers of essential airport services are not required to negotiate through BARA and
 - BARA's members are not bound by the terms and conditions negotiated by BARA.
- 4.85. BAC is concerned that BARA will become involved in bilateral negotiations between BAC and airlines in respect of airline specific facilities such as offices, lounges, operational/aircraft maintenance/freight facilities.
- 4.86. BARA submits that re-authorisation is sought to cover negotiations in relation to the provision and pricing of essential airport services. As noted above, BARA submits that essential airport services are necessary to conduct safe and efficient international passenger and freight air transport services. BARA submits that it will participate in negotiations only if all affected parties consent to its involvement and that re-authorisation should not impinge upon BAC's commercial strategy if, in particular cases, BAC and the airlines would prefer to negotiate bilaterally.
- 4.87. The ACCC notes the proposed arrangements do not impact the ability of providers of essential airport services, including major international airport operators and the Gold Coast Airport, to negotiate individually with airlines in addition to, or instead of, collective negotiation.
- 4.88. Further, BARA's members are free to choose whether to accept the terms negotiated by BARA or to engage in negotiations individually.
- 4.89. The ACCC considers that collective negotiations will only take place where it is in the commercial interests of all parties to do so.

Coverage or composition of the group

Providers of essential airport services

- 4.90. As outlined above, BARA seeks re-authorisation to collectively negotiate with the major international airports, Gold Coast Airport, Airservices Australia, the BoM and *other providers of essential airport services*. BARA submits that, while it is expected that the vast majority of essential airport services will continue to be provided by airport operators, Airservices and the BoM, the providers of some essential airport services may change over time. BARA provides the example of CUTE services, which were previously provided by the airlines and are now provided by airport operators. BARA further submits that additional providers may emerge due to increased government-mandated security requirements and that there may also be some limited circumstances where two or more competing providers could deliver some essential airport services.
- 4.91. Accordingly, BARA seeks authorisation to collective negotiate with either:
- providers of essential airport services or
 - international airports,¹⁸ Airservices Australia, the BoM and other providers of essential airport services.
- 4.92. BARA submits that, under either option, its intent is to ensure that BARA's authorisation covers those situations where providers change or potential new providers emerge in the future.
- 4.93. While the ACCC accepts that the scope of 'essential airport services' can be said to be limited, generally speaking, to those services necessary to conduct safe and efficient international passenger and freight air transport services, the list of services identified by BARA is not exhaustive and therefore there appears to be scope for uncertainty about what may constitute a new 'essential airport service'. Similarly, the identity of the provider may itself affect the assessment of the competitive impact of the proposed arrangements. Indeed, any effect on competition arising from the proposed arrangements would depend on a range of factors including the identity of the provider, the nature of the essential airport service being offered, and the relative bargaining position of the parties, among others. In such circumstances, the ACCC does not consider it appropriate to grant authorisation in such terms as to enable BARA to collectively negotiate with providers of essential airport services other than those specifically identified.
- 4.94. Accordingly, the ACCC therefore proposes to grant authorisation for BARA to collectively negotiate with:
- Major international airports and Gold Coast airport¹⁹

¹⁸ BARA defines 'international airports' as the major international airports and Gold Coast Airport, BARA Application for Revocation and Substitution, Schedule B, p. 21.

¹⁹ BARA defines 'international airports' as the major international airports and Gold Coast Airport, BARA Application for Revocation and Substitution, Schedule B, p. 21.

- Airservices Australia; and
 - the BoM.
- 4.95. The ACCC notes that if BARA wishes to collectively bargain with providers of essential airport services, other than those named above in the future then, depending on the circumstances, BARA may apply to the ACCC for:
- a minor variation to the authorisation; or
 - revocation of the authorisation and substitution of a new authorisation.
- 4.96. Which of those two options is ultimately pursued is, of course, a matter for BARA. However, by way of example, it might be the case that where an existing essential airport service ceases to be provided by a major international airport and is instead provided by, say, a private firm, then it may be appropriate for BARA to apply for a minor variation to its authorisation.²⁰ In other circumstances, such as where the identity of the provider affects the assessment of the competitive impact of the arrangements, or where the authorisation is proposed to extend to collective bargaining about the provision of a new essential airport service, it might be more appropriate for BARA to make an application for revocation and substitution of its authorisation.

