



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Aviation White Paper

ACCC submission in response to the
terms of reference

15 March 2023

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Key points

The ACCC welcomes the opportunity to provide input to the development of a new aviation White Paper.

A competitive airline sector is vital to meet the needs of consumers and the economy more broadly, especially for a large country as geographically dispersed as Australia. Rivalry between airlines can deliver more routes, a greater choice of products, cheaper airfares, more reliable services and better customer service.

On many of these measures, international air passenger services to and from Australia generally delivered improved outcomes in the years leading up to the pandemic. The number of international passengers grew strongly, with a growing number of airlines offering an increasing choice of direct routes.

In contrast, the domestic airline industry does not appear to be fully meeting the needs of consumers or the economy (even discounting the issues that arose due to the disruptive impact of COVID-19). In the years leading up to the pandemic, growth in the number of domestic passengers flying did not keep pace with either the population or the economy, no new high-capacity airlines began offering services, flights were increasingly delayed and airfares went up. These issues have also been seen as the industry restarted after travel restrictions and lockdowns ended.

Some of these outcomes reflect a lack of effective competition. The Qantas Group continues to carry a dominant share of domestic passengers and has a number of advantages over other airlines. However, there is hope for a more competitive environment in future years if the expansion by Rex on intercity routes and the recent entry of Bonza can be sustained and built upon.

The Australian Government should consider policy measures to further assist in the promotion of new competition. This includes implementing reforms to the operation of the demand management scheme at Sydney Airport, most relevantly with respect to the way that take-off and landing slots are allocated to airlines.

Limited domestic competition also has a negative impact on the consumer experience. Even discounting the increase in issues and contacts received by the ACCC due to the disruption caused by the pandemic, contacts about airline issues have been increasing over the years and airlines remain one of the most complained about sectors to the ACCC. The ACCC considers there needs to be greater incentives for airlines to invest in their customer service and dispute resolution processes. This should be backed up by an effective external dispute resolution system.

Finally, airports are also crucial to both the efficiency and competitiveness of the aviation sector and to the consumer experience. The monitored airports hold market power within their location. Prior to the COVID-19 pandemic, the monitored airports achieved sustained high profit margins. For many years, aeronautical profit margins were between 40% and 50% and car parking profit margins were over 50%. These margins are in excess of those seen in workably competitive markets.

Whether it is competition, the consumer experience or the regulation of airports, the ACCC encourages the White Paper to keep the long-term interests of Australian consumers front and centre of its considerations.

1. The ACCC's role in aviation

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies.

The ACCC also has a number of specific roles in relation to the aviation industry:

- Since the former Treasurer's direction in June 2020, the ACCC has been monitoring the prices, costs and profits relating to the supply of domestic air passenger transport services and reporting to Government, pursuant to Part VIIA of the CCA. Through this monitoring role, the ACCC has sought to facilitate and protect competition in the industry. This role is due to conclude in June 2023.
- The ACCC conducts annual price and service quality monitoring of the four major airports (Brisbane, Melbourne, Perth and Sydney) under Part VIIA of the CCA and Part 8 of the *Airports Act 1996*. This includes monitoring the provision of aeronautical and car parking services at those airports.
- The ACCC has a role in assessing proposed price increases by Sydney Airport (for regional air services) and Airservices Australia under the price notification regime contained within Part VIIA of the CCA.

Businesses in the aviation industry are required to comply with the Australian Consumer Law (ACL), which is contained in the CCA. State and territory ACL regulators also enforce the ACL alongside the ACCC under a one law, multi-regulator model.

2. Domestic and international air passenger services

A competitive airline sector is vital to meet the needs of consumers and the economy, especially for a large country as geographically dispersed as Australia. Rivalry between airlines can deliver more routes, a greater choice of products, cheaper airfares, more reliable services and better customer service.

On a number of measures, it appears that the domestic airline industry has not been fully meeting the needs of consumers or the economy, even prior to the disruptive impact of COVID-19. Some of these outcomes reflect a lack of effective competition.

The domestic airline sector may deliver better outcomes in the next few years. Rex has brought additional competition to intercity routes, while Bonza intends to grow the market with new routes and cheap airfares. However, the new competition provided by Rex and Bonza needs to be sustained and built upon.

The Australian Government should consider policy measures to further assist in the promotion of new competition. This includes implementing reforms to the operation of the demand management scheme at Sydney Airport, most relevantly with respect to the way that take-off and landing slots are allocated to airlines.

In contrast to domestic services, international air services appear to have more closely met the needs of consumers and the economy over the last decade, even if they are recovering more slowly from the pandemic.

2.1. The pandemic has had a significant impact on the airline industry

The airline industry has been one of the sectors of the economy most heavily impacted by the pandemic. Much of the impact will continue to shape the airline industry for years to come, even when passenger numbers fully return to their pre-COVID-19 levels.

In early 2020, as governments around the world sought to slow the spread of COVID-19, borders were closed and as a result, much of the airline industry shutdown. Both international and domestic services declined by about 95%, with airlines reducing staff and either putting aircraft into long-term storage or handing them back to lessors.

Many governments around the world provided extensive financial assistance to the airline industry. Australian airlines received most of the \$5.6 billion that the Australian Government provided in direct support to the aviation sector in response to COVID-19.¹ This support was provided under economy-wide programs such as JobKeeper and industry-specific programs such as the Domestic Aviation Network Support (DANS) program which helped to maintain minimum levels of air connectivity.

Despite the financial assistance, Australian airlines incurred substantial financial losses as travel restrictions between some states and territories persisted until early 2022. In announcing the Qantas Group annual results for 2021-22, CEO Alan Joyce said that the result took the statutory loss before tax impact of the pandemic to nearly \$7 billion.²

In April 2020, Virgin Australia entered voluntary administration with significant debts and a lack of certainty about when normal flying would resume. It emerged from administration 7 months later with new owner Bain Capital and a new strategy. Virgin Australia permanently

¹ Australian National Audit Office (ANAO), Australian Government, [COVID-19 support to the aviation sector](#), 22 June 2022, accessed 14 February 2023.

² Qantas, [Qantas Group posts third major loss from pandemic, strong recovery underway](#) [media release], 25 August 2022, accessed 14 February 2023.

closed its low-cost subsidiary Tigerair, consolidated its fleet around Boeing 737s, and began targeting 'value-conscious' consumers as a mid-market carrier.

Despite the challenges, the new environment also presented opportunities. Regional airline Rex took advantage of both access to cheaper aircraft and Virgin Australia's difficulties to begin offering jet-based services between several large cities. The broader industry also rapidly adjusted their route networks in response to changing travel restrictions and demand, with Qantas greatly expanding into regional areas.

By the beginning of 2022, consumers were eager to fly again as state and territory travel restrictions began to be wound back. The pent-up demand for leisure travel was most evident in April 2022 when the number of domestic passengers jumped significantly and surpassed 90% of pre-pandemic levels. Business travel was slower to return, and it is not yet clear how much business travel will be permanently replaced by virtual meetings.

The strong leisure demand proved problematic from an operational perspective for airlines and the broader aviation sector, which were still operating with smaller workforces and facing staff absences from illness. Consumers experienced extensive cancellations, delays and mishandled bags. In July 2022, 6.4% of domestic flights were cancelled and a record 46% of domestic flights were delayed.³ In response, the industry reduced the amount of flying over the rest of the year to more manageable levels as airlines and airports rebuilt their capacity to handle the increasing passenger numbers.

The pandemic resulted in an unprecedented level of flight cancellations and delays, which continued while the airline sector recovered from the effects of the travel restrictions, lockdowns, and illnesses. Consumers' rights in relation to flight cancellations and delays, and their experiences in dealing with the airlines are discussed in Section 3.

Later in 2022, airfares became a growing concern for consumers as a result of strong leisure demand, reduced levels of flying, and very high jet fuel prices due to the war in Ukraine. After hitting an 11-year low in April 2022 when airlines were still encouraging people to fly again, a price index produced by the Bureau of Transport and Research Economics (BITRE) for the cheapest discounted tickets hit a 15-year high in December 2022. Price indices for the cheapest available restricted economy and business airfares were more stable over the period and generally remained below pre-pandemic levels.⁴

In early 2023, the airlines reported significant financial improvements as a result of strong demand and high airfares. In particular, Qantas Group announced a high underlying profit before tax of \$1.43 billion for the first half of 2022-23. This figure is close to the company's record high for a full year of operations.

2.2. The domestic airline industry has not fully met the needs of consumers and the economy

Before setting policy for the future of the aviation sector, it is helpful to consider whether the industry has been delivering good outcomes for consumers and the economy. This section considers this question in relation to domestic airline services over the past decade through measures such as the number of people flying, whether they have much choice regarding routes and airlines, the price of airfares, and the reliability of the services. Section 3 details the consumer experience in dealing with the airlines.

³ Bureau of Infrastructure, Transport and Research Economics (BITRE), Australian Government, [Domestic airline on-time performance](#), accessed 14 February 2023.

⁴ Bureau of Infrastructure, Transport and Research Economics (BITRE), Australian Government, [Domestic air fares](#), accessed 27 February 2023.

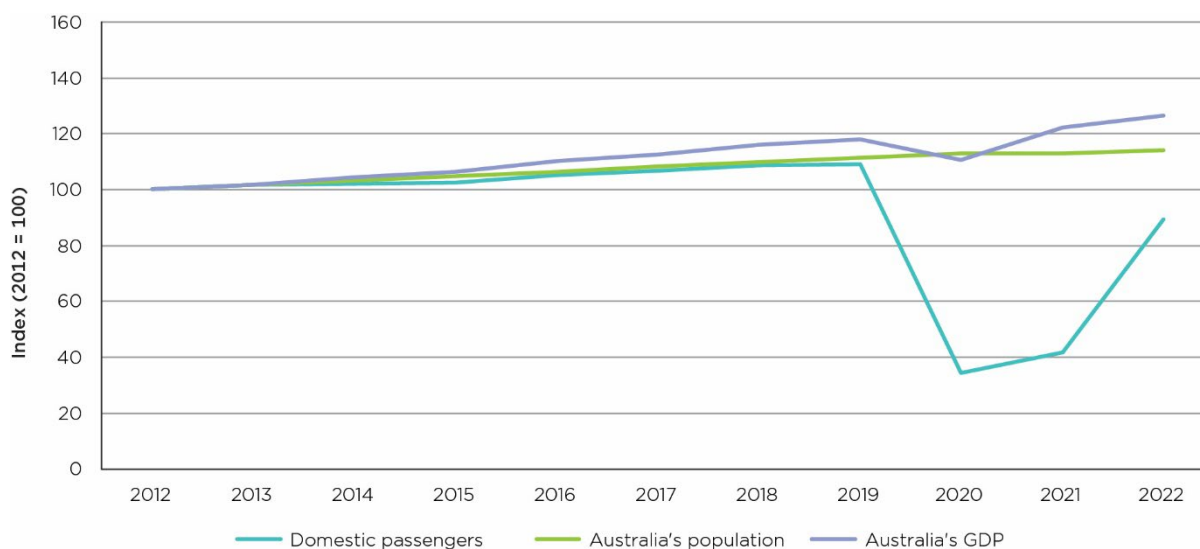
Are passenger numbers increasing?

In considering whether the domestic airline sector has delivered good outcomes for consumers and the economy, we should first consider the extent to which people are flying. It may be reasonable to expect that for a mature aviation industry in a developed economy like Australia, and without significant developments in alternatives such as high-speed rail, the number of domestic trips should grow at least as fast as the population and the economy.

