

## **Ministry of Transport report on the 2020 Application by Qantas and American Airlines for Reauthorisation of their Strategic Alliance**

### **Background**

1. On 23 July 2020, Qantas Airways and American Airlines jointly applied for reauthorisation under section 88 of the Civil Aviation Act 1990 of their Joint Business Agreement to coordinate their operations between and within Australia and New Zealand, and the United States, Canada and Mexico.
2. The existing arrangement was authorised for five years by the New Zealand Minister of Transport on 8 November 2015 and by Australia on 25 February 2016. The proposal was initially tentatively rejected by the US Department of Transport (DoT) in November 2016. Rather than address the DoT's concerns in the limited time allowed, the applicants refiled a later application which was finally approved in July 2019.
3. Due to the additional time taken to receive approval from the DoT, and the effective end of international travel from early 2020 due to the COVID-19 emergency, the applicants have only been able to take full advantage of the existing arrangements for about seven months. Nonetheless, in June 2016 American Airlines added a service from Los Angeles to Auckland, which became a fully joint offering with Qantas after the alliance received US regulatory approval. The applicants also announced two further services to be operated by American: Los Angeles-Christchurch and Dallas/Fort Worth-Auckland. These services were scheduled to begin in October 2020 but have been suspended.
4. The existing arrangement is based on a restated Joint Business Agreement, which followed the original Joint Business Agreement approved by the regulators in New Zealand, Australia and the United States in 2011.

### **Proposal**

5. Under the restated Joint Business Agreement, the airlines propose to continue to coordinate their operations on the Trans-Pacific, including coordination of marketing and sales, freight, pricing, scheduling, distribution strategies including agency arrangements, yield and inventory management, frequent flyer programs, lounges, joint procurement and product and service standards. Revenue is pooled. The Joint Business Agreement covers coordination of operations between and within Australia and New Zealand and the United States, Canada and Mexico.
6. The main benefit to New Zealand claimed for the proposal is that it provides the basis for the applicants to resume and expand direct services between New Zealand and the United States.
7. Though the proposal is for the existing cooperation between the airlines to be reauthorised and for their previously announced plans to be given effect, the whole aviation industry has effectively been reset by the current COVID-19 emergency and global economic recession.

## The Applicants

### Qantas

8. Qantas is Australia's national carrier. It has a fleet of over 270 aircraft, and before the COVID-19 pandemic, flew to 28 international destinations. It has its main hub at Sydney Airport.
9. Qantas owns the low-cost airline, Jetstar, which has 15 destinations outside Australia and is included in the Joint Business Agreement.

### American Airlines

10. American Airlines has the largest fleet of any airline, with around 875 aircraft under its main brand, and flies to more than 365 destinations in 61 countries. It operates regional services as American Eagle.
11. It operates out of ten hubs. The largest is Dallas/Fort Worth, which is one of the most connected airports in the world, with flights to over 200 destinations.
12. Both Qantas and American Airlines are founding members of the Oneworld airline alliance.

### Other Approvals

13. The applicants also intend to apply for reauthorisation of the Joint Business Agreement by the Australian Competition and Consumer Commission (ACCC). Approval will be sought for a period of five years from March 2021 to March 2026.
14. In 2019, the US DoT authorised the Joint Business Agreement for a seven year period, until July 2026.

### The role of Alliances in the airline industry

15. International aviation is governed by thousands of bilateral air services agreements. These agreements often restrict the destinations airlines are able to serve and the capacity they may provide. Many of these agreements also require airlines to be majority owned by nationals of their home State. These conditions make it difficult for airlines to merge or establish joint ventures in the same way that most other businesses can.
16. In order to overcome the restrictions imposed in bilateral air services agreements, airlines have found ways of working with each other to expand their global reach. This includes three global alliances – Star, Oneworld, and SkyTeam – through which airlines coordinate the provision of consumer services such as scheduling, ticketing, and frequent flier schemes. Greater or lesser levels of cooperation are possible through agreements between particular airlines, of which three kinds are common.

- i. Interline arrangements: in which one airline will sell tickets to other airlines at a pre-agreed price. This allows an airline to sell tickets for destinations that it does not fly to, by including a connecting service provided by its partner.
  - ii. Codeshare arrangements: by which an airline is able to sell seats on flights operated by another airline as if it were operating that flight with its own aircraft. This is usually only possible if it has been expressly permitted in the relevant bilateral air services arrangements.
  - iii. Revenue sharing alliances: in which airlines agree to cooperate on all aspects of pricing, scheduling and service delivery in a particular market. These arrangements are generally subject to a much higher level of regulatory scrutiny as they have the potential to reduce competition.
17. Airline alliances can provide benefits to consumers, such as better access to connecting flights, and the ability to earn and redeem frequent flyer points across the networks of both airlines. However, alliances can affect competition in the markets they cover. Cooperation between airlines that might otherwise compete in a particular market could lead to higher fares or reduced services. On the other hand, an alliance might be able to enter and provide competition in a market that would not be commercially viable for either airline on its own.

