



Australian  
Competition &  
Consumer  
Commission

# Determination

## Applications for authorisation

**lodged by**

**Virgin Blue Airlines Pty Ltd and Others**

**in respect of**

**an airline alliance between the applicants**

**Date: 3 February 2011**

**Authorisation no.:** A91247 &  
A91248

**Public Register no.:** C2010/803

**Commissioners:** Samuel  
Kell  
Schaper  
Court  
Dimasi  
Willett

## Summary

The ACCC grants authorisation for an alliance between Virgin Blue and Etihad in relation to air passenger services for a period of five years.

On 27 August 2010, Virgin Blue and Etihad Airways lodged applications for authorisation in relation to a commercial cooperation agreement, associated code share agreements, a frequent flyer agreement and a reciprocal lounge agreement (the Alliance).

Under the Alliance, Virgin Blue and Etihad will cooperate on joint pricing and scheduling of services across their respective networks. However, there is no revenue sharing under the Alliance.

The ACCC considers that the Alliance is likely to promote competition in the relevant markets and result in benefits for Australian consumers through new international services, increased online connections, enhanced value added services and stimulation of tourism.

Virgin Blue and Etihad currently do not directly compete on any routes, nor are they likely to directly compete in the future. In light of this, the ACCC considers that the Alliance is unlikely to result in any public detriment.

The ACCC granted interim authorisation on 23 September 2010 to enable the applicants to begin marketing and selling their new services, which are due to commence in February 2011.

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## List of abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	Prior to 1 January 2011, the <i>Trade Practices Act 1974</i> and, as of 1 January 2011, the <i>Competition and Consumer Act 2010</i> .
Air Pacific	Air Pacific Limited
BITRE	Bureau of Infrastructure, Transport and Regional Economics
Codeshare	Codesharing refers to arrangements involving the assignment of one airline's designator code to a flight operated by another airline
Department of Infrastructure	Department of Infrastructure and Transport
DIAC	Department of Immigration and Citizenship
Freesale	A type of code share where the marketing carrier effectively only pays for the seats it sells
Interline agreements	allow the passenger to purchase separate flights from multiple carriers in one transaction with one ticket and typically involves baggage check through.
IASC	International Air Services Commission
LCC	Low-cost carrier
Load factor	Load factors measure the percentage of seats filled on an aircraft on any given route. This is derived from dividing the number of passengers travelled by the number of seats available
NWC	New World Carrier – a low cost, high value airline model that aims to attract a broader cross section of passengers than the tradition LCC model.
Online connections	A passenger itinerary of two or more flight segments where connections are made between flights of the same airline, or its codeshare partners.
Sector	A sector is a non-stop flight leg between two points (excluding technical stops where no passengers or cargo are picked up or dropped off)
The Tribunal	The Australian Competition Tribunal
UAE	United Arab Emirates
Virgin Blue	Virgin Blue Airlines Pty Ltd, Virgin Blue International Airlines Australia Pty Ltd, Pacific Blue Airlines (Aust) Pty Ltd, Pacific Blue Airlines (NZ) Limited, Velocity Rewards Pty Ltd

Yield

Airline revenue per unit of traffic. Passenger yield is airline revenue per passenger kilometre

# 1. The applications for authorisation

- 1.1. On 27 August 2010, Virgin Blue Airlines Pty Ltd, Virgin Blue International Airlines Australia Pty Ltd, Pacific Blue Airlines (Aust) Pty Ltd, Pacific Blue Airlines (NZ) Limited, Velocity Rewards Pty Ltd (together Virgin Blue) and Etihad Airways (Etihad) lodged applications for authorisation A91247 and A91248 with the ACCC.
- 1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010*<sup>1</sup> (the Act). The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC’s consideration of these applications is contained in Attachment B.
- 1.3. Application A91247 was made under subsections 88(1) and 88(1A) of the Act to:
- make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act;
  - make and give effect to a provision of a contact, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 1.4. Application A91248 was made under subsections 88(1) and 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 have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act;
  - 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 the Act).
- 1.5. Virgin Blue and Etihad have applied for authorisation of an alliance between the two. The applicants have sought authorisation for five years. See Chapter 2 of this determination for further details about the Alliance.

## Interim authorisation

- 1.6. On 23 September 2010, the ACCC granted interim authorisation for the Alliance, allowing the applicants to commence the marketing and sale of the proposed services. In granting interim authorisation, the ACCC took into account the long lead times

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<sup>1</sup> The title of the relevant trade practices legislation has changed. As of 1 January 2011, the *Trade Practices Act 1974* is now cited as the *Competition and Consumer Act 2010*

required to attract sufficient passengers necessary to make new long haul services successful.

**Draft determination**

- 1.7. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.
- 1.8. On 16 December 2010, the ACCC issued a draft determination proposing to grant authorisation for the Alliance for five years.
- 1.9. A conference was not requested in relation to the draft determination.

## 2. Background to the application

### The applicants

#### Virgin Blue

- 2.1. The Virgin Blue Group commenced operations in Australia in August 2000. It is listed on the Australian Stock Exchange.
- 2.2. The Virgin Blue Group currently operates 88 aircraft on approximately 3,000 flights per week to 48 Australian and international destinations under the Virgin Blue, Pacific Blue, V Australia and Polynesian Blue brands. Polynesian Blue is not part of the Alliance, but may be in future. The destinations currently served by the Virgin Blue Group are listed in Table 2.1.