With some pandemic-related capacity constraints still holding back the number of passengers that can fly at present, it is more meaningful to consider domestic activity up to 2019. The industry flew 61,182,340 domestic passengers in 2019. This represented 2.4 domestic trips per year for each Australian.⁵

Between 2012 and 2019, the number of domestic passengers grew by 9.1% at an average of 1.3% per year. Figure 2.1 shows that the number of domestic passengers grew at a slower rate than the Australian population and the size of the Australian economy. The economy (measured by GDP) grew by 17.8% in real terms at an average of 2.4% per year, while the population increased by 11.5% at an average of 1.6% per year.

Figure 2.1 Changes in domestic passengers, population and the economy – 2012 to 2022



Source: ACCC calculations using BITRE domestic aviation annual summary, ABS population data, ABS gross domestic product (chain volume) measures series A2302459A).

Note: The GDP measure has been adjusted for CPI.

Can customers fly to the destinations they want to?

Another consideration is the degree of connectivity that the airline industry provides to consumers. The ACCC only has information on the number of domestic routes in Australia since 2019. There were 154 domestic routes in operation in January 2023, which is about the same as January 2019. The number of routes has been relatively stable over the 4-year period other than when state and territory governments had pandemic-related travel restrictions in place.

While not yet included in the data, the level of connectivity available to Australian consumers has increased recently with the launch of new airline Bonza. The low-cost airline is

⁵ Calculation using ABS population and BITRE domestic activity data from 2019. Australian Bureau of Statistics, National, State and Territory population, December 2019.

prioritising routes that would otherwise be unserved. Of the 27 Bonza routes either already in operation or that will shortly be introduced, only 2 are already served by another airline. This would increase the number of domestic routes in Australia to 179, up 16% from current offerings.

Consumers also benefit when there is a range of airlines in the domestic industry. Not only does this deliver benefits through competition (discussed in section 3.3.1), but it also provides consumers with more choices. Over the past decade, many passengers would have had a choice between 2 airlines. Qantas and Virgin Australia have provided full-service products and services including meals and airport lounges, while Jetstar and Tigerair have provided budget leisure travellers with low-cost offerings.

Qantas (through its QantasLink brand), Rex and Virgin Australia have had the biggest presence in regional areas, but many of these routes have only a single operator.

Are airfares competitively priced?

Another key consideration for consumers is how much they have to pay to fly. Figure 2.2 shows the movement between January 2013 and January 2023 in price indices produced by the Bureau of Transport and Research Economics (BITRE). Each index reflects the lowest available airfare in each fare class, weighted over selected routes, adjusted for inflation.

Figure 2.2 Real movements in domestic Australian airfares (13-month moving average) – January 2013 to January 2023



Source: BITRE monthly survey of the lowest available fare in each fare class, weighted over selected routes.

Note: Adjusted for CPI. The sharp increase in the restricted economy index from November 2017 is due to the exclusion of Jetstar’s restricted economy product (Starter with Max) after the airline began refunding cancellations in the form of a voucher.

The chart shows that airfares generally drifted upwards over the period prior to the pandemic. Between January 2013 and January 2020, the best discount economy index increased by 3% in real terms, the restricted economy index increased by 41%, and the business index increased by 26%. The restricted economy index increased sharply in late 2017, however this was driven by Jetstar no longer offering its restricted economy product. By this time, the index had already increased by 29% since January 2013.

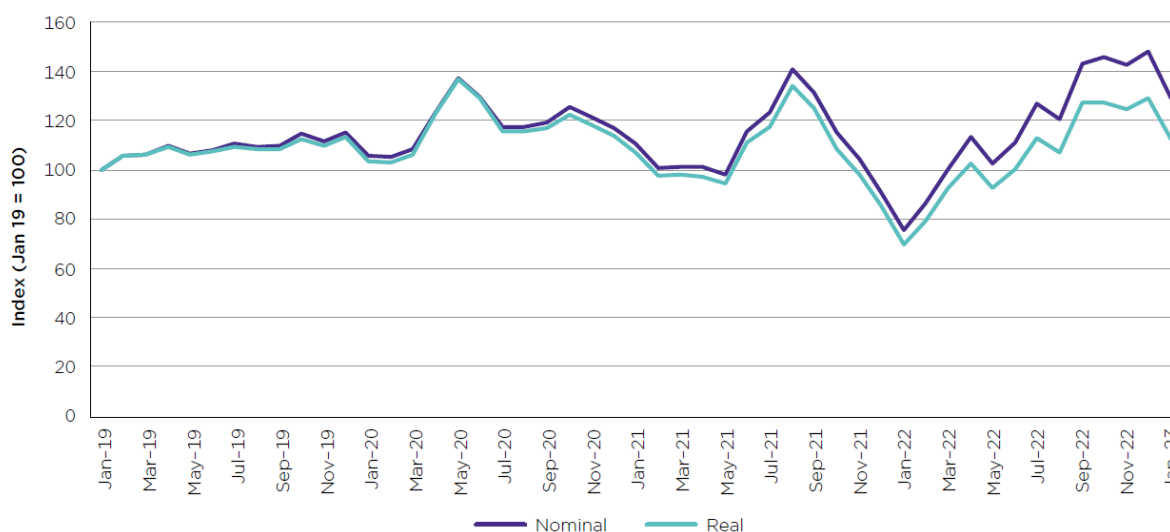
There were further pricing developments once the pandemic began and then throughout the industry’s recovery. All three indices fell significantly and stayed low at least until early 2022 when interstate travel restrictions were removed and people were once again confident to

travel. All three indices picked up throughout 2022 in response to strong pent-up demand for leisure travel and rising jet fuel prices due to the war in Ukraine. Also contributing to the rising airfares over 2022 was falling seat capacity, with the domestic airlines scaling back their levels of flying following high cancellation and delay rates in mid-2022.

The imbalance between supply and demand in the second half of 2022 was most clearly reflected in the price of discounted airfares, with airlines not needing to offer special rates in order to fill their flights. The BITRE discounted airfare price index hit a record high in December 2022. In contrast, the business airfare index in February 2023 was still far below what it was prior to the pandemic. This likely represents a combination of a slower recovery in business travel compared to leisure travel, as well as Virgin Australia offering cheaper business airfares as part of its strategy since 2020 to target the ‘value-conscious’ customer segment.⁶

Average revenue per passenger represents changes in airfares across all fare types and passengers. Figure 2.3 shows how average revenue for domestic services was very low at the start of 2022 as airlines tried to attract people to fly again. It then increased steadily throughout 2022 in response to the demand and supply factors explained above. By January 2023, average revenue per passenger was still 13% higher than it was in January 2019 in real terms, or 29% higher in nominal terms. Growing capacity and a downward trend in jet fuel prices suggests that domestic airfares may continue to ease in the coming months.

Figure 2.3 Index of average domestic fare revenue per passenger across all routes – January 2019 to January 2023



Source: Data collected by the ACCC from Qantas, Jetstar, Virgin Australia and Rex.

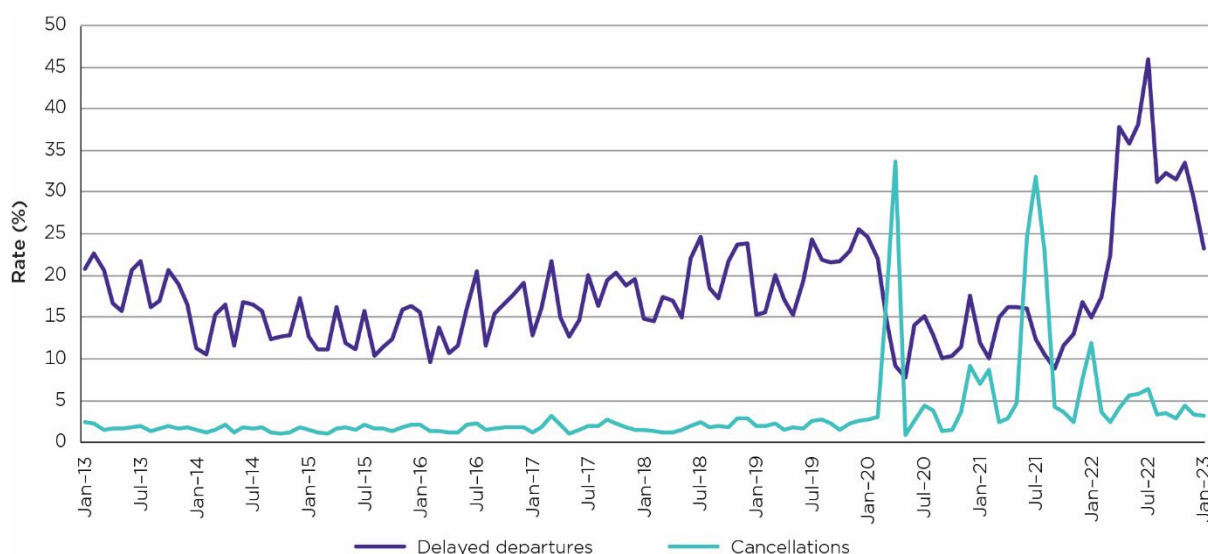
Note: The average revenue per passenger includes both economy and business fare revenue. It excludes ancillary revenues and Tigerair data.

Do airlines provide the services they schedule?

Consumers also want reliable services from the airlines. Figure 2.4 shows that prior to the pandemic, around 2% of flights were cancelled each month. Cancellations were not spread equally across all routes. For example, the Melbourne – Sydney route generally had a cancellation rate twice as high over this time.

⁶ Virgin Australia, [‘Virgin Australia has cut the price of one-way Business Class fares, seats from \\$299 on selected routes’](#), media release, 1 April 2022, accessed 1 March 2023.

Figure 2.4 Rate of delayed domestic departures and flight cancellations – January 2013 to January 2023



Source: BITRE on-time performance statistics.

Note: A flight is delayed if it takes off more than 15 minutes after the scheduled time.

A flight is considered to be delayed if it takes off more than 15 minutes after the scheduled time. The rate of delayed domestic flights trended down in the first part of the period shown in Figure 2.4, but then began trending upwards from 2016. Around 1 in 4 flights were delayed in December 2019, immediately before the pandemic. This worsening trend may have reflected growing congestion at airports.

Figure 2.4 also shows the impact of the pandemic on both cancellations and delays. Cancellations spiked at times when there were unexpected travel restrictions, such as the first onset of COVID-19 or the various waves of new variants. By January 2023, the rate of cancellations had almost returned to pre-pandemic levels. The rate of delayed flights spiked in the middle of 2022 as the broader aviation industry discovered that it could not support such levels of flying with significant reduced workforces. Many staff in the aviation industry had been made redundant as a result of the pandemic, or found other employment. The rate of delayed flights was still very high (23.3%) in January 2023. Jetstar reported higher rates of both delays and cancellations than other airlines in January 2023.

2.3. There has been a lack of effective competition in domestic airline services

The level of competition within an industry will often determine how well it meets the needs of consumers. This section considers the level of competition in domestic passenger air services and how it may develop in future years.

Competition appeared to have been declining prior to the pandemic

The level of competitive rivalry within the Australian domestic airline industry had generally been declining by the time the pandemic began. In the early 2010s, Virgin Blue’s transition into full-service carrier Virgin Australia meant that it was competing more directly with Qantas, especially for the high yield corporate customer segment. The two airlines competed vigorously for market share by adding capacity and bringing down airfares. However, the price war proved to be unsustainable and was abandoned in the latter part of the decade after both airlines had incurred significant financial losses.

