



Draft Determination and Interim Authorisation

Application for authorisation AA1000463
lodged by
British Airways and Qatar Airways

in respect of cooperation on services between Australia and the UK /
Europe

Authorisation number: AA1000463

26 March 2020

Commissioners:

Keogh

Rickard

Court

Ridgeway

Summary

The ACCC proposes to grant authorisation for five years to enable British Airways and Qatar Airways to coordinate their air passenger services on a number of routes between the UK / Europe and Australia, which include a UK-Doha leg.

The ACCC considers that the proposed coordination is likely to result in public benefits from enhanced products and services due to more convenient travel options and improved customer services. The ACCC is of the view that the arrangement is unlikely to result in public detriments in the form of unilateral or coordinated effects, given the airlines' existing Joint Business Agreement and the strength of competitors on relevant routes.

The ACCC has decided to grant interim authorisation to enable the proposed arrangements to commence while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 9 April 2020 before making its final decision. In addition, the airlines or an interested party may request that the ACCC hold a conference to discuss the draft determination.

1. The application for authorisation

- 1.1. On 6 January 2020, British Airways and Qatar Airways (the **Applicants**) lodged application for authorisation AA1000463 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for coordinating air passenger services between the UK / Europe and Australia for five years (the **Proposed Conduct**). This application for authorisation AA1000463 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).¹
- 1.2. The Applicants also requested interim authorisation under subsection 91(2) of the Act to enable them to engage in the Proposed Conduct while the ACCC is considering the substantive application. The request for interim authorisation is discussed further in section 6.

The Proposed Conduct

- 1.3. The authorisation relates to routes between the UK / Europe and Australia which include a UK-Doha leg (**the B&B Routes**²). The B&B Routes comprise all routes between (1) Australian cities which are offline³ to British Airways (**BA**) and (2) the UK and cities in Western Europe which are offline to Qatar Airways (**QR**).
- 1.4. The B&B Routes do not include services where the origin and destination port is Sydney as this is 'online' for both Applicants and thus outside the scope of the JBA.

¹ 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.

² B&B' means 'behind and beyond'.

³ An 'offline' route is one where the airline does not operate its own aircraft on the route but serves the route, if at all, only via competitive connecting code share or interline arrangements with third-party airlines

1.5. The Applicants are seeking authorisation to coordinate their air passenger services on the B&B Routes.

(the **Proposed Conduct**)

- 1.6. The Applicants' coordination may include: schedule coordination; capacity (limited to London-Doha); revenue planning; joint pricing; sales; marketing; service parameters and standards; product development and alignment of passenger handling policies and service procedures (limited to London-Doha); frequent flyer programs; and sharing and alignment of best practices and tools.⁴
- 1.7. The Proposed Conduct does not involve the coordination of capacity, except on the London-Doha trunk route.⁵
- 1.8. Currently, BA offers customers the possibility of travel to and from its offline points in Australia through its arm's length competitive code share relationships with Cathay Pacific, Malaysia Airlines, Qantas and / or QR, the latter two of which each fly their own planes to all of the four Australian cities.⁶
- 1.9. The Applicants submit that the Proposed Conduct involves the combination of two complementary networks, rather than competing networks, given BA's lack of operations and to the four Australian cities.⁷

Nine B&B Routes

1.10. The Applicants have identified nine of the total 104 B&B Routes as meeting density thresholds that are high enough to warrant investigation.⁸ These routes are:

- (1) ADL-LON (Adelaide – London);
- (2) MEL-LON (Melbourne – London);
- (3) PER-LON (Perth – London);
- (4) CBR-LON (Canberra – London);
- (5) ADL-MAN (Adelaide – Manchester);
- (6) MEL-EDI (Melbourne – Edinburgh);
- (7) PER-EDI (Perth – Edinburgh);
- (8) MEL-MAN (Melbourne – Manchester); and
- (9) PER-MAN (Perth – Manchester)

(collectively, the **Nine B&B Routes**).

⁴ Application for Authorisation AA1000463, submitted 6 January 2020, available on the ACCC's [public register](#), p. 15.

⁵ Application for Authorisation AA1000463, pp. 11-12.

⁶ Application for Authorisation AA1000463, p. 10.