**Table 2.1 Virgin Blue destinations<sup>2</sup>**

Adelaide	Darwin	Kununurra	Port Macquarie
Albury	Denpasar	Launceston	Port Moresby
Auckland	Dunedin	Los Angeles	Port Vila
Ballina	Fraser Coast	Mackay	Queenstown
Brisbane	Gold Coast	Melbourne	Rarotonga
Broome	Hamilton	Mildura	Rockhampton
Cairns	Hamilton Island	Nadi	Sunshine Coast
Canberra	Hobart	Newcastle	Sydney
Christchurch	Honiara	Newman	Townsville
Christmas Island	Johannesburg(1)	Nuku'Alofa	Uluru
Cocos (Keeling) Island	Kalgoorlie	Perth(1)	Wellington
Coffs Coast	Karratha	Phuket	Whitsundays

(1) Flights to these destinations will cease in 2011.

- 2.3. In 2005, Virgin Blue announced its move away from a low-cost carrier (LCC) business model and towards becoming a New World Carrier (NWC). Virgin Blue advises that a NWC is a low cost, high value airline model that is pitched between a full service carrier and a LCC. As part of this strategy, Virgin Blue is trying to attract higher yielding corporate and business passengers, while at the same time remaining attractive to leisure passengers.<sup>3</sup>
- 2.4. As part of Virgin Blue's NWC strategy, it is seeking to improve its international network by forming international alliances and maintaining a small fleet of aircraft.<sup>4</sup> Virgin Blue is currently in the process of seeking regulatory approval for alliances with Delta Air Lines on services between Australia and the United States and with Air New Zealand for services between Australia and New Zealand.

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<sup>2</sup> [www.virginblue.com.au/Personal/Flightinfo/WhereWeFly](http://www.virginblue.com.au/Personal/Flightinfo/WhereWeFly)

<sup>3</sup> *Submission in support of the Application for Authorisation of the Alliance between Virgin Blue and Etihad Airways*, 27 August 2010

<sup>4</sup> *Submission in support of the Application for Authorisation of the Alliance between Virgin Blue and Etihad Airways*, 27 August 2010

## Etihad

- 2.5. Etihad, the national airline of the United Arab Emirates (UAE), commenced operations in November 2003. Etihad has a fleet of 55 aircraft, operating around 1000 flights per week serving 60 destinations. These are listed in Table 2.2.

**Table 2.2 Etihad destinations<sup>5</sup>**

Abu Dhabi	Chicago	Johannesburg	Moscow
Almaty	Colombo	Karachi	Mumbai
Amman	Damascus	Kathmandu	Munich
Astana	Dammam	Khartoum	Muscat
Athens	Delhi	Kozhikode	Nagoya
Bahrain	Dhaka	Kuala Lumpur	New York
Bangkok	Doha	Kuwait City	Paris
Beijing	Dublin	Lahore	Peshawar
Beirut	Frankfurt	Larnaca	Riyadh
Brisbane	Geneva	London	Singapore
Brussels	Hyderabad	Manchester	Sydney
Cairo	Islamabad	Manila	Tehran
Cape Town	Istanbul	Melbourne	Thiruvananthapuram
Casablanca	Jakarta	Milan	Tokyo
Chennai	Jeddah	Minsk	Toronto

- 2.6. Etihad is not a member of any global alliance, but does have a number of codeshare and interline agreements. Etihad had a code share relationship with Qantas, which was terminated on 29 November 2010 with the announcement of the Alliance with Virgin Blue. This code share agreement covered Etihad and Qantas flights between Europe and Australia, via the UAE.

## The Alliance

- 2.7. The applicants' Alliance includes:

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

- 2.8. As part of these agreements, the applicants will cooperate on pricing and scheduling of services across their respective networks. However, there is no revenue sharing under the Alliance.

- 2.9. Under the Alliance, Virgin Blue would commence three Sydney-Abu Dhabi flights a week in February 2011, in addition to Etihad's 11 current services. This would enable the applicants to run double daily flights between Sydney and Abu Dhabi. Etihad has

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<sup>5</sup> Submission in support of the Application for Authorisation of the Alliance between Virgin Blue and Etihad Airways, 27 August 2010, Annexure F

agreed to make available scheduled departure times in its current schedule for the new Virgin Blue Sydney-Abu Dhabi flights and intends to reschedule some of its existing 11 frequencies in order to optimise behind and beyond connections to both of the applicants networks. Virgin Blue advises that it will commence these new Sydney-Abu Dhabi services by redeploying its V Australia aircraft from current Johannesburg and Phuket services.<sup>6</sup>