Another source of competition in the early 2010s was the presence of Tiger Airways. In particular, the Singaporean-owned low-cost carrier competed with Jetstar for budget leisure travellers. This competition led to important developments such as Qantas Group starting to deploy Jetstar on some larger intercity routes (alongside Qantas) to better compete with Tiger Airways. Tiger Airways' competitive impact reduced over time as it developed a poor reputation after it was temporarily grounded by the Civil Aviation Safety Association (CASA). Tiger Airways lost its independence soon after when it was acquired by Virgin Australia (and renamed Tigerair) through transactions in 2013 and 2015.

Competition within the domestic market was relatively subdued towards the end of the 2010s. Qantas Group and Virgin Australia did not face any competition from an independent airline on the major routes, while both appeared content with their respective shares of the market. Any possible competitive constraint from the potential for new entry would also have been minimal, with no airline of a material size entering the industry since Tiger Airways in 2007.

The CEO of Bonza, Tim Jordan, considers that Australian consumers have missed out as a result of a lack of competition in the market. In May 2022, Jordan said that despite being the eighth largest domestic aviation market in the world, Australia was the only one without an independent low-cost operator.⁷ He further said that while other markets around the world had significant growth in low-cost routes over the decade leading up to the pandemic, the number of routes operated by Jetstar and Tiger/Tigerair was the same in 2019 as it was in 2010 (58 routes).⁸ This is despite continued growth in the Australian population over the same period.

There have been notable competitive developments in recent years

There have been significant competitive developments within the Australian domestic airline industry in recent years since the beginning of the pandemic. The implications of many of these developments are yet to become fully clear.

One of the first key structural shifts for the industry was the decision by Virgin Australia to suspend the operations of Tigerair in March 2020. While the suspension was temporary at the time, the airline was formally discontinued in September 2020, leaving Jetstar as the country's only budget airline.

Carrying significant levels of debt, Virgin Australia went into voluntary administration in April 2020 with the aim of restructuring and refinancing the business. It emerged from administration in November 2020 with new owner Bain Capital and a new strategy targeting 'value-conscious' travellers in the middle of the market. New CEO Jayne Hrdlicka said that 'Australia already has a low-cost carrier and a traditional full-service airline, and we won't be either'.⁹ Virgin Australia also consolidated its fleet to the one aircraft type (Boeing 737s) and offloaded other aircraft types.

The new strategy employed by Virgin Australia has had several consequences for competition. While Virgin Australia continues to seek to attract business travellers, its new offering based around lower airfares but without complimentary meals has likely meant that Qantas faces less direct competition in the premium corporate customer segment. Separately, with a less diverse fleet of aircraft, Virgin Australia is less capable of directly servicing certain routes, especially in regional areas. Virgin Australia continues to offer some

⁷ Bishop, A, TravelBulletin, '[Will they get bums on seats?](#)', May 2022, accessed 23 January 2023.

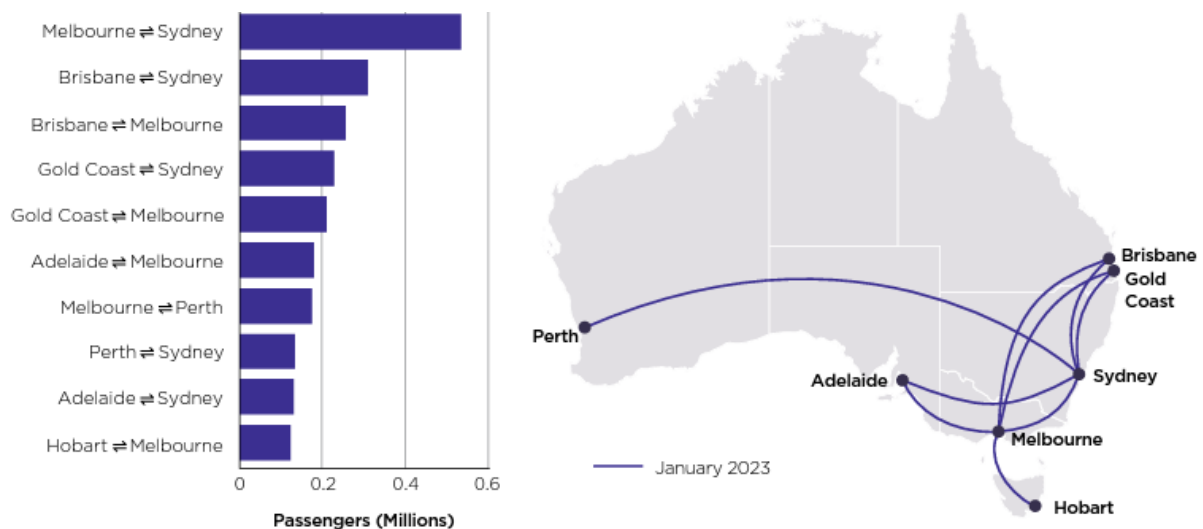
⁸ Bailey, J, Simple Flying, '[Bonza's launch will grow Australian low-cost routes by 40%](#)', 7 March 2022, accessed 23 January 2023.

⁹ Virgin Australia, '[Ready for take-off: Virgin Australia Group soars out of administration, unveils future direction](#)', media release, 18 November 2020.

of these routes through partnerships with other airlines, such as Link Airways on the Canberra – Sydney route.

While Virgin Australia was facing financial difficulties in 2020, regional airline Rex announced that it was acquiring jet aircraft for the purpose of offering services between major cities. It began offering services between Melbourne and Sydney in March 2021, before expanding its network to include Brisbane, Gold Coast, Adelaide and Canberra. Rex now offers 7 intercity routes including the 6 busiest domestic routes in the country (see Figure 2.5).

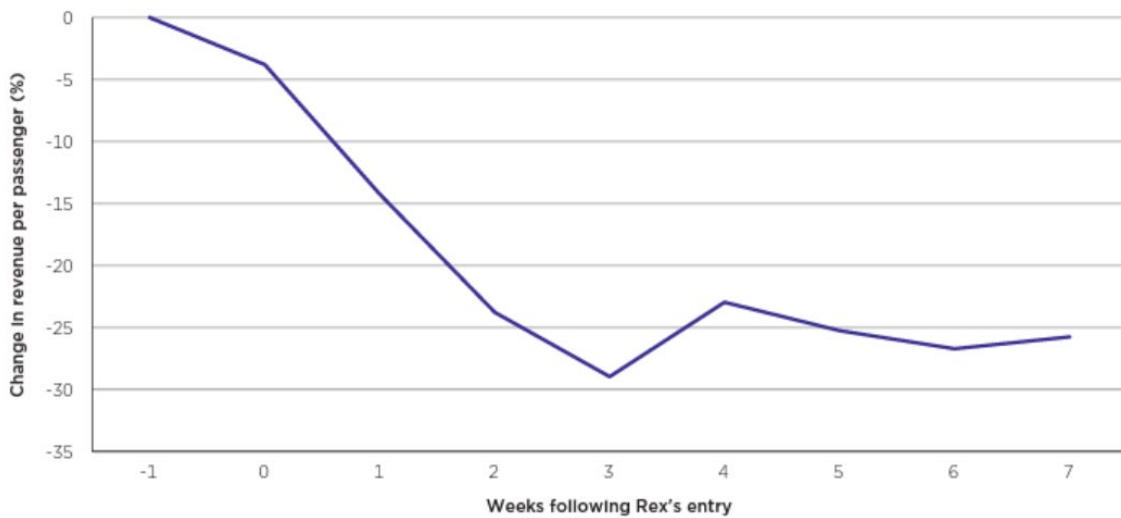
Figure 2.5 Busiest domestic routes by monthly passengers – January 2023



Source: Data collected by the ACCC from Qantas, Jetstar, Virgin Australia and Rex.

Rex’s presence as a third competing airline group has had a notable impact on airfares on these routes. Figure 2.6 shows how the combined industry revenue per passenger for Jetstar, Qantas, Virgin Australia and Rex decreased on the Melbourne – Sydney, Melbourne – Gold Coast, Sydney – Gold Coast and Melbourne – Adelaide routes in the weeks following Rex’s entry. Within 2 weeks of Rex’s entry, the airlines on average were earning 24% less revenue per passenger than they were in the week prior to Rex’s entry (week -1). Over the next 5 weeks, revenue per passenger then remained 26% lower than pre-entry levels on average across the 4 routes.

Figure 2.6 Change in industry revenue per passenger in weeks following Rex’s entry on intercity routes in 2021

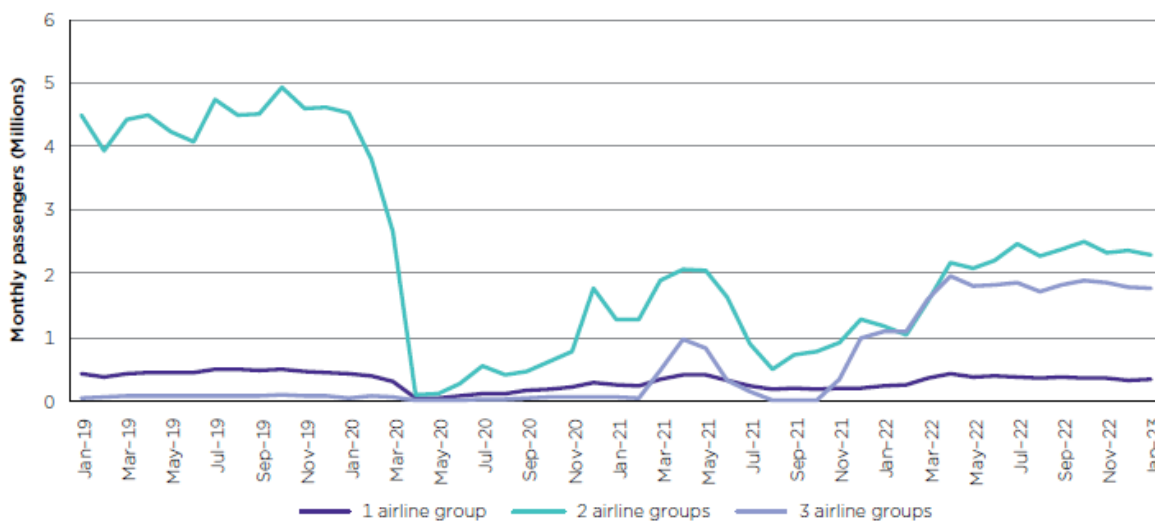


Source: Data collected by the ACCC from Qantas, Jetstar, Virgin Australia and Rex.

Note: Routes included in the analysis were Melbourne – Sydney, Melbourne – Gold Coast, Sydney – Gold Coast and Melbourne – Adelaide. Revenues include both the ticket sales and ancillary service revenues. Rex’s revenue per passenger is calculated relative to the week of its route entries (week 0).

Rex’s expansion on to major intercity routes has meant that many domestic passengers now fly on routes with 3 competing airline groups. Figure 2.7 shows that almost 2 million passengers—40% of all domestic passengers—were flying on routes with 3 competing airline groups in January 2023. Competition between more airline groups will generally result in better services and more attractive pricing.

Figure 2.7 Airline passenger market shares across all domestic routes – January 2019 to January 2023



Source: Data collected by the ACCC from Qantas, Jetstar, Virgin Australia and Rex.

