



Draft Determination and interim authorisation

Application for authorisation AA1000452

lodged by

BP Australia Pty Ltd on behalf of itself, resellers of fuel under the BP brand, Qantas Airways Limited and Qantas Frequent Flyer Limited
in respect of

the establishment of the BP Rewards loyalty program

Authorisation number: AA1000452

Date: 22 November 2019

Commissioners: Sims
Rickard
Cifuentes
Court
Ridgeway

Summary

The ACCC proposes to grant authorisation for five years to BP Australia Pty Ltd (BP) and participating BP fuel resellers, Qantas Airways Limited and Qantas Frequent Flyer Limited (the Applicants) to collectively participate in the BP Rewards, Qantas Frequent Flyer and Qantas Business Rewards programs.

The ACCC also proposes to grant authorisation to allow BP to require BP fuel resellers to participate in the Qantas Frequent Flyer and Qantas Business Rewards programs as a condition of offering new BP reseller agreements or renewing existing reseller arrangements.

The ACCC considers that the conduct is likely to result in some public benefits from the opportunity for consumers to earn and redeem loyalty points from the programs, enhanced competition in airline and fuel markets for consumers who value loyalty programs, and some transaction cost savings.

The ACCC considers the proposed conduct is unlikely to result in significant public detriment. BP's partnership with Qantas is unlikely to result in a detriment in airline markets. Other airline loyalty schemes will continue to have a range of other loyalty partners available to them, including fuel retailers, and fuel retailers are not critical to the success of airline loyalty schemes. The proposed conduct is unlikely to result in competitive harm in retail fuel and convenience markets, as partnered loyalty schemes are not a major driver of consumer behaviour in relation to fuel and convenience purchases and there are a number of other potential partners available.

The ACCC has granted interim authorisation to enable the Applicants to engage in the proposed conduct, to the extent that it relates to BP's participation in the Qantas Business Rewards program, while the ACCC completes its assessment of the substantive application.

The ACCC invites submissions in response to this draft determination before making its final decision.

1. The application for authorisation

- 1.1. On 5 September 2019, BP Australia Pty Ltd, on behalf of itself, resellers of fuel under the BP brand (**BP Resellers**), Qantas Airways Limited and Qantas Frequent Flyer Limited (together, **Qantas**) (the **Applicants**) lodged application for authorisation AA1000452 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for the establishment of the BP Rewards loyalty program, appointing Qantas as the first cornerstone partner of the BP Rewards program for a period of five years (the **Proposed Conduct**). This application for authorisation AA1000452 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC can grant authorisation which 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.
- 1.3. The Applicants also requested interim authorisation under subsection 91(2) of the Act to enable them to engage in the Proposed Conduct, to the extent that it relates to BP's participation in the Qantas Business Rewards (**QBR**) program, while the ACCC is considering the substantive application. The request for interim authorisation is discussed further in section 7.

The Proposed Conduct

- 1.4. The Applicants are seeking authorisation to establish a BP Rewards loyalty program with Qantas as the first cornerstone partner.
- 1.5. The program will enable common members of the BP Rewards program and Qantas Frequent Flyer (**QFF**) program to elect whether to earn Qantas or BP points when they make a purchase at BP.¹
- 1.6. The partnership between BP and Qantas also extends to the business rewards programs each offers, whereby businesses that use the BP Plus fuel card at BP and BP Reseller sites will be able to earn Qantas points on their purchases.
- 1.7. Authorisation is being sought for aspects of these commercial arrangements, including:
 - Any exclusive dealing that may arise when BP or a participating BP Reseller supplies, or offers to supply, benefits to a BP Rewards Program, QFF Program and/or QBR Program member, or when BP seeks to make participation in the BP Rewards and the QFF programs mandatory for BP Resellers
 - Coordination between BP and BP Resellers regarding their collective participation in the BP Rewards, QFF and or QBR programs
 - Coordination between BP and Qantas in respect of the BP Rewards Program, QFF program and/or QBR program, including in relation to the rate(s) at which BP or Qantas points may be directly earned and allocated.²
- 1.8. Members of the BP and Qantas rewards programs will be able to choose, depending on which points they have elected to accrue, to redeem their points for benefits at BP or Qantas (or other program partner businesses).³

(the **Proposed Conduct**)

2. Background

The applicants

BP

- 2.1. BP refines, imports and supplies petrol, diesel and automotive liquid petroleum gas (petrol) on a retail and wholesale basis. Relevant to the Proposed Conduct, BP:
 - supplies retail fuel and convenience store items through a network of BP-branded “company-owned-company-operated” (**COCO**) and commission agent (**CA**) service stations, and
 - supplies wholesale fuel to BP Resellers (independent operators of service stations at which fuel is re-sold under the BP brand), and to distributors that re-sell fuel to BP Resellers.

¹ BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 2

² BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 15

³ BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 14

- 2.2. BP has a total 1,451 branded sites in Australia, of which there are 1,093 BP Reseller sites. As independently-owned and operated fuel retailers, BP Resellers conduct their businesses independently of BP, negotiate their own commercial contracts with non-fuel suppliers, and set fuel prices independent of BP.
- 2.3. BP sites (COCO, CA, and Reseller sites) account for approximately 18%⁴ of the market for retail fuel in Australia.

BP resellers

- 2.4. BP resellers are independently owned and operated petrol stations which onsell fuel supplied by BP under the BP brand. Of the 1,451 BP-branded sites in Australia, 1,093 are BP reseller sites. BP Resellers conduct their businesses independently of BP, negotiate their own commercial contracts with non-fuel suppliers, and, in particular, retain absolute discretion over their retail fuel pricing.

