



# Draft Determination and Interim Authorisation

Application for revocation of A91502 and A91503 and the substitution  
of authorisation AA1000532

lodged by Qantas Airways Limited and American Airlines Inc.  
in respect of a Restated Joint Business Agreement

Authorisation number: AA1000532

Date: 26 February 2021

Commissioners:

Court

Brakey

Keogh

Rickard

## Summary

The ACCC proposes to re-authorise Qantas Airways Limited & American Airlines Inc. (the Applicants) to continue to operate their aviation alliance by giving effect to a Restated Joint Business Agreement (JBA) for a further five years.

The Applicants entered into the original JBA in 2011 in order to coordinate their operations relating to flights between Australia/New Zealand and the United States, Canada and Mexico (the Trans-Pacific routes). The ACCC granted authorisation for the Applicants to give effect to the original JBA for five years on 29 September 2011. On 25 February 2016, the ACCC re-authorised the alliance for five years to 18 March 2021.

The ACCC considers that re-authorising the Restated JBA is likely to result in public benefits, including a greater likelihood of increased capacity and new routes; increased connectivity and improved schedule choice; loyalty program benefits and improved lounge access; and operational efficiencies.

The ACCC recognises that the operation of the alliance is still significantly affected by the impact of COVID-19 and there is considerable uncertainty about when this is likely to change. The ACCC considers that the extent to which the public benefits are likely to be realised going forward depends on the recovery in demand for Trans-Pacific services. The greater the demand for these services, the greater the public benefit that is likely to be realised.

The ACCC considers that the Proposed Conduct is not likely to result in any significant public detriments.

The ACCC proposes to grant re-authorisation for five years.

The ACCC has decided to grant interim authorisation for the alliance authorised in 2016 to continue while the ACCC assesses the application for re-authorisation.

The ACCC invites submissions in relation to this draft determination by 12 March 2021, before making its final decision.

### 1. The application for authorisation

- 1.1. On 19 October 2020, Qantas Airways Limited & American Airlines Inc. (the **Applicants**) lodged an application to revoke authorisations A91502 and A91503 and substitute authorisation AA1000532 for the ones revoked (referred to as **re-authorisation**) with the ACCC. The Applicants are seeking re-authorisation to continue to coordinate on their operations between and within Australia/New Zealand and the United States (**US**), Canada and Mexico (**Trans-Pacific routes**) pursuant to a Restated Joint Business Agreement (**Restated JBA**) and associated agreements, for a further five years. This application for re-authorisation AA1000532 is made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The Applicants also requested interim authorisation to facilitate the immediate planning and coordination of services to be operated after 18 March 2021, when the current authorisations are due to expire.
- 1.3. Authorisation provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

## The Applicants

### Qantas Airways Limited

- 1.4. Qantas was incorporated in Australia in 1920 and is Australia's largest domestic and international airline.
- 1.5. Prior to the COVID-19 pandemic, the Qantas Group operated more than 4,500 domestic and 730 international flights each week using two airlines: Qantas – a full service airline offering domestic and international services; and Jetstar Airways – a low cost airline offering domestic and international services, predominantly focussing on servicing price sensitive consumers.
- 1.6. In addition to its alliance with American, the Qantas Group is currently a party to the following airline alliances:
  - an alliance with Emirates, which was re-authorised by the ACCC for five years on 23 March 2018;<sup>1</sup>
  - an alliance with China Eastern Airlines which was re-authorised by the ACCC on 29 January 2021 until 31 March 2023;<sup>2</sup> and
  - a proposed alliance with Japan Airlines Co Ltd, which is the subject of an application for authorisation to the ACCC dated 18 December 2020.<sup>3</sup> The ACCC is currently considering public submissions in response to the application, prior to making a draft determination.
- 1.7. Qantas also has an extensive network of codeshare and interline partners.<sup>4</sup>

### American Airlines

- 1.8. American Airlines Group Inc. is a holding company and its principal, wholly-owned subsidiaries are American, Envoy Aviation Group Inc., PSA Airlines Inc. and Piedmont Airlines Inc. Prior to the COVID-19 pandemic, American (together with its wholly-owned regional airline subsidiaries and third-party regional carriers operating as American Eagle) operated an average of 6,800 flights per day to more than 365 destinations in 61 countries. In 2019, approximately 215 million passengers boarded American flights.
- 1.9. American and Qantas are founding members of the **oneworld** alliance. American has established a transatlantic joint business with British Airways, Iberia and Finnair and a joint business with Japan Airlines, each of which has been granted antitrust immunity by the relevant regulators. American also has codeshare agreements with other airlines.

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<sup>1</sup> The determination is available on the ACCC's public register: <https://www.accc.gov.au/system/files/public-registers/documents/AA1000400%20-%20Revocation%20and%20Substitution%20of%20A91332%20%26%20A91333%20-%20Qantas%20Airways%20Limited%20%26%20Emirates%20-%20Final%20Determination%20and%20Interim%20Authorisation%20Decision%20-%202023.03.18%20-%20PR.pdf>

<sup>2</sup> The determination is available on the ACCC's public register: <https://www.accc.gov.au/system/files/public-registers/documents/Final%20Determination%20Decision%20-%202029.01.21%20-%20PR%20-%20AA1000526%20-%20Qantas%20and%20China%20Eastern.pdf>

<sup>3</sup> The application is available on the ACCC's public register: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/qantas-and-ja>.

<sup>4</sup> These partners include, for the Trans-Pacific routes, United Airlines, Air Canada, Hawaiian, Alaska Airlines, WestJet, Fiji Airways, Air Tahiti Nui and Air New Zealand.

## The Proposed Conduct

1.10. The Restated JBA and associated agreements provide for coordination between the Applicants in respect of:

- marketing and sales
- freight
- pricing
- scheduling
- distribution strategies and agency arrangements
- yield and inventory management
- frequent flyer programs
- lounges
- joint procurement and product and service standards

(the **Proposed Conduct**)<sup>5</sup>

1.11. The ACCC notes that the Proposed Conduct provides for the alignment of incentives through revenue sharing arrangements that result in 'metal neutrality'. That is, the Proposed Conduct enables Qantas and American to be indifferent as to whether a passenger travels on Qantas or American operated services.