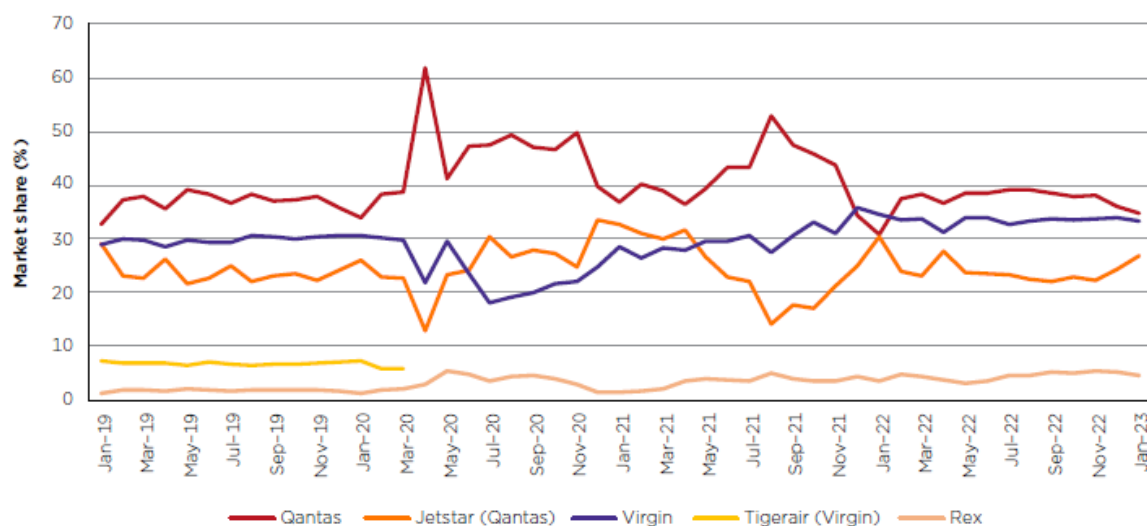
Note: The 3 airline groups are Qantas Group (including Jetstar), Virgin Australia (including Tigerair) and Rex.

While Rex’s entry on to the major intercity routes has been positive for consumers, its impact is somewhat limited because of its relatively small scale. Rex will grow its fleet of Boeing 737 jet aircraft from 7 to 9 by the middle of the year, but this compares to fleets of at least 79 jet aircraft for each of Qantas, Jetstar and Virgin Australia. The ACCC has observed that

competitors will often reduce their prices for flights that are scheduled at similar times to Rex, but less so for other times.

The relatively small scale of Rex’s operations is represented by its small market share (Figure 2.8). Over the past year, Rex has generally flown about 5% of domestic passengers, compared to 38% for Qantas, 34% for Virgin Australia and 23% for Jetstar. The Qantas Group airlines combined accounted for a little over 60% of passengers. Market share differs by type of route: Virgin Australia and Qantas generally have similar market shares on routes linking two larger cities¹⁰, while Qantas is the dominant provider on regional routes.

Figure 2.8 Airline passenger market shares across all domestic routes – January 2019 to January 2023



Source: Data collected by the ACCC from Qantas, Jetstar, Virgin Australia and Rex.

Qantas is offering services on more regional routes than prior to the pandemic. It offered 116 domestic routes in January 2023, compared to 90 in January 2019. No other airline offered more than 62 in January 2023. Rex has withdrawn from some regional routes over the last few years.

Rex raised concerns in late 2020 and early 2021 about Qantas entering regional routes with low passenger numbers that have historically been operated by Rex, and Qantas adding capacity on intercity routes after Rex began operating on these routes. The ACCC investigated whether the Qantas behaviour was a misuse of market power in breach of competition law. In concluding the investigation, we noted that a range of factors impacted the competitive dynamics in the market at the time, particularly the COVID-19 movement restrictions and border closures.

New low-cost carrier Bonza began offering regularly scheduled flights from February 2023. The airline’s network covers 27 routes across Queensland, New South Wales and Victoria. Bonza is launching predominantly unserved routes that directly connect regional centres to holiday destinations.

Bonza is the first high-capacity passenger airline to enter the Australian market since Tigerair 15 years ago. It is also the first independent low-cost carrier in the market since Virgin Australia acquired Tigerair in 2013.

¹⁰ For its airline monitoring role, the ACCC defines ‘larger cities’ as Sydney, Melbourne, Brisbane, Adelaide, Perth, Canberra and the Gold Coast. Remaining locations are considered ‘regional’.

For many consumers, the primary benefit from Bonza's entry to the market will be through the additional connectivity provided by the new routes. It will also provide some direct competition to other airlines on the contested Melbourne – Sunshine Coast and Melbourne – Mildura routes. While Bonza's stated strategy is to operate on unserved and underserved routes, Bonza may expand into more contested routes in the future, including possibly larger intercity routes. This would represent a more significant competitive threat to the other airlines.

The domestic airline industry is at a critical point from a competition perspective. After two decades of what has essentially been a duopoly between Qantas Group and Virgin Australia, the expansion of Rex onto intercity routes and the launch of Bonza provides an opportunity for the industry to enter a more competitive era. This will require both airlines not only succeeding with their current plans but expanding further into the future.

However, the new competition provided by Rex and Bonza is far from assured. New airlines in the past and around the world have often struggled in response to aggressive competition from the incumbent airlines, for which the ACCC will be watching closely for signs of anti-competitive behaviour. Both airlines may also be hindered by limited access to take-off and landing slots at large airports, especially Sydney Airport, which is discussed further in section 2.5.1. Further, some people in the industry such as aviation expert Neil Hansford have questioned whether the Bonza business model targeting leisure travellers in regional areas can succeed in Australia.¹¹

Should Rex and Bonza not succeed, it will not just result in less competition in the near term, but will likely deter new airlines from attempting to enter the domestic intercity routes for many years.

2.4. International air passenger services

This section will look at international air passenger services to and from Australia. The ACCC is less familiar with international services than it is with the domestic industry because it does not have a direction to monitor that part of the sector.

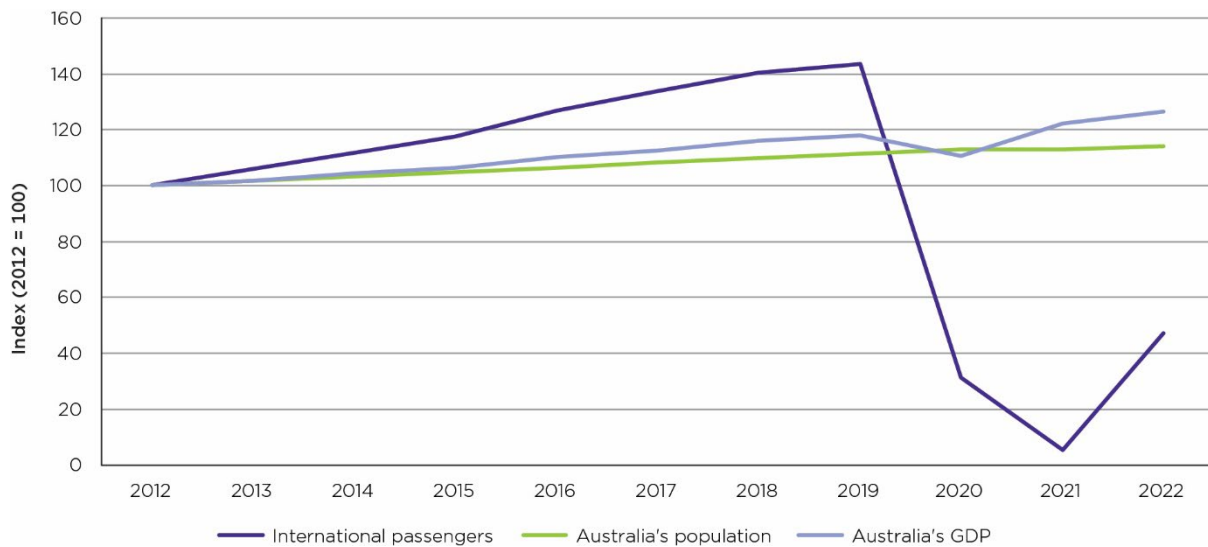
The international airline industry has delivered improved outcomes for consumers and the economy

International air services appear to have better met the needs of Australian consumers and the economy over the last decade than domestic services, even if they are recovering more slowly from the pandemic.

Figure 2.9 shows that the number of people flying to and from Australia grew significantly in the years prior to the pandemic. International passengers increased by 43.6% between 2012 and 2019 at an average of 5.3% per year. This was well above growth in the population (1.6% p.a.) and the economy (2.4% p.a.) during that period.

¹¹ Marsh, S, 9news.com.au, '[Bonza or bust: Aviation expert says Australia not big enough to support another airline](#)', 13 October 2021, accessed 1 March 2023.

Figure 2.9 Changes in international passengers, population and the economy – 2012 to 2022

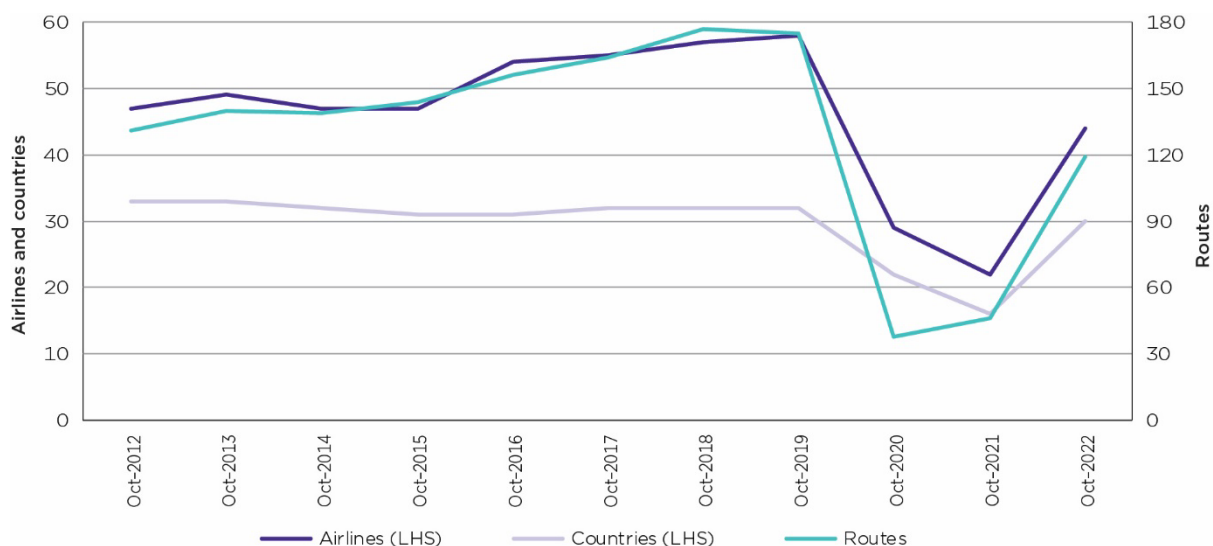


Source: ACCC calculations using BITRE international annual time series, ABS population data, ABS gross domestic product (chain volume) measures series A2302459A).

Note: The GDP measure has been adjusted for CPI.

The growth in passengers corresponded with an increasing choice of airlines. Figure 2.10 shows that the number of international airlines servicing Australia increased from 47 in 2012 to 58 in 2019. The majority of the new international airline entering Australia were based in the Asia Pacific region. These included low-cost carriers such as Thai AirAsia X and Cebu Pacific, and full-service carriers such as Hainan, Xiamen, Sri Lankan, LATAM and American Airlines, as well as Air India and Batik Air (formerly Malindo Air).

Figure 2.10 Number of international airlines servicing Australia, and number of countries and routes serviced in October – 2012 to 2022



Source: ACCC calculation based on BITRE data.

