



Australian
Competition &
Consumer
Commission

Draft Determination

Applications for authorisation

lodged by

Qantas Airways Limited & American Airlines Inc.

in respect of

a Joint Business Agreement between the applicants

Date: 22 August 2011

Authorisation no.: A91265 &
A91266

Public Register no.: C2011/428

Commissioners:

Sims
Kell
Schaper
Court
Dimasi
Walker
Willett

Summary

The ACCC proposes to grant authorisation for a Joint Business Agreement between Qantas and American Airlines for five years.

On 12 May 2011, Qantas and American Airlines lodged applications for authorisation of a Joint Business Agreement (JBA). Under the JBA, the airlines will coordinate operations on services between Australia/New Zealand and the United States (the trans-Pacific routes), and on their respective services which support the trans-Pacific routes.

The applicants propose to coordinate all business operations, including flying operations, pricing and revenue management, scheduling, cargo, passenger sales and marketing, airport services and frequent flyer programs.

The ACCC considers that the JBA is likely to result in new and improved products and services, (including improved schedules and connectivity, a greater choice of connection and stop-over options, and the possibility of new and improved routes) and enhanced value added services (including reciprocal lounge access, equivalent frequent flyer privileges and improved check-in procedures). The ACCC also considers that the JBA will provide the applicants with an incentive to offer new fare products, which may result in lower fares on many trans-Pacific routes.

Qantas and American Airlines do not directly compete on any routes, and the information currently available suggests that they are unlikely to directly compete in the future. In light of this, the ACCC considers that the JBA is unlikely to result in any public detriment.

Therefore, the ACCC proposes to grant authorisation to the applicants for the JBA for five years.

On 9 June 2011, the ACCC granted interim authorisation, allowing the parties to commence the JBA while it considers the substantive applications for authorisation.

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

Contents

1. THE APPLICATIONS FOR AUTHORISATION	1
Interim authorisation	2
2. BACKGROUND TO THE APPLICATION	3
THE APPLICANTS	3
Qantas.....	3
American Airlines	3
THE JBA	4
THE AVIATION INDUSTRY	6
3. SUBMISSIONS RECEIVED BY THE ACCC.....	8
4. ACCC EVALUATION	10
THE MARKET	10
THE COUNTERFACTUAL.....	13
PUBLIC BENEFIT	14
New and improved products and services.....	15
New fare products and lower fares.....	16
Increased tourism	20
Streamlined corporate travel procurement	21
A stronger frequent flyer proposition.....	21
ACCC conclusion on public benefits	22
PUBLIC DETRIMENT	22
International air passenger transport services	23
International air freight transport services	23
The sale of air transport services.....	24
Australian domestic air passenger transport services.....	24
ACCC conclusion on public detriments.....	24
BALANCE OF PUBLIC BENEFIT AND DETRIMENT	24
LENGTH OF AUTHORISATION	25
VARIATIONS TO THE PROPOSED CONDUCT	25
5. DRAFT DETERMINATION.....	26
THE APPLICATION.....	26
THE NET PUBLIC BENEFIT TEST	26
CONDUCT FOR WHICH THE ACCC PROPOSES TO GRANT AUTHORISATION	27
INTERIM AUTHORISATION.....	27
FURTHER SUBMISSIONS	27
ATTACHMENT A — THE AUTHORISATION PROCESS.....	28
ATTACHMENT B — CHRONOLOGY OF ACCC ASSESSMENT FOR APPLICATIONS A91265 & A91266.....	29
ATTACHMENT C — THE TESTS FOR AUTHORISATION AND OTHER RELEVANT PROVISIONS OF THE ACT.....	30

List of abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	The Competition and Consumer Act 2010
The applicants	Qantas Airways Limited & American Airlines Inc.
Codeshare	Code sharing refers to arrangements involving the assignment of one airline's designator code to a flight operated by another airline.
The applicants' Codeshare Agreement	The applicants currently sell tickets on each others' services under a free-sale Codeshare Agreement dated 23 September 2004.
Free sale	A type of code share where the marketing carrier effectively only pays for the seats it sells
Interline agreement	Interlining involves the carriage of passengers and/or freight between two points using more than one airline under an arrangement which typically involves baggage check through and the honouring of tickets between airlines
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
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

1. The applications for authorisation

- 1.1. On 12 May 2011, Qantas Airways Limited (Qantas) & American Airlines Inc. (American Airlines) (together, the applicants) lodged applications for authorisation A91265 & A91266 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* (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 A91265 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 A91266 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 that Act).
- 1.5. In particular, Qantas and American Airlines have sought authorisation to make and give effect to a Joint Business Agreement (JBA). Under the JBA, they would coordinate operations on international air passenger transport services between Australia/New Zealand and the United States (the trans-Pacific routes), and on extensive Qantas and American Airlines services which support the trans-Pacific routes. The applicants have sought authorisation for five years.
- 1.6. Qantas will operate trans-Pacific services and connecting services in Australia and to New Zealand on behalf of the proposed JBA. American Airlines will operate connecting services in the United States, Canada and Mexico, and provide sales support for the trans-Pacific routes.

Interim authorisation

- 1.7. On 9 June 2011, the ACCC granted interim authorisation to allow the parties to commence the proposed JBA while the ACCC considers the substantive authorisation. Interim authorisation will remain in place until the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

2. Background to the application

The applicants

Qantas¹

- 2.1. Qantas was incorporated in Queensland in 1920 and is Australia's largest domestic and international airline. The Qantas Group employs approximately 32,500 people and offers services across a network covering 182 destinations in 44 countries - 59 in Australia and 123 in other countries (including those covered by code share partners).
- 2.2. As at 1 September 2010, Qantas operated a fleet of 252 aircraft. Qantas also operates airline related businesses which include airport support services, catering, freight operations, loyalty programs, defence support services and engineering.
- 2.3. Qantas operates flights using the following brands:
 - Qantas: a full-service airline offering domestic and international services
 - Jetstar: a low fare airline offering domestic and international services
 - QantasLink: a full-service regional domestic airline.
- 2.4. Qantas also has interests in Jetstar Asia and Valuair (both Singapore-based airlines, of which Qantas owns 49%), Jetstar Pacific (a Vietnam-based airline of which Qantas owns 27%) and Air Pacific (a Fiji based airline of which Qantas owns 46%).
- 2.5. Domestically, Qantas (including QantasLink and Jetstar) operates over 5,600 flights each week. These flights serve 59 city and regional destinations in all states and mainland territories. Internationally, Qantas (including Jetstar) operates more than 970 flights each week, of which approximately 630 are Qantas flights and 340 are Jetstar flights.
- 2.6. For the financial year ended 30 June 2010, Qantas reported revenue of A\$13.8 billion and a profit before tax of A\$178 million.