- 2.10. Virgin Blue also plans to commence services between Brisbane, Singapore and Abu Dhabi from February 2012 under the Alliance.
- 2.11. To give effect to the Alliance, the applicants propose to:
- enter into reciprocal interline agreements
  - codeshare on a freesale basis on each other's networks with favourable pro-rates and
  - offer reciprocal lounge and frequent flyer benefits.
- 2.12. The applicants advise that they will also work together on a range of other joint initiatives, including:
- further product alignment
  - staff travel reciprocity
  - joint sales and marketing and
  - airport processes, maintenance and ground handling.
- 2.13. The Alliance will enable Virgin Blue to offer services from Australia to the UAE and onto the UK/Europe and other international destinations, such as the Middle East, Africa and Asia, through connections on Etihad flights from Abu Dhabi. Similarly, it will allow Etihad to offer services beyond Australia's major international gateways, and into Virgin Blue's beyond network, which includes destinations throughout Australia, New Zealand, the Pacific Islands and to Los Angeles.<sup>7</sup>
- 2.14. The Alliance also contemplates further agreements, including codesharing between Etihad and Polynesian Blue, another Virgin Blue brand.
- 2.15. Given the ACCC granted interim authorisation for the Alliance, the applicants have commenced selling and marketing the Alliance's services, although flights are not due to commence until February 2011.

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<sup>6</sup> On 26 August 2010 Virgin Blue announced that it would withdraw its current V Australia services to Johannesburg and Phuket because they are loss making and are not expected to turn a profit in the foreseeable future – see *Submission in support of the Application for Authorisation of the Alliance between Virgin Blue and Etihad Airways*, 27 August 2010, p.13

<sup>7</sup> Virgin Blue, News and Press Releases - *Virgin Blue Group of Airlines Receives Interim Authorisation for Strategic Alliance with Etihad Airways*, 23 September 2010, [http://www.virginblue.com.au/AboutUs/Media/NewsandPressReleases/P\\_013600.htm](http://www.virginblue.com.au/AboutUs/Media/NewsandPressReleases/P_013600.htm)

- 2.16. Codeshare arrangements are authorised by the International Air Services Commission (IASC). IASC has approved codeshare agreements between the applicants on a number of routes which allow the parties to jointly price and market their services. IASC's authorisation is conditional upon the joint pricing and marketing practices being authorised by the ACCC.

## **The air travel industry**

### **International aviation regulation**

- 2.17. The international airline industry is highly regulated. The 1944 *Convention on International Civil Aviation* established the principle that each country has exclusive sovereignty over its airspace. This principle continues to guide the regulatory framework today.
- 2.18. International air transport cannot occur unless it is specifically authorised pursuant to a government to government bilateral air services agreement (ASA).
- 2.19. An ASA specifies the terms and conditions of airline activity between two countries. An ASA may indicate the destinations that can be served in a particular country, the permitted frequencies per week and any rights to operate via or beyond to third countries. Typically, the rights granted under an ASA can only be exercised by designated carriers of the countries that are parties to them.
- 2.20. Australia and the UAE have an ASA, registered on 3 July 2007. A Memorandum of Understanding between the two countries' aeronautical authorities (signed on 8 February 2010) outlines capacity entitlements of air services between the countries.<sup>8</sup>

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<sup>8</sup> The Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, media release, *More Seats On Routes Between Australia and the Middle East*, 12 February 2010. See: [www.minister.infrastructure.gov.au/aa/releases/2010/February/AA029\\_2010.htm](http://www.minister.infrastructure.gov.au/aa/releases/2010/February/AA029_2010.htm)

### **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.
- 3.2. Broadly, the applicants submit that the Alliance would create public benefits in the form of increased tourist traffic between Europe and Australia, as well as increased competition in the domestic and international passenger aviation markets, and would not result in any public detriment.
- 3.3. The ACCC sought submissions from 100 interested parties potentially affected by the application, including competitors, airports, regulators and industry groups. A summary of the public submissions received from interested parties follows.
- 3.4. The Australian Federation of Air Pilots supports the Alliance, submitting that it would not cause any detriment to its members' employment opportunities.
- 3.5. Sydney Airport supports the Alliance, submitting that the new flights would generate extra economic activity and bring extra tourists to Sydney and regional centres served by Virgin Blue. They also note that greater choice and convenience in terms of frequent flyer and passenger lounge programs will benefit travellers, as will greater route choice and coordination which could result in reduced travel times.
- 3.6. Tourism Queensland supports the Alliance, noting the importance of tourism to the Queensland economy. They submit that European passengers provide more tourist dollars to Queensland and Australia than passengers from Thailand or South Africa, so the new flights proposed under the Alliance will be of much greater benefit to local tourism than the Brisbane-Phuket and Melbourne-Johannesburg routes they would replace. Tourism Queensland submits that the higher frequencies proposed under the Alliance will make the Brisbane-Singapore-Abu Dhabi route more attractive than it is currently.
- 3.7. The Department of Infrastructure and Transport supports the Alliance, submitting that it will help support a competitive and sustainable Australian aviation industry. The Department of Infrastructure further submits that the Alliance will help ensure the continued viability of Virgin Blue's services to the UAE, and give the airline the ability to compete across a range of other markets without the need for significant capital expenditure. The Department notes that it is unlikely Virgin Blue would commence viable European services without an alliance partner.
- 3.8. Webjet does not oppose the Alliance.
- 3.9. Qantas opposed the granting of interim authorisation to the Alliance but did not directly comment on whether final authorisation should be granted. Qantas submitted that the Alliance would significantly change the dynamics of the relevant markets which, if granted interim authorisation, would not be easily corrected if final authorisation was denied.