The increase in the number of international airlines has corresponded with a growing choice of routes, Figure 2.10 shows that the number of international city pairs (i.e. routes) increased from 131 in October 2012 to 175 in October 2019, prior to the pandemic. The number of countries being served has remained relatively the same over this period. The increase in

routes is thus largely a result of the airlines expanding into different cities in their existing network of countries.

However, we are aware that consumers have also experienced poor customer service and difficulties in even contacting some international airlines. Any changes to the consumer protection framework considered through the White Paper process needs to ensure the same requirements and obligations are placed on both international and domestic airlines.

International air passenger services appear relative competitive, but this varies by route

International air passenger services are considered to be relatively competitive, although this would vary by route. As discussed above, the number of airlines providing services to and from Australia had increased significantly in the years leading up to the pandemic. Much of the new competition in recent years, including post-pandemic, has come from low-cost airlines coming to Australia.

Another indicator of the healthier competition in international services is that the largest operator Qantas Group carries a relatively low share of the overall international capacity. While the industry is still going through changes as it recovers from the pandemic, Qantas (19%) and Jetstar (10%) combined for less than a third of international scheduled capacity in the week starting 27 February 2023.¹² This is about half their domestic market passenger share in January of 61.7%. Other significant competitors offering services to and from Australia include large global airlines Singapore Airlines, Emirates, Qatar Airways and United Airlines.

A lack of competition can emerge on certain routes where there are certain barriers to entry. These barriers could include any restrictions under the bilateral air services agreement between the two countries and limited access to take-off and landing slots at airports.

2.5. Policy settings that could encourage further airline competition

This section of the submission considers policy settings which could support positive outcomes for consumers and the economy by promoting competition between airlines.

2.5.1. Reform of the demand management scheme at Sydney Airport

One of the most effective ways that the Australian Government could support further airline competition would be to implement reforms to the operation of the demand management scheme at Sydney Airport, most relevantly with respect to the way that take-off and landing slots are allocated to airlines.

A public review of the demand management scheme by Peter Harris, in addition to further work by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) with stakeholder working groups, has already identified various reforms to improve the operation of the scheme.

New and expanding airlines can find it difficult to obtain slots at Sydney Airport

Sydney Airport is Australia's busiest airport and key international gateway. Despite the strong demand from airlines for access to the airport, capacity growth is limited by a combination of a lack of land for expansion (e.g. a new runway) and various measures imposed by the Australian Government to address concerns about aircraft noise from nearby residents (e.g. movement cap, curfew).

¹² CAPA – Centre for Aviation

This situation means that not all airlines that want to offer services to and from Sydney Airport can do so, particularly during peak times. The consequential reduction in airline competition has significant implications for the price, quality and choice of flights available to consumers, as well as the broader economy that benefits from domestic and international travel.

Access to the airport will continue to be an issue even after Western Sydney Airport is operational from 2026. This is because most passengers and airlines are likely to continue to strongly prefer Sydney Airport for its proximity to the CBD.

Where slots are constrained, it is important that the airport can operate as efficiently as possible within the confines associated with its land area and/or consideration of other policy objectives. Further, it is important that the airport's capacity is allocated to airlines in a way that maximises the benefit to consumers and the economy.

As identified by the Productivity Commission in its 2019 inquiry into the economic regulation of airports, the current demand management scheme at Sydney Airport does not appear to be achieving either of these goals.¹³

Demand management scheme reform is needed to increase competition

The ACCC considers that the current legislative rules for managing airline use of take-off and landing slots at Sydney Airport can impede competition in two interrelated ways:

- Rules allowing airlines to retain slots in perpetuity exacerbate capacity constraints by limiting the opportunities for new or expanding airlines to acquire slots needed to launch new services and compete.
- Airlines are able to exploit the scheme by acquiring and hoarding slots for strategic reasons, such as to prevent competitors' access to slots, resulting in inefficient slot use and further diminishing opportunities for increased competition.

The impact of these flaws in the demand management scheme is more than theoretical. Rex's ability to continue to expand its intercity jet operations and bring choice and competition to more flights each week will likely be hindered without better access to peak period slots at Sydney Airport. Bonza CEO Tim Jordan also said that access to slots at Sydney Airport had been an impediment for the new airline, which has not included Sydney in its initial network of 27 routes.¹⁴

Retention of slots in perpetuity

Under the existing demand management scheme, slots are allocated to airlines by the slot coordinator (Airport Coordination Australia) through an administrative process on the basis of historical precedence. Historical precedence gives the airline an indefinite right to retain a slot series in subsequent seasons so long as they satisfy the 'use it or lose it' and 'size of aircraft' tests in the previous equivalent scheduling season. While historical precedence provides airlines with certainty around their future slot holdings to support network planning, this system tends to reinforce the market position of incumbent airlines and hinders opportunities for future competition by new or expanding airlines.

Under the current system, where slots are allocated to airlines based on historical precedence, airlines do not bear the scarcity value of their slot holdings. Where capacity constraints increase over time, the value of slot holdings also increase, giving the airlines an incentive to retain slots even if they are not being efficiently utilised. Airlines have a further incentive to hold onto slots given that, once relinquished to the slot pool, a competing airline

¹³ Productivity Commission, [Economic Regulation of Airports](#) (final report), 21 June 2019, pp. 239-258.

¹⁴ Dowling, H, Australian Aviation, '[Exclusive: Bonza won't deal with airports that don't negotiate fees](#)', 16 February 2022, accessed 26 February 2023.

will likely acquire the slot and gain historical precedence. This makes it very difficult for the original airline to re-acquire that slot again in future, reducing the original airline's ability to provide additional services in the long term.

The demand management scheme may enable some airlines to retain more slots than they need

In recent years, there have been growing concerns within industry that airlines have been able to use the rules of the demand management scheme to hoard slots and/or use slots inefficiently.

Airlines already holding slots may apply for more slots than they need, including for the purpose of preventing competitors or potential competitors from accessing those slots. The current rules permit airlines to maintain access to these slots if the airlines meet certain obligations under the 'use it or lose it' and 'size of aircraft' tests, including by strategically distributing flight cancellations across different flight times through the season or operating flights that they would otherwise cancel given passenger demand. By meeting these obligations the airlines can retain historical precedence to those slots in subsequent scheduling seasons even though the slots could potentially be used more efficiently by another airline.

Holding onto slots for the purpose of gaining an anticipated value increase of slot holdings, to entrench market position and/or to restrict competitors' access to slots results in an overall loss in the productivity of the airport. This occurs when airlines who have slots allocated do not use them and the slots are also not re-allocated to others, meaning that slots are not used efficiently. This behaviour is likely to inhibit competition in the airline industry.

Consultation has already identified opportunities to improve slot management at Sydney Airport

There has already been extensive work to identify opportunities to improve the rules for the operation of Sydney Airport and how slots at the airport are managed by Airport Coordination Australia.

Following a recommendation from the Productivity Commission, the Department commenced an extensive review of the demand management scheme at Sydney Airport in late 2020.¹⁵ The ongoing review is looking at whether various aspects of the scheme remain fit-for-purpose, including implementation of the cap on aircraft movements, measures to ensure access for regional services, and the system for allocating take-off and landing slots to airlines.

After a broad consultation process, former Productivity Commission Chair Peter Harris reported to government in February 2021 with a series of recommendations to improve the operation of the scheme. In particular, the report made a number of recommendations to make the scheme more robust with regard to identifying and taking action where airlines are misusing their slots, such as by hoarding slots and then selectively cancelling flights in a way that still meets the 'use-it-or-lose-it' rules. This included resourcing for the regular scrutiny of cancellation data by an independent auditor and an appointed delegate with responsibility for taking necessary action in the Federal Court.

The report also recommended changes to the way that slots are allocated, such as removing a preference currently given to incumbent airlines seeking to change the time of a slot ahead of new entrant slot allocation requests.

¹⁵ Department of Infrastructure, Transport, Regional Development, Communications and the Arts, [Review of Sydney Airport Demand Management Scheme](#), accessed 26 February 2023.

Some stakeholders including the ACCC then participated in a number of working groups organised by the Department up until early 2022 to refine details of the recommendations.

The implementation of these reforms would create meaningful benefits to consumers and the economy. It will do this by maximising the productivity of the airport under the existing aircraft movement cap, and make more slots available to new and expanding airlines that will improve choice and competition.

2.5.2. Fit-for-purpose economic regulatory oversight for airports

Airports are a key input for the provision of airline services. Their behaviour can impact on the level of competition between airlines in two main ways:

- Airports can make efficient and prudent investment in infrastructure that provides additional capacity in time for new or existing airlines to offer new services. The investment could relate to a new runway, aprons, taxiways or terminal facilities. Investment that minimises congestion and therefore supports quick turnarounds between a plane landing and taking off on its next flight can be particularly helpful for low-cost carriers.
- Airports that provide services to airlines at reasonable charges and required quality of service can help support the business case for airlines to offer new services, in particular low-cost carriers. In this regard, 'reasonable' may refer to charges that reflect the efficient cost of providing the services, including a return on the investment commensurate with the risk to the airport. Required quality of services means that the airport does not invest in a higher standard of facilities than required by airlines or passengers, nor deteriorate service quality below users' reasonable expectations.

Major airports in Australia have significant market power, particularly in the provision of aeronautical services, because they do not face much, if any, competition from other airports. This affects their incentives to invest efficiently, apply reasonable charges or provide required quality for their services. For example, airports may have an incentive to over- or under-invest in their infrastructure. These include deferring investment to constrain capacity or making investment too early ahead of expected demand and seeking to recover the costs from the airline and other users. Chapter 4 of this submission looks at these issues and the need for appropriate regulatory oversight.

2.5.3. Restrictions on 'no less favourable' clauses in agreements between airports and airlines

'No less favourable' clauses in contracts between airports and airlines limit the ability for the airport to offer lower charges or other incentives to a rival airline. A restriction on these clauses being included in airport/airline contracts may facilitate the entry or expansion of airlines.

In its 2019 inquiry into the economic regulation of airports, the Productivity Commission identified that some agreements between airports and airlines had such 'no less favourable' clauses.¹⁶ It said that the clauses sought to limit competition in order to protect the incumbency of the airline that negotiated the terms. The Productivity Commission recommended that the Aeronautical Pricing Principles (APPs) be amended to specify that any agreement between an airport and airport user should not contain anti-competitive clauses that reference the terms being offered to users' competitive rivals.¹⁷

¹⁶ Productivity Commission, [Economic Regulation of Airports](#) (final report), 21 June 2019, p. 144.

¹⁷ Ibid, page 40.

In response to the recommendation, the Australian Government at the time said that it had amended the APPs to specify the exclusion of these clauses in airport/airline contracts.¹⁸ However, the ACCC understands that the amended APPs were not formally re-issued.

The ACCC shares concerns regarding these clauses because they may entrench the market power of incumbent airlines and in turn can affect access to essential inputs for an airline. In particular, the cost of access to airport services can be a key factor in the ability of a low-cost carrier to price in a way that stimulates demand. There is a real risk that these clauses are anti-competitive where they have the purpose or effect of entrenching the preferential treatment of large incumbent operators.

However, 'no less favourable' clauses are not inherently anti-competitive and may, in some circumstances, generate economic efficiencies and be pro-competitive. For example, these clauses may encourage airports and airlines to enter into long-term arrangements and reduce transactional costs by reducing the need for airlines to monitor supply costs of rivals. As a result, any assessment of the competitive harm or otherwise of these clauses requires consideration of the terms of the particular clause and the circumstances in which it is employed.

2.5.4. ACCC's monitoring of domestic air services

A further direction to the ACCC to monitor domestic air services would help deter airlines from engaging in anti-competitive behaviour and inform the government about the state of competition in the industry.