## Framework for our analysis

### The Ministry's role

18. The statutory framework applying to alliance and codeshare agreements between airlines is set out in Part 9 of the Civil Aviation Act 1990. Part 9 provides a sector specific alternative mechanism to the authorisations regime in Part 5 of the Commerce Act 1986.
19. The Minister of Transport has responsibility for authorising or declining an application made under the Civil Aviation Act 1990. The Ministry provides advice to the Minister on whether authorisation would be consistent with the criteria set out in the Act and with the public interest.

### Statutory considerations

20. Section 88 of the Act sets out a number of statutory conditions which must be met by all provisions of the arrangements for which authorisation is being sought.
21. We have analysed the provisions of the proposed Joint Business Agreement against the statutory criteria set out in the Act and found that they do not breach the criteria of the Act. This analysis is detailed in Appendix 1.

### The public interest analysis

22. [REDACTED]  
[REDACTED]  
[REDACTED] In making your decision, you may weigh any detriment to

consumer welfare against any special considerations relating to international air carriage in the relevant markets.

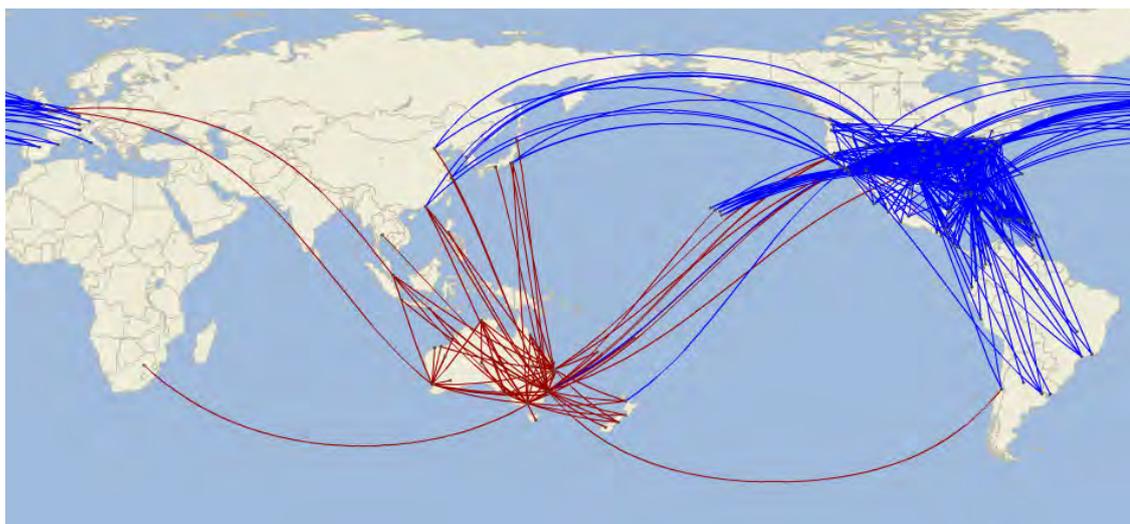
23. We have assessed the likely effects of the proposed Joint Business Agreement to determine whether authorisation is in New Zealand's best overall interests. We have considered:
- the likelihood that the benefits claimed by the applicants will eventuate both with and without the Alliance
  - what is likely to occur if authorisation is declined
  - risks or detriments that authorisation would entail for New Zealand
  - the effect of the COVID-19 pandemic and associated economic recession on aviation markets.

### **Conditions**

24. The ACCC can make the Agreement subject to conditions such as operating a fixed number of seats, or setting a fixed time limit on the authorisation.
25. The US DoT is also able to impose conditions on authorisation. In this case, the DoT has required the applicants to provide regular reports on the benefits delivered by the authorised cooperation, including an overall assessment at the end of the authorised period.
26. There is no mechanism for you to impose conditions on an authorisation in New Zealand. Most alliances authorised in New Zealand have been subject to time limits, and one (between Air New Zealand and Virgin Australia in 2010) has been subject to minimum capacity requirements. Applicants now propose five-year timeframes themselves as they recognise that requests for longer periods would be less likely to be authorised.

### **Rationale for the Alliance, and claimed benefits**

27. The applicants state that they need the joint business in order to maintain a network based around routes between New Zealand and Australia, and the Americas. Furthermore, they say that the reinstatement and sustainability of their currently suspended services will depend on continued preferential network access, and marketing and logistical cooperation, to re-stimulate demand and compete effectively.
28. The map below, provided by the applicants, shows the complementarity of their respective networks. Only the Sydney–Los Angeles route is served by both airlines.