American Airlines²

- 2.7. American Airlines, the principal subsidiary of AMR Corporation, was founded in 1934. As at 31 December 2010, American Airlines provided services to approximately 160 destinations throughout North America, the Caribbean, Latin America, Europe and Asia. The majority of American Airlines flights operate to or from five major United States cities: Dallas/Fort Worth, Chicago O'Hare, Miami, New York City and Los Angeles.

¹ The majority of information under this sub-heading is sourced from:

- Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011
- Qantas, *Annual report 2010*

² The majority of information under this sub-heading is sourced from:

- Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011
- AMR Corporation, *Annual report 2010*.

- 2.8. AMR Eagle Holding Corporation is a wholly owned subsidiary of AMR Corporation and owns two airlines, American Eagle Airline, Inc. and Executive Airlines, Inc, collectively known as American Eagle. Established in 1984, American Eagle is American Airlines' regional affiliate. As at 31 December 2010, American Eagle operated approximately 1,500 daily departures serving over 175 destinations in North America, Mexico and the Caribbean.
- 2.9. American Airlines also operates airline related businesses:
- AAdvantage: a travel awards/frequent flyer program
 - AA Vacations: a holiday business offering flights, accommodation, ground transportation and activities
 - American Airlines Cargo: providing cargo capacity to major cities in the United States, Europe, Canada, Mexico, the Caribbean, Latin America and Asia using the cargo holds of its passenger fleet.
- 2.10. For the 2010 financial year (to December), American Airlines reported revenue of US\$22.2 billion and a loss before tax of US\$506 million.

The applicants' other alliances

- 2.11. Both Qantas and American Airlines are part of the oneworld marketing alliance, which links the networks of its member airlines to facilitate global passenger travel, and also links the members' frequent flyer programs and access to lounge facilities. Other members include British Airways, Cathay Pacific, Finnair, LAN Airlines, Iberia, Japan Airlines (JAL), Malev Hungarian Airlines, Mexicana, Royal Jordanian and S7 Airlines.
- 2.12. Qantas and British Airways have a Joint Services Agreement, most recently authorised by the ACCC on 31 March 2010. American Airlines has been granted antitrust immunity by the United States Department of Transportation (US DOT) for an integrated alliance with British Airways, Iberia, Finnair and Royal Jordanian, and by the European Union's Directorate General Competition for a joint business agreement with British Airways and Iberia in respect of their European Union to North America operations. Additionally, an integrated alliance between American Airlines and Japan Airlines covering their trans-Pacific services between North America and Asia has recently been approved by the US DOT and the relevant Japanese regulatory authorities.

The JBA

- 2.13. The applicants currently sell tickets on each others' services under a free sale Codeshare Agreement dated 23 September 2004. Since American Airlines ceased operations on the trans-Pacific routes in 1992, it has placed its code on a number of services within Qantas' trans-Pacific and domestic Australian and New Zealand

network. Qantas places its code on American Airlines domestic services within the United States, and also on services between the United States and Canada/Mexico.³

- 2.14. The JBA will supersede the existing Codeshare Agreement. The JBA involves the coordination of operations on certain designated routes (the JB Services), including:
- trans-Pacific routes;
 - Brisbane – Los Angeles and Dallas/Fort Worth
 - Sydney – Los Angeles, New York (JFK), Dallas/Fort Worth and Honolulu
 - Melbourne – Los Angeles
 - Auckland – Los Angeles
 - and ‘behind and beyond’ codeshare routes⁴.
- 2.15. Qantas will operate trans-Pacific services and connecting services in Australia and on the trans-Tasman on behalf of the JBA. American Airlines will operate connecting services in the United States, Canada and Mexico and provide sales support for the Trans-Pacific Routes.
- 2.16. Qantas and American Airlines (and their related bodies corporate) may coordinate the following under the JBA:
- flying operations
 - codesharing
 - interlining
 - pricing and revenue management
 - scheduling (including frequencies and connection requirements)
 - cargo
 - passenger sales and marketing
 - holiday/vacation products and packages
 - frequent flyer programs
 - distribution
 - customer rebates, incentives and discounts

³ Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011.

⁴ For a complete list of existing routes see: Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011, Appendix E - The JB Services.

- agency arrangements (including coordinating agency commissions, rebates, incentives and discounts)
- ground handling
- airport services
- co-branded joint offices
- corporate dealing and
- joint procurement.

2.17. For example, the applicants propose to:

- establish a Joint Management Committee to conduct the JBA and govern the activities of the applicants on the JB Services
- develop new fare products and promotions and conduct integrated marketing campaigns drawing on the marketing presence of both carriers in their respective home markets and
- establish joint management and planning of ground products and services, including; coordinating the use of airport facilities by expanding reciprocal airport lounge access, developing joint lounges at certain airports and streamlining check-in facilities.

The aviation industry

International aviation regulation

- 2.18. 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.
- 2.19. International air transport cannot occur unless it is specifically authorised pursuant to a government to government bilateral air services agreement (ASA).
- 2.20. 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.
- 2.21. An Open Skies Agreement is one form of ASA between two countries. In essence, it is an agreement which provides minimal (or no) restrictions on the ability of the airlines of two countries to operate services between countries.

Australia/United States Open Skies Agreement

- 2.22. On 14 February 2008, Australia and the United States concluded the Open Skies Agreement (OSA), allowing all Australian and American owned carriers to provide unlimited direct services between the two countries. Air New Zealand can provide unlimited direct services by combining rights established under the United States/New Zealand and Australia/New Zealand open skies arrangements.
- 2.23. Under the OSA, the carriage of traffic over domestic sectors is reserved for national carriers. The agreement only allows the beyond carriage of genuine international traffic between international gateways (for example, Qantas' own trans-Pacific passengers between Los Angeles and New York).⁵ This means international airlines depend on commercial arrangements with domestic carriers in order to offer behind or beyond international gateway markets.

⁵ Air Transport Agreement between the Government of the United States and the Government of Australia, 1944, Annex I, section 1.

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, Qantas and American Airlines submit that they can achieve the following public benefits by working together under the JBA:
- improved product and services including new routes, additional frequencies, improved schedules, enhanced connectivity and better ground product and services
 - new fare products and lower fares to more destinations through a revision of fare zones, the introduction of a ‘Walkabout Pass’ and provision for preferential availability ensuring more availability for discounted fares across a broader travel period
 - increased tourism through increased passenger traffic and a focus on strategic joint promotion
 - streamlined corporate travel procurement and
 - a stronger frequent flyer proposition.
- 3.3. The ACCC sought submissions from approximately 90 interested parties potentially affected by the application, including competitors, airports, travel agents, government departments, regulators and tourism and industry groups. The ACCC received submissions from Sydney Airport, Brisbane Airport and Virgin Australia.
- 3.4. Sydney Airport considers the proposed JBA will result in a number of public benefits, which will be seen across the broader economy and the Australian tourism industry from an improvement in their travel experience. Sydney Airport considers airline passengers will benefit from an improvement in their travel experience, particularly outbound international passengers as they will be able to purchase online journeys across international and United States networks offered by American Airlines.
- 3.5. Brisbane Airport supports the application, noting the potential public benefits, including improved tourism from the United States, and also noting that there is no lessening of competition on the trans-Pacific route.
- 3.6. Virgin Australia opposed the granting of interim authorisation to the JBA, but did not directly comment on whether final authorisation should be granted. Virgin Australia queried whether the commercial imperatives on which the application for interim authorisation was based were still applicable; whether Qantas would still continue to offer the Dallas/Fort Worth services even if it did not obtain interim authorisation for the alliance; and how the applicants would unwind the alliance if final authorisation were not granted.