The ACCC is currently monitoring the prices, costs and profits relating to the supply of domestic air passenger transport services under a direction from the former Treasurer on 19 June 2020. The direction was issued under subsection 95ZE(1) of the CCA which provides the ACCC with the powers to compel relevant information from the airlines. The direction requires the ACCC to report on its monitoring at least once every quarter. The ACCC will produce its 12th and final report in June 2023 when the direction is due to expire.

The ACCC's monitoring of the industry puts a spotlight on the sector that helps support competition. The additional ACCC scrutiny helps to deter incumbent airlines from engaging in anti-competitive behaviour including with respect to new and expanding airlines. It also enables the ACCC to act more quickly should competition or consumer issues arise because it already has dedicated staff members with industry knowledge and expertise through ongoing access to, analysis and reporting on industry data.

The monitoring role has assisted the ACCC in various investigations into specific behaviour. Examples include the investigation into Rex's allegations that the Qantas expansion into certain regional areas in late 2020 and early 2021 was anti-competitive, and the ongoing investigation into difficulties that consumers have faced in using Qantas flight credits.

The monitoring role also enables the ACCC to better inform policy discussions. The public reports produced under the direction have informed the Australian Government and other stakeholders about the domestic airline industry including the significance of various competitive developments. Knowledge acquired under the role has also directly assisted the ACCC in preparing this submission and its extensive engagement with the review of the demand management scheme at Sydney Airport.

¹⁸ Australian Government, '[Australian Government response to the Productivity Commission inquiry into the economic regulation of airports](#)', 11 December 2019, accessed 26 February 2023.

2.5.5. Air cabotage restrictions could be removed

Removing restrictions on air cabotage could potentially promote competition on some domestic routes.

Australia prevents foreign airlines from picking up domestic passengers on a domestic leg of an international flight. For example, a foreign-flagged flight originating in Malaysia and travelling to Darwin and then on to Sydney cannot embark domestic passengers for the Darwin to Sydney leg, yet an Australia international carrier flying the same route could embark passengers for the Australian leg.

In its 2015 review of competition policy, the review panel led by Ian Harper said that there would be considerable benefits from removing air cabotage restrictions for remote and poorly served domestic routes.¹⁹ It regarded the blanket air cabotage restrictions on foreign-flagged carriers as inefficient.

¹⁹ Competition Policy Review, [Final Report](#), March 2015, pp. 209-211.

3. Consumer experiences

Consumers have been increasingly raising concerns and frustrations about issues in the aviation sector with regulators, government and in the media. Their frustrations stem from high prices, poor customer service (particularly poor communication), decreasing service quality, uncertainty of rights, and a lack of accountability.

Consumers play a crucial role in fostering an efficient and competitive aviation industry. Engaged and empowered consumers lead to improved competition, productivity, and innovation. In competitive markets, consumers don't make purchasing decisions based on price alone. Customer service and the entire consumer experience when dealing with a business is also hugely influential in consumers' decision making.

Unfortunately, the relatively low level of competition in the domestic airline market over much of the last decade has a direct impact on both the airlines' pricing and their incentives to invest in overall service provision. Limited competition means pricing can remain above inflation levels. Further, the lack of viable alternatives means there is reduced risk of customers switching. This reduces the incentive for the airlines to invest in systems and measures that would provide high-quality customer service.

As revealed by the data below, even accounting for the spike due to COVID-19 related travel issues, contacts to the ACCC about consumers' issues with airlines have been increasing over the years. The ACCC is also aware that the state and territory ACL regulators similarly receive high levels of contacts from consumers about issues with the airlines. Similarly, the consumer advocacy group CHOICE has previously highlighted consumers' issues in resolving disputes with airlines, including as far back as in its 2016 "Complane" campaign.

The airlines should be able to resolve many of these from the consumer's initial contact to them about the issue, or even pro-actively before the issue generates consumer complaints, rather than consumers having to resort to raising issues with regulators or pursuing claims in tribunals or small claims courts.

Particularly over the past year there has been an increase in contacts to the ACCC reporting problems with even being able to get a considered response from an airline. Indeed many consumers report problems simply being able to get in contact with an appropriate person to discuss their issue or to conduct transactions that require engagement with a person. There is no current sign of this trend improving.

The ACCC is also aware that many consumers have struggled to get a resolution to their issues from the Airline Customer Advocate (the ACA). The limitations of the ACA service are discussed further below.

There are many consumer issues that could be more simply resolved by airlines directly, or through an effective external dispute resolution process. The ACCC considers:

- there needs to be greater incentives for the airlines to invest in systems, processes and people to dramatically improve their customer dispute resolution, and
- the current ACA service needs to be replaced with an effective external dispute resolution scheme, such as one modelled on the Telecommunications Industry Ombudsman.

3.1. ACCC contacts data

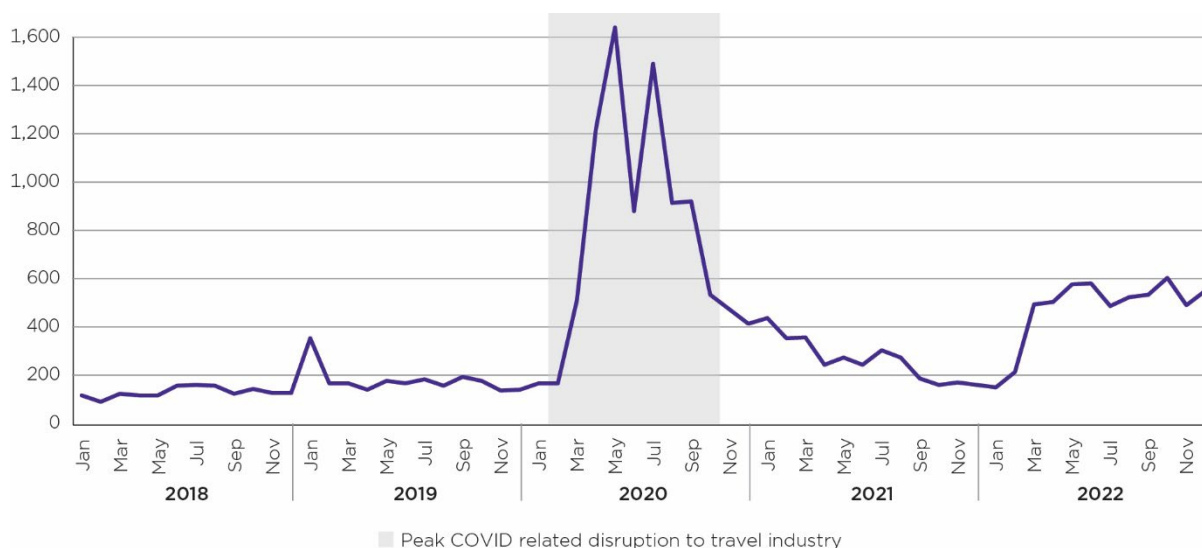
The ACCC receives thousands of contacts about international and domestic airlines every year. However, despite the large spike in contacts in 2020 due to the pandemic, contacts

were also trending up in the years prior to 2020, and have been trending up since travel restrictions and lockdowns were lifted.

Table 3.1 ACCC contacts regarding international and domestic airlines from January 2018 to December 2022

ACCC contacts regarding airlines (international and domestic) ²⁰		
Year	Total contacts	Average contacts per month
2018	1553	129
2019	2157	180
2020	9332	778
2021	3161	263
2022	5708	476
Total from January 2018 to December 2022	21 911	

Figure 3.1 ACCC contacts regarding international and domestic airlines from January 2018 to December 2022



²⁰ As a comparison, while the data in the ACCC's 2017 [Airlines Terms and Conditions Report](#) only covered domestic airlines, the report noted that between 1 January 2016 and 14 December 2017 the ACCC received over 1,400 contacts about issues with the airlines.

Figure 3.2 Distribution of ACCC contacts regarding airlines from January 2018 to December 2022 – international vs domestic airlines

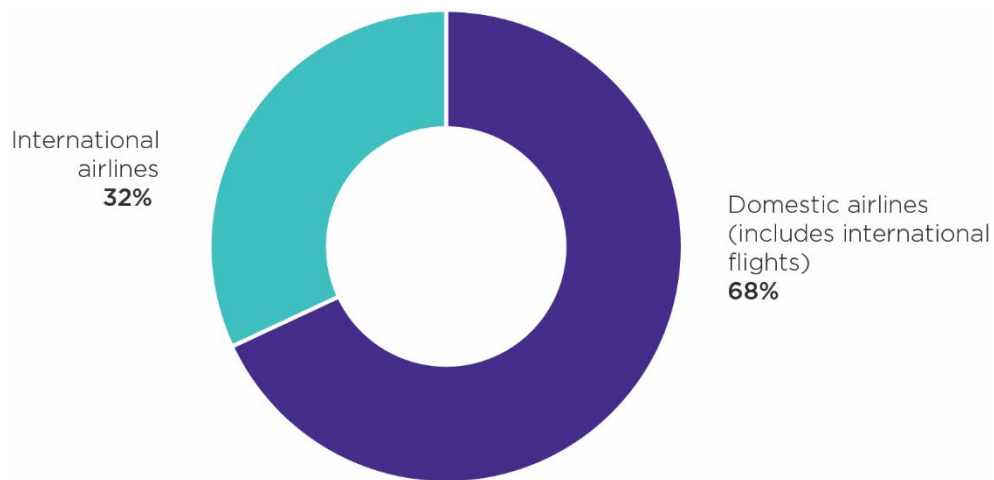
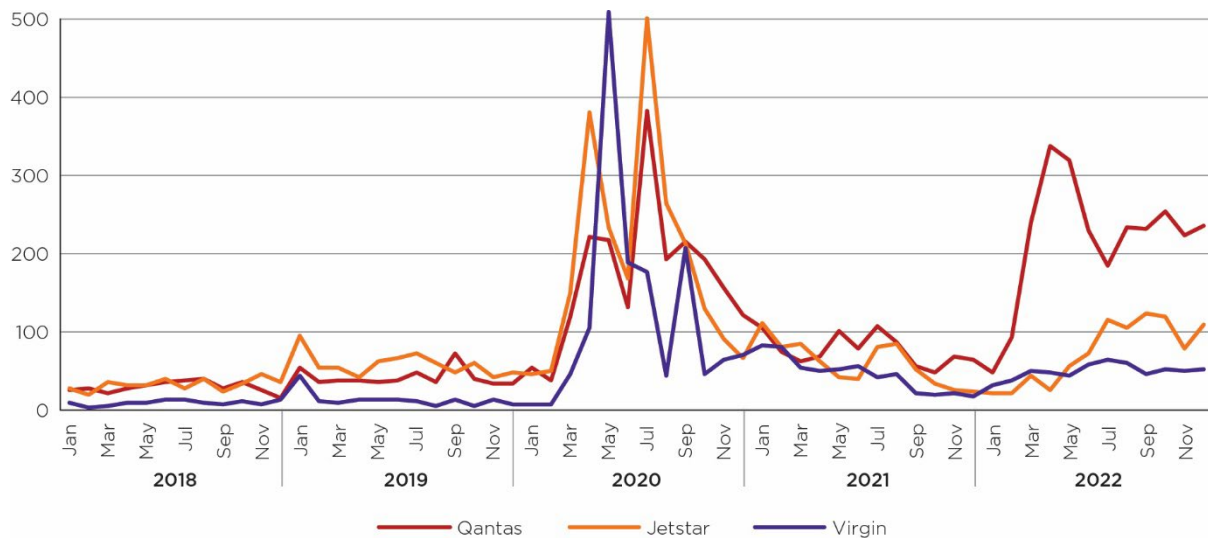


Figure 3.3 ACCC contacts regarding the major domestic airlines from January 2018 to December 2022



The above figures are raw contacts data and individual reports have not been reviewed. Contacts do not always mean a business has acted in breach of the ACL or the CCA. These figures will include:

- contacts where consumers have enquired about their rights on an issue (as opposed to making a complaint about an airline’s conduct)
- contacts about Virgin during 2020 which largely related to Virgin entering administration, and its subsequent purchase by Bain Capital, and how this impacted consumers’ rights
- contacts where consumers are complaining about conduct that would not give rise to a breach of the ACL or the CCA

- contacts where an airline is perceived to be responsible for parts of the aviation supply chain they do not control (e.g. airport facilities, air traffic control)
- contacts involving issues arising with airline bookings made through travel agents or other intermediaries. In these cases, the cause of the consumer's issue may lie with the airline, the intermediary, neither, or both.
- complaints about the airlines' conduct where the allegations have not been confirmed or verified.