Qantas

- 2.5. Qantas is Australia's largest domestic and international airline. Qantas' core business activity is the supply of domestic and international air transport services under the Qantas brand. Qantas also provides low-cost air transport services – both domestically and internationally – under its Jetstar brand through its wholly-owned subsidiary Jetstar Airways.
- 2.6. Qantas also has various airline-related businesses, which include loyalty programs. This includes the QFF program for consumers, and the QBR program for businesses, allowing members to earn points through purchases of Qantas and affiliate airline flights or from program partners, and to redeem those points for various rewards and benefits.
- 2.7. Qantas launched its QFF program in 1987 and is Australia's largest loyalty program. It has 12.3 million members⁵ and is a coalition points-based scheme, which brings together a variety of loyalty partners under one program, allowing members to earn and redeem points with a number of different merchants.⁶

Customer loyalty schemes in Australia

- 2.8. It is estimated that almost 90% of Australians are members of at least one loyalty scheme,⁷ with the average Australian adult belonging to (on average) 4.3 loyalty schemes.⁸ In a Mastercard study in 2018, 79% of Australian respondents stated that they were members of a retail loyalty scheme, followed by airline (50%), financial institution (43%), restaurant (28%), hotel (19%) and entertainment (17%).⁹
- 2.9. The top five loyalty schemes in Australia, by number of members is outlined at Table 1 below:

⁴ ACCC Retail and wholesale petrol market shares in Australia, September 2018

⁵ ACCC, *Customer loyalty schemes: Draft report*, September 2019, p. 9

⁶ ACCC, *Customer loyalty schemes: Draft report*, September 2019, p. 7

⁷ The Point of Loyalty, *For love or money 2019: Executive summary*, p. 9

⁸ The Point of Loyalty, *For love or money 2019: Executive summary*, p. 9

⁹ Mastercard, *Achieving advocacy and influence in a changing loyalty landscape: a Mastercard Asia Pacific study*, January 2018

Table 1: Top five loyalty schemes in Australia, by number of members, in 2019

Loyalty scheme	Number of members
Qantas Frequent Flyer	12.9 million ¹⁰
Woolworths Rewards	11.7 million ¹¹
Velocity Frequent Flyer	9.8 million ¹²
Flybuys	8.6 million individuals/6.7 million households ¹³
Priceline Sister Club	7.1 million ¹⁴

2.10. A survey by The Point of Loyalty in 2019 indicated that 47% of surveyed respondents were active (within the past 12 months) in all of the programs they were enrolled in.¹⁵

2.11. Many of the loyalty schemes in Australia are partnered with other loyalty schemes. For example, a customer purchasing fuel at a Caltex petrol station can (indirectly) earn QFF points by scanning their Woolworths Rewards card at the time that they purchase fuel, and then converting those points into Qantas Frequent Flyer points. The effect of these partnerships between loyalty programs is that this may limit the pool of available partners for other loyalty schemes, if there is any exclusivity involved in the partnerships. It is proposed that BP and Qantas will be each other's exclusive direct-earn airline and fuel partners. This issue as it relates to the Proposed Conduct is discussed in further detail in the 'Key Issues' section of this paper.

ACCC review into customer loyalty schemes

2.12. In February 2019, the ACCC commenced a review into consumer and competition issues that are associated with consumer-facing customer loyalty schemes in Australia. Consumer and competition issues arising from customer loyalty schemes are a current priority for the ACCC, and the review focussed on three key issues:

- Consumer issues – whether consumers are properly informed and receive the benefits advertised by loyalty schemes
- Data practices – the collection, use and disclosure of consumer data by loyalty schemes and their partners
- Competition issues – the potential impact of loyalty schemes on competing firms, in particular on new entrants.¹⁶

2.13. On 5 September 2019, the ACCC released its draft report into customer loyalty schemes (**Draft Report**). The report made four draft recommendations:

¹⁰ Qantas Group, *Qantas Group Performance FY19 Highlights*

¹¹ Woolworths Limited, *2019 Annual report*, p. 2

¹² Virgin Australia, *Annual report 2019*, p. 2

¹³ Loyalty Pacific (Flybuys) submission to ACCC review into customer loyalty schemes, October 2019, p. 2. Flybuys allows multiple individuals from the same household to participate in their program under a single account.

¹⁴ Australian Pharmaceutical Industries Limited, *Annual report 2017*, p. 11

¹⁵ The Point of Loyalty, *For love or money 2019: Executive summary*, p. 9

¹⁶ ACCC, *Customer loyalty schemes: Draft report*, September 2019, p. iv.

- Improve how loyalty schemes communicate with customers¹⁷
- Prohibition against unfair contract terms and certain unfair trading practices¹⁸
- Improve the data practices of loyalty schemes,¹⁹ and
- Strengthen protections in the Privacy Act and broader reform of Australian privacy law.²⁰

2.14. As detailed in the ACCC's report on customer loyalty schemes, loyalty schemes can have pro-competitive effects and intensify competition between rivals leading to competing loyalty discounts and lower prices for consumers. Loyalty schemes also have the potential to lessen competition by:

- 'locking up' customers and introduce switching costs that increase barriers to entry and expansion for rival firms
- allowing a dominant firm in one market to leverage its market power into a secondary market, including through exclusive partnerships with firms in other industries.