American-operated network (February 2020)  
Qantas-operated network (February 2020)

29. The applicants claim the benefits of the alliance to New Zealand are:
- improved connectivity and schedule choice, and increased capacity, for travellers flying from New Zealand and Australia to destinations within the US, Canada and Mexico
  - improved products and services for customers, including lounge facilities, coordinated customer service and better baggage handling
  - enhanced benefits for members of each airlines' frequent flyer programs, particularly through reciprocal earning and redemption opportunities
  - a variety of fare products, price points and lower fares enabled by coordinated inventory management
  - competition on the Trans-Pacific Routes
  - the stimulation of tourism and trade to and within New Zealand, through joint sales and marketing, especially from campaigns in the United States to promote New Zealand.

## Market Definition

30. The alliance (as it relates to New Zealand) covers routes between New Zealand and North America (the US and Canada).
31. Before the COVID-19 pandemic, there were five direct services offered between New Zealand cities and the mainland United States or Canada:
- |         |                        |                                       |
|---------|------------------------|---------------------------------------|
| 31.1.1. | Auckland-Los Angeles   | [American Airlines] [Air New Zealand] |
| 31.1.2. | Auckland-San Francisco | [Air New Zealand] [United]            |
| 31.1.3. | Auckland-Chicago       | [Air New Zealand]                     |
| 31.1.4. | Auckland-Houston       | [Air New Zealand]                     |

- 31.1.5. Auckland-Vancouver [Air New Zealand]
32. Three further city-pairs were planned to launch in October 2020 but have been postponed:
- 32.1.1. Auckland-Dallas/Fort Worth [American Airlines]
- 32.1.2. Christchurch-Los Angeles [American Airlines]
- 32.1.3. Auckland-New York (Newark) [Air New Zealand]
33. The Alliance also covers domestic services within New Zealand (operated by Jetstar), and American Airlines services within North America (Canada, the US and Mexico) connecting to a trans-Pacific flight.
34. The Alliance does not cover services beyond North America (such as Europe), or trans-Tasman services which do not connect with a flight between Australia and North America.
35. Unlike other alliances authorised in New Zealand, the proposed Joint Business Agreement also covers freight services. Qantas operates one-way freighter service from the United States to Australia via New Zealand, and a number of services between Australia and the United States. Both Qantas and American also carry freight in the belly space of passenger operations.

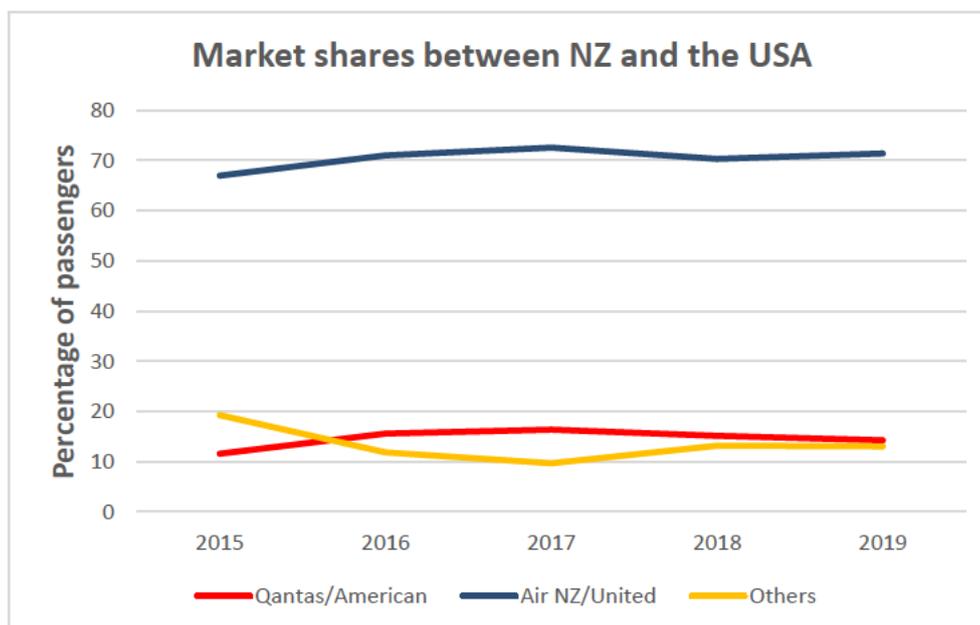
## Market Overview

36. In the year ended August 2015, 283,000 North American residents visited New Zealand. Around 203,000 New Zealanders listed a destination in North America (the US, Canada or Mexico) as their main destination.
37. Until 2016, only Air New Zealand, with its alliance partner United, offered direct services between New Zealand and the mainland United States. Other airlines offered routes through Australia, Fiji, Tahiti, Hong Kong, Shanghai, Hawaii and Canada. In 2016, American Airlines introduced its Auckland-Los Angeles service in partnership with Qantas.
38. By 2019, nearly a million passengers were flying between New Zealand and the United States – up from around 640,000 passengers in 2015. The biggest jump occurred over 2016–17, coinciding with the new Qantas/American service. However, Air New Zealand also greatly increased capacity at this time and passenger numbers peaked at over a million in 2017.
39. American Airlines suspended its Auckland-Los Angeles service in March 2020. Both American and Qantas have indicated that they are unlikely to resume international operations before mid-2021, although Qantas has raised the possibility of an earlier travel bubble with New Zealand.