## 2. Background

### Previous authorisations in respect of the alliance

- 2.1. Qantas and American entered into their alliance pursuant to a Joint Business Agreement dated 6 May 2011 (the **Original JBA**). The ACCC authorised the alliance for five years on 29 September 2011.<sup>6</sup> At that time, the ACCC considered the Original JBA would be likely to result in a number of public benefits, and would not be likely to result in public detriments as the Applicants did not overlap on any routes and were unlikely to do so in the future.<sup>7</sup>
- 2.2. The Original JBA was also authorised by the New Zealand Minister of Transport on 26 September 2011, and approved by the US Department of Transportation (**USDOT**) on 9 November 2011.
- 2.3. In June 2015, the Original JBA was revised to become the Restated JBA, reflecting American's planned entry into the Trans-Pacific air passenger services market with its own direct Sydney–Los Angeles service (the only route overlapping with Qantas) and Auckland–Los Angeles service. American's new Sydney–Los Angeles service was intended to facilitate Qantas' introduction of new services on the Sydney–San Francisco route, as Qantas did not have sufficient capacity to serve passengers on

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<sup>5</sup> The Applicants submit that the precise scope of co-ordination under the alliance will evolve over its term and may be altered from time to time.

<sup>6</sup> <https://www.accc.gov.au/system/files/public-registers/documents/D11%2B2315190.pdf>.

<sup>7</sup> Under the Original JBA, Qantas operated Trans-Pacific services and connecting services in Australia/New Zealand, and American operated connecting services in US/Canada/Mexico and provided sales support for the Trans-Pacific services.

both the Sydney–Los Angeles route and the Sydney–San Francisco route. Prior to this, American had only operated ‘indirect’ Trans-Pacific services (one-stop service between Dallas/Fort Worth and Sydney, via Honolulu) in 1990-1992.

- 2.4. On 25 February 2016, the ACCC re-authorised the alliance under the Restated JBA for five years to 18 March 2021.<sup>8</sup> The ACCC concluded the alliance was likely to continue to result in a number of material public benefits and unlikely to result in any significant public detriments, particularly as American would be unlikely to operate Trans-Pacific services in its own right absent the alliance.
- 2.5. The Restated JBA was authorised by the New Zealand Minister of Transport for five years in November 2015. The Applicants also applied for anti-trust immunity in respect of the Restated JBA from the USDOT in June 2015. The USDOT tentatively rejected the application in November 2016, but subsequently approved it with conditions<sup>9</sup> in July 2019 after the Applicants withdrew and re-submitted the application with variations to the Restated JBA.<sup>10</sup> In approving the Restated JBA, the USDOT concluded the alliance will be procompetitive and is likely to generate substantial public benefits. The USDOT’s approval is valid until 19 July 2026.<sup>11</sup>
- 2.6. In July 2020, the Applicants also sought re-authorisation of the Restated JBA from the New Zealand Minister of Transport for a further five years from November 2020. In November 2020, the Minister re-authorised the Restated JBA for a period of five years.

## Air passenger services between Australia and the US pre-COVID 19

- 2.7. According to Tourism Research Australia statistics, there were 804,000 US visitor arrivals to Australia, and 1.093 million Australian short-term resident departures to the US in 2019.<sup>12</sup> Historically, the majority of travellers between Australia and the US connect from and/or to destinations behind and beyond the key gateways in each country (e.g. Adelaide–Sydney–Dallas/Fort Worth–Miami), rather than simply travel between the key gateways (e.g. Sydney–Dallas/Fort Worth).<sup>13</sup>
- 2.8. In 2019, the Qantas Group (including Jetstar) was the largest operator of Trans-Pacific air passenger services, with approximately 43% share of passengers. Virgin Australia (Virgin) and Delta Airlines (Delta), who have been in an alliance since 2009, had an approximate combined share of 17% of these passengers. United Airlines’ (United) share was 12%, followed by Air New Zealand (6%). American had a share of approximately 4%. These share estimates suggest a relatively moderate level of concentration in the provision of Trans-Pacific services generally.<sup>14</sup> Concentration over

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<sup>8</sup> <https://www.accc.gov.au/system/files/public-registers/documents/D16%2B22969.pdf>.

<sup>9</sup> The conditions imposed by the USDOT include: provide interline access for new entrants operating non-stop services in the US-Australia and/or US-New Zealand market; submit origination and destination information for all passenger itineraries that contain a U.S. point; undertake annual reporting on the progress of the joint venture; and withdraw from any International Air Transportation Association tariff coordination activities for any proposed fares between the US and any countries whose airlines have been granted anti-trust immunity to participate in similar alliance with a US airline.

<sup>10</sup> The amendments to the Restated JBA were primarily to adjust the financial settlement terms and to remove an exclusivity provision so Qantas and American could enter into codeshare and frequent flyer relationships with other carriers.

<sup>11</sup> <https://beta.regulations.gov/document/DOT-OST-2018-0030-0144>

<sup>12</sup> Application pages 13-14.

<sup>13</sup> For instance, Qantas has indicated that 22% of passengers flying on the Sydney-Dallas/Fort Worth route in 2019 were direct point-to-point passengers; and the remaining 75% passengers originated from behind a US gateway and/or travelled beyond an Australian gateway.

<sup>14</sup> The ACCC typically measures concentration of the market with reference to the Herfindahl-Hirschman Index (HHI) (see the ACCC’s [Merger Guidelines 2008](#) at paragraphs 7.6-7.16). The HHI measures around 2,050 under the proposed alliance.

the provision of Trans-Pacific air passenger services increased slightly between 2016 and 2019.<sup>15</sup>

**Table 1: Australia-US Passenger Share 2016-2019**

Carrier	2016	2017	2018	2019
Qantas	34%	34%	35%	36%
Virgin Australia	11%	11%	11%	13%
United Airlines	10%	10%	11%	12%
Jetstar	9%	9%	8%	7%
Air New Zealand	6%	6%	6%	6%
Hawaiian Airlines	6%	6%	6%	6%
Delta Airlines	4%	4%	4%	4%
American Airlines	4%	4%	4%	4%
Cathay Pacific	2%	2%	2%	2%
Air Canada	1%	1%	2%	2%
Other	12%	13%	11%	9%

*Source: ABS (AU-Resident Short-Term Traveller Arrivals from the US and American Short-Term Visitor Arrivals in AU)*

- 2.9. Prior to COVID-19, there were eleven direct city-pairs between Australian cities and the mainland US/Canada flown by various carriers (with varying frequencies).<sup>16</sup> In addition, there were a number of indirect services (e.g. one stop services via New Zealand and other hubs in the Pacific and Asia).<sup>17</sup>
- 2.10. In 2019, Qantas accounted for 40% share of all passengers on the Sydney-Los Angeles route (the only overlapping direct route flown by both Qantas and American); and American accounted for 12% on the route.
- 2.11. The remaining direct carriers on the Sydney–Los Angeles route in 2019 were Virgin Australia (15%), Delta (11%) and United Airlines (9%). Air New Zealand and a range of other carriers also operated on this route with indirect services. These share estimates indicate a reasonably high level of market concentration on the Sydney–Los Angeles route with the alliance compared to a situation without the alliance.<sup>18</sup>

<sup>15</sup> The HHI is up from approximately 1850 to 2050 during this period.