2.15. The Digital Platforms Inquiry also identified potential concerns relevant to customer loyalty schemes, including:

- Insufficient transparency and meaningful consumer control over the collection, use and disclosure of consumer data
- a lack of informed and genuine choice for consumers engaging in the digital economy, and
- a lack of consumer protection and effective deterrence under existing laws governing data collection.

3. Previous authorisations

BP Australia Pty Ltd (Velocity) – Authorisation – A91485 – A91487²¹

3.1. On 18 August 2015 the ACCC granted authorisation for five years for BP and BP Resellers to collectively participate in the Velocity Frequent Flyer Program, a loyalty scheme associated with Virgin Australia. The ACCC also granted authorisation to allow BP to require BP Resellers to participate in the Velocity Program as a condition of offering new BP Reseller agreements or renewing existing reseller agreements. The authorisation enabled BP and BP Resellers to provide opportunities for Velocity members to earn points for purchases made at BP sites.²²

3.2. The ACCC accepted that the conduct was likely to result in the following public benefits:

¹⁷ ACCC, *Customer loyalty schemes: Draft report*, September 2019, p. 32

¹⁸ ACCC, *Customer loyalty schemes: Draft report*, September 2019, p. 32-33

¹⁹ ACCC, *Customer loyalty schemes: Draft report*, September 2019, p. 64

²⁰ ACCC, *Customer loyalty schemes: Draft report*, September 2019, p. 64

²¹ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/bp-australia-pty-ltd-authorisations-a91485-a91487>

²² A91485 – A991487 - BP Australia Pty Ltd Final Determination, 18 August 2015, p. 1-2

- Consumer benefits from Velocity members being able to earn points at a broader range of locations, and
 - Increased competitiveness of BP as a fuel retailer due to the value consumers place on the Velocity program.²³
- 3.3. The ACCC considered that the proposed conduct was unlikely to lead to any significant public detriment because:
- co-ordination was limited to participation in the program,
 - the arrangements would not impact the ability of competitors to enter into partnerships with other merchants, and
 - the requirement for mandatory participation was ameliorated by the ability for resellers to cease retailing BP fuel.²⁴

BP Australia Pty Ltd (Woolworths) - Authorisations A91580 – A91582²⁵

- 3.4. On 14 December 2017 the ACCC granted authorisation to BP, Woolworths and BP Resellers to introduce the Woolworths Rewards Loyalty Program at BP owned and operated service stations and certain BP Reseller service stations.²⁶ The parties have not engaged in this conduct due to the proposed acquisition by BP of Woolworths retail fuel sites not being completed.
- 3.5. The ACCC accepted that the following public benefits were likely to arise from the loyalty program:
- Increased and additional opportunities to earn and redeem points
 - consistent offerings for consumers, which may be more easily marketed, accords better with consumer expectations, and will reduce consumer search costs, and
 - some transaction cost savings associated with the implementation of the shopper docket scheme and loyalty program.²⁷
- 3.6. The ACCC accepted the theoretical possibility of an increase in competition in fuel retailing, but concluded that this was not likely to be significant given the ability for shopper docket discounts to increase pre-discount pump prices.²⁸

4. Consultation

- 4.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 4.2. The ACCC invited submissions from a range of potentially interested parties including fuel retailers, airlines, convenience chains, automotive representative groups, industry

²³ A91485 – A991487 - BP Australia Pty Ltd Final Determination, 18 August 2015, p. 7-10

²⁴ A91485 – A991487 - BP Australia Pty Ltd Final Determination, 18 August 2015, p. 12

²⁵ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/bp-australia-pty-ltd-ors-authorisations-a91580-a91582>

²⁶ A91580 – A91582 – BP Australia Ltd & Ors Final Determination, 14 December 2017, p. i

²⁷ A91580 – A91582 – BP Australia Ltd & Ors Final Determination, 14 December 2017, p. 20

²⁸ A91580 – A91582 – BP Australia Ltd & Ors Final Determination, 14 December 2017, p. 16

associations, supermarket retailers, department stores and relevant regulatory bodies.²⁹

- 4.3. The ACCC received four public submissions from interested parties in relation to the application. The ACCC has also considered confidential information from a variety of sources to assist its consideration of the Proposed Conduct.
- 4.4. The ACCC wrote to the Applicants requesting further information regarding several matters, and a response to interested party submissions. The ACCC's letter and the Applicants' response are available on the ACCC Public Register. The Applicants' response is discussed where relevant in the Assessment section below.
- 4.5. Public submissions by the Applicants and interested parties are on the [Public Register](#) for this matter.

5. ACCC assessment

- 5.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 5.2. 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

- 5.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 5.4. The Applicants submit that the relevant areas of competition likely to be impacted by the Proposed Conduct are competition between consumer and business loyalty program schemes, and competition in retail fuel and convenience markets.
- 5.5. The ACCC considers that customer loyalty or reward schemes are used by businesses to attract and retain customers by offering a discount or rebate to customers who make repeat purchases, rather than forming a separate market.
- 5.6. Consumers may benefit from their participation in loyalty schemes by receiving rewards such as discounts on products and services, and access to exclusive offers and service levels. They may receive these benefits on purchases they would have otherwise made. The ACCC's draft report on customer loyalty schemes contains further information about competition and consumer issues associated with customer loyalty schemes.
- 5.7. Qantas and Virgin benefit through their loyalty scheme offerings both from attracting more airline customers and from generating revenue from the retail partners that pay to be a part of their loyalty program. Loyalty programs such as QFF and Velocity are characterised by network effects in that:

²⁹ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- the more retail partnerships a loyalty program has, the more appealing it is for consumers to become members
- the more members the loyalty program has, the greater benefit it can provide to retail partners and the greater fee or commission Qantas and Virgin can charge retail partners.