- 3.10. The applicants only responded directly to the Qantas submission. The applicants submit that Qantas had not identified any detriment to the public or even to itself from the Alliance. They submit that Qantas' reference to a change in market dynamics contained an 'implicit premise' that the change was negative, and that this premise was without basis.
- 3.11. The ACCC did not receive any submissions following the draft determination.
- 3.12. The views of the applicants and interested parties are outlined in the ACCC's evaluation of the Alliance in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website ([www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)) by following the links to this matter.

## 4. ACCC evaluation

4.1. The ACCC's evaluation of the Alliance is in accordance with tests found in 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;

as well as with the 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;

as well as with the test found in section 90(8) of the Act which states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.

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

### The market

4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant markets affected by that conduct.

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

- the supply of international air transport services for passengers travelling between (a) Australia and the Middle East and (b) Australia and the UK/Europe; and

- the supply of Australian air transport services for passengers travelling on domestic routes.
- 4.5. The applicants submit that, for the purposes of analysing the Alliance, separating business and leisure passengers does not alter the competitive assessment as Virgin Blue does not currently supply international air transport services in the relevant markets.
- 4.6. Further, the applicants submit that the markets for international air freight transport and for the sale of air travel are not relevantly affected by the authorisation.
- 4.7. In its recent authorisation of Qantas and British Airway's Joint Services Agreement (JSA)<sup>9</sup> the ACCC assessed the impact of the arrangement on markets for:
- international air passenger transport for leisure passengers
  - international air passenger transport for business passengers
  - international freight transport
  - the sale of air transport and
  - Australian domestic passengers.
- 4.8. In relation to international air passenger transport, the ACCC has previously identified separate product markets for leisure and business passengers on long haul routes. This approach is based on the view that there are limitations in demand and supply side substitutability which make it appropriate to distinguish between more price sensitive (leisure) passengers and more time sensitive (business) passengers. The ACCC has not been provided with any information which suggests that it should depart from this view in this case.
- 4.9. The ACCC notes and accepts the applicants' submission that adopting a narrow or broad product market will not alter the assessment in this case since the applicants do not currently offer any competing services.
- 4.10. In terms of the geographic dimension of the market for international passengers, the ACCC has generally taken the view that there is a point to point market for more time sensitive business passengers and a regional market for more price sensitive leisure passengers.
- 4.11. The applicants currently do not operate any overlapping services. In light of this, the ACCC accepts the applicants' submission that the services to be provided under the Alliance give some guidance on the relevant geographic market. Adopting this approach, the applicants have identified the supply of international air transport services for passengers travelling between (a) Australia and the Middle East and (b) Australia and the UK/Europe as relevant markets.

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<sup>9</sup> ACCC, *Determination - Applications for authorisation – Qantas Airways Limited & British Airways plc*, 31 March 2010

- 4.12. The ACCC notes that Etihad also operates services from the Middle East to numerous destinations in Asia and a more limited number of destinations in Africa and the Americas, such that the Alliance is also likely to affect the markets for passengers travelling between Australia and Asia, and Australia and Africa. However, the ACCC accepts that the two markets identified by the applicants are likely to be the main focus of the assessment in this case.
- 4.13. Based on the information available, the ACCC accepts that international freight transport and the sale of air transport services are not relevantly affected by this authorisation.
- 4.14. The ACCC has previously noted that the primary way that an international alliance could affect competition in the market for domestic travel is by directing domestic on-carriage or feeder traffic to a particular carrier, at the expense of other domestic carriers. The ACCC notes that this alliance is likely to have such an effect and therefore, it is relevant to consider the impact on the market for domestic air passenger services.
- 4.15. For the purposes of this assessment, the ACCC considers that the relevant areas of competition are:
- international air transport services for passengers travelling between Australia and the Middle East, and between Australia and the UK/Europe; and
  - domestic air transport services for passengers travelling within Australia.

## **The counterfactual**

- 4.16. 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.<sup>10</sup>
- 4.17. 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’.
- 4.18. The applicants claim that absent the Alliance, Virgin Blue would not be in a position to enter the Australia-Middle East market or compete in the broader market for services between Australia and Europe:

Without access to onward connections on Etihad’s network, particularly to Europe, 3 weekly services from Sydney to Abu Dhabi would not be an attractive proposition for Australian passengers and would be unlikely to attract passengers.<sup>11</sup>

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<sup>10</sup> *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.

<sup>11</sup> *Submission in support of the Application for Authorisation of the Alliance between Virgin Blue and Etihad Airways*, 27 August 2010, p.13

- 4.19. In support of this claim the applicants have advised that only five to ten percent of traffic between the UAE and Australia originates or terminates in the UAE.<sup>12</sup> Most traffic is from or going to destinations throughout the world, in particular Europe.
- 4.20. The applicants submit that that they would not enter into ‘favourable’ codeshare arrangements absent the Alliance.
- 4.21. In respect of interim authorisation, Qantas expressed concern for passengers buying tickets for the new services proposed under the Alliance in the event the ACCC subsequently denies final authorisation. Qantas therefore considers that the new services proposed by Virgin Blue will not commence without authorisation of the Alliance.
- 4.22. The Department of Infrastructure submits that it is unlikely Virgin Blue would commence viable European services without an alliance partner.
- 4.23. The ACCC considers that the Alliance would not proceed without authorisation, and Virgin Blue would be unlikely to launch three weekly Sydney-Abu Dhabi services in February 2011 or three weekly Brisbane-Singapore-Abu Dhabi services in February 2012. With only five to ten percent of traffic between the UAE and Australia being point to point traffic, the ACCC accepts that Virgin Blue could not offer a viable service on the route without offering the beyond connections available on Etihad’s network with the Alliance.