⁷ Application for Authorisation AA1000463, p. 29.

⁸ The Applicants have excluded routes with less than an estimated 20,000 passengers per annum, following the European Commission's decisional threshold practice (which excludes routes with less than 30,000 passengers per annum).

Joint Business Agreement

- 1.11. The Applicants entered into a confidential Joint Business Agreement (the **JBA**) on 17 November 2016, which was subsequently amended on 15 May 2018. The JBA covers the Applicants' air passenger services on all routes between the UK and Qatar, including the trunk route London-Doha, and on more than 80 routes behind and beyond each of London and Doha.⁹ The Parties have been implementing the JBA in stages, commencing with their London-Doha trunk route and B&B Routes into Asia and Africa.¹⁰ This application now seeks to expand those B&B Routes to Australia.
- 1.12. The principal objective of the JBA is to give BA and QR access to 'offline' origin and destination ports. An 'offline' route is one where the airline does not operate its own aircraft but provides services, if at all, via competitive connecting code share or interline arrangements with third-party airlines.¹¹
- 1.13. The Applicants submit that the JBA allows them to offer customers more compelling and competitive travel options than either would be able to individually, as well as generating efficiencies and cost savings.¹²
- 1.14. The Applicants submit that the Nine B&B Routes are important to the Parties' ability to compete. The B&B Routes generally are important to the Applicants for maximising passenger numbers on, and the commercial viability of, the London-Doha trunk route. Specifically, the Applicants submit that cooperation on the Nine B&B Routes will improve their ability to compete effectively on these routes relative to Qantas, Emirates, other Middle Eastern and Asian carriers, as well as SkyTeam and Star Alliance global alliances.¹³

2. Background

Impact of COVID-19 on the aviation industry

- 2.1. The ACCC is cognisant of the impact the COVID-19 pandemic is having on the aviation industry, including extreme reductions in flight frequencies. The ACCC recognises there may be fluctuations in market structure and dynamics over this time. However, the duration of this authorisation covers a period in which a return to more stable conditions over time is expected. The ACCC may reconsider the authorisation if the relevant markets should become significantly less competitive in future.

Applicants

- 2.2. British Airways Plc (**BA**) is a British airline with a hub at London Heathrow and bases at London Gatwick and London City airports. It is part of the International Airlines Group. BA flies to more than 70 different countries, carries more than 40 million customers a year and has a fleet of nearly 300 aircraft.¹⁴

⁹ Application for Authorisation AA1000463, p. 9

¹⁰ Application for Authorisation AA1000463, p. 10.

¹¹ Application for Authorisation AA1000463, p. 9.

¹² Application for Authorisation AA1000463, pp. 9-10.

¹³ Application for Authorisation AA1000463, p. 16.

¹⁴ Application for Authorisation AA1000463, p. 13.

- 2.3. BA offers flights to Australia via Singapore, Bangkok, Hong Kong, Tokyo or Doha. Of these, the only flight wholly operated by BA is between London and Sydney, via Singapore. All other routes involve a mid-point transfer to another carrier's aircraft.¹⁵
- 2.4. Qatar Airways Q.C.S.C. (**QR**) is the national carrier of the State of Qatar and flies to more than 160 destinations. In 2015, the Australian and Qatari Governments approved an expanded Air Services Agreement, paving the way for increased flights between the two countries. The Agreement allows Qatari or Australian airlines to operate up to 21 flights a week between Qatar and major Australian gateway airports.¹⁶
- 2.5. QR offers daily non-stop flights from Melbourne, Adelaide and Perth to Doha and 'direct' flights from Canberra to Doha, via Sydney.¹⁷ QR flies twice daily between Sydney and Doha.

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 competitors, suppliers, customers, relevant industry associations, consumer groups, airports, state and federal government and relevant regulatory bodies. The ACCC did not receive any submissions from interested parties in relation to the application.

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**).

Areas of competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. The Applicants submit that it is not necessary to precisely define the affected markets. The Applicants submit that they are subject to competitive constraints from other carriers for the supply of passenger air services between Australia and the UK / Europe, particularly well-established carriers like Emirates, Etihad and Qantas (in their own right and through code share and authorisation arrangements).¹⁸

¹⁵ Application for Authorisation AA1000463, p. 13.