5.8. Accordingly, the ACCC considers that the relevant areas of competition are :

- Competition in airline markets
- Competition in retail fuel and convenience markets.

Future with and without the Proposed Conduct

5.9. 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.

5.10. As a starting point, the ACCC typically assesses the Proposed Conduct against a counterfactual of the status quo. In the present circumstances, the ACCC considers that the most likely future without the Proposed Conduct would be:

- BP and Velocity continue their partnership (due to expire in March 2020 and would require renegotiation and authorisation)
- BP may decide to partner with Qantas for the sites that it controls, with BP Resellers individually electing to negotiate and partner with either Qantas or Velocity (this may also require authorisation), or
- BP enters into a partnership with another loyalty scheme, which may also require authorisation.

5.11. However, any of the above would likely be conduct that requires authorisation, and the ACCC does not typically assess the future without the Proposed Conduct to be conduct that would itself require authorisation.

5.12. In the circumstances, the ACCC considers it appropriate to begin by assessing the benefits and detriments of the Proposed Conduct by comparison to a future in which BP is not a part of a loyalty scheme. However, as the ACCC considers it is likely that BP would partner with an alternative loyalty scheme, the ACCC has also considered the impact on benefits and detriments if the future without the Proposed Conduct were that BP is partnered with an alternative loyalty partner. This is likely to result in some of the benefits and detriments being offset.

Public benefits

5.13. 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.*³⁰

30 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

5.14. The ACCC has considered the following potential public benefits:

- direct consumer benefits
- more consistent consumer and business offerings
- enhanced competition in the supply of consumer and business loyalty programs
- enhanced competition in the supply retail fuel and convenience products
- enhanced competition in the supply of airline products and services, and
- transaction cost savings.

Direct consumer benefits

5.15. The Applicants submit that the Proposed Conduct will benefit consumers directly, as it will result in the establishment of a new loyalty program and partnership, and that this is a public benefit. The Applicants further submit that with the Qantas partnership, the program will be able to grow at a faster rate than it would have been able to otherwise.³¹

5.16. In particular, the Applicants submit that the establishment of the loyalty scheme will result in the following benefits to consumers:

- The ability to directly earn either BP or Qantas points at no additional cost compared to non-members
- the ability to redeem BP or Qantas points in exchange for goods or services, discounts and rewards
- the ability to redeem loyalty program points, and
- flexibility for consumers in how they earn and redeem points.³²

5.17. Wessel Petroleum (a BP Reseller) supports this, noting that since the majority of its customers are located in regional areas serviced only by Qantas, the BP Qantas partnership will enable its customers to 'earn rewards which will be beneficial to them'. Wessel Petroleum also stated that the Proposed Conduct was likely to provide benefits to its business customers based in regional areas, for whom Qantas is the preferred airline.³³

5.18. The Applicants claim that this is consistent with the ACCC's approach in the 2015 authorisation of BP's partnership with the Velocity Frequent Flyer Program, where the ACCC accepted this claim.

5.19. The ACCC accepts that consumers will be able to benefit from the Proposed Conduct by earning points (which may be redeemed for goods and services) on a wider range of purchases and at a broader range of locations and that this constitutes a public benefit.

5.20. The ACCC also notes that the partnership is likely to be more broadly adopted, and implemented more effectively and efficiently under the Proposed Conduct, than if Qantas organised participation directly with BP and BP resellers.

³¹ BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 29

³² BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 29

³³ Wessel Petroleum submission, 26 September 2019, p. 1

5.21. The ACCC also notes that, as a result of the Proposed Conduct, Velocity customers will no longer be able to directly earn Velocity points at BP branded sites and BP reseller sites.

ACCC Loyalty Schemes Draft Report

5.22. While the ACCC accepts that loyalty schemes can result in public benefits, we note the findings of the Loyalty schemes draft report that there are a range of business practices in the loyalty scheme industry that have the ability to cause widespread consumer detriment.

5.23. Business practices the report identified as being detrimental to consumers that could have the effect of diminishing claimed consumer benefits include:

- Reductions in earn rates when consumers book with affiliates, and in relation to frequent flyer programs, consumer confusion regarding lower earn rates when booking with affiliate airlines and for certain booking classes.
- Loyalty points expiring without adequate warning from operators about the need to earn or redeem points by a certain date.
- The devaluation of the redemptive value of loyalty points.
- The imposition of taxes and charges by frequent flyer programs when consumers seek to redeem points.
- Restrictions on redemption opportunities, and program operators not effectively notifying consumers of restrictions
- The length and complexity of loyalty schemes' policies, operations and terms which means that consumers are unable to make well informed decisions about whether to participate in the program, and if so, how to optimise the benefits of participation.³⁴

5.24. Therefore, the ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of increased opportunities for consumers to earn and redeem QFF, QBR and BP Rewards program points. However, to the extent that the loyalty programs engage in business practices the loyalty schemes draft report identified as detrimental to consumers, this would be likely to reduce these consumer benefits. The ACCC notes that BP is currently in the process of reviewing the draft BP Rewards and BPme Terms and Conditions, and has offered to provide the ACCC with a revised draft once it becomes available.³⁵

Consistent offerings for consumers and businesses

5.25. BP submits that the Proposed Conduct will allow the benefits of the BP, QFF and QFB programs to be offered more consistently across BP branded sites than if BP resellers were to independently negotiate their participation in the QFF and QFB programs or other loyalty programs.