<sup>16</sup> These were: Sydney/Melbourne/Brisbane-Los Angeles, Sydney/Melbourne/Brisbane-San Francisco, Sydney-Dallas/Fort Worth, Sydney-Houston and Sydney/Melbourne/Brisbane-Vancouver.

<sup>17</sup> These transit points were: Auckland, Honolulu, Vancouver, Nadi, Hong Kong, Dubai, Doha, Seoul and Tokyo.

<sup>18</sup> The HHI with the alliance is approximately 3,170 in 2019, compared to without the alliance at approximately 2,200.

**Table 2: Sydney–Los Angeles Passenger Share 2016-2019**

Carrier	2016	2017	2018	2019
Qantas	35%	35%	39%	40%
Virgin Australia	21%	19%	18%	15%
American Airlines	15%	12%	9%	12%
Delta Airlines	8%	9%	9%	11%
United Airlines	10%	11%	11%	9%
Air New Zealand	5%	7%	6%	5%
Fiji Airways	3%	3%	4%	3%
Hawaiian Airlines	2%	1%	1%	2%
Other	2%	2%	2%	1%

## The impact of the COVID-19 pandemic on the alliance

- 2.12. The COVID-19 pandemic has led to significant disruptions to air passenger services. In February/March 2020, the Australian Government imposed entry restrictions on incoming travellers,<sup>19</sup> and imposed a ban on Australian citizens and permanent residents travelling overseas<sup>20</sup> (unless an exemption applies).
- 2.13. Since that time, Qantas has suspended its international operations including its Trans-Pacific services<sup>21</sup> (except limited services over the Tasman in October and November 2020, and repatriation flights to/from Europe). Qantas is expecting to resume most of its international flights from the end of October 2021, when the rollout of COVID-19 vaccines in Australia will be largely complete.<sup>22</sup>
- 2.14. Similarly, American’s global network has been significantly disrupted by the pandemic. American has suspended its direct, daily Auckland–Los Angeles service from March 2020 until late 2021-2022. It also suspended its direct Sydney–Los Angeles flights in March 2020; but has resumed services on the route from November 2020 (four return services per week) after reaching a codeshare agreement with Alaska Airlines to feed demand from the west coast of the US.<sup>23</sup> Qantas is currently selling codeshare seats

<sup>19</sup> <https://covid19.homeaffairs.gov.au/leaving-australia#toc-2>.

<sup>20</sup> <https://covid19.homeaffairs.gov.au/travel-restrictions#toc-0>.

<sup>21</sup> <https://www.qantasnewsroom.com.au/media-releases/qantas-group-outlines-customer-and-employee-impact-of-coronavirus-related-network-cuts/>, 19 March 2020.

<sup>22</sup> <https://www.qantasnewsroom.com.au/media-releases/qantas-and-jetstar-prepare-to-resume-international-flights-from-late-october/>, 25 February 2021.

<sup>23</sup> Alaska Airlines is headquartered within the Seattle area (in the state of Washington, US). Alaska Airlines also had a codeshare agreement with Qantas prior to the pandemic (it codeshared on Qantas’ Trans-Pacific routes between Australia and the US and Qantas codeshared on its services in the US).

on American's Sydney–Los Angeles services, while its own Trans-Pacific operation is suspended.

- 2.15. Due to the significant financial impact caused by the contraction in travel demand,<sup>24</sup> both Qantas and American have been undergoing a significant reorganisation, including restructuring and standing down/reducing workforce across their businesses. Along with other domestic airlines, Qantas is currently receiving financial assistance from the Australian Government to ensure domestic air services continue to operate effectively to serve passengers travelling within Australia.<sup>25</sup> Similarly, American (and other airlines in the US) are receiving payroll support from the US Government.<sup>26</sup>

## The impact of the COVID-19 pandemic on other major carriers operating direct Trans-Pacific services

- 2.16. Impacted by the COVID-19 travel restrictions, Virgin Australia entered into voluntary administration in April 2020 and subsequently sold its business to new ownership. Virgin has suspended all long-haul international flights (including Trans-Pacific flights) as well as its alliance with Delta on routes between Australia and the US, instead focussing on operating domestic flights and short-haul international flights. Virgin may re-start its alliance with Delta in the future, however that is subject to it re-commencing long-haul international flights.<sup>27</sup> It has been reported that Virgin is unlikely to resume long-haul international flights in the short-medium term, but is interested in doing so when sufficient demand returns (e.g. in late 2022).<sup>28</sup> While Virgin currently has no long-haul aircraft in its fleet, it has considered plans to order eight wide-body Boeing 787-9 aircrafts with which it could re-launch long haul international flying in the future.<sup>29</sup>
- 2.17. Despite suspension of its alliance with Virgin, Delta has been operating Trans-Pacific services on its own. Delta has been operating Sydney–Los Angeles service during 2020 (having reduced its frequency from daily service to three times weekly service). From 1 November 2020, Delta adjusted its service on the route to operate six times weekly, but with a smaller aircraft. It is reported that Delta is planning to resume daily Sydney–Los Angeles service in 2021.<sup>30</sup>
- 2.18. United Airlines (who is in an alliance with Air New Zealand) has suspended all services between Australia and the US except its daily Sydney–San Francisco service during

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<sup>24</sup> The pandemic has resulted in a \$4 billion revenue impact on Qantas in the second half of financial year 2020, contributing to a \$2.7 billion statutory loss before tax in the 2020 financial year; while in July 2020, American reported a second-quarter 2020 loss before tax of \$4.3 billion (excluding net special items).

<sup>25</sup> This includes the Domestic Aviation Network Support program, which started from 16 April 2020 and has been extended to 28 March 2021. See further details at: <https://www.infrastructure.gov.au/aviation/>.

<sup>26</sup> <http://news.aa.com/news/news-details/2020/American-Airlines-Statement-on-COVID-19-Relief-Package-and-Psp-Extension-GEN-OTH-12/default.aspx>. (21 December 2020).

<sup>27</sup> <https://www.executivetraveller.com/news/delta-virgin-australia-pause-joint-venture-partnership> (9 September 2020).

<sup>28</sup> <https://www.executivetraveller.com/news/virgin-australia-ceo-usa-japan-flights-unlikely-until-late-2022> (9 December 2020).

<sup>29</sup> Ibid.