¹⁶ Application for Authorisation AA1000463, p. 14.

¹⁷ QR does not collect any BA passengers during the Sydney stopover.

¹⁸ Application for Authorisation AA1000463, pp. 23-25.

4.5. The ACCC considers that the primary area of competition relevant to the assessment of the Proposed Conduct is international air passenger transport services on routes between Australia and the UK / Europe.

Future with and without the Proposed Conduct

- 4.6. 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.
- 4.7. The Applicants submit that the counterfactual scenario would be less effective competition against other carriers on the B&B Routes with substantially fewer benefits for passengers travelling on routes between Australia and the UK / Europe.¹⁹
- 4.8. The ACCC considers that without the Proposed Conduct, the status quo will continue:
- a) BA is unlikely to commence operating flights from Australia (other than Sydney) in its own right; and
 - b) BA and QR will continue their existing arm's length code share and interline arrangements.

Public benefits

4.9. 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.²⁰

4.10. The ACCC has considered the following public benefits:

- enhanced products and services;
- efficiencies and lower fares; and
- increased competition.

Enhanced products and services

- 4.11. The Applicants submit that the Proposed Conduct will benefit customers through:
- more compelling and competitive travel options, such as by adjusting schedules to offer more convenient connection times
 - seamless journeys when connecting between the Applicants on indirect services through enhanced customer support in London and Doha and reciprocal lounge access;
 - seamless booking and check-in on either Applicant's website;
 - enhanced access to both Applicants' frequent flyer programs;

¹⁹ Application for Authorisation AA1000463, p. 17.

²⁰ 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.

- fare combinability leading to a greater number of frequency choices for passengers; and
- optimised scheduling across both airlines (which is expected to increase efficiencies and generate cost savings).²¹

4.12. The ACCC considers that customers are likely to appreciate the promotion of more seamless services and transitions than currently exist due to the Applicants operating individually. The ACCC considers that better integrated processes, expanded travel options and improved flight scheduling is likely to benefit customers.

4.13. The ACCC considers that public benefit in the form of enhanced products and services is likely.

Efficiencies and lower fares

4.14. The Applicants submit that the Proposed Conduct will allow them to generate efficiencies across the B&B Routes, leading to lower average per-passenger costs and lower fares as strong competition from other major airlines and alliances means cost efficiencies will be passed on. The Applicants further submit that there is strong empirical evidence of the pro-consumer price effects of metal-neutral joint ventures.²²

4.15. The Applicants consider that the Proposed Conduct will lead to the elimination of double-marginalisation²³, which will reduce fares and improve capacity utilisation.²⁴

4.16. The Applicants submit that the Proposed Conduct will allow the Applicants to improve efficiencies by benefitting from:

- economies of scope by spreading costs over a greater number of destinations;
- more efficient and effective brand exposure, marketing budget allocation and sales impact;
- economies of density as a result of increased load factors, consequently reducing average cost per seat sold;
- cost savings from various invariable costs, including marketing and sales, scheduling, capacity planning; and
- other cost savings and efficiencies through joint procurement and supply management.²⁵

4.17. In principle, the ACCC accepts that the Proposed Conduct may facilitate public benefits through cost savings and other efficiencies arising from integration of the Applicants' operations. However, at this stage, the Applicants have provided limited substantiation of cost savings and efficiencies.

²¹ Application for Authorisation AA1000463, p. 30.

²² Application for Authorisation AA1000463, p. 30.

²³ In arm's length arrangements, the Applicants individually set prices on the portion of the itinerary where they operate their own aircraft and maximise their own mark-up based on the demand on that portion of the passenger's journey. However, this pricing fails to consider the demand for the overall itinerary and results in higher fares and suboptimal capacity utilisation. By comparison, the cooperative pricing arrangement under the JBA will allow each of the Parties to consider the effect of its pricing on the overall demand for the itinerary, removing double-marginalisation and consequently reducing fare levels and improving capacity utilisation: p. 31, Application.

²⁴ Application for Authorisation AA1000463, p. 31.

²⁵ Application for Authorisation AA1000463, pp. 31-32.

