



Australian
Competition &
Consumer
Commission

Draft Determination and interim authorisation

Applications for authorisation

lodged by

Etihad & Alitalia

in respect of

a Co-operation Agreement implementing a
commercial partnership

Date: 17 December 2014

Authorisation numbers: A91468 & A91469

Commissioners:

Sims
Schaper
Rickard
Cifuentes
Court
Featherston

Summary

The ACCC proposes to grant authorisation for ten years to Etihad and Alitalia in respect of a Co-operation Agreement. Under the Co-operation Agreement Etihad and Alitalia will coordinate various aspects of the supply of international air transport services including pricing, scheduling and marketing activities.

The ACCC also grants interim authorisation to enable Etihad and Alitalia to commence joint activities under the Co-operation Agreement while the ACCC continues with its assessment of the applications.

Next steps

The ACCC will seek further submissions in relation to this draft determination before making its final decision. The Applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

1. The applicants and applications for authorisation

The applications for authorisation

- 1.1. On 6 November 2014, Etihad Airways PJSC (Etihad) and Alitalia Compagnia Aerea Italiana S.p.A. (Alitalia) (together 'the Applicants') lodged authorisation applications A91468 and A91469 with the ACCC under sections 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the CCA).
- 1.2. The Applicants have sought authorisation to make and give effect to a commercial Co-operation Agreement (the Co-operation Agreement) to implement a partnership for the purposes of co-operating in relation to the provision of international air transport services (the Partnership).¹ This includes both passenger and cargo transport services. In particular, the Co-operation Agreement includes provisions relating to the following joint activities:
 - pricing, scheduling and marketing activities:
 - route and schedule co-operation
 - pricing
 - marketing, distribution, dealing and sales representation including consolidation of sales offices and joint travel agent and corporate account dealing; and
 - processes and working arrangements
 - co-operative activities
 - procurement including in respect of aircraft, engines, maintenance, repair and overhaul operations, catering, ground handling and fuel
 - freesale codesharing²

¹ The Co-operation Agreement was entered into on 8 August 2014, subject to applicable laws and regulatory approvals.

² Codeshare refers to a commercial agreement between airline partners whereby a marketing partner publishes and manages marketing flight numbers for flights actually operated by a partner airline (Operating Carrier). Codeshare is an agreement between two or more carriers to share each other's inventory for optimal utilisation of the same. The company which actually operates the flight is called the Operating Carrier. The company who does not operate the flight but markets it under its own airline

- reciprocal preferred fare pro-ration
 - loyalty programs including fully reciprocal frequent flyer programmes to achieve loyalty scheme neutrality
 - reciprocal lounge access, staff travel and staff exchange and training programs
 - product development including seamless full service transfer products at airports
 - a global sales agreement to support sales in the United Arab Emirates
 - airport representation and ground handling; and
 - technical handling.
- 1.3. The Applicants submit that they currently only overlap with direct flights on one city pair, Rome-Abu Dhabi and that Alitalia does not currently operate on any routes to Australia.
- 1.4. The Applicants have also requested interim authorisation under section 91 of the CCA to allow them to engage in the activities described in the Co-operation Agreement until the ACCC makes a final decision about the application for authorisation.

The Applicants

- 1.5. Etihad is the national airline of the United Arab Emirates, and was established by Royal (Emiri) Decree in July 2003. Etihad is a full service network carrier which operates flights to 72 destinations in 48 countries, including Australia.
- 1.6. Etihad operates around 30 flights per week between Abu Dhabi and Sydney, Brisbane, Perth and Melbourne. Etihad also operates flights to Milan and Rome from Abu Dhabi, as well as flights from Abu Dhabi to other European destinations and various South East Asian and Middle Eastern destinations.
- 1.7. Etihad and Alitalia have an existing freesale codeshare agreement covering four flights a week by Alitalia on the Abu Dhabi/Rome route and some Alitalia services within Italy and Europe more generally. In turn, Alitalia codeshares on Etihad flights from Abu Dhabi to Melbourne, Sydney, Perth and a number of other destinations including Bangkok, Singapore, Beijing, Johannesburg, Muscat and Bahrain.
- 1.8. Etihad has previously entered into other airline alliances with:
- Virgin Australia, which was approved by the ACCC in 2011 and includes a commercial cooperation agreement, a frequent flyer agreement and a reciprocal lounge access agreement.
 - Air Berlin, which was approved by the ACCC in 2012 and includes a commercial co-operation agreement and codeshare agreement covering joint pricing, joint route and scheduling and joint marketing, distribution and sales representation as well as a range of other cooperative arrangements. Etihad owns 29.21% of the issued capital in Air Berlin.