<sup>30</sup> <https://www.executivetraveller.com/news/delta-virgin-australia-pause-joint-venture-partnership> (9 September 2020).



the pandemic.<sup>31</sup> United resumed its Sydney–Los Angeles service to three times weekly in July 2020,<sup>32</sup> and further increased it to five times in December 2020.<sup>33</sup>

## Regulatory environment

- 2.19. Due to an Open Skies Agreement (OSA) entered into between Australia and the US in February 2009, Australian and US airlines have been able to operate restricted capacity on direct routes between the two countries. Prior to this, Qantas and United were the only carriers operating direct services between Australia and the US.
- 2.20. Under the OSA, the carriage of traffic over domestic sectors is reserved for national carriers of each country, except for beyond carriage of genuine international traffic between international gateways (e.g. Qantas' own traffic between Los Angeles and New York). As a result, international airlines depend on commercial arrangements with domestic carriers in the other country in order to serve behind and beyond international gateways.
- 2.21. By combining its rights under the OSA between Australia and New Zealand and the Multilateral Agreement on the Liberalization of Air Transport between New Zealand and the US, Air New Zealand can provide unlimited one stop, indirect services between Australia and the US via New Zealand.

## 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including major airlines, airports, industry associations, government departments and organisations, unions and supporting service providers (e.g. catering, fuel suppliers, ground handling).<sup>34</sup>
- 3.3. The ACCC received one submission, from the Department of Infrastructure, Transport, Regional Development and Communications.
- 3.4. The Department supports the application for re-authorisation, noting that the alliance has benefited outbound Australian passengers and Australia's inbound tourism since it began in 2011. The Department notes that the number of airlines operating on US-Australia routes remained steady from 2014 to 2019; and over that time, capacity offered grew in line with demand and Qantas carried a similar percentage of passengers on similar capacity over this time. The Department considers that while the alliance had significant market power pre COVID-19 (with Qantas carrying 48% of Australia-US passengers in 2019), there was also considerable competition from the Virgin/Delta alliance and United Airlines (which has an alliance with Air New Zealand). The Department submits that re-authorisation would help facilitate recovery of Qantas' international operations post COVID-19 (which may take most of the five year re-authorisation period sought by the Applicants).

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<sup>31</sup> That is, it suspended its Sydney-Houston, Melbourne-Los Angeles, Sydney-Los Angeles and Melbourne-San Francisco services.

<sup>32</sup> <https://hub.united.com/united-summer-2020-schedule-update-2646143797.html> (9 June 2020).

<sup>33</sup> <https://hub.united.com/2020-11-09-responding-to-thanksgiving-travel-demand-united-adds-over-1-400-domestic-flights-to-schedule-2648796004.html> (9 December 2020); <https://www.executivetraveller.com/news/united-airlines-boosts-los-angeles-sydney-flights> (23 December 2020).

<sup>34</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register, [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

- 3.5. The Department also considers other international airlines (of either country, or other countries) could immediately commence or increase Australia-US services, as there is no economic or regulatory barrier preventing them from doing so.
- 3.6. Public submissions by the Applicants and interested parties are available on the Public Register for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

### Relevant areas of competition

- 4.3. The ACCC considers the relevant areas of competition are:
  - Trans-Pacific air passenger transport services, including services between Australia or New Zealand and each of the US, Canada and Mexico;
  - Australian domestic air passenger transport services;
  - Trans-Pacific air cargo transport services;
  - the sale of international travel services; and
  - the supply and acquisition of ancillary goods and services.

### Trans-Pacific air passenger transport services

- 4.4. The ACCC considers that the primary area of competition relevant to the assessment of the Proposed Conduct is Trans-Pacific air passenger transport services, including:
  - direct services between international gateways on either side of the Pacific (e.g. Sydney to Dallas/Fort Worth); and
  - services originating from locations behind one of these gateways to a gateway on the other side of the Pacific (e.g. Adelaide–Sydney–Dallas/Fort Worth).
- 4.5. The ACCC notes that the relevant area of competition includes services between Australia or New Zealand and each of the US, Canada and Mexico. However, within this area of competition, the ACCC considers it appropriate to focus its assessment on services between Australia and the US (including the overlapping route of the Applicants, i.e. Sydney–Los Angeles). This is because, prior to the pandemic:
  - most Trans-Pacific passengers travelled between Australia and the US;<sup>35</sup>

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<sup>35</sup> According to the Australian Bureau of Statistics, total passenger numbers in 2019 (short-term visitors arriving and short-term residents returning) were 1.87 million passengers between Australia and the US, 373,500 passengers between Australia and Canada and 40,000 passengers between Australia and Mexico.

- neither Applicant operated services between New Zealand and Canada or Mexico;
- American did not operate services between Australia and Canada or Mexico; and
- Qantas only operated limited seasonal services between Australia and Canada (i.e. Sydney–Vancouver).

### **Australian domestic air passenger transport services**

- 4.6. The ACCC has previously recognised that an international aviation alliance can affect competition for the supply of domestic air passenger transport services by directing the onward carriage (i.e. inbound) traffic or feeder (i.e. outbound) traffic to a particular carrier (in this case, Qantas) at the expense of the competitive position of other domestic carriers.
- 4.7. While customers flying with American Airlines on the Trans-Pacific are likely to have an incentive to choose Qantas for any domestic Australian travel,<sup>36</sup> Virgin also receives feeder traffic from Delta (even as their alliance is suspended). In addition, it remains open for Qantas and Virgin to compete on the domestic journey for passengers travelling on direct Trans-Pacific routes with United. From March 2021, a third carrier, REX, will also compete to some extent with Qantas and Virgin for domestic passengers (e.g. on routes between Sydney, Melbourne and Brisbane and regional areas).<sup>37</sup>
- 4.8. The ACCC notes it is possible for an alliance to lessen competition in the supply of domestic air passenger transport services through the bundling of domestic and Trans-Pacific air passenger transport services. However, the Proposed Conduct does not change the number of airlines from which customers can acquire the services.<sup>38</sup> Further, it does not prevent or limit the ability of Virgin and other domestic/regional carriers to compete for such passengers on their merits.
- 4.9. Accordingly, the ACCC considers the Proposed Conduct is not likely to result in any significant public detriment in the supply of domestic air passenger transport services, and this market is not considered furthered in this draft determination.

### **Trans-Pacific air cargo transport services**

- 4.10. The ACCC considers that the product and geographic scope of the supply of Trans-Pacific air cargo (i.e. freight and mail) transport services is likely to be broader than the supply of Trans-Pacific air passenger transport services. This is because:
- air cargo can be transported in the belly space of international passenger aircrafts and on dedicated freighter aircrafts; and
  - air cargo transport customers are more likely (than air passenger transport customers) to regard the direct and indirect service offerings of air cargo

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<sup>36</sup> American has a small share of Australia-US services, so the number of such passengers would be relatively small.