5.26. The Applicants submit that enabling a consistent offering of the program will benefit consumers and businesses in the following ways:

³⁴ ACCC Customer loyalty schemes draft report, September 2019, pp. 22-32

³⁵ BP Australia Pty Ltd & Ors Supplementary Submission, 30 October 2019, p. 9-10

- Consistency across the BP network will enable consumers and businesses to have a clear understanding of BP and BP Resellers' participation in the loyalty programs,
- Meeting consumer expectations that all BP sites will participate in promotions in relation to the BP brand.
- Having the program offered at all BP sites means consumers will not have to seek out the sites at which the promotions are offered.³⁶

5.27. While the ACCC considers that the Proposed Conduct is likely to result some public benefits, the ACCC notes that it is likely that terms and conditions would be very similar if not identical if BP and BP resellers negotiated separately with Qantas. In those circumstances, Qantas is likely to require standard terms and conditions for all participants.

Enhanced competition in the consumer and business loyalty program sectors

5.28. The Applicants submit that the Proposed Conduct will enhance competition in the consumer and business loyalty program sectors due to the attractiveness of the BP and Qantas partnership and redemption rates.

5.29. The Applicants further submit that the Proposed Conduct will enable BP and Qantas to market the programs more effectively to existing and potential members. Further, the Applicants argue that since the BP Rewards and QFF programs are both structured to offer a direct earn proposition, the two programs will compete with each other.³⁷

5.30. As noted above, the ACCC does not consider that there is a loyalty scheme market, rather, loyalty schemes act to facilitate competition in other markets – such as airline or retail fuel and convenience markets. Therefore, the ACCC does not consider that the Proposed Conduct would have the impact of enhancing competition between loyalty schemes per se. The impact of loyalty schemes on retail fuel and convenience and airline markets is discussed below.

Enhanced competition in retail fuel and convenience markets

5.31. The Applicants submit that the ability to earn loyalty program points for fuel is likely to be valued by consumers, and that this will enhance competition in retail fuel and convenience markets in the following ways:

- The benefits from a consistent loyalty program offering increases the competitiveness of the BP branded network as a whole,
- The conduct will cause other fuel and convenience retailers to reassess the competitiveness of their loyalty program and improve their offers for the redemption of loyalty program points at petrol stations
- other fuel and convenience retailers may begin to allow members of competing loyalty programs to directly redeem points for fuel discounts at the point of sale, or other promotional offers, or enhance their existing retail fuel/convenience and loyalty offerings, and

³⁶ BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 29-30

³⁷ BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 30-31

- competing fuel retailers such as 7-Eleven, United or Puma may choose to partner with a new loyalty program operator and allow loyalty program points to be earned and/or redeemed at their respective fuel sites.³⁸

5.32. As noted in the *Australian Convenience and Petroleum Marketers Association (ACAPMA) 2019 Monitor of Fuel Consumer Attitudes*, for the majority of consumers, the price of fuel is the most important driver of their decision about where to purchase fuel. In contrast, the ability to use loyalty cards was the most important factor for only 6 per cent of customers.³⁹ While the report noted that loyalty to service stations had increased since 2017, this loyalty was driven primarily by price. However, 20 per cent of consumers indicated that loyalty was driven by the ability to use loyalty cards.⁴⁰

5.33. Therefore, the ACCC considers that the ability to earn and redeem QFF and QBR points on BP fuel purchases is likely to be valued by some consumers. This is likely to improve BP Branded sites' retail competitiveness in relation to these customers, and may elicit procompetitive responses from other loyalty programs and retail partners such as improved points and redemption offerings, new partnerships, and discounts.

5.34. The ACCC notes that to the extent that the Proposed Conduct would prompt a competitive response from competitor fuel retailers, such as through a reduction in prices or other additional service offering, this would likely be of benefit to a broader cross section of consumers than just those who value loyalty programs.

Enhanced competition in the supply of airline services

5.35. While the Applicants did not claim that the conduct would impact competition in the supply of airline services, as noted above, the ACCC considers it to be a relevant area of competition.

5.36. The ACCC considers that for consumers who value earning QFF, QBR and BP points, the Proposed Conduct is likely to improve the competitiveness of Qantas, and that this is a public benefit. In particular, the Proposed Conduct may elicit a competitive response from other airlines, including by the introduction of new partnerships and improved points and redemption offers.

5.37. The ACCC considers that, to the extent the Proposed Conduct elicits a competitive response from other airlines through improved offers and discounts, this would be a public benefit to a broader range of consumers.

Transaction cost savings

5.38. The Applicants submit that BP and BP resellers would incur significant transaction costs if they individually negotiated their loyalty program arrangements with Qantas, and that this allows individual sites to increase their competitiveness without incurring significant transaction costs.⁴¹

5.39. The ACCC accepts that there are transaction cost savings from jointly negotiating BP and BP reseller participation in the QFF and QFB programs including legal and other expert advice costs. The ACCC considers that the Proposed Conduct will also result in

³⁸ BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 31-32

³⁹ Australian Convenience and Petroleum Marketers Association 2019 Monitor of Fuel Consumer Attitudes, 8 November 2019, p. 13

⁴⁰ Australian Convenience and Petroleum Marketers Association 2019 Monitor of Fuel Consumer Attitudes, 8 November 2019, p. 15

⁴¹ BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 32

transaction cost savings for Qantas compared to individual negotiation with BP and each BP reseller.

Public detriments

5.40. 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.*⁴²

5.41. The ACCC has considered the following public detriments:

- potential detriment in airline markets
- potential detriment in retail fuel and convenience markets
- potential concerns regarding the use of personal data.