Increased competition

- 4.18. The Applicants submit that the Proposed Conduct will increase competition by making the Applicants more effective competitors against other carriers and joint businesses. The Applicants note that the ACCC has previously accepted enhancements to product and service offerings have the potential to trigger competitive responses from rival airlines.²⁶
- 4.19. The ACCC considers that, as discussed above, it is likely that the Proposed Conduct will enable the Applicants to provide enhanced products and services to consumers. This may make the Applicants more effective competitors if consumers consider the enhanced products and services are desirable.
- 4.20. However, the ACCC does not consider that there is currently sufficient evidence to conclude that a substantial public benefit in the form of triggering a competitive response from rivals is likely to arise. Rather, notwithstanding the current market disruptions from COVID-19, the ACCC considers that rival airlines will continue to strongly compete for passengers between Australia and the UK/Europe and the Proposed Conduct is unlikely to be an integral driver of this competition.
- 4.21. The ACCC considers there may be some public benefit in the form of increased competition.

ACCC conclusion on public benefit

- 4.22. The ACCC considers that the Proposed Conduct is likely to result in public benefits from enhanced products and services due to more convenient travel options and improved customer services.

Public detriments

- 4.23. 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.²⁷*
- 4.24. The Applicants submit that the Proposed Conduct will not result in any anti-competitive detriments because:
- there is no significant competitive overlap between the Applicants;
 - London to Sydney (where the Applicants do overlap) will be excluded from the Proposed Conduct;
 - there are competitive constraints on each of the Nine B&B Routes.
- 4.25. The ACCC has considered the following public detriments:
- unilateral effects; and
 - coordinated effects.

²⁶ Application for Authorisation AA1000463, p. 30.

²⁷ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

Unilateral effects

- 4.26. An alliance between carriers can have unilateral effects if it removes or weakens competitive constraints in such a way that the alliance partners find it profitable to raise prices, reduce services or otherwise exercise any market power they may acquire as a result of the alliance, despite any expected response from other competitors.
- 4.27. The ACCC considers that absent the Proposed Conduct, it is unlikely that the Applicants would enter routes currently solely supplied by the other, particularly given the Applicants' formalised cooperation in the JBA.
- 4.28. On the routes that both Applicants currently operate on, the ACCC considers there remains sufficient competitive tension from other airlines. These remaining competitors are likely to restrain the Applicants from raising prices or reducing services and are discussed in further detail below.
- 4.29. The ACCC considers that the Proposed Conduct is not likely to materially enhance the ability and incentive of the Applicants to unilaterally raise prices, reduce services or otherwise exercise any market power they may acquire, as a result of the Proposed Conduct.

Coordinated effects

- 4.30. Coordinated effects refer to the risk of competitive harm from the Proposed Conduct by increasing the risk of coordinated conduct among airlines on international routes. Coordinated conduct in this sense involves competing airlines recognising and accommodating their mutual interdependence (explicitly or tacitly) by not competing as aggressively as they otherwise would. In considering this risk, the key issue is whether the Proposed Conduct increases the likelihood of coordinated conduct between airlines more broadly (beyond the coordination that is inherent in the Proposed Conduct).
- 4.31. The Applicants do not operate overlapping services on the routes included within the Proposed Conduct (noting that flights to and from Sydney are excluded). As such, it is unlikely that either carrier currently plays a strong role in preventing the other from coordinating with their competitors.
- 4.32. Accordingly, the ACCC considers that the Proposed Conduct is unlikely to materially enhance the ability and incentive of the Applicants to coordinate with other carriers to raise price or reduce service.

Remaining competitors to provide continued restraint

- 4.33. The Applicants submit that the Australia to UK / Europe route is highly competitive with well-established carriers like Emirates, Etihad and Qantas. The Applicants note these carriers have a number of code share and authorisation arrangements, which, collectively, have made it difficult for individual carriers to compete effectively.²⁸
- 4.34. The Applicants note that the ACCC has previously concluded the Australia to UK / Europe route is highly competitive on the basis that:
- there is competition on routes to UK/Europe via multiple hubs;

²⁸ Application for Authorisation AA1000463, p. 25.