<sup>37</sup> Rex has announced it will commence services between Sydney and Melbourne in March 2021. See Rex's media release, <https://www.rex.com.au/BlobViewer/BlobViewer.aspx?attachtype=MR&filename=386167562F4973346A5850376E3966706666727030432F7934717A434E662B6E312B4B524C4D30794B6475357A394971622B766C4569555650362F567A6B614D5648317846524137316D534D4F33656E3252726C38773D3D> (19 November 2020).

<sup>38</sup> Qantas is currently selling domestic flights, as well as Trans-Pacific flights operated by American (as its own Trans-Pacific flights are suspended). Virgin is currently selling only domestic flights, while Delta is selling its Trans-Pacific flights as well as seats on domestic flights operated by Virgin.

transport service providers as close substitutes, as the 'inconvenience' of one or multi-stop journeys is generally less of an issue for cargo than it is for passengers.

4.11. Based on US Bureau of Transportation statistics, the alliance will result in only a minor incremental increase in the Applicants' market share for air cargo transport services between Australia and the US<sup>39</sup>. The ACCC notes that there is a broad range of operators offering both direct and indirect air cargo transport services on the Trans-Pacific.<sup>40</sup> On this basis, the ACCC considers the Proposed Conduct is unlikely to result in any public detriment in the supply of Trans-Pacific air cargo transport services, and this market is not considered further in this draft determination.

### **The sale of international travel services**

4.12. The ACCC considers that the Proposed Conduct is unlikely to adversely affect the market for the sale of international travel services given the broad range of mechanisms for ticket purchases. Beside direct distribution by airlines, there is competition from travel agencies (online and in shop fronts) and global online travel businesses (e.g. Expedia). Therefore, this market is not considered further in this draft determination.

### **The supply of ancillary goods and services**

4.13. The ACCC understands that American does not currently supply any ancillary goods and services (such as ground handling, aircraft maintenance, catering and aircraft cleaning) in Australia.

4.14. Accordingly, the ACCC considers that the Proposed Conduct is unlikely to have any impact on competition for the supply of ancillary goods or services, and this market is not considered further in this draft determination.

### **The procurement of ancillary goods and services**

4.15. The Proposed Conduct extends to the Applicants jointly procuring ancillary products and services such as fuel, ground handling services, aircraft maintenance, catering and aircraft cleaning.

4.16. The ACCC has had regard to the likely impact of the Proposed Conduct on the acquisition of these products and services that form inputs to the supply of air passenger transport services. In theory, there may be an anti-competitive impact if the alliance created market power in the acquisition of any of these services, or if American switched its acquisition of services to Qantas, foreclosing third party suppliers.

4.17. The ACCC has had regard to the following factors:

- in the likely future without the Proposed Conduct, American Airlines would be unlikely to operate Trans-Pacific services (or to do so to any significant extent);
- the relatively large number of alternative acquirers of these products;

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<sup>39</sup> American's market share was 1% (for air cargo services from US to Australia) and 6% (for air cargo services from Australia to the US) in 2019.

<sup>40</sup> Other competitors operating direct freight services include United, Delta, FedEx, UPS and Polar, Air New Zealand, Cathay Pacific and Singapore Airlines. There are also other freight operators operating one/multi stop connections between Australia and the US via New Zealand, Pacific Islands, Asia and the Middle East.

- the bargaining power of the large corporations that supply many of the inputs; and
- the fact that many of the inputs are acquired on an international basis.

4.18. Having regard to these factors, the ACCC considers that the Proposed Conduct is unlikely to have any significant impact on competition in the procurement of ancillary goods and services, and this market is not considered further in this draft determination.

## Future with and without the Proposed Conduct

4.19. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.

4.20. The Applicants submit that, absent the Proposed Conduct both parties would be likely to revert to a limited, arms-length codeshare relationship; and this would ultimately mean that Qantas' Trans-Pacific services would be jeopardised, and that American would be unlikely to retain its existing Trans-Pacific services, or launch new services in the future.

4.21. The ACCC considers that without the Proposed Conduct, the Applicants would be likely to implement a more limited codeshare agreement. The ACCC notes that this is what the Applicants did during 2016-2019 when they had not received approval of their Restated JBA from the USDOT.

4.22. Consistent with the view in its 2016 determination, the ACCC considers that without the Proposed Conduct there would be low likelihood of American operating Trans-Pacific services on its own.<sup>41</sup> Even if American operated Trans-Pacific services, it would be unlikely to materially expand its capacity or frequency in the absence of the Proposed Conduct. The ability to combine with Qantas' substantial existing services and the revenue-sharing arrangement under the Restated JBA is likely to significantly mitigate the risks that American would face as a standalone operator of Trans-Pacific services.

## Public benefits

4.23. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>42</sup>

<sup>41</sup> American Airlines launched its Trans-Pacific services in December 2015 in anticipation of receiving regulatory approvals for the Restated JBA. The Restated JBA was approved by the New Zealand Minister of Transport in November 2015 and by the ACCC in February 2016, but did not receive approval from the USDOT until July 2019. During the period of delay in obtaining the USDOT approval, American down-gauged its Sydney-Los Angeles service to a smaller aircraft and downsized its Auckland-Los Angeles operation to become a seasonal rather than a year-round service. The Applicants were largely in a holding pattern in terms of capacity adjustments while awaiting USDOT approval, given the difficulty of cancelling and potentially then re-starting services. They submit that if the USDOT approval was not ultimately granted, the long-term viability of their Trans-Pacific services would have been jeopardised. Following USDOT approval, American announced new Trans-Pacific services – see paragraph 4.34 below.

<sup>42</sup> 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.

4.24. The ACCC re-authorised the Restated JBA in 2016 and concluded that the alliance had, and would be likely to continue to, result in:

- material public benefits in the form of enhanced products and services including new frequencies and destinations, increased and better online connections, better scheduling, greater loyalty program benefits and improved lounge access;
- material public benefits in the form of the promotion of competition on the Trans-Pacific; and
- small public benefits in the form of cost savings and efficiencies.

4.25. The ACCC also considered there were potential public benefits in the form of stimulation of tourism and trade.

4.26. The Applicants submit that their joint business has a proven history of delivering significant public benefits since it first commenced in 2011, including:

- material capacity expansion;
- increased connectivity and enhanced schedule choice;
- an enhanced frequent flyer proposition;
- improved customer services;
- a variety of fare products, price points and lower fares; and
- stimulation of tourism and trade to and within Australia.