code and flight number is called the Marketing Carrier. Source:
<http://www.iata.org/whatwedo/passenger/Documents/passenger-glossary-of-terms.xls>

- 1.9. Etihad has also entered into a codeshare and interline³ arrangements with various airlines, including Air New Zealand. Etihad codeshares on all of Air New Zealand's trans-Tasman routes and the majority of New Zealand domestic services. Air New Zealand codeshares on Etihad's services between Abu Dhabi and Brisbane, Sydney and Melbourne and three behind routes⁴ to European destinations. Etihad has another 47 codeshare agreements and 194 interline agreements with airlines worldwide.
- 1.10. Alitalia is the largest airline in Italy, owned by various entities including the Italian State-owned postal operator. In addition to entering the Co-operation Agreement, Etihad will also acquire a 49% shareholding in Alitalia and become the largest individual shareholder in the resulting new company referred to as 'New Alitalia'. The acquisition is subject to regulatory approval. On 11 November 2014 the European Commission announced that it had approved the acquisition conditional on commitments by Etihad and Alitalia including a commitment to release slots to a new entrant at the airports of Rome Fiumicino and Belgrade.⁵
- 1.11. Until September 2014, Alitalia operated two brands: Alitalia and Air One. However, Air One has now ceased operations with the Alitalia brand taking over some routes.
- 1.12. During the summer of 2014 Alitalia operated flights to 103 destinations, 26 in Italy and 77 in other countries throughout the world. Alitalia does not currently operate flights to or from Australia and has not done so since 2000. It is, however, a member of the Sky Team alliance which as at 21 July 2014 included 20 airlines offering services through a network of 1064 destinations in 178 countries.
- 1.13. Alitalia is also a member of a transatlantic joint venture with Delta, Air France and KLM and a joint venture with Air France and KLM on routes between Italy, France and the Netherlands and some international routes
- 1.14. Alitalia also has codeshare agreements with all Sky Team members and numerous other carriers including AirBaltic, Air Corsica, AirServia, Bulgaria Air, Carpatair, Cyprus Airways, Luxair, Montenegro Airlines, SriLankan Airlines and TAP Portugal.

2. Submissions received by the ACCC

- 2.1. The ACCC consulted relevant government agencies, airports, airlines and service suppliers. No submissions were received in relation to the applications for authorisation.

3. ACCC evaluation

- 3.1. The ACCC's evaluation of the Co-operation Agreement is in accordance with the relevant net public benefit tests⁶ contained in the CCA. While there is some

³ Interline agreements facilitate the transfer and handling of baggage, cargo and passengers between each leg of the journey for journeys that require multiple airlines on multiple sectors.

⁴ Behind routes refers to complimentary segments behind the originating destination. For example on a route between Sydney and Abu Dhabi, behind routes may include Auckland to Sydney.

⁵ http://europa.eu/rapid/press-release_IP-14-1766_en.htm

⁶ Sections 90(8), (6), (7), (5A) and (5B).

variation in the language of the tests, in broad terms, the ACCC is required to identify and assess the likely public benefits and detriments arising from the conduct, including those constituted by any lessening of competition. The ACCC may grant authorisation if it is satisfied that the benefit to the public would outweigh the public detriments.