- 3.7. The applicants only responded directly to Virgin Australia's submission. The applicants submitted that the commercial imperatives for seeking interim authorisation were applicable as the critical launch period for a new service extends into subsequent months; the expansion to daily Dallas/Fort Worth services would be unlikely without the JSA; and unwinding the alliance will present little difficulty given American Airlines does not operate on the trans-Pacific.
- 3.8. The views of the applicants and interested parties are outlined in the ACCC's evaluation of the JBA 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 JBA is in accordance with tests 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.
- sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
 - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
 - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
 - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

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

The market

- 4.3. The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant markets affected by that conduct.
- 4.4. Previously, the ACCC has considered the impact of aviation alliance agreements on competition in the following markets:

- international air passenger transport services, with regard to particular geographic and product segments
 - international air freight transport services
 - the sale of air passenger transport services and
 - Australian domestic air passenger transport services.
- 4.5. The applicants note that the ACCC draws the data for the analysis of these markets from the Australian Bureau of Statistics (ABS). The applicants consider that this data distorts the market definition because it is collected on the basis of ‘purpose of travel’ rather than actual class travelled, and it would arguably be more accurate to characterise the market in terms of a premium segment and an economy segment reflecting cabin of travel rather than purpose of travel. Nevertheless, for the purposes of this matter, the applicants have provided information based on the markets previously identified by the ACCC.

International air passenger transport services

- 4.6. As set out above, the JBA provides for coordinated commercial arrangements between Qantas and American Airlines in respect of air passenger services on the trans-Pacific routes and all ‘behind and beyond’ routes; including Qantas’ international services between Australia and New Zealand, and American Airlines domestic United States network and international services between the United States and Canada and Mexico.
- 4.7. The applicants currently do not operate any overlapping direct services⁶. Given the current international aviation regulatory environment, and absent any stated intention of American Airlines to enter the trans-Pacific market, the ACCC considers that the applicants are unlikely to offer any competing services in the future.

Product dimension

- 4.8. The ACCC has previously identified separate product markets for leisure and business passenger services on long haul routes, including in its 2009 determination in relation to the alliance between Virgin Blue and Delta Air Lines on trans-Pacific routes.⁷
- 4.9. 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

⁶ The ACCC recognises that Qantas and American Airlines could be said to be operating competing services for those passengers who may choose to travel indirectly between an Australian gateway city and Dallas/Fort Worth or New York City. Specifically, a passenger travelling from Sydney – Dallas/Fort Worth could fly directly with Qantas, or indirectly with Qantas on the Sydney – Los Angeles segment and with American Airlines on the Los Angeles – Dallas/Fort Worth segment. Similarly, a passenger travelling from Sydney – New York City has the option to fly on Qantas services for the entire journey, or fly the Sydney – Los Angeles segment with Qantas and the Los Angeles – New York City segment with American Airlines.

⁷ ACCC, Determination for applications A91195 & A91196 lodged by Qantas & British Airways (2010); ACCC, Determination for applications A91227 & A91228 lodged by Virgin Blue & Air New Zealand (2010); ACCC, Determination for applications A91151-2 & A91172-3 lodged by Virgin Blue & Delta Air Lines (2009); ACCC, Determination for applications A91097 & A91098 lodged by Air New Zealand and Air Canada (2009).

(leisure) passengers and more time sensitive (business) passengers, in particular on long-haul routes.

- 4.10. The ACCC understands that leisure travellers are relatively more price sensitive and relatively less concerned about factors such as travel time, flexibility, connectivity, convenience and comfort when compared to business passengers. Notwithstanding the applicants' submissions, the ACCC considers that, particularly on long haul routes, these sensitivities generally apply regardless of which cabin a business or leisure passenger chooses to travel in.
- 4.11. The ACCC considers that in the market for international air passenger transport services, adopting a narrow or broad product market is not likely to alter the assessment in this case, since the applicants do not currently offer any competing services.

Geographic dimension

- 4.12. The ACCC has previously considered both a city-pairs/point-to-point approach and a regional approach in defining the geographic scope of the market for international air passenger transport services.⁸
- 4.13. The ACCC notes that adopting a point-to-point or regional market is not likely to alter the assessment in this case, since the applicants currently do not operate any overlapping direct services.
- 4.14. In light of this, the ACCC considers that the services to be provided under the JBA give some guidance on the relevant geographic market. The ACCC considers that this indicates the relevant geographic market is the provision of international air transport services for passengers travelling between Australia and the United States, and on extensive 'behind and beyond' services across both their networks to the extent they support the trans-Pacific services.

International air freight transport services

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

⁸ACCC, Determination for applications A91195 & A91196 lodged by Qantas and British Airways (2010); ACCC, Determination for applications A91227 & A91228 lodged by Virgin Blue & Air New Zealand (2010); ACCC, Determination for applications A91151-2 & A91172-3 lodged by Virgin Blue & Delta Air Lines (2009).

The sale of air passenger transport services

- 4.17. In previous determinations in respect of aviation alliances, the ACCC has recognised a separate market for the sale of air passenger transport services, which includes tickets sold directly by airlines to travellers as well as those sold through indirect channels such as travel agents.
- 4.18. Similarly to the market for international air freight transport, no information has been provided which suggests that the ACCC should depart from this view.

Australian domestic air passenger transport services

- 4.19. The ACCC has previously recognised that an international aviation alliance could affect competition in the market for domestic air passenger transport services by directing domestic on-carriage or feeder traffic to a particular carrier, at the expense of the competitive position of other domestic carriers.
- 4.20. The ACCC notes that the JBA could have such an effect, by directing American Airlines' United States originating passengers on to Qantas' trans-Pacific services and then to onward domestic connections with Qantas.
- 4.21. The ACCC has not received any information which suggests that it should depart from a consideration of the impact of the JBA on domestic air passenger transport services. Therefore, the ACCC considers it relevant to consider the impact of the JBA on the market for domestic air transport services for passengers travelling within Australia

Conclusion on relevant areas of competition

- 4.22. For the purpose of assessing this application, on the basis of the issues outlined above the ACCC considers the relevant areas of competition for the purpose of assessing the impact of the JBA are:
- international air passenger transport services between Australia and the United States, between Australia and Canada or Mexico via the United States, and between the United States and New Zealand via Australia
 - international air freight transport services between Australia and the United States
 - the sale of air passenger transport services and
 - domestic air passenger transport services in Australia.