4.27. However, the Applicants note that the realisation of these benefits since 2016 has been hindered firstly, by delays in the US regulatory process which prevented full implementation of the Restated JBA in all relevant jurisdictions until July 2019 and secondly, by the COVID-19 pandemic in 2020.

4.28. The ACCC accepts that these factors are likely to have prevented the alliance from delivering the public benefits identified in 2016 to the extent anticipated at the time of the last re-authorisation. The ACCC also recognises that the operation of the alliance remains significantly affected by the impact of COVID-19 and there is considerable uncertainty about when this is likely to change. The ACCC considers that the extent to which the claimed public benefits are likely to be realised going forward depends on the recovery in demand for the Trans-Pacific services. The greater the demand for these services, the greater the public benefit that is likely to be realised.

4.29. The ACCC considers that the claimed public benefits fall within the following broad categories:

- enhanced products and services;
- operational and other efficiencies; and
- stimulation of tourism and enhanced trade opportunities.

4.30. The ACCC's assessment of the likely public benefits from the Proposed Conduct is set out below.

## Enhanced products and services

4.31. The ACCC considers that the Proposed Conduct has and is likely to result in material public benefits through enhanced products and services in the following categories:

- increase in capacity and facilitation of new routes;
- increased connectivity and improved schedule choice;
- loyalty program benefits; and
- improved lounge access.

### *Increase in capacity and facilitation of new routes*

4.32. The Applicants submit that the alliance enabled by the Proposed Conduct will assist them to reinstate, sustain and ultimately grow their Trans-Pacific capacity post the COVID-19 pandemic. They add that without the Proposed Conduct, there will be less cooperation, fewer codeshare destinations and flights, and more restricted inventory, resulting in fewer and less optimal choices for passengers.

4.33. The Applicants note that as a consequence of not having the metal-neutral joint business during USDOT's deliberation of the Restated JBA, the Applicants reverted to an arms-length codesharing agreement, by winding back sales support to each other's services on the Trans-Pacific routes, reducing codeshare sales on flights, and reducing frequency and capacity of several Trans-Pacific routes (as a result of reduced sales support from each other and passenger demand).

4.34. However, once USDOT approved the Restated JBA in July 2019, the Applicants announced several new direct routes as follows:

- Brisbane–San Francisco service, operated by Qantas via three weekly Dreamliner 787-9 flights. The services were commenced in February 2020 (now suspended due to the pandemic);
- Brisbane–Chicago service, announced by Qantas in 2019 to be commenced in April 2020 via a four weekly Dreamliner 787-9 flights (now postponed due to the pandemic);
- Auckland–Dallas/Fort Worth service and Christchurch–Los Angeles service, announced by American in 2019 to be commenced in October 2020 (now postponed to late 2021-2022)

4.35. The Applicants submit that the new routes were made possible by their joint business under the Restated JBA, just as their earlier launch of services (e.g. Qantas' Sydney–San Francisco service and American's Sydney–Los Angeles service in 2015) were made possible by the Original JBA.

4.36. In its 2016 determination, the ACCC considered that the alliance had resulted in material public benefits, including significant addition of new routes and capacity during 2011-2015.

4.37. The information in the current application for re-authorisation suggests that the Applicants more or less maintained, rather than increased, capacity on their Trans-Pacific services during 2016-2019. However, as discussed earlier, the ACCC accepts that the Applicants' Trans-Pacific capacity decisions over that time are likely to have been impacted by the delay in obtaining USDOT's approval of the Restated JBA.

- 4.38. The ACCC notes that shortly after the USDOT approval, the Applicants announced the new routes as referred to in paragraph 4.34 above. The ACCC accepts that the addition of these routes was made possible by the alliance.
- 4.39. The ACCC considers that the Proposed Conduct has facilitated significant capacity growth and introduction of new routes by the Applicants during the previous periods of authorisation. The ACCC considers that, compared to the likely future without the Proposed Conduct, continuation of the alliance provides a greater likelihood of increased capacity and new routes in future as the airlines benefit from passenger feeds arising from their complementary networks. The ACCC considers that this constitutes a material public benefit.

### ***Increased connectivity and improved schedule choice***

- 4.40. The Applicants submit that the Restated JBA has facilitated a significant increase in codeshare destinations. The Applicants have expanded their codeshare relationship to encompass a total of 166 destinations, with 11 destinations in Australia, four destinations in New Zealand and 151 destinations in the US.
- 4.41. The Applicants also submit that the alliance has enabled them to provide passengers with more choice of departure, arrival times and transit points for flights. For instance, passengers travelling from Adelaide to Los Angeles could fly with American via Sydney or Auckland, or with Qantas via Brisbane, Sydney or Melbourne, with services operating at different times of the day. Passengers were provided with the option of mixed-metal round trip itineraries (where they could depart on one airline and return on the other), or itineraries which included both a Qantas and an American segment.
- 4.42. The ACCC considers that the Proposed Conduct has and is likely to continue to result in public benefit by providing passengers with an expanded range of 'online connections' (i.e. connections between two or more flight segments operated by the same airline or codeshare partners) compared to the likely future without the Proposed Conduct. The benefits to passengers of such online connections (as opposed to 'interline connection' between two different airlines) include:
- eliminating the risk of forfeiting non-refundable fares if the first flight in a journey is delayed;
  - increased convenience in not having to collect and re-check baggage mid-journey (where applicable); and
  - time savings associated with 'through check' (i.e. passengers do not need to allow time for a second check-in, where applicable) and better transit times due to coordination of the timing of connecting flights.
- 4.43. The ACCC accepts that the Proposed Conduct aligns the Applicants' incentives in relation to capacity, scheduling, sales and marketing. The ACCC considers that this has and is likely to continue to result in public benefit in the form of improved schedule choice, reducing travel and transit times.

### ***Lower fares***

- 4.44. The Applicants submit the Proposed Conduct would incentivise them to work together to stimulate demand and re-build their capacity through providing lower and more flexible fares. The Applicants claim that since the USDOT approval was granted in July 2019, the Applicants coordinated to offer low fares – e.g. on routes between Sydney/Melbourne/Brisbane to Los Angeles/San Francisco, fares were routinely below



\$1,000 return (all inclusive, economy class) and as low as \$879 on the Sydney-Los Angeles route.