The relevant areas of competition

- 3.2. For the purpose of assessing these applications, the ACCC considers the relevant areas of competition are:
- international air passenger transport services between Australia and Italy; and
 - international air cargo transport services between Australia and Italy.
- 3.3. The ACCC notes that the most direct air transport services between Australia and Italy are on routes transiting through hubs in either Asia or the Middle East. In turn, this means there are many routes, and combinations of route segments, between Australia and Italy that can be chosen by consumers of air transport services.
- 3.4. Within these areas of competition, the ACCC has examined the likely effect of the Co-operation Agreement on competition and rivalry on particular routes (and route segments) where necessary.
- 3.5. The ACCC notes that the only city pair on which the Applicants overlap with direct flights is Abu Dhabi – Rome. In addition, the Applicants currently have a codeshare agreement covering routes between the Australian cities of Perth, Melbourne and Sydney and the Italian cities of Milan, Rome and Venice, via Abu Dhabi.
- 3.6. The ACCC considers that there may be separate international air passenger transport service markets for leisure and business passengers between Australia and Italy. The ACCC also notes that for some leisure travellers other European destinations may be considered to be a substitute for Italy as an entry point to Europe. However, the ACCC considers that the outcome of the competition assessment in this matter is not materially impacted by such distinctions.
- 3.7. The ACCC considers that the relevant air cargo transport services market includes not only direct services but also indirect services between points in Australia and points in Italy.

Future with and without

- 3.8. To assist its assessment of the Co-operation Agreement against the authorisation tests, the ACCC compares the likely future with the conduct for which authorisation is sought and the likely future without the conduct the subject of the authorisation. The ACCC will compare the public benefits and detriment likely to arise in the future where the conduct occurs against the future in which the conduct does not occur.
- 3.9. The ACCC considers that without authorisation:

- the Applicants would not proceed with the Co-operation Agreement;
 - Alitalia would continue its existing operations from its Italian hubs and would be unlikely to commence standalone flights to Australia; and
 - Etihad would continue to operate flights between Australia and Europe (including Italy).
- 3.10. As Etihad is to acquire 49% of Alitalia it is likely that, even in the absence of the Co-operation Agreement, Etihad will seek to align its operations more closely with Alitalia including continuing its current codeshare arrangements with Alitalia and integrating its codeshare and alliance arrangements with other airlines (including Air Berlin and Virgin Australia).

Public benefit

- 3.11. Public benefit is not defined in the CCA. 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.⁷

- 3.12. The Applicants submit that as a result of the Co-operation Agreement they will be able to offer:

- enhanced products and services including:
 - increased choice of journey options and access to broader connections and a broader schedule
 - reciprocal access to Etihad and Alitalia airport lounges, frequent flyer and premium guest programmes
 - increased ability to purchase flexible fares
 - reduced likelihood of luggage being lost;
- new services and routes operated by Alitalia including new services to smaller Italian cities such as Venice, Catania and Bologna with connections in Abu Dhabi; and
- stimulation of tourism to Australia.

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

Enhanced products and services

- 3.14. The ACCC recognises that conceptually when airlines that provide complementary services act independently or less co-operatively, 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 products and services. The consequence of this 'externality'⁸ can include less convenient connections for

⁷ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

⁸ 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

passengers, higher fares/cargo charges due to double marginalisation, less attractive customer reward programs and/or lower levels of provision of ground services such as airport lounges and check-in services.

- 3.15. The ACCC accepts that cooperation agreements can provide a means to address this externality or inefficiency by enabling airlines to coordinate across complementary segments. Typically this coordination occurs through:
- joint setting of schedules and fares/cargo charges;
 - reciprocal access to value added services (frequent flyer schemes, frequent shipper schemes and airport lounges) between the airlines; and
 - revenue sharing.
- 3.16. The ACCC considers that the Applicants are likely to have an incentive under the Co-operation Agreement to optimise their joint service offering and that this is likely to result in public benefits by facilitating single booking of complementary passenger and cargo services, and through check-in of baggage and cargo. It also has potential to confer public benefits through better scheduling of complementary services, improved customer disruption handling and better access to value added services (reward schemes and airport lounges).
- 3.17. The ACCC acknowledges that the Co-operation Agreement will enable the Applicants to initiate reciprocal frequent flyer programs and status recognition, which will enhance the attractiveness of both airlines' loyalty programs. Generally speaking, the ACCC considers that there are likely to be some public benefits from reciprocal access to loyalty programs and that these are likely to accrue to passengers who prefer to fly with one of the Applicants, are members of a loyalty program and who value the ability to earn or use frequent flyer points.