BARA members

- 4.97. The ACCC considers that where the size of bargaining groups is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group.
- 4.98. At present there are 35 members of BARA, including airlines such as Emirates, Air New Zealand, Qantas, United Airlines, Singapore Airlines and V Australia.
- 4.99. The ACCC notes that collective negotiations are only undertaken on behalf of member international airlines.
- 4.100. Given the voluntary nature of the arrangements and the level of market power generally held by the airports, the ACCC is not concerned about the size and composition of the collective bargaining group, particularly in circumstances where the target group for the proposed collective negotiations are limited to the parties identified at paragraph 4.97 above

Boycott activity

- 4.101. Collective boycotts can remove the discretion of the target to participate in collective bargaining and to accept the terms and conditions (including price) offered by the collective bargaining group. This is because the target, faced with the threat of

²⁰ Further information about the minor variation process appears in Attachment C.

withdrawal of supply, will be under increased pressure to accept the terms and conditions offered by the collective bargaining group.

- 4.102. The ACCC notes that BARA has not applied for re-authorisation to engage in collective boycott activity. Accordingly, any such conduct, should it occur, would not be protected from legal action under the Act.

Inclusion of Gold Coast Airport in the application

- 4.103. BARA seeks re-authorisation to extend to negotiations with the Gold Coast Airport in addition to the major international airports. Gold Coast Airport was not included in BARA's previous authorisation.
- 4.104. BARA submits that there is a real prospect that some of BARA's member airlines may be interested in flying to the Gold Coast.
- 4.105. Queensland Airports Limited (QAL), owner operator of the Gold Coast Airport, opposes the inclusion of Gold Coast Airport to the re-authorisation and submits that BARA members account for only 1% of total passenger movements through the airport. QAL submits that BARA's involvement will not offer any economies of scale or potential transaction cost savings.
- 4.106. QAL further submits that it has developed close and mutually beneficial relationships with the airlines that service Gold Coast Airport. In particular, QAL has pursued a differentiation strategy, with a strong focus on the leisure market and meeting the needs of low cost carriers (LCCs). For example, Gold Coast Airport submits that it has the first common use domestic/international LCC terminal facility in Australia. QAL submits that BARA's sectorial interests may work against the high level of efficiency achieved through developing homogenous domestic/international common use LCC facilities and introduce a degree of complexity to current close airport/airline relationships.
- 4.107. QAL also submits that south east Queensland and northern New South Wales is a fiercely competitive market for airport services, dominated by Brisbane and giving Gold Coast Airport little or no opportunity to exercise market power. In this respect, QAL submits that LCCs have proven to be ready, willing and able to move their assets to alternative locations if their needs are not met. QAL does not consider BARA demonstrates any understanding of the needs of this sector, nor any scope for it to improve the competitiveness of the facilities and services provided to those airlines.
- 4.108. In relation to market power, the ACCC notes that in an Inquiry Report of 2006, the PC found that larger non-monitored airports generally face significant competition from other airports, other modes of travel and/or other destinations.²¹ That report also noted that, in 2002 the PC found that, as a result of a combination of these factors, some of these larger non-monitored airports – including Gold Coast Airport – had little market power.²²

²¹ Productivity Commission (PC), 2006, *Review of Price Regulation of Airport Services*, Report No. 40, 14 December 2006, p 105.

²² Productivity Commission (PC), 2006, *Review of Price Regulation of Airport Services*, Report No. 40, 14 December 2006, pp 105-106.