The counterfactual

- 4.23. 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.⁹

⁹ *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

- 4.24. 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’.
- 4.25. The applicants submit that without authorisation they would:
- continue to act independently in marketing and sales while offering an inferior network, schedule and capacity and frequent flyer offering and a less efficient procurement process compared to what they would be able to offer as a joint business.
 - be unable to realise the benefits and efficiencies of integration and would be disadvantaged compared to the Virgin/Delta alliance (recently granted anti-trust immunity in the United States) and the United/Air New Zealand alliance (both are members of the Star Alliance).
- 4.26. In their submission in support of interim authorisation, the applicants stated that without the ability to cooperate, the current frequency of the new Dallas/Fort Worth services may not be sustainable, and expansion to daily services would be unlikely.¹⁰
- 4.27. The ACCC did not receive any other submissions on the likely counterfactual.
- 4.28. The ACCC considers that without authorisation:
- The parties would continue to operate non-overlapping direct services under their existing free sale Codeshare Agreement
 - American Airlines would continue to place its code on a number of services within Qantas’ trans-Pacific, Australian and New Zealand network, and Qantas would continue to place its code on American Airlines’ domestic services within the United States, and also on services between the United States and Canada/Mexico.
 - Qantas will continue to operate some services between Sydney and Dallas/Fort Worth with fewer frequencies than anticipated under the Alliance.

Public benefit

- 4.29. 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.¹¹

¹⁰ Qantas and American Airlines, *Submission in support of application for interim authorisation*, 2 June 2011.

¹¹ *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.

- 4.30. The applicants submits that the JBA, will deliver public benefits, including:
- new and improved products and services
 - new fare products and lower fares
 - increased tourism
 - streamlined corporate travel procurement and
 - a stronger frequent flyer proposition.

4.31. The ACCC's assessment of the likely public benefits of the JBA follows.

New and improved products and services

- 4.32. The applicants submit that the JBA will enable the addition of new routes, increased frequencies, improved schedules, enhanced connectivity and better ground products and services.
- 4.33. Dallas/Fort Worth is the major hub of American Airlines, where it operates (with American Eagle) approximately 750 flights to 186 destinations worldwide. The applicants note that Qantas' new Sydney – Dallas/Fort Worth services are supported by 28 codeshare destinations from Dallas/Fort Worth to a wide range of major cities across the United States, Canada and Mexico.
- 4.34. The applicants consider that the JBA provides a joint platform for the applicants to ensure the viability of the new Dallas/Fort Worth services and increase these services to a daily frequency as soon as possible.
- 4.35. The applicants submit that the JBA will also provide them with an incentive and opportunity to explore the expansion of their codeshare network and launch new trans-Pacific routes and connections. They note that under their existing codeshare relationship, the addition of new codeshare destinations is limited by the perception that administrative costs may outweigh any benefit of increased traffic. The applicants consider that the detailed sharing of market information under the JBA will lead to improved demand forecasting, prompt identification of market opportunities and enhanced ability to cater for growth through the addition of routes and frequencies.
- 4.36. By way of example, the applicants note that initial response to the Dallas/Fort Worth service indicates Vancouver, Calgary and Toronto are high demand 'beyond' destinations. At the moment these destinations involve relatively long connection times. The applicants submit that the JBA would provide the opportunity to reduce transit times by the better coordination of schedules.
- 4.37. Finally, the applicants submit that an integrated management and planning structure allowed under the JBA will enable a coordinated strategy to improve ground products and service for passengers through the expansion of reciprocal lounge access and improved check-in processes.

- 4.38. The ACCC recognises that when airlines providing complementary services act independently, the effect that each airline has on the demand for the other airline's services is not taken into account by either party in planning network products and services. The consequence of this 'externality'¹² can include less convenient or more time consuming connections and/or lower levels of provision of ground services such as airport lounges and check-in services.
- 4.39. For instance, air travel from Adelaide to Chicago requires a domestic segment in Australia (Adelaide – Melbourne), an international segment (say, Melbourne – Los Angeles) and a domestic segment in the United States (Los Angeles – Chicago). The carriers operating these segments provide complementary services. A change in scheduling of a carrier operating one segment, say Melbourne – Los Angeles, can affect the demand for travel on the connecting domestic segments. However, as independent airlines, Qantas will not take into consideration any change in demand for American Airlines' services in making decisions about products and services on its segments. Similarly, American Airlines will not take into account the effect of changes to products and services on its Los Angeles – Chicago segment on the demand for Qantas' Adelaide – Melbourne and Melbourne – Los Angeles segments.
- 4.40. The ACCC accepts that cooperation agreements can provide a means to address this externality or inefficiency by enabling airlines to share the benefits of an increase in demand across complementary segments. Typically, these cooperation agreements involve the ability to jointly set schedules and fares, and often some revenue sharing mechanism between the airlines.
- 4.41. The ACCC considers that the applicants are likely to have the incentive under the JBA to optimise their joint network offering. To the extent that the JBA facilitates this network optimisation, the ACCC considers that it is likely to result in public benefit by providing consumers with improved schedules and connectivity, a greater choice of connection and stop-over options, and the possibility of new and improved routes.
- 4.42. Additionally, the ACCC considers that the JBA is likely to provide the applicants with strong incentives to offer ground services to each others' customers on an equal basis. The ACCC accepts that this is likely to result in public benefit by providing consumers with expanded reciprocal lounge access (which will be of benefit to business passengers in particular) and improved check-in processes.