Cost savings and efficiencies

- 3.18. The ACCC considers that the Co-ordination Agreement has the potential to deliver cost savings and efficiencies. The Applicants have identified areas where they intend to work on a cooperative basis. This includes procurement of aircraft, engines, maintenance, repair and overhaul operations, catering, ground handling and fuel. The ACCC expects that working cooperatively in these areas should allow the Applicants to realise cost savings and efficiencies.
- 3.19. The ACCC also considers that, given competition from other airlines on relevant Etihad/Alitalia routes, as discussed further at paragraphs 3.32 to 3.34 these benefits are likely to be passed through to passengers and users of the Applicants' cargo services in the form of lower fares/cargo rates or higher levels of service.

of an externality, market prices do not reflect the full costs and benefits of producing or consuming a product or service. This results in an economic inefficiency or market failure.

- 3.20. Therefore, the ACCC considers that the Co-operation Agreement is likely to give rise to public benefits in the form of cost savings and efficiencies.

New services and routes operated by Alitalia with connections in Abu Dhabi

- 3.21. The Applicants submit that as a result of the Co-operation Agreement, Alitalia intends to offer new services and routes including new services between Abu Dhabi and smaller Italian cities such as Venice, Catania and Bologna from Summer 2015. These flights will connect in Abu Dhabi with flights operated by Etihad.
- 3.22. The ACCC considers it is possible that the Co-operation Agreement would assist Alitalia to introduce new services and routes. To the extent that Australian passengers, or cargo shippers or potential passengers or cargo shippers, value these services and routes, this would be expected to generate some benefits to Australian businesses and individuals.
- 3.23. However, the Applicants have provided only very limited details about why they consider that Co-operation Agreement is necessary to facilitate this route expansion. Accordingly, absent evidence that the Co-operation Agreement will facilitate such expansion that would not otherwise occur in the absence of the agreement, the ACCC has not placed significant weight on this potential public benefit.

Promotion of competition

- 3.24. The ACCC considers that aviation alliances can stimulate competitive responses amongst rivals in the international air passenger transport services markets where the alliance enhances the alliance partners' products and results in lower fares (to the extent that the cost savings and other efficiencies are passed through to customers).
- 3.25. As noted above, the ACCC considers that the Commercial Alliance will assist Etihad and Alitalia to offer an integrated service and that this has the potential to allow the applicants to better compete with rival airlines operating in the same relevant markets. This may trigger a competitive response from those rivals, resulting in public benefits such as lower prices and higher levels of service being offered in the future.

Tourism

- 3.26. When considering other airline alliance agreements the ACCC has previously noted that there are a wide range of factors which influence tourism demand and expenditure, including general purchasing power in source countries, the relative cost of other destinations, the total cost of visiting Australia and the perceived quality of Australia as a destination.
- 3.27. In this case, the ACCC considers that the Co-operation Agreement has the potential to stimulate tourism in Australia if it generates increased passenger traffic to Australia. The ACCC considers that this may provide some limited benefits to Australian businesses and individuals.