## **Public benefit**

- 4.24. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>13</sup>
- 4.25. The applicants submit the Alliance will deliver significant public benefits, including:
- the promotion of Virgin Blue as a second Australian international airline and enhanced competition with Qantas
  - new international services operated by Virgin Blue
  - enhanced products and services, particularly the availability of an extensive international network of destinations across Etihad’s current network on Virgin Blue code and with Virgin Blue frequent flyer benefits and
  - stimulation of tourism to Australia, particularly to destinations beyond Australia’s main international gateways.

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<sup>12</sup> Tourism Australia, *UAE/Saudi Arabia Aviation Profile*, May 2009

<sup>13</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

4.26. The ACCC's assessment of the likely public benefits from the Alliance follows.

### **Increased competition**

4.27. The applicants submit that the Alliance will improve Virgin Blue's ability to compete with Qantas, by allowing Virgin Blue to build an international network and target corporate customers more effectively. The applicants consider this will result in a public benefit, as Australian customers will benefit from improved competition between Qantas and Virgin Blue across their networks.

4.28. Sydney Airport considers that the Alliance will promote increased competition for international air travel to and from Australia.

4.29. The Department of Infrastructure submits that an increase in services to Abu Dhabi would deliver a broader reach into the UK/Europe market by Australian carriers and provide consumers with a choice of two Australian airlines when travelling to these destinations.

4.30. The ACCC acknowledges that the Alliance gives Virgin Blue an ability to offer an increased number of online connections and gives Etihad access to Virgin Blue's Australian connections. The ACCC discusses the public benefits associated with these product and service enhancements below.

4.31. The central issue here is whether, by enabling these additional connections, the Alliance stimulates a more vigorous competitive response from the Qantas Group than would occur absent the Alliance.

4.32. The ACCC accepts that the Alliance will result in a broader and more integrated network. The ACCC notes that the benefits of such network expansion has been recognised by various international regulators. For example, in its recent decision to grant antitrust immunity for an alliance among five members of the 'oneworld' alliance, the US Department of Transportation stated:

Consistent with economic theory and the experience of other alliances, the proposed alliance is likely to significantly reduce fares on 'interline' routes in which only one partner operates one segment and only another partner operates another segment. The cooperation of the partners over the joint network increases overall traffic flows and revenue, providing each partner with the necessary incentive to avoid self-interested markups on a particular segment that they operate, which benefits consumers and the alliance as a whole. Many of the synergies of the alliance, including the ability to cooperatively price itineraries with multiple segments, would not occur but for the Alliance Agreements.<sup>14</sup>

4.33. The ACCC considers that cooperation between Virgin Blue and Etihad across their networks is also likely to result in such benefits in this case, and this in turn is likely to improve Virgin Blue's ability to compete against the Qantas Group.

4.34. Again, the ACCC notes that facilitating a competing alliance is a public benefit that has been recognised by the DOT:

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<sup>14</sup> Department of Transportation, *Joint Application of American Airlines, Inc., British Airways plc, Finnair OYJ, Iberia Lineas Aereas de Spana, S.A., Royal Jordanian Airlines* Docket DOT-OST-2008-0252, p.31.

...the proposed transaction facilitates a third strategic alliance. This too is a public benefit. Oneworld will become more competitive in a number of markets, exerting increased competitive discipline on fares and services in those markets. Consumers getting a third viable option will enjoy more destinations, better connections, improved schedules, and better frequent flyer benefits. These benefits complement the annual surplus from price reductions and increased traffic on current interline routes.<sup>15</sup>

- 4.35. The ACCC concludes that the Alliance is likely to result in public benefits by stimulating competition between Virgin Blue and the Qantas Group, including in respect of business passengers.

### **New international services**

- 4.36. The applicants submit that the Alliance will enable Virgin Blue to commence the following services:
- three weekly V Australia operated services from Sydney to Abu Dhabi, meaning the Alliance will offer double daily services from February 2011 and
  - three weekly V Australia operated services from Brisbane to Singapore and on to Abu Dhabi, from February 2012.
- 4.37. The applicants consider these new services will provide more choice for Australians travelling to the UAE and beyond destinations in Europe, the Middle East, South Asia and Africa.
- 4.38. For the reasons discussed earlier, the ACCC is of the view that Virgin Blue would be unlikely to launch these services absent the Alliance. As such, the ACCC considers that the new international services available under the Alliance are likely to result in a public benefit in the form of increased choice and convenience for consumers.

### **Enhanced products and services**

- 4.39. The public benefits claimed by the applicants under this heading fall into two categories – increased online connection options and enhanced value added services.