New fare products and lower fares

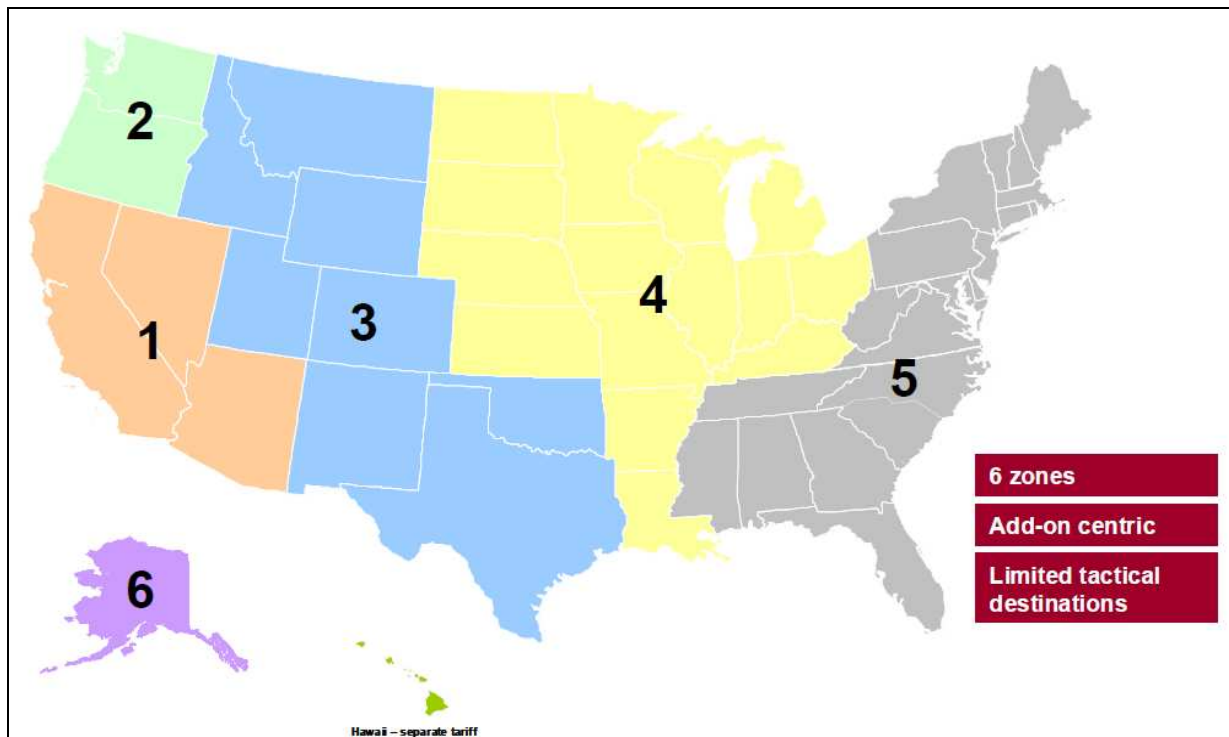
- 4.43. The applicants submit that the JBA will enable the development of new fare products and lower fares for passengers travelling from Australia to the United States, such as a simplified zoned pricing structure and the creation of a 'Walkabout' multi-sector pass. The applicants submit that these initiatives will create tangible benefits to consumers, including:
- additional discounts to the majority of the top 20 United States destinations

¹² An externality is an economic term referring to a cost or benefit that affects a third party (a party who did not agree to the action causing the cost or benefit) and is not reflected in market prices. In the presence of an externality, market prices do not reflect the full costs or benefits of producing or consuming a product or service. This results in an economic inefficiency or market failure.

- offering new tactical destinations and
- a preferential availability agreement with American Airlines.

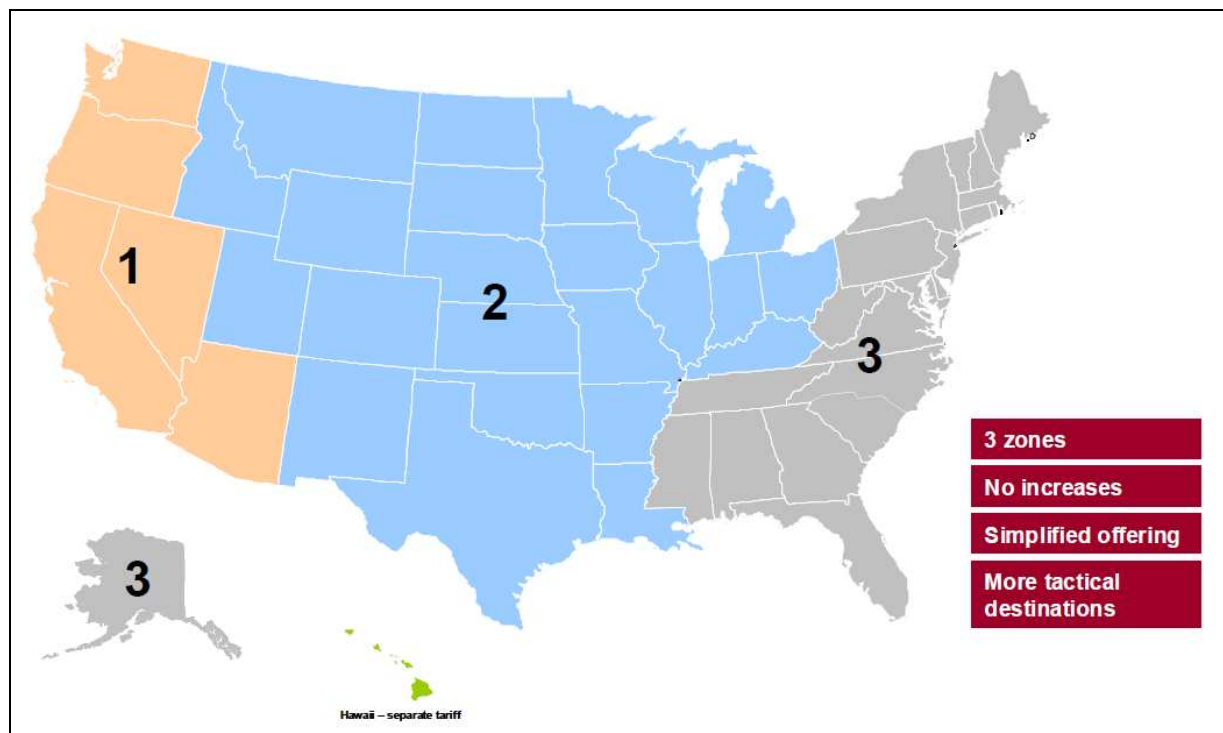
4.44. The applicants currently offer fares in the United States according to a geographic zone structure. Under the applicants' proposed simplification of zoned pricing, the current six zones will be reduced to three, as set out in figures 4.1 and 4.2 below.

Figure 4.1: Current six zone structure¹³



¹³ Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011, p. 28.

Figure 4.2: Proposed three zone structure¹⁴



4.45. The applicants submit that the new three zone pricing structure will:

- be simpler to manage and communicate to consumers and trade
- result in fare reductions for 64% of United States destinations
- allow a broader offering of discounted tactical fares to an increased number of destinations and
- allow expanded stop-over options between gateway cities in the United States and end destinations.

4.46. In their submission, the applicants illustrate the difference in fares under the six and three zone fare structure and set out the resulting fare reductions to 20 'popular' United States destinations (see figures 4.3 and 4.4 below).

¹⁴ Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011, p. 28.