- there are a large number of established carriers with the ability and incentive to expand their operations, including a number of Chinese airlines which have recently expanded services to Australia and are growing their market presence;
- there is available capacity for new entry on the route; and
- the route is characterised by year-on-year increases in capacity and reductions in average fares, as more competitors enter the route and expand their services, leading to an increase in total passenger numbers.²⁹

4.35. The Applicants identify competitors likely to constrain BA and QR on the Australia to UK / Europe route as including:

- Qantas and Emirates, cooperating under an alliance;
- Etihad and Virgin Australia, cooperating under an alliance;
- Singapore Airlines, with Changi Airport a major transit point for UK / Europe-bound travellers;
- China Southern and China Airlines, operating between Australia and the UK / Europe, with mid-points in Guangzhou and Taipei; and
- Virgin Atlantic and Virgin Australia, authorised by the ACCC to cooperate on services between the UK / Ireland and mid-points in Hong Kong and Los Angeles.³⁰

4.36. The Applicants further note that the Nine B&B Routes are ‘highly contestable’ and that customers will have the ability to completely bypass the Applicants.³¹

4.37. The ACCC considers that the Australia to UK / Europe route continues to be highly competitive. The ACCC considers that the presence of numerous vigorous competitors will limit the possibility of competitive harm flowing from the Applicants’ coordination on the B&B Routes. These competitors are likely to continue competing strongly between themselves and the Applicants if the Proposed Conduct is authorised.

ACCC conclusion on public detriment

4.38. The ACCC considers that the Proposed Conduct is unlikely to result in public detriments in the form of unilateral or coordinated effects, given the existence of the Applicants’ JBA and the strength of competitors on relevant routes.

Balance of public benefit and detriment

4.39. For the reasons outlined in this draft determination, the ACCC is satisfied 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

4.40. The Act allows the ACCC to grant authorisation for a limited period of time.³² 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

²⁹ Application for Authorisation AA1000463, pp. 25-26.

³⁰ Application for Authorisation AA1000463, pp. 26-29.

³¹ Application for Authorisation AA1000463, p. 29.

³² Subsection 91(1).

review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

- 4.41. In this instance, the Applicants seek authorisation for five years.
- 4.42. In light of the ongoing evolution of services and the generally dynamic nature of the aviation industry, as well as the current uncertainty around the lasting impacts of COVID-19 on the industry, the ACCC considers five years is an appropriate period for authorisation.
- 4.43. The ACCC proposes to grant authorisation for five years.

5. Draft determination

The application

- 5.1. On 6 January 2020, the Applicants lodged application AA1000463 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicants seek authorisation for the Proposed Conduct. 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.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, 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 authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000463 to enable the Applicants to coordinate their air passenger services on a number of routes between the UK / Europe and Australia, as described in paragraphs 1.3 to 1.9 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 within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000463 for five years.
- 5.9. The proposed authorisation is in respect of the arrangement as it stands at the time authorisation is granted. Any changes to the arrangement during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.10. This draft determination is made on 26 March 2020.

6. Interim authorisation

- 6.1. On 6 January 2020, the Applicants requested interim authorisation to coordinate their air passenger services on a number of routes between the UK / Europe and Australia.
- 6.2. The Applicants submit that there are clear benefits and no detriments associated with the Proposed Conduct and that interim authorisation should be granted as soon as possible.³³
- 6.3. The Applicants submit that any delay will delay the realisation of the public benefits. The Applicants note that scheduling and marketing activities typically occur in large blocks and the absence of interim authorisation will likely prevent the benefits of the Proposed Conduct from accruing for an entire season. The Applicants submit the inability to take advantage of these benefits would be commercially costly for both BA and QR and detrimental to passengers travelling on the B&B Routes.
- 6.4. The ACCC did not receive any submissions from interested parties on interim authorisation.
- 6.5. The reasons for the ACCC's decision to grant interim authorisation are:
 - It is unlikely that the competitive dynamics in any market will be materially impacted by allowing the Applicants to begin coordinating their services. In the event final authorisation is not granted, the relevant markets will be able to return to substantially their current state.
 - 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.
 - There is unlikely to be any harm to any interested parties.
- 6.6. 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 9 April 2020. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

³³ Application for Authorisation AA1000463, p. 33.