#### ***Increased online connection options***

- 4.40. The applicants submit that the Alliance will enable passengers to purchase online and interline journeys across the entire international and Australian domestic networks offered by them. Further, they submit that the Alliance will give passengers access to better connections and a broader schedule:

The Alliance will enable online (and interline) connections between all points currently served by Virgin Blue Group in domestic Australia and internationally with Etihad's extensive international network of destinations...<sup>16</sup>

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<sup>15</sup> Department of Transportation, *Joint Application of American Airlines, Inc., British Airways plc, Finnair OYJ, Iberia Lineas Aereas de Spana, S.A., Royal Jordanian Airlines* Docket DOT-OST-2008-0252, p.32.

<sup>16</sup> *Submission in support of the Application for Authorisation of the Alliance between Virgin Blue and Etihad Airways*, 27 August 2010, p.21

- 4.41. The applicants submit that new online journeys will be created for Australian consumers, which were previously unavailable, such as:
- Sydney-Moscow
  - Adelaide-Dublin
  - Perth-Athens
  - Cairns-Munich
  - Brisbane-Manchester
  - Gold Coast-Abu Dhabi
  - Uluru (Ayers Rock)-London
  - Melbourne-Frankfurt
- 4.42. Further, the applicants submit that passengers on Etihad's services will be able to access online journeys to destinations throughout Australia, beyond the major international gateways, using Virgin Blue's domestic network.
- 4.43. The applicants submit that both business and leisure customers value online connections for a number of reasons, including:
- increased convenience
  - likelihood of making a connecting flight if previous journey sector is delayed
  - reduced likelihood of luggage being lost and
  - price – unlike separate 'mix and match' fares, online flights that are part of a favourable code share service such as under the Alliance, are not subject to double marginalisation.
- 4.44. Sydney Airport notes that more choice, more convenience and reduced travel times for passengers will give rise to a public benefit. Further, they consider that outbound international passengers will particularly benefit from the ability to purchase online journeys across the Australian domestic and international networks offered by the two applicants.
- 4.45. The ACCC recognises that there are important benefits to consumers from online connections, and notes the significant amount of literature that supports this notion.<sup>17</sup>
- 4.46. The ACCC considers that increased online connection options for consumers is a source of public benefit under the Alliance. These benefits take the form of convenience in not having to collect and transfer/hold baggage mid journey, time

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<sup>17</sup> See for example: Carlton, D, Landes, W and Posner, R 1980, *Benefits and costs of airline mergers: a case study*, Bell Journal of Economics, Vol. 11, pp. 65-83.

savings associated with checking into connecting flights and removal of the risk of forfeiting non-refundable fares if the first flight in their journey is delayed.

### ***Enhanced value added services***

- 4.47. The applicants submit that customers will also benefit from reciprocal frequent flyer and status credits programmes and reciprocal lounge access across the networks of the two alliance partners.
- 4.48. The applicants state that consumer surveys consistently show that airline satisfaction for consumers is highly tied to the additional services offered by the airlines. These other value added factors have been shown to have a significant impact on consumer satisfaction and preferences when choosing which airline to fly with.
- 4.49. The applicants have not provided any further detail about the public benefits likely to arise from reciprocal loyalty programs and lounge access in this case.
- 4.50. The ACCC accepts that the attractiveness of Virgin Blue's loyalty program is likely to be enhanced under the Alliance as a result of access to Etihad's broader network offering. The ACCC considers that the public benefits from reciprocal access to loyalty programs are likely to accrue to passengers who prefer to fly with Virgin Blue or Etihad, are members of an alliance loyalty program and who value the ability to earn or use frequent flyer points.
- 4.51. Generally speaking, the ACCC accepts that lounge access is important to business passengers in particular, and an alliance is likely to provide the Alliance partners with stronger incentives to serve each others' customers on an equal basis than under an access arrangement between rivals.

### **Tourism benefits**

- 4.52. The applicants submit that the addition of new flights proposed under the Alliance, and the ability to leverage each others distribution and marketing strengths in promoting the Alliance's services, will increase overall passenger numbers to Australia. The applicants engaged InterVISTAS to conduct an analysis of the Alliance and they found that the introduction of new services will have the effect of stimulating market growth, which the applicants claim would have flow on benefits for Australian tourism.
- 4.53. The applicants submit that the Alliance will enable new services to destinations within Australia that were previously unavailable without the inconvenience and costs associated with switching airlines. They say that this will improve the attractiveness of travel in Australia beyond the major international gateways, having a direct and beneficial impact on Australian tourism.
- 4.54. Tourism Queensland notes the importance of tourism to the Australian and Queensland economies, and considers that the Alliance will deliver a higher level of international visitors to Australia:

The current V Australia services of Melbourne-Johannesburg and Brisbane-Phuket have minimal benefit to the Queensland and Australian tourism industries in comparison to the proposed Abu Dhabi alternatives. The Johannesburg and Phuket routes are largely focussed on

taking Australians overseas. The Abu Dhabi services will help facilitate tourist arrivals from key European markets including the United Kingdom, Germany and France.