Potential detriment in the supply of airline services

5.42. The ACCC has considered whether the Proposed Conduct is likely to give rise to competition detriments in airline markets. The ACCC considers that if BP entering into an arrangement with Qantas as its exclusive airline loyalty partner reduced the ability of other airline loyalty programs to partner with suitable fuel and convenience retailers, this may impact on the competitiveness of those other airlines.

5.43. However, in order to substantiate this competitive harm in airline markets as a result of the Proposed Conduct, a series of propositions would have to hold:

- a partnership with suitable fuel retailers would have to be critical to the success of an airline loyalty scheme
- there would have to be no suitable fuel and convenience retailers available for an airline loyalty scheme to partner with and
- having a loyalty scheme would have to be critical to the overall success of an airline.

Importance of a fuel retailer to an airline loyalty scheme

Existing relationships between major fuel retailers and loyalty schemes

5.44. Many of the major fuel retailers in Australia are linked to coalition loyalty schemes⁴³ through which customers can directly or indirectly earn airline loyalty points, for example:

- Caltex is partnered with Woolworths Rewards and currently to the Qantas Business Rewards program
- Shell/Coles Express is partnered with Flybuys
- Woolworths petrol stations (now owned by EG Group) are partnered with Woolworths Rewards, and

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

⁴³ Coalition loyalty schemes bring together a variety of partners under their programs, which allow members to earn and redeem points with a number of different merchants across the economy.

- BP (as noted above) is currently partnered with Velocity until March 2020.⁴⁴
- 5.45. Together, these four retailers account for approximately 60% of fuel and convenience retailer sales nationally. The remaining 40% do not have partnerships with major coalition loyalty schemes.⁴⁵ The ACCC considers that it is likely that an airline loyalty scheme could partner with other fuel retailers not already linked to a coalition loyalty program, however, that in isolation, a partnership with a single smaller fuel and convenience retailers would be potentially more limited in reaching potential members or geographically limited than a partnership with one of the four major fuel retailers.
- 5.46. The nature of coalition loyalty schemes (such as Woolworths Rewards, Flybuys, QFF and Velocity) means that many loyalty schemes are interlinked. For example, the Woolworths Rewards program is linked to the QFF program whereby members of the Woolworths Rewards program can exchange points earned under that program for QFF points at a particular rate. Similarly, Flybuys is linked to Velocity so that Flybuys members can exchange Flybuys points for Velocity points at a particular rate. The effect of this is that fuel and convenience retailers may be indirectly linked to airline loyalty schemes even when they have not entered into an arrangement with the airline loyalty scheme.
- 5.47. At present, customers can earn QFF points (either directly or indirectly) as a result of transactions at Caltex and Woolworths petrol stations, and Velocity points at BP and Shell/Coles Express. As a result of the Proposed Conduct, in the future customers would be able to earn Qantas points on purchases at BP.

Airline loyalty schemes and other loyalty schemes

- 5.48. The Applicants submit that in order for an airline to be competitive, it is not essential that an airline loyalty scheme be partnered with a major fuel retailer.⁴⁶ The Applicants point to the fact that 'coalition loyalty programs provide members with opportunities to earn and redeem points across a coalition of partners... [which] offer members numerous opportunities to earn points on their regular, everyday spend across a range of program partners encompassing a variety of products and services', of which fuel is 'just one of many such products or services'.⁴⁷
- 5.49. The ACCC recognises that airline loyalty schemes can and do partner with a wide range of businesses and loyalty programs through which customers can earn airline loyalty points. In addition to fuel retailers, these include major supermarket retailers, credit cards, major banks, and department stores.
- 5.50. Information available to the ACCC indicates that the points acquired by consumers through purchases at fuel retailers linked to coalition loyalty schemes account for a quite small proportion of overall points earned by consumers. The ACCC considers that this indicates that partnerships with fuel retailers, while important, are not critical to the success of an airline loyalty scheme.
- 5.51. The Applicants note that 'the proposed arrangements between BP and Qantas will not limit other airlines' ability to enter into coalition loyalty scheme partnerships with other large fuel retailers such as Caltex, Mobil, 7-Eleven, United, Metro and Puma.⁴⁸ The ACCC considers that airline loyalty schemes have a range of potential other

⁴⁴ BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 22-23

⁴⁵ BP Australia Pty Ltd & Ors application for authorisation AA1000452, 4 September 2019, p. 22-23

⁴⁶ BP Australia Pty Ltd & Ors Supplementary Submission 30 October 2019, p. 3-4

⁴⁷ BP Australia Pty Ltd & Ors Supplementary Submission 30 October 2019, p. 4

⁴⁸ BP Australia Pty Ltd & Ors Supplementary Submission 30 October 2019, p. 5

partnerships available to them to make their scheme attractive to customers, including but not limited to partnerships with fuel and convenience retailers.

5.52. The ACCC also considers that as the major fuel and convenience retailer loyalty partnerships come up for renegotiation, it is possible that other airline loyalty programs could partner with major fuel and convenience retailers (and any associated loyalty program) in the future. As such, any impact on the attractiveness of other airline loyalty schemes as a result of the Proposed Conduct would likely be limited to the short term and that this would not necessarily be a concern in the long term as partnerships are renegotiated.

Importance of a loyalty scheme to an airline

5.53. The Applicants claim that it is not essential for an airline to have a loyalty program, noting that only Qantas and Virgin Australia offer coalition-based schemes.⁴⁹ Rex has a loyalty scheme that does not have any partners, and Velocity and Qantas Frequent Flyer points can be redeemed for Tigerair and Jetstar flights.