- 4.109. In response to QAL's submission, BARA submits that the airline industry is often subject to significant change and that, as a result, more of BARA's members see opportunities for international air services to the Gold Coast in the future. If this were to happen, BARA submits that, with the endorsement of both Gold Coast airport and the airlines involved, it could facilitate negotiations.
- 4.110. BARA submits that its application for re-authorisation does not restrict the currently preferred commercial strategy of Gold Coast Airport and does not require the airport operator to negotiate with BARA.
- 4.111. The ACCC recognises that QAL has developed its own commercial strategy for negotiating with airlines, and considers that the voluntary nature of the arrangements will not compel it to change that strategy.
- 4.112. The ACCC considers that the proposed arrangements do not impact the ability of Gold Coast Airport to negotiate individually with airlines. Rather, it provides BARA member airlines with an option to engage in collective negotiations.
- 4.113. The ACCC considers that, given the voluntary nature of the proposed arrangements, the involvement of BARA in any future negotiations will only occur if it is considered mutually beneficial to both the Gold Coast Airport and the airlines involved. The ACCC considers that QAL remains in a position to choose whether to engage in collective negotiations through BARA, or to continue negotiating with airlines within its existing framework.
- 4.114. The ACCC also notes QAL's submission that BARA members currently account for just over 1% of total passenger movement at Gold Coast Airport. In this regard, the ACCC does not consider that BARA would be in a position to exercise any significant level of bargaining power in engaging in negotiations with Gold Coast airport.
- 4.115. The ACCC considers that the inclusion of Gold Coast airport as a party with whom BARA may collectively negotiate would allow the public benefits outlined above to be delivered in the event that other BARA members decide to expand their operations to the Gold Coast.
- 4.116. The ACCC therefore proposes not to exclude Gold Coast Airport as a party with whom BARA is authorised to collectively negotiate on behalf of its member airlines.

ACCC conclusion on public detriments

- 4.117. The ACCC considers that there are several features of the proposed arrangements which limit the potential detriment. In particular, the level of competition between airlines for essential airport services is likely to remain low and the voluntary nature of the collective bargaining arrangements leaves both international airlines and the airport service providers free to pursue individual negotiations if they so choose. Additionally, the proposed arrangements do not involve collective boycott conduct.
- 4.118. The ACCC considers that these features would limit the potential detriment in circumstances where the parties with which BARA proposes to collectively negotiate

are identified. Accordingly, as outlined at paragraphs 4.93 – 4.99 above, the ACCC does not propose to extend authorisation for BARA to engage in collectively negotiations with ‘other service providers’ that have not been identified.

Balance of public benefit and detriment

- 4.119. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.120. In the context of applying the net public benefit test in section 90(8)²³ of the Act, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²⁴
- 4.121. For the reasons outlined in this chapter the ACCC considers the public benefits likely to result from the conduct are: an improved bargaining position for airlines, which may result in improved input into pricing and non-pricing arrangements; the potential for transaction cost savings; and the potential for more efficient infrastructure investment.
- 4.122. The ACCC considers there are several features of the proposed arrangements that limit the potential detriment. Firstly, the level of competition between airlines for essential airport services remains low. In addition, participation in the collective bargaining arrangements on behalf of both the targets and international airlines remains voluntary. Finally, BARA has not sought authorisation for collective boycott activity.
- 4.123. Accordingly, 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 tests in sections 90(5A), 90(5B), 90(6) and 90(7), are met.

Length of authorisation

- 4.124. The Act allows the ACCC to grant authorisation for a limited period of time.²⁵ The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.
- 4.125. In this instance, BARA seeks authorisation for five years.
- 4.126. The ACCC considers that, in the case of this application, a period of five years would be appropriate and proposes to grant authorisation for the proposed collective bargaining arrangements for five years.

²³ 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.

²⁴ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

²⁵ Section 91(1).

5. Draft determination

The application

- 5.1. On 26 November 2009 the Board of Airline Representatives of Australia Inc (BARA) lodged an application for the revocation of authorisation A30232 and the substitution of authorisation A91200 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91200 was made using Form FC, Schedule 1, of the Trade Practices Regulations 1974. The application was made under subsections 88(1A) and 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 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)
 - 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.
- 5.3. BARA seeks re-authorisation to collectively negotiate with the major international airports, Gold Coast Airport, Airservices Australia, the Bureau of Meteorology and other providers of essential airport services.
- 5.4. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination in relation to the application.

The net public benefit test

- 5.5. For the reasons outlined in Chapter 4 of this draft determination (and subject to the issues identified in paragraphs 5.12 and 5.13), the ACCC considers that in all the circumstances 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.