- 4.45. The Applicants submit that together they have delivered attractive fare products for consumers travelling between Australasia and the US, such as the 'Qantas Explorer' fare product, which has enabled more 'beyond gateway' multi-sector itineraries. They have also launched creative fare products that offered flexible price points to price-sensitive passengers, giving passengers the options to use both carriers' services on the same itinerary. The Applicants submit that if the Proposed Conduct is re-authorised they will work on adopting a dealing strategy for their joint business (by customer segment or distribution channel) to facilitate greater availability of discounted fares.
- 4.46. In its 2016 determination, the ACCC considered that the alliance was likely to lead to lower prices for journeys connecting separate services operated by each of the Applicants than if they were operating independently at arms-length from each other.<sup>43</sup>
- 4.47. The ACCC accepts that some lower fares were made available by the Applicants on routes between Australia and the US during a time of more normal market conditions before the pandemic. However, based on the information currently available, it is not clear to the ACCC that lower fares will be likely to result from the alliance going forward.

### ***Loyalty program benefits***

- 4.48. The Applicants submit that their alliance has enabled them to deliver generous benefits to their frequent flyer members. The Applicants note that during the period of delay in obtaining USDOT's approval, the Applicants significantly reduced mileage accrual across flights operated by the other carrier. However, after USDOT's approval in July 2019, there was an expansion of reciprocal benefits offered to both of the Applicants' frequent flyer members, and significant increases in cross-metal point accruals.<sup>44</sup>
- 4.49. The ACCC considers that the attractiveness of the Applicants' loyalty programs is enhanced under the alliance, and that the benefits of reciprocal access to loyalty programs accrue to alliance passengers who are members of an alliance loyalty program. Given the large number of frequent flyer members and the range of benefits that might accrue to them,<sup>45</sup> the ACCC considers this is likely to result in a public benefit.

### ***Improved lounge access***

- 4.50. The Applicants submit that their joint business has facilitated increased investment in each Applicant's lounge infrastructure, resulting in significant benefits to consumers. In 2019, over 4,500 Qantas passengers accessed American's new Admirals Club in Los Angeles. Similarly, Qantas has expanded and improved its lounges.

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<sup>43</sup> This is because airlines in a metal-neutral alliance would have incentive to cooperate on their pricing. In contrast, airlines operating at arms-length from each other would individually charge a price that includes a mark-up over their own costs, which results in a higher price for the whole journey.

<sup>44</sup> For instance, 31 per cent increase in mile accruals in the year to September 2019 for American AAdvantage members travelling on Qantas-operated services, and 772 per cent increase in accruals in the year to September 2019 for Qantas members travelling on American-operated services.

<sup>45</sup> For instance, flight upgrades, priority check in, preferred seating and lounge access.

- 4.51. The ACCC considers that the alliance is likely to provide American with stronger incentives to serve Qantas customers on an equal basis under the alliance than under some other form of arms-length access arrangement.
- 4.52. The ACCC considers that the alliance has resulted in public benefits to consumers in the form of improved lounge access and that these benefits are likely to continue under the Proposed Conduct.

### **Operational efficiencies**

- 4.53. In the past the ACCC has accepted that improved operating efficiency and/or avoidance of duplicated fixed costs through airline alliances are likely to result in a public benefit.
- 4.54. The Applicants identified several areas of improvements, including co-locating in the same airport terminal in Chicago O'Hare Airport to reduce minimum connection time by 61%<sup>46</sup> and enabling 14 additional connections to be made; the planned introduction of American's booking system to Qantas and deep linking of both Applicants' websites to provide a better purchase experience for customers; and improved integration of baggage handling processes in key gateways such as Los Angeles.
- 4.55. The ACCC considers that the alliance is likely to facilitate public benefits through cost savings and other efficiencies realised through the integration of the Applicants' operations over time.

### **Tourism recovery and trade benefits**

- 4.56. The Applicants submit that re-authorisation would allow the Applicants to more quickly and effectively reinstate, sustain and ultimately grow their joint Trans-Pacific services, which would benefit Australian consumers and assist the Australian inbound tourism industry to recover from the impacts of COVID-19.
- 4.57. The Applicants state that before COVID-19, the Applicants successfully boosted inbound tourism to Australasia through holding numerous coordinated joint marketing campaigns and trade events.<sup>47</sup> These included co-branded campaigns promoted by American in the US, Canada and Mexico (where Qantas has limited reach) to raise awareness about the joint network and new routes. They also jointly marketed their combined network to corporate businesses and exporters/importers (to support bilateral trade), and collaborated on more effective freight delivery options using their networks.
- 4.58. The ACCC considers that airline alliances can stimulate tourism by: (i) making Australia more accessible or convenient as a tourist destination through enhancing the alliance's product and service offerings; and (ii) allowing the parties to exploit synergies through joint rather than separate tourism promotion activity.
- 4.59. The ACCC considers that generally, there are a wide range of factors that 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.
- 4.60. In this case, the ACCC considers that the increase in connectivity of the Applicants' services and expansion of frequencies and destinations likely to result from the

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<sup>46</sup> American co-located to the same terminal Qantas used for departure for its Brisbane-Chicago service (Terminal 3 in Chicago O'Hare Airport). This reduced the minimum connection time from 90 minutes to 35 minutes.

<sup>47</sup> For instance, 'G'day USA' and 'Australia Day Lunch and Learn' events.

Proposed Conduct has the potential to stimulate greater levels of inbound tourism to Australia as travel restrictions ease. The alliance also provides a strong incentive for the Applicants to continue to pursue joint marketing opportunities.

4.61. With respect to trade, the ACCC considers the key drivers of the volume and value of (non-tourism) trade between Australia and the US are largely outside the influence of airlines. They include, for example, purchasing power in source countries, the relative prices of goods and services, consumer tastes and preference, 'ease of doing business', and stability of government. Nevertheless, the ACCC considers the Proposed Conduct may result in some potential trade-related public benefits, by making it easier for foreign businesses and Australian exporters/importers to access locations in either countries covered by the Applicants' extensive networks.

### **ACCC conclusion on public benefit**

4.62. The ACCC considers that the Proposed Conduct is likely to result in the following public benefits:

- enhanced products and services including a greater likelihood of increased capacity and new routes; increased connectivity and improved schedule choice; loyalty program benefits and improved lounge access; and
- operational efficiencies.

4.63. The ACCC considers that stimulation of tourism and trade is a potential benefit of the Proposed Conduct.

### **Public detriments**

4.64. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>48</sup>*

4.65. In its 2011 determination, the ACCC concluded that the alliance was unlikely to result in any public detriment because the Applicants did not compete on any routes and were unlikely to do so in the future.