Figure 4.3: Comparison of the six and three zone fare structure¹⁵

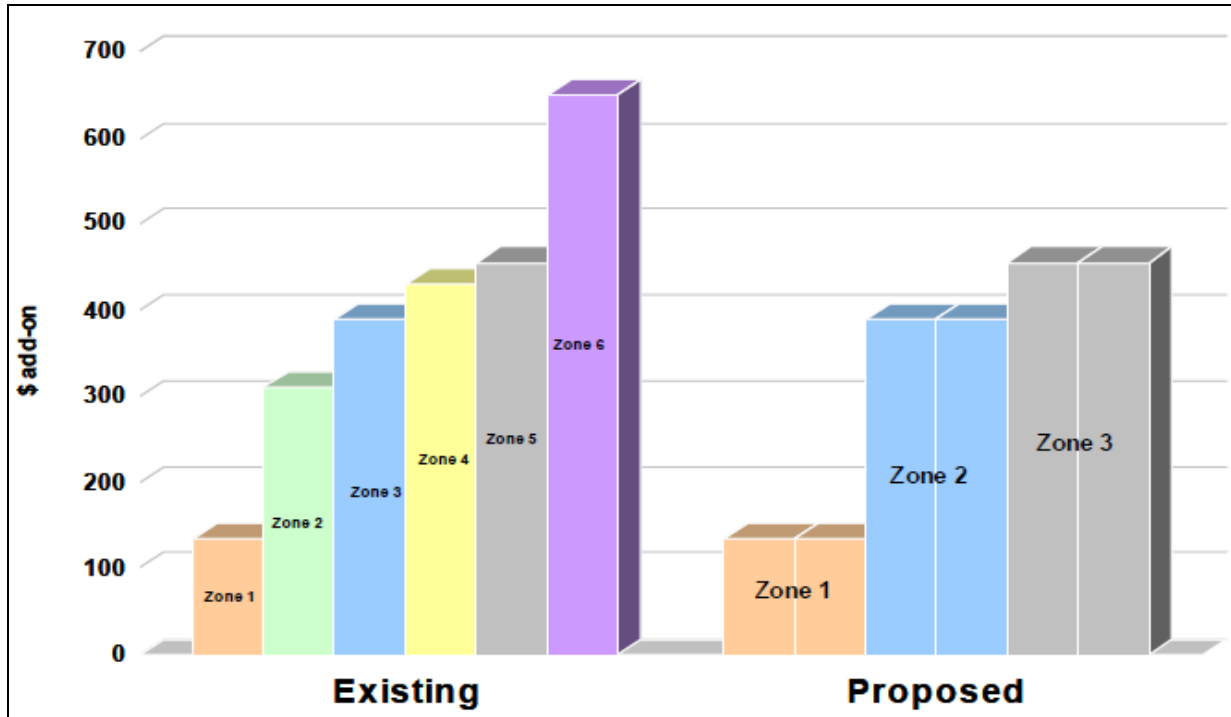
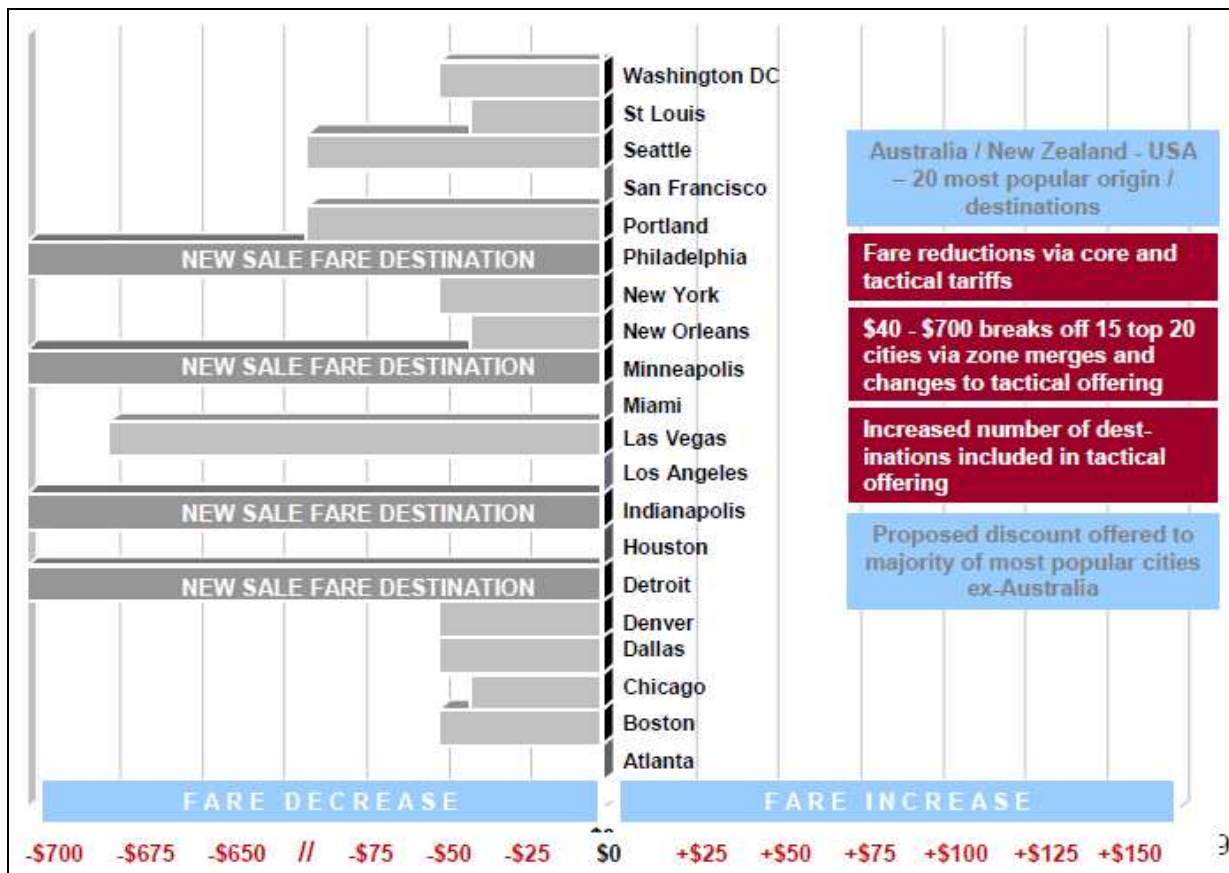


Figure 4.4: Fare reductions by city¹⁶



¹⁵ Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011, p. 29.

¹⁶ Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011, p. 29.