**Passengers on all flights between NZ and the USA**

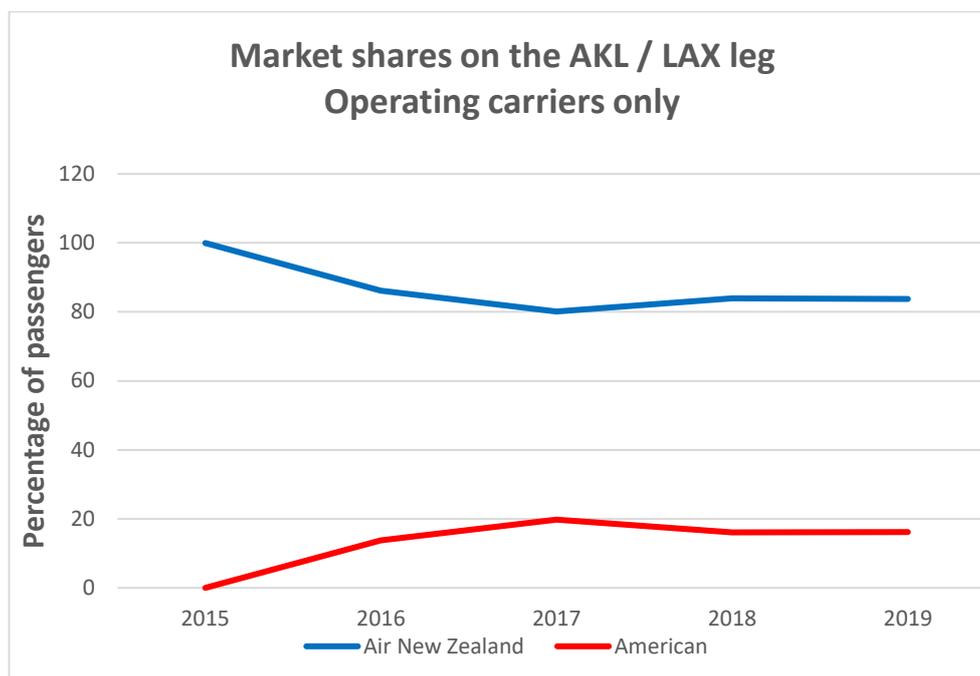
|                 | 2015   | 2016   | 2017    | 2018   | 2019   |
|-----------------|--------|--------|---------|--------|--------|
| American        | 6817   | 35234  | 77526   | 54849  | 55651  |
| Qantas          | 65490  | 94201  | 84654   | 91803  | 81000  |
| Jetstar         | 2200   | 2373   | 1897    | 236    | 413    |
| Air New Zealand | 404542 | 546790 | 602664  | 521006 | 466184 |
| United          | 26386  | 52963  | 124484  | 162012 | 221846 |
| <br>            |        |        |         |        |        |
| Hawaiian        | 62031  | 59667  | 59958   | 85022  | 82921  |
| Virgin          | 30691  | 16195  | 10792   | 11910  | 14889  |
| Delta           | 15494  | 7202   | 6263    | 6919   | 7479   |
| Fiji            | 15694  | 17063  | 19978   | 23881  | 20291  |
| <br>            |        |        |         |        |        |
| Sum of these    | 629345 | 831688 | 988216  | 957638 | 950674 |
| <br>            |        |        |         |        |        |
| Total           | 643260 | 844592 | 1001901 | 971453 | 963334 |

40. Air New Zealand and its alliance partner United have the lion's share of the market, consistently taking about 70 percent, even as the market has grown and they were joined by a significant competitor for direct services.



41. For the last couple of years, Qantas/American has had 16 percent of the Auckland-Los Angeles market. From 2017 cooperation was restricted to codesharing and they were operating a seasonal service only, after failing to receive approval of their revenue-sharing alliance from the US DoT. This market comprises about half a

million passengers, with a peak of over 600,000 in 2017 falling to around 440,000 and 430,000 for 2018 and 2019.



### Competition in the market

42. There is no doubt that the introduction of Qantas/American’s Auckland-Los Angeles service has increased capacity and grown the market. It has also brought direct competition to the Air New Zealand/United services, which in general is likely to increase the choice of products for customers, and may constrain or reduce ticket prices.
43. The applicants have provided the following tables showing falling prices for passenger services between New Zealand and the United States.