Public detriment

- 3.28. Public detriment is also not defined in the CCA 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.⁹
- 3.29. The Applicants submit that Alitalia does not operate air services on routes between Italy and Australia and had no plans or ability to start such operations prior to entering into the Co-operation Agreement. Therefore, the applicants submit that the Co-operation Agreement will not lead to a loss of potential competition in any relevant market.
- 3.30. The Applicants submit that the only city pair on which they currently overlap with direct operated flights is Rome-Abu Dhabi and they have only been overlapping on this route since July 2014. The Applicants submit that the European Commission considered this route in detail as part of its merger control review of Etihad's acquisition of joint control over Alitalia and concluded that, for the majority of passengers, the Rome-Abu Dhabi route is substitutable with Rome-Dubai (on which Emirates had some 80% market share) and no competition concerns were raised.
- 3.31. The ACCC notes that Etihad is to become the largest shareholder (49%) in Alitalia. The ACCC considers that this may give the applicants an incentive to more closely align their commercial interests with or without authorisation. The ACCC also considers that the destinations serviced by Etihad and Alitalia are largely complementary.
- 3.32. The Applicants only directly overlap on one route, Abu Dhabi – Rome. This route comprises one segment of travel offered between Rome and Australia by the Applicants. The ACCC notes that there are many other options available to travellers between Australia and Rome, including services with a comparable travel time to that offered by the Applicants by Qatar Airways, Qantas/Emirates, Thai Airways, Cathay Pacific and Singapore Airlines/Lufthansa.
- 3.33. The ACCC notes that Alitalia does not directly operate flights on any routes into or out of Australia. Based on the available information, the ACCC considers that it is unlikely Alitalia would be likely to recommence offering service to Australia over the timeframe for which authorisation is sought (10 years).
- 3.34. Alitalia does, however, currently offer flights between Italy and Australia pursuant to its codeshare agreement with Etihad. Absent the Co-operation Agreement, Alitalia may be more likely to also consider other options for providing flights between Italy and Australia such as through existing and potentially new codeshare agreements with other airlines.. Therefore, there is potentially some loss of competitive rivalry for air passenger and cargo transport services between Australia and Italy as a result of the Co-ordination Agreement. However, given that Alitalia does not have a significant presence on these routes – and the competitive discipline imposed by other international airlines on these routes – the ACCC considers that any reduction in

⁹ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

competition resulting from the Co-operation Agreement is likely to be very limited.

- 3.35. On this basis, the ACCC considers that the Co-operation Agreement is likely to result in little if any public detriment.

Balance of public benefit and detriment

- 3.36. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
- 3.37. In the context of applying the net public benefit test in subsection 90(8)¹⁰ of the CCA, the Tribunal commented that:
- ... something more than a negligible benefit is required before the power to grant authorisation can be exercised.¹¹
- 3.38. For the reasons outlined in this draft determination the ACCC considers the Co-operation Agreement is likely to result in public benefits in the form of:
- enhanced products and services; and
 - cost savings and efficiencies.
- 3.39. The Co-operation Agreement may also result in some stimulation of tourism, promotion of competition, and new services and routes operated by Alitalia with connections in Abu Dhabi.
- 3.40. The ACCC considers that the Co-operation Agreement is likely to result in little if any public detriment.
- 3.41. Accordingly, the ACCC is satisfied that the public benefit that is likely to result from the Co-operation Agreement would outweigh the public detriment, including from any lessening of competition that may result. The ACCC is therefore satisfied that the relevant net public benefit tests are met.

Length of authorisation

- 3.42. The CCA allows the ACCC to grant authorisation for a limited period of time.¹² This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the likely public detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 3.43. In this instance, the Applicants seek and the ACCC proposes to grant authorisation for ten years.

¹⁰ The test at subsection 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.

¹¹ *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

¹² Subsection 91(1).

Scope of the authorisation the ACCC proposes to grant

- 3.44. The Applicants seek authorisation to make and give effect to the Co-operation Agreement.
- 3.45. The Co-operation agreement was signed by the Applicants on 8 August 2014. The ACCC does not have the power to grant authorisation to corporations to make a contract or arrangement or to arrive at an understanding if the contract or arrangement has been made or the understanding has been arrived at before the ACCC makes a determination in respect of the application¹³. Consequently the ACCC cannot authorise the making of the Co-operation Agreement. Therefore, as discussed further below, the relevant statutory tests to be applied to these applications are subsections 90(5B), 90(7) and 90(8)(b) of the Act, in relation to conduct giving effect to provisions in the Co-operation Agreement.