Conduct for which the ACCC proposes to grant authorisation

- 5.6. The ACCC proposes to grant authorisation:
- to allow BARA, on behalf of itself and its member international airlines from time to time, to negotiate with the operators of major international airports and Gold Coast Airport, the Bureau of Meteorology and Airservices Australia in relation to the provision of essential airport services at designated international airports, and agree on terms and conditions of acquisition of such services – including prices – on an airport by airport basis and

- for BARA and its member international airlines to make and give effect to the contracts or arrangements, or understandings between BARA, its member international airlines and the operators of the major international airports, Gold Coast Airport, the Bureau of Meteorology and Airservices Australia at designated international airports on an airport by airport basis.
- 5.7. BARA will not bind its members to any terms and conditions negotiated by BARA with major international airport operators, the Gold Coast Airport operator, the Bureau of Meteorology and Airservices Australia. Each airline will determine whether to accept the terms and conditions offered by the respective providers of essential airport services as a result of BARA's negotiations.
- 5.8. Under the terms of the re-authorisation, no party may be compelled to engage in collective negotiations. Providers of essential airport services and airlines who do not wish to participate may continue with or engage in individual negotiations. Airports can choose whether or not they wish to enter discussions with BARA or the extent to which they wish to enter discussions with BARA.
- 5.9. The re-authorisation relates only to BARA's members operating scheduled international air services and where an airline has both international and domestic operations, only to those international operations of that airline.
- 5.10. This draft determination is made on 24 March 2010.
- 5.11. The attachments to this determination are part of the draft determination.

Conduct not proposed to be authorised

- 5.12. The proposed authorisation does not extend to any collective boycott activity by BARA. Accordingly, any such activity, should it occur, is not protected from legal action under the Act.
- 5.13. The ACCC also does not propose to extend authorisation for BARA to engage in collectively negotiations with 'other service providers' not identified in BARA's application.

Further submissions

- 5.14. 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.

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 application A91200

The following table provides a chronology of significant dates in the consideration of the application by BARA.

DATE	ACTION
26 November 2009	Application for revocation and substation lodged with the ACCC.
8 January 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
28 January 2010	Submission received from BARA in response to interested party submissions.
24 March 2010	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.²⁶

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.²⁷

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.²⁸

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 future²⁹

²⁶ *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.

²⁷ *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.

²⁸ Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.³⁰

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation³¹. 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.³² 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.³³

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.³⁴ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.³⁵

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.³⁶ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.³⁷

²⁹ Section 88(10).

³⁰ Section 88(6).

³¹ Section 90(10A)

³² Subsection 91A(1)

³³ Subsection 87ZD(1).

³⁴ Subsection 91B(1)

³⁵ Subsection 91B(3)

³⁶ Subsection 91C(1)

³⁷ Subsection 91C(3)

Attachment D – Members of Board of Airline Representatives of Australia Inc³⁸

1. Aeroflot Russian Airlines (SU)
2. Aerolineas Argentinas (AR)
3. Air Calin (SB)
4. Air Canada (AC)
5. Air India (AI)
6. Air Mauritius (MK)
7. Air New Zealand Limited (NZ)
8. Air Pacific Limited (FJ)
9. Air Tahiti Nui (TN)
10. Air Vanuatu (NF)
11. Asiana Airlines (OZ)
12. Austrian Airlines (OS)
13. Cathay Pacific Airways Ltd (CX)
14. Delta Airlines
15. Emirates (EK)
16. Etihad Airways
17. Eva Airways Corporation (BR)
18. Federal Express (FX)
19. Garuda Indonesian Airways (GA)
20. Japan Airlines (JL)
21. Korean Air (KE)
22. Malaysia Airlines (MH)
23. Philippine Airlines (PR)
24. Qantas Airways Limited (QF)
25. Qatar Airways
26. Royal Brunei (BI)
27. Scandinavian Airlines System (SK)
28. Singapore Airlines (SQ)
29. South African Airways (SA)
30. Thai Airways International (TG)
31. Turkish Airlines (TK)
32. United Airlines (UA)
33. Vietnam Airlines (VN)
34. Virgin Atlantic Airlines (VS)
35. V Australia (VA)

³⁸ Information provided by BARA, BARA Application for Revocation and Substitution, Schedule A.