#### Average Ticket Value for US-New Zealand Services 2018–2019

| Marketing Carrier and Point of Sale | 2018         | 2019         | YoY        |
|-------------------------------------|--------------|--------------|------------|
| <b>American</b>                     | <b>\$896</b> | <b>\$844</b> | <b>-6%</b> |
| NZ POS                              | \$533        | \$500        | -6%        |
| US POS                              | \$975        | \$903        | -7%        |
| <b>Qantas</b>                       | <b>\$780</b> | <b>\$733</b> | <b>-6%</b> |
| NZ POS                              | \$675        | \$568        | -16%       |
| US POS                              | \$832        | \$811        | -3%        |
| <b>Air NZ</b>                       | <b>\$837</b> | <b>\$805</b> | <b>-4%</b> |

|               |              |              |           |
|---------------|--------------|--------------|-----------|
| NZ POS        | \$812        | \$798        | -2%       |
| US POS        | \$879        | \$815        | -7%       |
| <b>United</b> | <b>\$796</b> | <b>\$847</b> | <b>6%</b> |
| NZ POS        | \$656        | \$622        | -5%       |
| US POS        | \$822        | \$899        | 9%        |

#### Average Ticket Value for Auckland-Los Angeles Services 2018–2019

| Marketing Carrier<br>and Point of Sale | 2018         | 2019         | YoY         |
|--|--------------|--------------|-------------|
| <b>American</b>                        | <b>\$819</b> | <b>\$739</b> | <b>-10%</b> |
| NZ POS                                 | \$432        | \$407        | -6%         |
| US POS                                 | \$932        | \$810        | -13%        |
| <b>Qantas</b>                          | <b>\$715</b> | <b>\$689</b> | <b>-4%</b>  |
| NZ POS                                 | \$650        | \$535        | -18%        |
| US POS                                 | \$755        | \$761        | 1%          |
| <b>Air NZ</b>                          | <b>\$960</b> | <b>\$934</b> | <b>-3%</b>  |
| NZ POS                                 | \$928        | \$922        | -1%         |
| US POS                                 | \$999        | \$945        | -5%         |
| <b>United</b>                          | <b>\$883</b> | <b>\$819</b> | <b>-7%</b>  |
| NZ POS                                 | \$593        | \$508        | -14%        |
| US POS                                 | \$1,012      | \$999        | -1%         |

44. The applicants describe this as an example of recent lower ticket price trends resulting from the competitive nature of the trans-Pacific routes. Such trends are difficult to separate from other factors, and we are not sure that these tables demonstrate the effect of competition. The drop in price is consistent with the approximately 10 percent reduction in the price of jet fuel in 2019 (with little change in the exchange rate).
45. Nonetheless, it is likely that competition does constrain these prices. And the tables do clearly show a tendency for Qantas and American to offer cheaper fares than the market leaders.
46. The strong regional focus of both Qantas and American, and the complementarity of their networks (see above) makes it unlikely that their cooperation would reduce competition in any connected markets.

## Consequences of declining to authorise the proposed arrangements

47. The applicants say that if the Joint Business Agreement is not approved, it is likely that they would revert to a limited codeshare relationship. Without the incentive provided by sharing revenue, they would each market and develop their own services at the expense of the joint trans-Pacific routes. They would also lose the operational and logistical efficiencies that come from cooperation, and the smaller networks each could offer would reduce passenger choice.
48. The applicants point out that this was in fact the situation while approval from the US DoT was unexpectedly delayed. As a consequence, Qantas removed its code from American's Sydney-Los Angeles flights, American removed its code from Qantas' Sydney-Dallas/Fort Worth and Sydney-Los Angeles flights, and both carriers revised their frequent flyer programs to provide separate mileage accrual. The airlines also reduced the frequency and capacity of their trans-Pacific services, including downsizing the Auckland-Los Angeles operation to become a seasonal service. The applicants stress that during this time, they still anticipated approval from the DoT, and so continued to offer services that may not have otherwise been sustainable.
49. However, we suggest that the implications for services between Australia and the United States from the delay in US approval would probably not recur if you decline the proposed agreement but the ACCC approves it. In that case we would expect that Qantas would still be able to offer New Zealanders one-stop services to the United States through Australia, though it may be more difficult for passengers to purchase codeshare tickets to destinations requiring a domestic connection in the United States.
50. But the applicants are clear that if your approval is declined, American Airlines would be unlikely to reinstate its Auckland-Los Angeles service or launch the planned Christchurch-Los Angeles and Auckland-Dallas/Fort Worth services.
51. This makes sense. Without the full support of the other partner, the two airlines could be expected to channel passengers through their existing services between Australia and North America, rather than incur the significant costs associated with direct services to New Zealand. The US market is heavily reliant on connecting traffic, and access to connecting services on each end of the route is vital to enable the airlines to compete effectively with Air New Zealand and United Airlines.
52. If the Qantas/American alliance did not provide direct services between New Zealand and the United States, the applicants point out that it would leave only the Air New Zealand/United alliance in that market. This effective monopoly would reduce customer choice and could increase ticket prices. On the other hand, we note that the current uncertainty about international aviation means that we cannot be sure to what extent Air New Zealand/United will return to this market (although Air New Zealand is currently still operating to the United States) – so it is possible that approval of the application would hand a monopoly to the applicants.
53. Of this possibility, we note that while New Zealanders would likely benefit from competition in the trans-Pacific market, the worst outcome would be to have no

services at all. So reauthorisation would minimise both the possibility of a monopoly and of being left with no services.