- 4.55. Further, Tourism Australia submits that for the year ending June 2010, visitors from the United Kingdom and Europe to Queensland spent \$1.181 billion compared to \$0.091 billion by Thai visitors.
- 4.56. Sydney Airport submits that the additional flights proposed under the Alliance will help to support and increase Australian tourism, business and trade. Sydney Airport further submits that the Alliance will stimulate tourism in parts of Australia beyond Sydney, by providing international passengers with improved access to Virgin Blue's domestic and regional NSW network.
- 4.57. The ACCC has noted previously that there are a wide range of factors which influence tourism demand, including general purchasing power in source countries, the relative cost of other destinations, the total cost of visiting Australia (land as well as air component) and the perceived quality of Australia as a destination.<sup>18</sup>
- 4.58. The ACCC accepts that stimulation of tourism is a potential source of public benefit under the Alliance. The ACCC considers that the Alliance is likely to stimulate tourism through increased online connections, making it easier for travellers to access destinations in Australia beyond the main international gateways.
- 4.59. The ACCC recognises that the Alliance may stimulate tourism through the exploitation of synergies through joint rather than separate tourism promotion activity. Although the applicants have not provided details of how the parties plan to implement joint promotion of tourism, the ACCC notes Etihad's extensive international presence and its incentive to promote the Alliance's new services and corresponding destinations in Australia. The ACCC also notes Virgin Blue's incentive to promote the new services, in particular its ability to offer for the first time services between Australia and Europe. The ACCC therefore considers the promotion of the new services act to stimulate tourism, both to and from Australia.
- 4.60. Under the Alliance, Virgin Blue will re-deploy aircraft from its current Johannesburg and Phuket routes to the Abu Dhabi route. The ACCC notes Tourism Australia's submission and recognises that the Abu Dhabi services may stimulate tourism by replacing services that primarily attract Australians going overseas.

#### **ACCC conclusion on public benefits**

- 4.61. The ACCC considers that the Alliance is likely to result in public benefits in the form of:
- increased competition between Virgin Blue and the Qantas Group resulting from the benefits of network expansion
  - new international services

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<sup>18</sup> ACCC Determination for applications A91097 and A91098 lodged by Air New Zealand Limited and Air Canada, January 2009, page 23.

- enhanced products and services, namely increased online connections and enhanced value added services and
- stimulation of tourism.

## **Public detriment**

4.62. 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.<sup>19</sup>

## **International air transport services**

- 4.63. The applicants submit that the Alliance will cause no public detriment as they do not currently compete, nor are they potential competitors, in any of the relevant markets because absent the Alliance, Virgin Blue would not enter the Australia-Middle East or Australia-UK/Europe markets as an independent carrier.
- 4.64. Interested party submissions did not identify any potential public detriments arising from the Alliance.
- 4.65. Under the Alliance, Virgin Blue and Etihad will jointly decide on the prices and schedules of services throughout their respective network. Generally speaking, agreements between competitors which influence the pricing decisions of market participants can result in higher prices for consumers and send market signals which direct resources away from their most efficient use.
- 4.66. However, the ACCC acknowledges that the applicants are currently not in direct competition with each other on any routes.
- 4.67. The ACCC notes that Virgin Blue and Etihad both service Sydney, Melbourne, Brisbane and Johannesburg, however there is no overlap between their networks.
- 4.68. The applicants note that it is possible to fly from Sydney-Los Angeles-London through V Australia's alliance with Delta, potentially creating competition with Etihad's Sydney-Abu Dhabi-London route. However, the applicants consider that the indirect routing and the consequent time involved make the V-Australia/Delta service an unlikely substitute.
- 4.69. The ACCC accepts the view that it would not be viable for an airline such as Virgin Blue to offer services between Australia and Abu Dhabi, where point to point traffic is lower than ten percent, without providing onward connections to destinations such as Europe. Therefore, the ACCC considers that, based on current available information, the applicants are unlikely to offer directly competing services in the future.

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<sup>19</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- 4.70. In any event, the ACCC notes that the applicants face direct competition from Emirates and Qatar Airways in the Australia-Middle East market. The ACCC also notes the applicants' submissions that:
- Emirates and Etihad continue to aggressively add capacity to Australia following recent changes to the ASA between the two countries.
  - Emirates is the dominant airline in the region with over half (56% in 2008) of all UAE/Saudi Arabian tourists entering Australia on this airline.
  - there are currently no constraints on the number of direct flights from the Middle East to Australia increasing – under the MOU, there is sufficient capacity for Emirates and Etihad to increase, and for Air Arabia to introduce, air transport services between Australia and the Middle East.<sup>20</sup>
- 4.71. The applicants submit that the Australia-UK/Europe market is characterised by strong competition between a large number of competitors. This is broadly consistent with the ACCC's view in the authorisation of Qantas and British Airways' JSA<sup>21</sup> that the Europe and South East Asia leisure passenger markets are currently subject to significant levels of competition. The ACCC has not departed from this view since the JSA authorisation.

### **Domestic air transport services**

- 4.72. The applicants submit that the competitive effect in the market for domestic air travel is a positive one. The applicants argue that the Alliance will enhance competition between Virgin Blue and the Qantas-Jetstar Group as it will give Virgin Blue the opportunity to better match Qantas' network, feeder traffic and distribution strength.
- 4.73. The ACCC's assessment of increased competition is set out in **Public benefit** above. In light of that discussion, the ACCC has no reason to believe that the Alliance is likely to result in anti-competitive detriment in the domestic passenger market.

