



**Virgin Blue Airlines Pty Ltd & Ors and Etihad Airways –
applications for authorisation A91247 and A91248 – request for
interim authorisation**

REASONS

DECISION

The Australian Competition and Consumer Commission (the ACCC) has decided to grant interim authorisation in respect of the applications for authorisation lodged by Virgin Blue and Etihad on 27 August 2010.

Interim authorisation commences immediately, and will remain in place until the date the ACCC's final determination comes into effect or interim authorisation is revoked.

THE APPLICATION

Virgin Blue and Etihad are seeking authorisation for a proposed alliance, which will include:

- a commercial cooperation agreement
- associated code share agreements
- a frequent flyer agreement
- a reciprocal lounge agreement.

Under the alliance, Virgin Blue and Etihad have agreed to cooperate on joint pricing and scheduling of services across their networks.

The applicants are seeking authorisation for a period ending no earlier than five years from the date of implementation.

THE AUTHORISATION PROCESS

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

INTERIM AUTHORISATION

Section 91 of the Act allows the ACCC to grant interim authorisation without making a decision on the merits of the application.

The ACCC will only grant interim authorisation in appropriate circumstances. In many circumstances it is not appropriate to do so because interim authorisation allows an applicant, for a limited period, to engage in conduct before the ACCC has been able to fully assess whether the conduct satisfies the authorisation test.

CONSULTATION

Upon receipt of the application for authorisation, the ACCC invited submissions from 100 interested parties in order to consider the request for interim authorisation.

Submissions were received from the Australian Federation of Air Pilots (AFAP) and Qantas.

The AFAP supports both interim and final authorisation on the grounds that it will strengthen Virgin Blue and thus provide employment opportunities for its members.

Qantas opposes interim authorisation on the grounds that the applicants have not demonstrated it is necessary, and that it creates the risk of passengers who buy tickets before the final determination suffering harm if the application is ultimately denied.

REASONS FOR DECISION

In granting interim authorisation the ACCC has taken into account:

- the fact that Virgin Blue and Etihad currently do not operate any competing services and
- the lead time required to market and sell tickets before the commencement of long-haul services such as those proposed by the applicants.

The ACCC considers it reasonable for the applicants to be able to promote the services at this stage and have the opportunity to deliver the claimed public benefits.

The ACCC considers it unlikely that granting interim authorisation will result in permanent changes to the relevant markets.

The ACCC is aware that consumers who book one of the new services during the period of interim authorisation are likely to be affected if final authorisation is denied.

However, the ACCC notes that Virgin Blue and Etihad have put in place route protection plans to manage the travel arrangements of any affected passengers.

RECONSIDERATION OF DECISION

The ACCC may review its decision on interim authorisation at any time. The ACCC's decision in relation to interim authorisation should not be taken to be indicative of whether or not final authorisation will be granted.

Attachment A When can Interim Authorisation be Granted?

Requests for interim authorisation are considered on a case by case basis. In *International Air Transport Association and Alitalia Linea Aerea Italiana SPA*¹ (the *IATA case*) the Tribunal noted that it would be impossible to attempt to define all relevant principles governing the grant of an interim authorisation. It stated that much would depend on the facts of the particular case, the urgency of the occasion and the conduct the subject of the application by the parties. It also noted that in considering a request for interim authorisation, it would generally be inappropriate to examine questions of law or facts too closely at an early stage of review.

While it is not possible to outline all of the issues that the Commission will take into account in determining whether a specific request for interim authorisation should be granted, some major factors considered in determining whether interim authorisation should be granted include the following:

- The policy of the TPA is clearly opposed to arrangements that are in restraint of trade and other anti-competitive practices. The Commission is therefore unlikely to grant interim authorisation to arrangements that are highly anti-competitive unless compelling reasons are provided.
- The Commission is unlikely to grant interim authorisation where this will permanently alter the competitive dynamics of the market or inhibit the market from returning to its pre-interim state if final authorisation is later denied, unless special circumstances apply. Similarly, a factor the Commission will consider is whether a person appealing in good faith against the refusal of authorisation by the Commission would be effectively denied their right of appeal to the Tribunal by the refusal of an interim authorisation. This would apply, for example, if the arrangement once departed from could not be reinstated in the event of a final decision favourable to the applicant.
- The Commission will consider the possible harm, if any, that will occur to the applicant if a grant of interim authorisation is denied.
- The possible harm that will occur to other parties (such as customers and competitors) if a request for interim authorisation is granted or denied will also be taken into account.
- The Commission will consider whether granting interim authorisation is urgent and/or necessary.
- The Commission will consider the extent to which the relevant market will change if interim authorisation is granted. For instance, interim authorisation is more likely to be granted in cases where it will maintain the status quo in the market.
- Any possible benefit or detriment to the public will be considered to the extent the Commission is able to make such an assessment at the time of considering the request for interim authorisation.
- In some cases it may be thought preferable not to disturb the existing position pending a final decision as the good or bad effects of the existing situation will usually be clearer than the possible effects of a change in that situation.
- The length of time that is likely to elapse between the granting of the interim authorisation and the anticipated date of final authorisation will be considered.
- A preliminary assessment of the public benefits and anti-competitive detriments likely to result from the proposed conduct may be undertaken.
- Whether there is a risk of legal action by a third party is a relevant consideration. The Commission has considered that it would be detrimental to the authorisation process if private legal action was commenced before an application for authorisation is determined.
- Whether a refusal to grant interim authorisation will result in potential public benefits being lost will also be considered.

¹ (1995) ATPR 40-537