- 4.47. The applicants consider that the joint approach to planning and pricing facilitated by the JBA would involve common use and access to fares, and enable them to optimise the number of discounted seats available through the booking life of a flight as well as the strategic release of discounted inventory to drive volume on poor performing routes.
- 4.48. The applicants submit that the JBA will allow them to introduce a ‘Walkabout Pass’ for passengers travelling to the United States from Australia and New Zealand. Using the Walkabout Pass, a passenger can fly multiple sectors on the same ticket as opposed to purchasing sector fares. Currently, passengers travelling to the United States can use a oneworld ‘Visit North America Pass’, but the applicants submit that this product is not stop-over friendly and involves ‘add-ons’ to the Los Angeles tariff.
- 4.49. The applicants consider that the proposed Walkabout Pass would enable more effective marketing of beyond gateway multi-sector itineraries, under which fares would be based on mileage and tiered accordingly. They submit that these tiered fare levels would result in lower lead-in fares. Qantas proposes to offer American Airlines access to a domestic Australia pass to boost American Airline’s ex-United States offering.
- 4.50. The applicants also consider that the JBA would enable them to develop and promote fare products for multi-stop itineraries across a range of destinations in a way not facilitated by the current oneworld multi-sector products, such as United States – Australia via Asia or United States – Asia via Europe.
- 4.51. The ACCC considers that the JBA creates potential for lower connecting fares between the parties and new fare products as a result of:
- better coordination of available capacity on their respective domestic sectors to realise higher load factors and
 - removal or reduction of ‘double marginalisation’, which is a situation that occurs where suppliers of vertically related or complementary products independently charge a price which includes a mark-up over their costs to maximise their individual profits and do not take account of the impact of these prices on demand for the other airline’s services. The net result is higher prices on connecting routes than if the two firms were to coordinate their pricing, for example, through a cooperation agreement or alliance such as the JBA.
- 4.52. The ACCC considers that the JBA is likely to result in public benefit by facilitating new fare products and lower fares.

Increased tourism

- 4.53. The applicants submit that by drawing on the expertise of Qantas and American Airlines in their respective home countries, and the provision of better information to agents, the JBA will be able to achieve more efficiently and effectively the promotion of travel to Australia.
- 4.54. Drawing on Qantas’ Australian expertise and infrastructure, the applicants submit that the JBA would allow American Airlines’ AAVacations to develop a comprehensive range of Australian and Asia Pacific land, air and integrated products and actively

market this to residents of the United States and its own customer base. To achieve this, it is proposed that AAVacations would partner with Tour East Australia, a majority owned subsidiary of Qantas. The applicants submit:

Cooperation between Qantas and AAVacations will drive improved access to lower priced land inventory in Australia as a result of the increased purchasing scale. This would enable both Qantas and AAVacations to pass these savings on to consumers. In the case of AAVacations, it is estimated that these arrangements would enable it to offer integrated holiday packages at a 5 to 15% discount to the cost of purchasing flights and land components separately.¹⁷

- 4.55. AAVacations estimates that, based on its experience of conversion rates in other markets and the specific characteristics of Australia as a destination, the launch of Australian vacations packages could initially generate up to 360 additional visitors to Australia and New Zealand per month.
- 4.56. 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.¹⁸
- 4.57. In this case, the ACCC considers that the JBA may stimulate tourism both by enhancing the applicants' joint network offering and by integrating the sales and distribution network of AAVacations and Qantas' Tour East Australia. The ACCC notes the applicants' estimates of holiday package cost savings and increased visitor numbers, and considers that stimulation of tourism may be a source of some public benefit under the JBA.

Streamlined corporate travel procurement

- 4.58. The applicants submit that together, they can develop a joint strategy to better service their corporate customers by drawing on their respective experience and perspective. They consider the JBA will enable them to develop joint fare products for large corporate as well as small-to-medium enterprises, and provide incentives to leverage their home point-of-sale strengths to promote and distribute these products.
- 4.59. The ACCC considers these public benefits have mostly been considered by the ACCC in the three sections above: the ACCC recognises that the JBA will provide incentives for the applicants to develop a range of new products and services and offer lower fares. Therefore, this benefit claim will not be further considered here.

A stronger frequent flyer proposition

- 4.60. The applicants submit that the JBA provides incentives for them to consider mutual automatic status recognition for members of both frequent flyer programs, AAdvantage and Qantas Frequent Flyer. This means that frequent flyer members of either program will have increased opportunities to earn and/or redeem frequent flyer points and take advantage of other membership benefits when travelling on the other airline, such as

¹⁷ Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011, p. 32.

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

cabin upgrade offers and onboard loyalty status recognition. The applicants submit that this will benefit customers and make the airlines' loyalty programs more competitive.

- 4.61. Qantas and American Airlines also consider that the JBA provides incentives to better leverage their respective strengths of both AAdvantage and Qantas Frequent Flyer membership bases to conduct joint marketing programs, generating more traffic for the joint network. They submit that this benefit would not be possible absent the JBA.
- 4.62. The ACCC acknowledges that the JBA will enable the applicants to initiate reciprocal status recognition and point accrual, which will enhance the attractiveness of both airlines' loyalty programs. Generally speaking, the ACCC considers that the public benefits from reciprocal access to loyalty programs are likely to accrue to passengers who prefer to fly with one of the alliance members, are members of an alliance loyalty program and who value the ability to earn or use frequent flyer points.

ACCC conclusion on public benefits

- 4.63. The ACCC considers that the JBA is likely to result in public benefits in the form of:
- new and improved products and services (including improved schedules and connectivity, a greater choice of connection and stop-over options, and the possibility of new and improved routes) and enhanced value added services (including reciprocal lounge access, equivalent frequent flyer privileges and improved check-in procedures).
 - new fare products and lower fares
 - an enhanced frequent flyer proposition and
 - potentially, the stimulation of Australian tourism.

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.¹⁹
- 4.65. Qantas and American Airlines submit that the proposed JBA will not result in any anti-competitive detriment, as they have complementary rather than overlapping networks.
- 4.66. The ACCC's assessment of whether the JBA would be likely to result in any public detriment is set out below.

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

International air passenger transport services

- 4.67. The applicants submit that American Airlines passengers represent only 2.8% of the 1,860,935 passengers carried between Australia and the United States in the financial year ending June 2010. They consider that this small share reflects the reality that American Airlines does not operate its own services on the trans-Pacific route, has limited sales presence and recognition in Australia, and does not actively market Australia as a destination.
- 4.68. The applicants do not consider the JBA will give them the ability or incentive to increase prices or offer diminished service as they are constrained by the other carriers operating on the trans-Pacific and the threat of entry (or re-entry) afforded by the Open Skies Agreement.
- 4.69. The applicants submit that the recent entry and rapid expansion of Virgin Australia and Delta demonstrates the ease with which carriers can establish a presence on the trans-Pacific routes. The applicants also note that over the last two years the trans-Pacific routes have been characterised by constant sale²⁰ activity in all cabins with a view to maintaining load factor in light of the increased capacity on the routes and heightened price sensitivity of business and leisure travellers.
- 4.70. The ACCC notes that the applicants face direct competition from United Airlines, the Virgin Australia/Delta alliance, and to a lesser extent Air New Zealand, which operates services between Australia and the United States via New Zealand. In addition, the ACCC considers that indirect carriers²¹ may pose some, albeit limited, competitive constraint on the applicants.
- 4.71. The applicants note that the Qantas Group's market share has declined over the last couple of years in the markets for both leisure and business passengers between Australia and the United States. They note that this decline can be attributed to the entry of Virgin Australia and Delta in 2009.²²
- 4.72. Despite Qantas' recent decline in market share, the ACCC notes that it remains the largest player on the trans-Pacific route, with a 43% share of passengers (48% including Jetstar) in the year ended June 2010.²³ However, given American Airlines does not operate services on this route, the ACCC does not consider that the JBA will have any anti-competitive effect on these market dynamics.