### **ACCC conclusion on public detriments**

- 4.74. The ACCC considers that the Alliance is unlikely to result in any public detriment, given that the applicants do not currently directly compete, nor are they likely to directly compete in any of the relevant markets.

### **Balance of public benefit and detriment**

- 4.75. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the Alliance is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

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<sup>20</sup> *Submission in support of the Application for Authorisation of the Alliance between Virgin Blue and Etihad Airways*, 27 August 2010, Annexure D.

<sup>21</sup> ACCC, *Determination - Applications for authorisation – Qantas Airways Limited & British Airways plc*, 31 March 2010

4.76. In the context of applying the net public benefit test in section 90(8)<sup>22</sup> of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>23</sup>

4.77. For the reasons outlined in this chapter, the ACCC considers that the Alliance is likely to result in public benefits in the form of:

- increased competition between Virgin Blue and the Qantas Group resulting from the benefits of network expansion
- new international services
- enhanced products and services, namely increased online connections and enhanced value added services and
- stimulation of tourism.

4.78. The ACCC considers that the Alliance is unlikely to result any public detriment.

4.79. 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 relevant tests are met.

## **Length of authorisation**

4.80. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>24</sup> 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.

4.81. In this instance, the applicants seek authorisation for five years. As indicated above, the ACCC considers that the public benefits of the Alliance are substantial and there is unlikely to be any public detriment. On this basis, the ACCC considers it appropriate to grant authorisation for the Alliance for five years.

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<sup>22</sup> 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.

<sup>23</sup> *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

<sup>24</sup> Section 91(1).

## 5. The determination

### The application

- 5.1. On 27 August 2010, Virgin Blue and Etihad lodged applications for authorisation A91247 and A91248 with the ACCC.
- 5.2. Application A91247 was made using Form A Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsections 88(1A) and 88(1) of the Act to:
- make and give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
  - make and give effect to a provision of a contact, arrangement or understanding, a provision of which is, or may be, a cartel provision and which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act.
- 5.3. Application A91248 was made using Form B Schedule 1, of the Trade Practices Regulations 1974. Application A91228 was made under sections 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 have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
  - make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- 5.4. In particular, Virgin Blue and Etihad seek authorisation of an alliance in relation to air passenger services.

### The net public benefit test

- 5.5. For the reasons outlined in Chapter 4 of this determination, 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.
- 5.6. The ACCC is satisfied that the conduct for which authorisation is sought is likely to result in such a benefit to the public that the conduct should be allowed to take place.
- 5.7. The ACCC therefore **grants** authorisation to applications A91247 and A91248.

## **Conduct for which the ACCC grants authorisation**

- 5.8. The ACCC grants authorisation for the alliance between Virgin Blue and Etihad for five years.
- 5.9. The authorisation in respect of the Alliance as it stands at the time authorisation is granted. Specifically, the proposed authorisation extends to Virgin Blue and Etihad to jointly price and schedule services across their respective networks, as detailed in their commercial cooperation agreement and associated code share agreements. Any changes to the Alliance during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.10. This determination is made on 3 February 2011.
- 5.11. The attachments to this determination are part of the determination.

## **Conduct not authorised**

- 5.12. The authorisation does not extend to Virgin Blue and Etihad to revenue share under the Alliance.

## **Interim authorisation**

- 5.13. At the time of lodging the application, Virgin Blue and Etihad requested interim authorisation of the Alliance. The ACCC granted interim authorisation on 23 September 2010.
- 5.14. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## **Date authorisation comes into effect**

- 5.15. This determination is made on 3 February 2011. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 25 February 2011.

## **Attachment A — the authorisation process**

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

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

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

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

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

## **Attachment B — chronology of ACCC assessment for applications A91247 & A91248**

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

<b>DATE</b>	<b>ACTION</b>
27 August 2010	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
9 September 2010	Closing date for submissions from interested parties in relation to the request for interim authorisation.
14 September 2010	Submission received from Virgin Blue and Etihad in response to interested party submissions.
22 September 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
23 September 2010	The ACCC granted interim authorisation for the Alliance.
16 December 2010	Draft determination issued.
14 January 2011	Closing date for submissions from interested parties in relation to the draft determination.
3 February 2011	Determination issued.

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

## Competition and Consumer Act 2010

### 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.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup>

## 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 future<sup>28</sup>

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<sup>25</sup> *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.

<sup>26</sup> *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.

<sup>27</sup> Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>29</sup>

## **Six- month time limit**

A six-month time limit applies to the ACCC's consideration of new applications for authorisation<sup>30</sup>. 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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup> The ACCC may also review an authorisation with a view to revoking it in certain circumstances.<sup>34</sup>

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.<sup>35</sup> The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.<sup>36</sup>

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<sup>28</sup> Section 88(10).

<sup>29</sup> Section 88(6).

<sup>30</sup> Section 90(10A)

<sup>31</sup> Subsection 91A(1)

<sup>32</sup> Subsection 87ZD(1).

<sup>33</sup> Subsection 91B(1)

<sup>34</sup> Subsection 91B(3)

<sup>35</sup> Subsection 91C(1)

<sup>36</sup> Subsection 91C(3)