54. When our previous report recommended approval of the current Joint Business Agreement, Air New Zealand/United provided the only direct services between New Zealand and the United States. We speculated that if the agreement were not approved, this lack of competition and growing passenger numbers might encourage an airline other than the applicants to join the market, but that this would be difficult. In particular, we noted that another US airline would probably not find a partner to provide domestic connectivity in New Zealand, as both Air New Zealand and Jetstar were already aligned with US airlines. The current aviation environment makes a new entrant even less likely.
55. However, in a scenario where reauthorisation was declined and Air New Zealand and United withdrew from the market, it could become feasible for either Qantas or American on its own to offer a direct service between New Zealand and the United States. We have no reason to think either airline is considering this, and it would offer fewer benefits to consumers than the proposed cooperation.

## **Competition and the national interest**

56. We would usually undertake a public interest analysis of a proposed alliance by considering the relevant markets and whether the proposal is likely to reduce or enhance competition, or have any other effects that might benefit or harm New Zealanders. Such analysis is based heavily on examining existing market dynamics, so is relatively simpler for a proposed reauthorisation, where the impact of the alliance should already be evident.
57. In this case the benefits of the existing alliance are apparent. In particular: one additional direct route between New Zealand and the United States; two further routes planned; competition in the New Zealand-United States market, where there was previously a monopoly; and access to one-stop services to additional US destinations through Australia. Other than perhaps the one-stop services, these would likely not have happened otherwise.
58. However, the international aviation and tourism industries were brought to a near standstill due to the effects of the COVID-19 pandemic. And while air services are recovering in some parts of the world<sup>1</sup>, the progression of the disease in the United States means it could be some time before many flights to New Zealand and Australia resume.
59. There are four main factors behind the current situation. The global pandemic itself, the associated economic recession, and travel restrictions imposed by states, such as mandatory quarantine and border closures, could all independently suppress demand for travel. In addition, the border closures and restrictions, including

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<sup>1</sup> Though they may be declining again. Aviation analysts OAG predict that early August may have had the peak capacity for the year.

passenger caps, practically reduce the possibility of providing air services. All of these factors can be expected to reduce only slowly, and no one knows when.

60. Furthermore, the damage that has been done to these industries means that even as travel becomes possible and demand begins to increase in some parts of the world, that demand will not be met in the same way as before. In particular, international airlines have all suffered a massive reduction in revenue and have had to take drastic measures to continue operating. Many have laid off staff and mothballed aircraft, and may have had to borrow heavily. As air services resume, they will have to be on a reduced scale. Some routes may not return, and some airlines may not survive.
61. On the other hand, travel and tourism are important to all economies, and governments will prioritise their recovery. Many airlines have had financial support. Markets may also adapt. One consequence of the 2008 global financial crisis was increased market share for low-cost airlines. It is possible that relatively cheap oil, low interest rates and a surplus of unemployed aircraft and airline staff will enable new operators to emerge, unencumbered by the debt and loss of capability facing many established airlines.
62. Most commentators do expect demand for air travel to recover within the five-year period for which approval is requested<sup>2</sup>. However, recovery may be slow and its nature is unpredictable.
63. All of which means that a typical public interest analysis of this application is of limited value. We propose a consideration of scenarios that represent what seem to be the extremes of what is possible.
  - 63.1. Aviation markets return to something like their previous size and configuration within a few years.
  - 63.2. Travel demand or airline capacity are considerably reduced in the long term.
64. If markets and airlines recover within a few years, we can give credence to airlines' previous planning. In this case, we would expect a Qantas/American alliance to reinstate its Auckland-Los Angeles service and perhaps even launch the planned Christchurch-Los Angeles and Auckland-Dallas/Fort Worth services during the period for which approval is sought. Services from Australia to other US destinations would also be reinstated. All of these would improve consumer choice and increase competition, with plausible benefits for New Zealanders. In this case, we would recommend reauthorising the alliance.
65. If demand or supply for international air travel is reduced in the long term, New Zealand is likely to be badly affected. Many international routes would not be reinstated, and airlines would be looking for the greatest return on what they did provide. Passenger numbers might make it difficult for airlines to justify maintaining services to New Zealand. In this case, we would want to maximise the incentives for airlines to serve New Zealand, including by encouraging alliances to offer jointly-

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<sup>2</sup> For example, in July and August, the International Air Transport Association (IATA) and S&P Global Ratings both estimated a return to previous levels of global passenger traffic in 2024.

provided trans-Pacific services, where these are not feasible for airlines acting alone. In this case, there is a risk of New Zealand having no direct flights to the United States. We would recommend reauthorising the Qantas/American alliance to increase their likelihood.

66. While other scenarios are possible, consideration of both of these apparent extremes supports a recommendation to reauthorise the Joint Business Agreement.