4. Draft determination

The applications

- 4.1. On 6 November 2014, the Applicants lodged applications for authorisation A91468 and A91469 with the ACCC. Application A91468 was made using Form A and A91469 Form B of Schedule 1, of the Competition and Consumer Regulations 2010.
- 4.2. The applications were made under subsection 88(1) and (1A) of the CCA to make and give effect to a commercial Co-operation Agreement to implement a partnership for the purposes of co-operating in relation to the provision of international air transport services. This includes both passenger and cargo transport services.
- 4.3. The Applicants seek authorisation of the Co-operation Agreement as it may have the effect of substantially lessening competition within the meaning of section 45 of the CCA. The arrangements may also contain an exclusionary provision (within the meaning of section 45 of the CCA) that may also be a cartel provision.
- 4.4. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

- 4.5. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the Co-operation Agreement 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.
- 4.6. In addition, the ACCC is satisfied that the Co-operation Agreement 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.

¹³ Section 88(12) of the Act.

- 4.7. The ACCC therefore **proposes to grant authorisation** to applications A91468 and A91469.

Conduct for which the ACCC proposes to grant authorisation

- 4.8. The ACCC proposes to grant authorisation to Etihad and Alitalia to give effect to a commercial Co-operation Agreement to implement a partnership for the purposes of co-operating in relation to the provision of international air transport services.¹⁴ This includes both passenger and cargo transport services. The ACCC proposes to grant authorisation for ten years.
- 4.9. Further, the proposed authorisation is in respect of the Co-operation Agreement as it stands at the time authorisation is granted. Any changes to the Co-operation Agreement during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 4.10. This draft determination is made on 17 December 2014.

Interim authorisation

- 4.11. At the time of lodging the application, the Applicants requested interim authorisation to give effect to the Co-operation Agreement while the ACCC considers the substantive application.
- 4.12. The Applicants requested interim authorisation on the basis that:
- the Partnership will result in no public detriment as it will not diminish competition because Alitalia does not currently operate flights to or from Australia and with or without authorisation is unlikely to compete on routes to or from Australia without the assistance of a partner carrier such as Etihad;
 - interim authorisation will allow the public benefits claimed in relation to the applications to be realised sooner; and
 - scheduling and marketing activities typically occur in large blocks (for example, for an entire Summer or Winter season) and in the absence of interim authorisation to combine these activities, the benefits from the Co-operation Agreement may not accrue for an entire season.
- 4.13. When considering any request for interim authorisation, the ACCC considers a range of factors, including harm to the applicant and other parties if interim authorisation is or is not granted, possible benefit and detriment to the public, the urgency of the matter and whether the market would be able to return to substantially its pre-interim state if the ACCC should later deny authorisation.
- 4.14. The ACCC considers that it is appropriate to grant interim authorisation at this time as:
- the likelihood that the conduct will result in significant anti-competitive detriment is low, given the lack of current or likely future overlap between

¹⁴ The Applicants applied for authorisation to both 'make' and 'give effect to' the contract. As explained in paragraph 3.45 above the ACCC cannot authorise the making of the agreement (see subsection 88(12)) of the Act.

the Applicants on Australia routes in the absence of the Co-operation Agreement;

- it would be relatively easy for the market to return to its pre-authorisation state should substantive authorisation ultimately be denied by the ACCC; and
- interim authorisation will allow benefits to begin to be realised by the Partnership.

4.15. Accordingly, the ACCC grants interim authorisation under subsection 91(2) of the CCA. Interim authorisation is granted to give effect to the Co-operation Agreement.

4.16. Interim authorisation commences immediately and will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

Further submissions

4.17. The ACCC will now seek further submissions from interested parties. In addition, the Applicants or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the CCA.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide 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 subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 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.

Subsections 90(6) and 90(7) 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 subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Subsection 90(8) states that the ACCC shall not:

- 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

- 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.