4.66. In its 2016 determination, the ACCC noted that the Proposed Conduct would result in American commencing Sydney–Los Angeles services; but considered that these services were only enabled by the alliance, and that absent the alliance American would not operate Trans-Pacific services. The ACCC also considered that the Proposed Conduct was unlikely to result in public detriments, as Qantas and American were constrained by other direct and indirect carriers on the Trans-Pacific.

4.67. The ACCC's assessment of the likely public detriments from the Proposed Conduct in the context of the current application is as follows.

### **Trans-Pacific air passenger transport services – unilateral effects**

4.68. One of the main ways in which an airline alliance can lessen competition is through unilateral effects. An alliance can have unilateral effects if it removes or weakens

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

competitive constraints in such a way that the alliance partners find it profitable to raise prices, restrict output or otherwise exercise any market power they may acquire as a result of the alliance, despite any expected response from other competitors.

- 4.69. The Applicants submit that they would not have any ability or incentive to restrict capacity or increase prices due to competition from other Trans-Pacific carriers. The Applicants consider that in the likely future with the Proposed Conduct, competition on the Trans-Pacific routes would remain strong (particularly competition with Delta and United), despite Virgin not operating internationally in the short-medium term.
- 4.70. As noted in paragraphs 2.8 and 2.11 above, the effect of the Qantas and American alliance is to increase concentration in the provision of Trans-Pacific service – especially with respect to services between Sydney and Los Angeles. Further, the ACCC notes that following Virgin’s suspension of Trans-Pacific services in the wake of COVID-19 (at least in the short-medium term), the Trans-Pacific air passenger transport services market has become more concentrated. As a result, the Qantas and American alliance is likely to continue to service a significant share of passengers on the Trans-Pacific routes.
- 4.71. However, the ACCC considers that absent the alliance, American would not be likely to operate Trans-Pacific services (or materially expand its frequency or capacity of Trans-Pacific services). American would not compete in the Australian domestic air passenger services market and Qantas would not compete with American in the domestic air passenger transport services markets of the US/Canada/Mexico.
- 4.72. Accordingly, the ACCC considers the Proposed Conduct is unlikely to materially enhance the ability and incentive of the Applicants to unilaterally raise prices, restrict capacity or reduce services.

### **Trans-Pacific air passenger transport services – coordinated effects**

- 4.73. Coordinated conduct involves competing airlines recognising and accommodating their mutual interdependence by not competing as aggressively as they otherwise would.
- 4.74. The ACCC does not consider the Proposed Conduct increases the likelihood of coordinated conduct between competing airlines on the Trans-Pacific. This is because, as stated above, American would be unlikely to operate Trans-Pacific services in its own right or materially expand its Trans-Pacific capacity and frequency absent the Proposed Conduct.
- 4.75. The ACCC considers Virgin’s suspension of Trans-Pacific services (at least in the short-medium term) creates a more material risk of coordinated conduct occurring, as there is now a reduced number of airlines competing in the Trans-Pacific air passenger transport services market. However, the ACCC also considers that such risk (to the extent it exists) and the uncertainty about whether Virgin may ultimately re-join the market are likely to be present with or without the Proposed Conduct.

### **ACCC conclusion on public detriment**

- 4.76. Based on the reasons outlined above, the ACCC considers that the Proposed Conduct is not likely to result in public detriment by increasing the risk of unilateral effects or coordinated conduct on the Trans-Pacific services.

## Balance of public benefit and detriment

4.77. For the reasons outlined in this draft determination, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

## Length of authorisation

4.78. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>49</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the 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.

4.79. In this instance, the Applicants seek authorisation for five years, as they consider that will closely align with the current regulatory approvals of the Restated JBA from the New Zealand Minister of Transport (granted in November 2020 for five years) and USDOT (granted in July 2019 for seven years). The Applicants also consider this period of authorisation will provide certainty for them to invest in their joint business across all jurisdictions, in circumstances where demand recovery for global air passenger transport services will be at least several years away (e.g. 2024, according to the International Air Transport Association's forecast). The Applicants submit that any shorter term or conditional approvals will not provide sufficient certainty for them to make the investment required to re-build and grow their networks.

4.80. The ACCC recognises that there is significant uncertainty about when the global aviation industry is likely to recover from the effects of the pandemic. In this context, and having regard to the current and past assessments that the alliance is likely to deliver a net public benefit, the ACCC proposes to re-authorise the Proposed Conduct for five years. The ACCC considers that this period of authorisation is likely to give the Applicants sufficient certainty to progress the alliance, and notes that the timeframe is also consistent with international regulatory approvals.

## 5. Draft determination

### The application

5.1. On 19 October 2020 the Applicants lodged an application to revoke authorisations A91502 and A91503 and substitute authorisation AA1000532 for the ones revoked (referred to as re-authorisation). This application for re-authorisation is made under subsection 91C(1) of the Act.

5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

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<sup>49</sup> Subsection 91(1).

- 5.4. For the reasons outlined in this draft determination, the ACCC considers that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant re-authorisation.

## Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisations A91502 and A91503 and grant authorisation AA1000532 in substitution to enable the Applicants to give effect to a Restated Joint Business Agreement under which the Applicants will coordinate their operations between Australia/New Zealand and US, Mexico and Canada for a further five years, as described in paragraph 1.10 and defined as the Proposed Conduct.
- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition or contain an exclusionary provision within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant re-authorisation AA1000532 for five years.
- 5.9. This draft determination is made on 26 February 2021.

## 6. Interim authorisation

- 6.1. The existing authorisations A91502 and A91503 are due to expire on 18 March 2021. In order to enable due consideration to be given to the application for re-authorisation, the ACCC has decided to suspend the operation of authorisations A91502 and A91503 and grant interim authorisation in substitution.<sup>50</sup> The ACCC has decided to grant interim authorisation for the following reasons:
  - interim authorisation will maintain the status quo, allowing the Applicants to continue their coordination and work together to re-build their Trans-Pacific services, while also minimising financial harm, uncertainty and disruption that will be experienced if interim authorisation is not granted;
  - interim authorisation is not likely to result in any significant changes to the market dynamics or prevent the market from returning to its pre-authorisation state if final authorisation is not granted, given the Applicants have been coordinating operations on the Trans-Pacific routes under the existing authorisations A91502 and A91503;
  - the ACCC considers its final determination in this matter is unlikely to come into effect before the existing authorisations expire; and
  - for the reasons set out in this draft determination, the ACCC considers the Proposed Conduct is likely to result in public benefits, which would outweigh any likely public detriments.
- 6.2. The ACCC grants interim authorisation on the same terms as authorisations A91502 and A91503.

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<sup>50</sup> This decision is made under s 91(2)(f) of the CCA.

6.3. 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.

## 7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination, by **12 March 2021**. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.