## Consultation

67. The Ministry consulted stakeholders on the application for reauthorisation of this alliance between 29 July 2020 and 31 August 2020. Submissions were received from Auckland Airport, Christchurch Airport and Tourism Industry Aotearoa. No submission raised any objection to reauthorisation.
68. Auckland Airport stated that reauthorisation would provide additional connectivity and choice to consumers, and noted that such cooperative arrangements could encourage airlines to recover and restart air services after the COVID-19 crisis.
69. Christchurch International Airport supports reauthorisation, and is concerned that if the application is not approved, the postponed Christchurch-Los Angeles service will not be introduced. It appreciates the marketing effort that American Airlines has already made to promote the new service. It agrees that this alliance is pro-competitive and increases capacity to New Zealand, and to the South Island in particular.
70. Tourism Industry Aotearoa supported authorisation of this alliance in 2015 and continues to support it. It believes that a continued Qantas/American alliance will assist with the rebuild of international tourism in Australia and New Zealand by supporting sales in North America and increasing the number of New Zealand destinations accessible from there. The submission also notes the value of the services from the United States to Australia, and of New Zealand being part of that network, given that North American tourists will often visit both countries on the same trip.

## Conclusion

71. The restated Joint Business Agreement for which reauthorisation is sought has been the basis of cooperation between Qantas and American Airlines since 2016. However, it has only been in full effect since it received approval from the US DoT in mid-2019.
72. Cooperation between Qantas and American Airlines has increased choice for consumers on the Auckland-Los Angeles route, and increased the marketing of New Zealand to tourists from North America. The full implementation of the agreement will allow further benefits to consumers from coordinated booking and reward schemes, and much larger regional networks in North America, Australia and New Zealand.
73. Although this market grew by more than the capacity added by Qantas and American Airlines, we conclude that their cooperation has increased trans-Pacific passenger

capacity. It will therefore have allowed more New Zealanders to travel and brought more tourists to New Zealand.

74. Qantas/American provide the only competition to Air New Zealand/United for direct flights between New Zealand and the United States. This is likely to constrain ticket prices and encourage more attractive products to be offered. While Air New Zealand has more than two-thirds of the market, Qantas/American has tended to offer cheaper tickets.
75. Qantas and American Airlines are unlikely to compete with each other in markets relevant to New Zealand as their focus is on regional networks which have almost no overlap. Their cooperation on trans-Pacific routes does not reduce competition.
76. Qantas and American Airlines plan to add two further direct services – Auckland-Dallas/Fort Worth and Christchurch-Los Angeles. These can be expected to provide similar benefits and provide the new option of a direct flight between the United States and the South Island.
77. While all international air services must currently be in doubt, we accept that without the Alliance, the three Qantas/American services are unlikely to be offered unless the agreement is reauthorised.
78. In addition to the benefits to New Zealand from more services and competition on the trans-Pacific, the current uncertainty about international aviation means we must consider the risk that no direct services might be offered between New Zealand and the United States. Reauthorisation of the agreement would make it more likely that Qantas and American Airlines will offer such services, and less likely that there will be none.
79. There is no statutory reason relating to Part 9 of the Civil Aviation Act 1990 for you to decline reauthorisation.
80. We recommend that you reauthorise the Joint Business Agreement between Qantas Airways and American Airlines, as requested.

## Appendix 1: Statutory Analysis

1. This section examines whether and how the proposed Joint Business Agreement complies with Part 9 (principally section 88(4)) of the Civil Aviation Act 1990.

### Section 88(3):

***In considering whether to grant authorisation under subsection (2) of this section, the Minister shall ensure that the granting of such authorisation will not prejudice compliance with any relevant international convention, agreement, or arrangement to which the Government of New Zealand is a party.***

2. New Zealand has open skies agreements with both the US (the Multilateral Agreement on the Liberalisation of International Air Transportation (MALIAT) under which American Airlines operates) and Australia (under which Qantas is designated and qualifies as 'Single Aviation Market' airline). Both of those agreements provide for open routes and capacity and explicitly provide for third country code-sharing.
3. Authorisation of the proposed arrangements is thus consistent with the relevant international arrangements and would not prejudice compliance with them.

### Section 88(4):

***Subject to subsection (5) of this section, authorisation shall not be given under this section to any provision of any contract, arrangement, or understanding that:***

- (a) ***“provides that any party to it may directly or indirectly enforce it through any form of action by way of fines or market pressures against any person, whether or not that person is a party to the contract, arrangement, or understanding”***

4. The Joint Business Agreement does not contain any provisions that provide for enforcement through fines or market pressures.

- (b) ***Has the purpose or effect of breaching the terms of a commission regime issued under section 89 of this Act***

5. Two commission regimes issued by the Minister of Transport are currently in force - the Civil Aviation (Passenger Agents' Commission Regime) Notice 1983 and the Civil Aviation (Cargo Agents' Commission Regime) Notice 1983.

6. 

7. These provisions do not have the purpose or effect of breaching the terms of either of these commission regimes. There is no prohibition on offering commissions outside the scope of a commission regime.