Notwithstanding these caveats, and even accounting for the 2020 spike due to COVID-19 related travel issues, such an increased level of contacts is at least indicative of the airlines' decreasing ability and effectiveness in handling and resolving consumer complaints.

While individual reports have not been reviewed, we are aware from our compliance, enforcement and monitoring work in the aviation sector of the broader industry issues around the COVID-19 related 2020 spike in contacts, and the more recent 2022 increases in contacts.

COVID-19 related travel issues

The key issues that arose in the travel sector as a result of cancellations due to COVID-19 related travel restrictions included:

- businesses misleading consumers by misrepresenting consumers' rights under the terms and conditions of their booking, including inadequate disclosure of the remedies consumers are entitled to
- businesses misleading consumers by deducting administration or cancellation fees, or unrecoverable costs amounts, from refunds without an adequate legal basis for doing so
- delays in consumers obtaining remedies
- inadequate communication from businesses, and businesses making it difficult for consumers to make contact.

The ACCC had to take action to ensure businesses, particularly those in the travel sector, were acting in accordance with their terms and conditions in providing remedies to consumers. This included engagement with airlines to facilitate remedies and the resolution of issues across all their customers, such as the action taken against [Qantas](#) and [Etihad](#).

These and other issues, and the ACCC's work in response, is set out in the ACCC's report on [The impact of COVID-19 on consumers and fair trading – \(an update on the work of the ACCC during the pandemic\)](#).

As noted in graph at figure 2.9 above, contacts about COVID-19 related travel issues predominately spiked between March and October 2020. However, there continued to be some COVID-19 related issues in contacts throughout the remainder of 2020, and into 2021.

More recent airline consumer issues

Contacts from consumers about the domestic airlines have generally trended higher over 2022. This includes high levels of contacts commensurate with the higher numbers of cancelled or delayed flights in mid- to late-2022.

After the COVID-19 lockdowns and travel restrictions ceased, there was a significant surge in demand for air travel in 2022. However, the aviation industry was not placed well to deal with this surge in demand, across all airlines, and worldwide.

The ACCC's [September 2022 domestic airline competition monitoring report](#) set out details of the domestic airline industry's on-time performance on record and high rates of flight cancellations. The report also noted that:

- As many other sectors experienced post-pandemic, there were challenges for the aviation industry in recruiting new staff to replace those who left or were stood down during the pandemic, and training new staff takes time.
- The industry was affected by the inflated rates of COVID-19 and flu infections that occurred across the Australian community in mid-2022, including staffing absences at short notice. The industry did not have the reserved staffing capacity to fill these absences.

These issues affected all aspects of the industry, including airlines, ground handlers, airport security and air traffic controllers. Flight disruptions also have a cascading impact. For example, a cancellation or delay can lead to an aircraft or crew members not being available at their scheduled destination for their next flight, generating multiple disruptions throughout the network.

Full aircraft also means that it is more difficult for airlines to find alternative flights for passengers whose original flight has been cancelled. Reduced staff also means less capacity to provide adequate customer service to assist consumers affected by delays and cancellations.

While airlines struggled with these issues, they need to continue to ensure they are honest and proactive in advising consumers of delays and cancellations, the reasons for delays and cancellations, and what remedies consumers are entitled to for those delays or cancellations.

Towards the end of 2022, airlines started reducing their schedules to better match the capability of the industry, rather than to match consumer demand.

In March 2023, the ACCC reported that the airlines had been able to increase their levels of capacity in January 2023 without significantly compromising on-time performance.²¹ This suggests that most airlines are getting closer to their pre-pandemic operational capability. Jetstar was an outlier however, continuing to report poor performance on both cancellations and delays.

3.2. The legal framework around consumer remedies for flight delays and cancellations

ACL rights – consumer guarantees

Under the ACL consumer guarantees, travel providers including airlines are required to supply their services within a reasonable time. If this consumer guarantee is not met, then consumers are entitled to a remedy. This may be a refund or replacement service, depending on whether the failure to meet the consumer guarantee is a major or minor failure.

Further, if there is a major failure to meet any of the consumer guarantees, in addition to a refund or replacement service, consumers are also entitled to compensation for consequential loss or damage that is reasonably foreseeable and caused by the failure to meet the consumer guarantee.

The airlines have compensation policies that set out the further assistance they will provide if a consumer's flight is delayed or cancelled, such as providing a voucher for, or reimbursing (up to a certain limit) the costs of, a meal and/or accommodation.

²¹ ACCC, [Airline Competition in Australia \(March 2023\)](#), March 2023.

However, an airline compensation policy cannot exclude consumers' rights under the ACL consumer guarantees.

Where a travel provider provides their service (e.g. the airline provides the flight), however the consumer misses the service through no fault of the travel provider, consumers will not be entitled to a refund or credit under the ACL consumer guarantees.

The ACL consumer guarantees are also unlikely to apply if an airline delays or cancels a flight due to the actions of a third party, such as in the instance of government restrictions on travel, like those implemented in response to the COVID-19 pandemic. In this situation, consumers' entitlement to a refund or credit will generally be determined by the terms and conditions of their booking.

Potential changes to the legal frameworks around customer service issues and consumer remedies for flight delays and cancellations

Some advocates have called for consumer protection measures to be introduced in Australia that set out more specific consumer compensation entitlements for delayed or cancelled flights.

For example, in the European Union, consumers are entitled to specific set amounts of compensation for a delay of 3 hours or more, with the amounts tiered based on the length of the delay. Further, where consumers are entitled to refunds for cancellations, the law requires the refund to be provided within 7 days of the cancelled flight.

However, these rules don't apply where the reason behind the flight disruption can be connected to 'extraordinary circumstances', and the issue is outside of the airline's control. Extraordinary circumstances include political instability, extreme weather conditions, medical emergencies, air traffic control restrictions, acts of terrorism and the like. Although, even in extraordinary circumstances, airlines must still show that they have taken reasonable measures to prevent the delay. For example, bad weather may be considered an extraordinary circumstance, however if other airlines were prepared for it and prevented delays then that standard applies to all airlines.

Introducing more specific requirements like this in Australia could be considered further as the Government develops its aviation related policies through the White Paper process. Further consultation would be required to assess all potential impacts on the market and consumers and balance the perspectives of both consumers and industry in considering potential reforms. Further consideration would also need to be given to the merits of sector specific rules around the remedies for the cancellation of services, as compared with the merits of the whole of economy requirements provided by the ACL consumer guarantees.

The ACCC has also been strongly advocating for reform to the ACL consumer guarantees to make it a contravention of the ACL for businesses to fail to provide a remedy for consumer guarantees failures, when they are legally required to do so.

This was a key recommendation in our submission to Treasury's [December 2021 consultation paper](#) on options aimed at improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the ACL.

At present, there are little to no incentives in the ACL for businesses to comply with their consumer guarantee obligations. This significantly undermines the consumer guarantees regime. The ACCC's recommended reform would change business incentives and improve compliance with the ACL.

Where there is non-compliance with the consumer guarantees, it is also difficult for individual consumers to enforce their rights. The costs of taking action in a court or tribunal can be considerable, particularly when consumers are opposing a well-resourced airline. Further,

there is limited effectiveness to such court or tribunal actions as consumers may not be granted the full remedy they are entitled to. In many tribunal considerations, the focus can be on determining some resolution to the dispute involving compromise, usually by consumers, rather than necessarily following the parties' entitlements and obligations under the law.

The ACCC has also been strongly advocating for a ban on unfair trading practices to be introduced into the ACL, to help address conduct that causes significant detriment to consumers but is not covered by existing provisions of the ACL. An appropriately framed prohibition on unfair trading practices in the ACL could also assist in addressing consumer issues in the aviation industry.

While ACL regulators will always have an important role to play in enforcing compliance with the ACL, the majority of consumers' issues with the airlines are issues that should be getting adequately resolved without regulator intervention, and without consumers needing to take action in a court or tribunal.

There needs to be the right frameworks in place to:

- better incentivise the airlines investing in customer service improvements across all aspects of their operations, and
- provide an effective external dispute resolution system.

Governments have often implemented policy settings (including during privatisation processes) that impose customer service type obligations on a monopoly provider. Whether such requirements are required in the airline industry given the market concentration is also something could be considered further as the Government develops its aviation related policies through the White Paper process. Customer service type obligations would also serve as a reference point for standards and expectations in an effective external dispute resolution scheme.

3.3. Improving external dispute resolution

With respect to external dispute resolution, the ACCC considers a new system is clearly required in the airline industry. External dispute resolution is an essential escalation pathway for consumers. However, the ACA is generally ineffective in this role.

The Airline Customer Advocate

The ACA was established in July 2012 as an industry-based scheme to facilitate the resolution of complaints from customers about the service provided by the participating airlines. These airlines are currently Jetstar Airways, Qantas, Regional Express and Virgin Australia. The ACA is funded by the airlines and is overseen by a committee of airline representatives.

The ACA has a limited remit to consider consumer complaints, and even then it has no ability to make decisions on remedies for consumers. For example:

- During the period of COVID-19 travel restrictions it determined that it could not accept the most common complaints from consumers about COVID-19 related cancelled travel.
- A requirement for 'eligible' complaints is that the consumer must have first followed the relevant airline's internal complaints process. If a consumer attempts to do this but gets no response from the airline despite chasing multiple times, the ACA will deem this an ineligible complaint as the full internal airline complaints process was not completed.

Further, the ACA also has no power to determine an outcome of a dispute. Its only real 'power' is that the airlines are required to respond to a complaint the ACA puts to them. The ACA assigns complaints to a case manager at the airline concerned. The airline case

manager then prepares a written response to the complaint on behalf of the airline concerned. The ACA then reviews the response and “if necessary will ask the airline for more information ... or explain the airline’s position”. The consumer will then receive a response from the ACA.²²

The ACA’s [annual report for 2021](#) showed that around twice as many complaints were considered “actioned and closed” by the ACA as there were complaints where consumers felt the issue was resolved to their satisfaction.²³

The ACA’s ineffectiveness also plays a part in the increasing level of contacts the ACCC (and other state and territory ACL regulators) have been receiving about airline issues, as it does not provide consumers with a viable conciliation option.

Further, unlike more effective external dispute resolution schemes, the ACA scheme does not review for systemic issues in the industry, which limits its value from a broader ACL compliance and broader policy perspective.