5.54. Velocity and the QFF program are significant contributors to the overall financial performance of their airlines, with the QFF program contributing 22.6%⁵⁰ and Velocity contributing 29.7%⁵¹ of profit margins to the overall financial performance of their businesses. The ACCC considers that this indicates that the performance of the QFF and Velocity loyalty schemes are very significant to the overall profitability of their airline businesses.

5.55. As a result, the ACCC considers that for full-service airlines (such as Virgin and Qantas), it is likely that a coalition loyalty scheme is important to the overall performance of an airline business.

5.56. Notwithstanding the importance of a loyalty scheme to airlines such as Virgin and Qantas, the ACCC considers that it is unlikely that the Proposed Conduct will result in significant detriments to competition in airline markets, because a partnership with a fuel retailer is unlikely to be essential to the success of an airline loyalty program, and in any case there will remain alternative fuel retailers available for competitor airlines' loyalty programs. The ACCC therefore considers that public detriment in the form of a competitive detriment in airline markets is not likely as a result of the Proposed Conduct.

Potential detriment in retail fuel and convenience markets

5.57. The ACCC received no submissions raising concerns about the impact of the Proposed Conduct on retail fuel and convenience markets. Nonetheless, the ACCC has considered the likely effects of the Proposed Conduct on retail fuel and convenience markets, and whether the loyalty partnership between Qantas and BP is likely to lead to a detriment by reducing the ability of other fuel and convenience retailers to compete with BP as a result of its linkage with Qantas.

5.58. The ACCC has previously considered the issue of fuel discounting in relation to loyalty partnerships, in particular examining whether fuel discounting could 'potentially reduce competition over the longer term in fuel markets by placing a significant proportion of sales beyond the competitive 'reach' of otherwise efficient fuel retailers'.⁵²

⁴⁹ BP Australia Pty Ltd & Ors Supplementary Submission 30 October 2019, p. 3

⁵⁰ Qantas Group, 2018-19 annual reports

⁵¹ Virgin Australia, 2018-19 annual reports

⁵² A91580 – A91582 – BP Australia Ltd & Ors Final Determination, 14 December 2017, p. 23

- 5.59. The Applicants submit that ‘a loyalty scheme partnership with a major airline is not necessary for a fuel retailer to be competitive in retail fuel markets in Australia’,⁵³ and that airline loyalty partners are just one of a wide variety of loyalty program partners that appeal to customers.
- 5.60. The ACCC considers it likely that as a result of the Proposed Conduct, customers who value QFF points may be more likely to purchase fuel at BP. However, to some extent this is mitigated by the customers who value Velocity points being now more likely to purchase fuel from a retailer where they can indirectly earn Velocity points.
- 5.61. As noted above, price is the primary determinant of customer decisions about where to purchase fuel. The ability to use loyalty cards was the most important factor for only 6 per cent of customers.⁵⁴ While the report noted that loyalty to service stations had increased since 2017, this loyalty was driven primarily by price. However, 20 per cent of consumers indicated that loyalty was driven by the ability to use loyalty cards.⁵⁵
- 5.62. Accordingly, the ACCC considers that there is unlikely to be a significant detrimental impact as a result of the Proposed Conduct on retail fuel and convenience markets.

Potential concerns regarding collection and use of customer data

- 5.63. In light of the concerns raised in the ACCC’s Digital Platforms Inquiry and the Loyalty schemes draft report into customer loyalty schemes, and concerns raised by the OAIC, the ACCC has considered whether the Proposed Conduct is likely to lead to a potential detriment from the collection and use of customer data.
- 5.64. The OAIC raised concerns that, as BP Resellers are independent operators of service stations, they may not be subject to the Privacy Act 1988 (Cth) (Privacy Act) and recommended that the ACCC impose a condition of authorisation requiring BP Resellers to opt-in to coverage of the Privacy Act under section 6EA.⁵⁶
- 5.65. The OAIC also recommended that the ACCC impose a condition requiring BP to undertake a Privacy Impact Assessment (PIA) prior to commencement of the program in order to address potential privacy risks associated with the establishment of the loyalty program, and to inform any risk management strategies.⁵⁷ A PIA assists organisations in understanding and evaluating their compliance with the Australian Privacy Principles (APP), which are rules of conduct contained in the Privacy Act.⁵⁸
- 5.66. The Applicants submit that it is BP’s standard practice to undertake a PIA where appropriate to manage privacy-related risks.
- 5.67. The Applicants also submit that it is unnecessary for the ACCC to impose a condition on authorisation that would require BP Resellers to opt-in to coverage of the Privacy Act. This is because:
- BP Resellers will not handle any personal information to which the Privacy Act applies

⁵³ BP Australia Pty Ltd & Ors Supplementary Submission 30 October 2019, p. 7

⁵⁴ Australian Convenience and Petroleum Marketers Association 2019 Monitor of Fuel Consumer Attitudes, 8 November 2019, p. 13

⁵⁵ Australian Convenience and Petroleum Marketers Association 2019 Monitor of Fuel Consumer Attitudes, 8 November 2019, p. 15

⁵⁶ OAIC submission 15 October 2019, p. 2

⁵⁷ OAIC submission, 15 October 2019, p. 2

⁵⁸ A breach of an APP by an agency is *deemed* to be an interference with the privacy of an individual: Privacy Act 1988 (Cth) s 13

- Even if BP Resellers were to handle personal information, many BP Resellers are already covered by the Privacy Act because they generate annual turnover of more than \$3 million per year (and therefore are not small businesses to which the provisions of the Privacy Act do not apply)
- To the extent that BP Resellers are not covered by the Privacy Act, that reflects that they are small businesses and therefore imposing obligations under the Privacy Act would be disproportionate given their size and relative inability to absorb additional compliance costs.⁵⁹

5.68. The Applicants also claim that BP's privacy policies and practices comply with its obligations under the Privacy Act.