- (c) ***Unjustifiably discriminates between consumers of international air services in the access they have to competitive tariffs***

8. The Joint Business Agreement does not set tariffs itself but rather sets out that the parties may coordinate activities on pricing. Therefore the Joint Business Agreement itself not contain any provisions that unjustifiably discriminate between consumers of international air services in the access they have to competitive tariffs.

**(d) So far as it relates to tariffs, has the effect of excluding any supplier of international carriage by air from participating in the market to which it relates**

9. The Joint Business Agreement previously provided [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
10. Such clauses are common in revenue sharing alliances and do not in themselves exclude other suppliers, as interlining arrangements are not ruled out.
11. However, this provision was amended to satisfy the US DoT, [REDACTED]  
[REDACTED]
12. The Joint Business Agreement does not have the effect of excluding other suppliers of international carriage by air from participating in the market to which it relates.

**(e) Has the purpose or effect of preventing any party from seeking approval, in terms of section 90 of this Act, for the purpose of selling international carriage by air at any other tariff so approved**

13. Neither the MALIAT nor the New Zealand – Australia Air Services Agreement require the filing of tariffs. As a matter of regulatory and administrative practice we have not in any case required airlines to seek approval of tariffs for more than twenty years.
14. The Joint Business Agreement contains a number of provisions relating to cooperation in the setting of tariffs.
15. These provisions do not however prevent either party for seeking authorisation of any other tariff should they wish to do so.

**(f) Prevents any party from withdrawing without penalty on reasonable notice from the contract, arrangement, or understanding**

16. The Joint Business Agreement has an initial term of [REDACTED] but either party may give notice to withdraw after [REDACTED] notice. This effective term of [REDACTED] is reasonable given the extent to which the airlines will be making commitments based on the agreement and is in line with other revenue sharing alliances that have been authorised recently.
17. There are also a number of circumstances (such as material default, force majeure or insolvency) under which one party may terminate the agreement with shorter notice and [REDACTED].
18. [REDACTED]  
[REDACTED]  
[REDACTED]

*Conclusion on section 88(4)*

19. None of the provisions of any of the agreements for which authorisation is sought breach any of the terms of section 88(4) of the Act.

**Section 88(5):**

***Notwithstanding the provisions of subsection (4) of this section, the Minister may authorise any provision of any contract, arrangement, or understanding under this section if the Minister believes that to decline authorisation would have an undesirable effect on international comity between New Zealand and any other State.***

20. This provision only becomes relevant if, contrary to the advice set out above, you determine that provisions in the agreements fall foul of one of the criteria in section 88(4) of the Act.
21. Comity is not defined in the Act and the Act is the only instance of the use of the term in New Zealand legislation.
22. 'Comity' is defined in the Shorter Oxford Dictionary (in the phrase 'comity of nations') as being "the courteous and friendly understanding by which each nation respects the laws and usages of every other, so far as may be without prejudice to its own rights and interests". Legal dictionaries focus more on the aspect of courts taking due notice of foreign laws and judgments. Comity is not part of international law but is regarded as important for public policy reasons.
23. Most international codeshare arrangements will require approval in at least two jurisdictions, each with their own legislation or processes. This provision does not entail that New Zealand must accept and adopt the findings of another regulator. The different regulators will operate under different legislation. The impacts of a proposed Alliance may also be different in the countries concerned.
24. We do not consider that declining to authorise any provisions of the Joint Business Agreement would have an undesirable effect on international comity between New Zealand and any other State.

**Section 90:**

***Authorisation of tariffs by Minister***

- (1) The Minister may from time to time specially authorise any tariff in respect of international carriage by air where the relevant places of departure and destination are within the territories of 2 countries, one of which is New Zealand, whether or not there is to be a break in the carriage or a transshipment.***
- (2) In giving authorisation under this section the Minister shall have regard to -***
  - (a) Whether the proposed tariff is excessive in terms of a reasonable return on investment by the supplier of the carriage; and***
  - (b) Whether it is likely that supply of the relevant carriage can be carried on for a reasonable period at the level of tariff proposed; and***
  - (c) Whether there is likely to be a substantial degree of benefit accruing to consumers generally, or to a significant group of consumers, as a result of the application of the proposed tariff,-***

***and shall ensure that the granting of such authorisation will not prejudice compliance with any international convention, agreement, or arrangement to which the Government of New Zealand is a party.***

25. [REDACTED]

26. As set out in the discussion of subsection 88(4)(e) above, the Joint Business Agreement provides that the parties may individually seek authorisation pursuant to section 90. The criteria in section 90(2) relate to individual tariffs and would be considered in the context of any such application received. The fact that many of the tariffs under the Joint Business Agreement will be set by the Alliance parties together should not frustrate an assessment of an individual tariff if the situation arises.

27. The provisions of section 90 will be relevant in the event that approval is sought for an individual tariff by one of the applicants, but do not preclude authorisation of any provision in the Joint Business Agreement.