International air freight transport services

- 4.73. The applicants note that Qantas and American Airlines have an interline agreement in respect of the carriage of freight on the trans-Pacific routes. The ACCC understands that the applicants do not offer any competing direct freight services. Based on the

²⁰ The ACCC takes this to mean frequent discounting of fares

²¹ Access to mainland United States from Australia is also available through indirect services over Asia using airlines such as Singapore Airlines and Cathay Pacific. The ACCC notes, however, that the market shares held by such carriers are relatively small in comparison to the direct carriers.

²² For more detailed information, see Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011, pp. 23 - 24 and Appendices G - I.

²³ Qantas and American Airlines, *Submission in support of applications for authorisation*, 11 May 2011, Appendix G

information available, the ACCC does not consider the JBA raises any significant competition concerns in the international air freight transport services market.

- 4.74. The ACCC notes that there are a number of other competitors in the market for air freight transport services between Australia and the United States, including major players such as Virgin Australia/Delta, United, FedEx, and United Parcel Services.

The sale of air transport services

- 4.75. The ACCC considers that the JBA is unlikely to adversely affect the market for the sale of air transport services given the wide range of mechanisms for ticket purchases available to consumers. The ACCC notes that while the JBA allows the applicants to jointly market their services, there is strong competition in the sale of air transport services from travel agencies (online and in shop fronts) as well as increasingly from the internet through global portals such as Zuji, Expedia and Webjet.

Australian domestic air passenger transport services

- 4.76. As noted above, an international alliance has the potential to lessen competition in the market for domestic air passenger transport services where the alliance directs domestic on-carriage or feeder traffic to a particular carrier (in this case, Qantas in Australia) at the expense of the competitive position of other domestic carriers.
- 4.77. The ACCC notes that under the applicants' current Codeshare Agreement, American Airlines passengers flying beyond or behind the Australian gateway cities (Brisbane, Sydney, Melbourne) are placed on Qantas domestic connections in any event. The ACCC also notes that passengers can opt to purchase the domestic leg of their journey separately.
- 4.78. Therefore, the ACCC does not consider that the JBA is likely to have any significant anti-competitive effects in the Australian domestic air passenger transport services market.

ACCC conclusion on public detriments

- 4.79. The ACCC considers that the JBA is unlikely to result in any anti-competitive detriment, given 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

- 4.80. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the JBA is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
- 4.81. In the context of applying the net public benefit test in section 90(8)²⁴ of the Act, the Tribunal commented that:

²⁴ 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.

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²⁵

- 4.82. For the reasons outlined in this chapter the ACCC considers the public benefits likely to result from the JBA are new and improved products and services, new fare products and lower fares, stimulation of tourism and an enhanced frequent flyer proposition. The ACCC does not consider that the JBA is likely to result any public detriment.
- 4.83. 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 are met.

Length of authorisation

- 4.84. The Act allows the ACCC to grant authorisation for a limited period of time.²⁶ 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.
- 4.85. In this instance, Qantas and American Airlines seek authorisation for five years. The applicants submit that this period reflects the negligible detriment associated with the proposed JBA, and the significant public benefits that will be achieved.
- 4.86. The ACCC did not receive any interested party submissions in relation to the length of authorisation sought.
- 4.87. As indicated above, the ACCC considers that the JBA is likely to result in a number of public benefits, and there is unlikely to be any public detriment. On this basis, the ACCC proposes to grant authorisation for the JBA for five years.

Variations to the proposed conduct

- 4.88. The ACCC notes that any amendments to the JBA during the proposed term of this authorisation would not be covered by the proposed authorisation.

²⁵ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

²⁶ Section 91(1).

5. Draft determination

The application

- 5.1. On 12 May 2011, Qantas and American Airlines lodged application for authorisation A91265 & A91266 with the Australian Competition and Consumer Commission (the ACCC).
- 5.2. Application A91265 was made using Form A, Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 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.
- 5.3. Application A91266 was made using Form B, 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 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, Qantas and American Airlines seek authorisation for a Joint Business Agreement (JBA).
- 5.5. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

- 5.6. For the reasons outlined in Chapter 4 of this draft determination, the ACCC considers that in all the circumstances the conduct for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
- 5.7. The ACCC is satisfied that the conduct for which authorisation is sought are likely to result in such a benefit to the public that the conduct should be allowed to take place.

- 5.8. The ACCC therefore **proposes to grant** authorisation to applications A91265 & A91266.

Conduct for which the ACCC proposes to grant authorisation

- 5.9. The ACCC proposes to grant authorisation for a Joint Business Agreement between Qantas and American Airlines for five years.
- 5.10. Further, the proposed authorisation is in respect of the JBA as it stands at the time authorisation is granted. Any changes to the JBA during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.11. This draft determination is made on 22 August 2011.
- 5.12. The attachments to this determination are part of the draft determination.

Interim authorisation

- 5.13. At the time of lodging the application, Qantas and American Airlines requested interim authorisation to commence the JBA. The ACCC granted interim authorisation on 9 June 2011.
- 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.

Further submissions

- 5.15. 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 *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 A91265 & A91266

The following table provides a chronology of significant dates in the consideration of the applications by Qantas and American Airlines.

DATE	ACTION
12 May 2011	Application for authorisation lodged with the ACCC, including an application for interim authorisation.
27 May 2011	Closing date for submissions from interested parties in relation to the request for interim authorisation.
8 June 2011	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
9 June 2011	The ACCC granted interim authorisation.
22 August 2011	Draft 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.²⁷

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.²⁸

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.²⁹

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 future³⁰
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.³¹

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation³². 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.

²⁷ *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.

²⁸ *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.

²⁹ Section 91(3).

³⁰ Section 88(10).

³¹ Section 88(6).

³² Section 90(10A)

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.³³ 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.³⁴

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.³⁵ The ACCC may also review an authorisation with a view to revoking it in certain circumstances.³⁶

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.³⁷ The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.³⁸

³³ Subsection 91A(1)

³⁴ Subsection 87ZD(1).

³⁵ Subsection 91B(1)

³⁶ Subsection 91B(3)

³⁷ Subsection 91C(1)

³⁸ Subsection 91C(3)