5.69. The ACCC considers that there are likely detriments arising out of the collection and use of customer data by loyalty schemes, including:

- Reduced consumer welfare from decreased privacy: The detriments suffered by consumers through decreased privacy and control over data can result in numerous additional harms ranging from receiving unsolicited targeted advertising to data breaches exposing their personal or financial information.
- Risks to consumers through increased profiling: The risks of detailed profiling of users include potential price discrimination by online retailers.
- Risks to consumers from discrimination and exclusion: The specificity of data collected by loyalty schemes enables highly detailed segmentation of consumers that may be used to exclude or discriminate against groups of people. There is a risk that this could be used to unfairly discriminate against or exclude groups of consumers on the basis of information in their online profiles, which are usually opaque to consumers and do not provide a way for consumers to see or verify the information held about them or to appeal decisions made on the basis of that information.

5.70. Absent the Proposed Conduct, BP and Qantas can and do collect and use customer data. The Proposed Conduct changes what BP and Qantas can currently do by allowing for a flow of information between BP Resellers and BP, and from BP to Qantas for the purpose of assigning points to members of the QFF program. As noted above, the Applicants consider that BP Resellers will not have access to personal information as a result of the Proposed Conduct, and to the extent that they would, many BP Resellers will be covered by the Privacy Act. Those BP Resellers that are not covered by the Privacy Act are small Resellers that are unlikely to be dealing with large amounts of customer data.

5.71. The ACCC considers that there is likely to be some detriment arising from the use of data provided to Qantas by BP as a result of the Proposed Conduct.

5.72. The ACCC encourages BP and Qantas to adopt the recommendations regarding the collection and use of customer data in the ACCC's report into customer loyalty schemes.

Balance of public benefit and detriment

5.73. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

⁵⁹ BP Australia Pty Ltd & Ors Supplementary Submission 30 October 2019, p. 9-10

- Direct consumer benefits, including the opportunities to directly earn and redeem QFF, QFB and BP loyalty program points on a range of products and services
- Consistent offering of the BP, QFF and QFB programs across the BP fuel retailer network
- Enhanced competition in the retail supply of fuel to consumers who value loyalty programs
- Enhanced competition in the supply of airline services to consumers who value loyalty programs, and
- Transaction cost savings, resulting from the ability for Qantas to establish BP reseller participation in the program collectively.

5.74. The ACCC considers that the Proposed Conduct is unlikely to result in significant public detriment due to:

- BP's partnership with Qantas is unlikely to result in a detriment in airline markets, because:
 - other airline loyalty schemes will continue to have a range of other loyalty partners available to them, and
 - a partnership with a fuel retailer is not critical to the success of an airline's loyalty scheme
- The Proposed Conduct is unlikely to result in a competitive harm to retail fuel and convenience markets, as partnered loyalty schemes are not a major driver of consumer behaviour in relation to fuel and convenience purchases
- Concerns regarding the use and collection of customer data flowing from the Proposed Conduct relates to a relatively small amount of data.

5.75. Therefore, 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.

6. Draft determination

The application

- 6.1. On 5 September 2019, the Applicants lodged application AA1000452 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 6.2. The Applicants seek authorisation for 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

- 6.3. 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.
- 6.4. 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.

6.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

6.6. The ACCC proposes to grant authorisation AA1000452 to enable the Applicants to participate in the arrangements as described in paragraphs 1.1-1.2 and defined as the Proposed Conduct.

6.7. 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.

6.8. The ACCC proposes to grant authorisation AA1000452 for five years.

6.9. 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.

6.10. This draft determination is made on 22 November 2019.

7. Interim authorisation

7.1. At the time of lodging the application, the Applicants requested interim authorisation for the Proposed Conduct insofar as it relates to BP's participation in the QBR program.

7.2. The Applicants seek interim authorisation in order for BP's participation in the QBR program to commence by 1 February 2020. The Applicants further submit that interim authorisation will allow for BP and Qantas to undertake various pre-launch activities including IT integration work, signage preparation, and marketing and promotional activities in December 2019 in order for a 1 February 2020 commencement of the conduct to be achieved.⁶⁰

7.3. The Applicants submit that no detriment will result from the granting of interim authorisation, and it is highly unlikely to permanently alter competitive dynamics in any relevant market.⁶¹

7.4. The ACCC considers that there is benefit to consumers in BP's participation in the QBR program commencing on 1 February 2020. The ACCC does not consider that the granting of interim authorisation would permanently alter competitive dynamics in any relevant market should authorisation ultimately not be granted.

7.5. As a result, the ACCC has decided to grant interim authorisation to the Applicants for the Proposed Conduct only as it relates to BP and BP Resellers' participation in the Qantas Business Rewards program. Interim authorisation does not extend to BP and BP Resellers' participation in the QFF program.

7.6. 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.

⁶⁰ BP Australia Pty Ltd & ors Supplementary submission dated 30 October 2019, p2-3

⁶¹ BP Australia Pty Ltd & ors Supplementary submission dated 30 October 2019, p2-3

8. Next steps

- 8.1. The ACCC now invites submissions in response to this draft determination. 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.