There has been a consistent concern about the lack of effectiveness of the ACA as a dispute resolution body. For example, many online reviews complain about its inability to assist consumers, and in 2021, CHOICE awarded the ACA a “Shonky”, labelling it “merely a fake advocate designed to help the airlines avoid accountability”.²⁴

Recommendations for improving external dispute resolution

The ACA should be replaced with a truly independent external dispute resolution ombuds scheme which has the ability to make binding decisions to resolve consumer complaints.

The Government should require a more effective scheme for the airline industry, one that is underpinned by legislation and follows the Government’s [Benchmarks for Industry-based Customer Dispute Resolution](#). The Telecommunications Industry Ombudsman (TIO) has been set up following these principles, and is regularly reviewed against them. The Government could also consider the characteristics of similar external dispute resolution schemes in the energy and finance sectors in designing an effective airline ombuds scheme.

Characteristics of the TIO scheme that help make it an effective dispute resolution scheme include:

- While the TIO is funded by telecommunications service providers (including carriers and eligible carriage service providers), the Board consists of equal numbers of industry, consumer and independent directors.
- The TIO has authority to make decisions on complaints about telephone and internet services that are binding on the service provider (if the consumer chooses to accept the decision), up to \$100,000 in value.
- The TIO also provides a number of guides for consumers and industry to help with common complaints and publishes a quarterly report outlining the complaint types and trends.
- In addition to resolving individual complaints, the TIO also addresses broader issues through its systemic issues work. The TIO initiates investigations into issues that have, or are likely to have, a negative effect on multiple consumers or a particular type of consumer. The TIO engages with service providers about these issues, and may also publish reports about these issues which provide guidance to consumers and

²² <https://www.airlinecustomeradvocate.com.au/General/TheProcess.aspx>

²³ See chart on page 9 of the ACA’s annual report at https://www.airlinecustomeradvocate.com.au/lib/Docs/AnnualReport/Annual_Report_2021.pdf

²⁴ <https://www.choice.com.au/about-us/media-releases/2021/november/might-as-well-put-your-complaint-in-a-shredder-choice-shonkys>

recommendations to service providers to improve their practices. The TIO's systemic investigations work can often also result in a referral to other regulators.

- The TIO is also subject to an independent review every five years, which includes public consultation and examines the TIO's role and effectiveness in contributing to better consumer outcomes in the telecommunications industry. The review reports make recommendations for improvements and are provided to the relevant Minister as well as published on the TIO's website.

4. Appropriate regulatory oversight of airports

4.1. Major airports in Australia are subject to a light-handed oversight regime

The four largest airports in Australia (Sydney, Melbourne, Brisbane and Perth) are regional natural monopolies and therefore face very little competition in the supply of their services. Airports provide a range of services, including aeronautical, car parking and landside access services. The degree of market power they hold in the supply of those services can vary. As recognised by the Productivity Commission (PC), these airports have significant market power in the provision of aeronautical services.²⁵

In Australia, providers of key infrastructure services with natural monopoly characteristics similar to those exhibited by the major airports are often subject to comprehensive economic regulation to ensure that they will not exploit their market power to the detriment of consumers.

However, the major airports are subject to a light-handed oversight regime only, which consists of periodic reviews by the PC, monitoring by the ACCC, the Australian Government's expectations set out in Aeronautical Pricing Principles and price notifications. They are not practically subject to declaration under the National Access Regime (Part IIIA of the CCA) because they are not vertically integrated. These are briefly discussed below.

Productivity Commission reviews

The PC is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues. The PC among other things conducts inquiries into different sectors of the economy such as airports.²⁶

The PC has conducted 4 inquiries into the economic regulation of airports. On each occasion, the PC has found that the monitored airports have significant market power in aeronautical services, but have not systematically exercised their market power to the detriment of the community. The Government has accepted the PC's main findings from each inquiry, while reserving the right to reconsider the existing light-handed approach to regulation in the future.

In its most recent report, the PC again recommended continuing with the existing price monitoring regime rather than reintroducing price controls or other forms of regulation, but also recommended adjustments to strengthen the monitoring regime to enhance transparency over airports' operations. The ACCC is currently finalising advice to Government on how this can be achieved.

ACCC monitoring

The ACCC's monitoring functions originate from directions issued pursuant to section 95ZF of the CCA as well as from the *Airports Act 1996* and associated regulations. The ACCC monitors revenues, costs and profits of aeronautical services at the monitored airports, along with some non-aeronautical activities (car parking and landside access activities).

The ACCC reports this information annually under a dual-till approach. This means that the ACCC separately reports on aeronautical, car parking and landside access services, which

²⁵ Productivity Commission, Economic Regulation of Airport – Inquiry report, Productivity Commission, 22 October 2019, p 11.

²⁶ Productivity Commission, About, <https://www.pc.gov.au/about#:~:text=The%20Productivity%20Commission%20is%20the, affecting%20the%20welfare%20of%20Australians.>

allows the ACCC to assess trends in each of these segments. The ACCC generally does not monitor, or report on, airports' financial performance in other non-aeronautical services, such as retailing, business parks and factory outlets.

A key limitation of the existing monitoring regime is that the data collected does not allow the ACCC to conclusively assess whether airport's profitability indicates exercise of market power. This is mainly because the various indicators and measures the ACCC uses to report on prices, costs and profits are based on historical accounting data. In addition, the data the ACCC receives is highly aggregated and does not allow analysis of individual services. Further, the ACCC has limited power in collecting certain information (for example, in relation to landside access services), which has resulted in airports providing incomplete and inconsistent information.

While the ACCC can make some observations about trends and movements in the indicators it monitors and can also make some comparisons across the monitored airports, it is not possible to conclusively determine whether the airports have been operating efficiently or whether they are earning returns that are consistent with the degree of risks they face.

In its latest report on Economic Regulation of Airports, the PC recommended to strengthen the monitoring regime to enhance transparency over airports' operations and to more readily detect the exercise of market power. Specifically, the PC recommended that:

- monitored airports are required to provide the ACCC with more detailed information on the operations and financial performance in relation to their aeronautical, car parking and landside access services, including further disaggregated reporting of costs (recommendation 9.4)
- quality of service monitoring is updated to reflect outcomes valued by airlines and passengers (recommendation 9.5).²⁷

The Australian Government agreed in principle with these recommendations and asked the ACCC to provide advice on how to implement them. The ACCC has consulted with the key stakeholders and is currently in the process of finalising its advice.

Aeronautical Pricing Principles

The Aeronautical Pricing Principles (the APPs) originated as 'Review Principles' in the Australian Government's response to the 2002 inquiry of the PC. The APPs were first published in full in 2007 as part of the Government's response to the 2006 PC inquiry.²⁸ The APPs are not part of any legislative instrument and are therefore not enforceable by private entities. However, the Australian Government considers the APPs to be a critical part of its light-handed regulatory regime for Australian airports.

A critical objective of the APPs is to assist airlines in negotiations with airports that have market power. The APPs are designed to enable airlines to obtain essential information from the airports and to provide them with an objective framework to:

- assess the reasonableness of airports' offers
- identify specific factors that are causing the parties to disagree on what prices are fair and reasonable
- seek an effective resolution of disputes between the parties.

²⁷ Productivity Commission, Economic Regulation of Airport – Inquiry report, Productivity Commission, 22 October 2019, p 42.

²⁸ Treasurer (Peter Costello), Productivity Commission Report – Review of Price Regulation of Airport Services [media release], Peter Costello, 30 April 2007.

The ACCC's 2020-21 Airport Monitoring Report, published in June 2022, identified that the APPs may not be assisting airlines in negotiation as intended.²⁹ Most of the major airports in Australia told the ACCC that they are providing detailed information to airlines and are using a building block model to inform their price offers. Some airlines have also told the ACCC that some airports are largely negotiating constructively.

However, because the APPs are unenforceable and there is no independent oversight of application of the APP, there appears to be disparity in compliance with, and understanding of, the APPs across airports in Australia. As noted in the 2020-21 Airport Monitoring Report, the ACCC considers that many airports have interpreted the APPs in a way that significantly undermines the benefits of the APPs to airlines.³⁰

Price Notifications

The ACCC has responsibility for assessing price notifications under Division 4 of Part VIIA of the Competition and Consumer Act 2010.

Price notifications apply to notified goods and services from declared firms. The Minister makes the decision on these firms, and the goods and services that are notified. These firms need to inform the ACCC of any proposed price increase to notified goods and services.

Currently there are 2 declared firms in the aviation sector:

- Sydney Airport for regional air services; and
- Airservices Australia.

The object of these provisions is to have price surveillance applied to markets where, in the view of the Minister, competitive pressures are not sufficient to achieve efficient prices and protect consumers.

The ACCC last assessed a price notification for Sydney Airport in 2013 and Airservices Australia in 2015.³¹

The National Access Regime

Airport services could potentially be regulated under the National Access Regime, which is provided for by Part IIIA of the CCA. Potential access seekers can apply to have a service declared under Part IIIA. Declaration provides a mechanism for an access seeker to gain access to nationally significant infrastructure via a negotiation-arbitration mechanism.

The assessment of whether a service should be declared is made by the National Competition Council (NCC). The NCC makes its recommendation to the designated Minister, who then makes a decision on whether the service is declared. Once declared, access seekers can seek arbitration by the ACCC if they are unable to reach agreement with the provider of the service. The Minister's decision on declaration and the ACCC's determination on the arbitration are both subject to review.

Part IIIA has little relevance to most of our ports, airports, and other monopolies that are not vertically integrated. The history of declaration decisions and court cases demonstrate that Part IIIA has primarily been interpreted to apply to vertically integrated industries to promote

²⁹ Australian Competition and Consumer Commission, *Airport Monitoring Report*, Australian Competition and Consumer Commission, 6 June 2022, p 7.

³⁰ Australian Competition and Consumer Commission, *Airport Monitoring Report 2020-21*, Australian Competition and Consumer Commission, 6 June 2022, p. 36.³¹ Information on airport and aviation price notifications, including previous price notifications, can be found here: <https://www.accc.gov.au/regulated-infrastructure/airlines-and-airports/airport-and-aviation-price-notification>.

³¹ Information on airport and aviation price notifications, including previous price notifications, can be found here: <https://www.accc.gov.au/regulated-infrastructure/airlines-and-airports/airport-and-aviation-price-notification>.

upstream and downstream competition. Part IIIA of the CCA will not act as a constraint where monopoly pricing, rather than denial of access, is the problem access seekers face.

There are also many practical issues with Part IIIA declaration process. It is lengthy, arduous, and subject to merits and judicial reviews, which can take years. The threshold for declaration is also perceived to be very high.

At present, no airport services are declared under the National Access Regime.³² Given the above, the ACCC considers it unlikely that airports consider there is a credible threat their services might be declared under Part IIIA of the CCA.

4.2. Airport regulation needs to be fit for purpose

In absence of an effective regulatory regime to constrain airports, airports could seek to maximise their profits by charging higher prices, providing lower quality of service, or both. Such behaviour would negatively impact the operation of the aviation sector and, given the critical role the sector plays in the Australian economy, reduce the productivity of the entire Australian economy.

Over nearly 20 years of monitoring prior to the COVID-19 pandemic, the ACCC has repeatedly observed in its Airport Monitoring Reports that airports achieved sustained high profit margins. For many years, aeronautical profit margins were between 40% and 50% and car parking profit margins were over 50%. The ACCC also regularly received complaints from airlines about the behaviour of major airports during negotiations.

In its 2019 report, the PC commented on high international charges at Sydney and Brisbane airports, Sydney Airport's high profitability and high operating costs at Perth Airport.³³

Although individually these findings are not conclusive, the ACCC is concerned that collectively they may indicate the current light-handed regulatory regime is not working well enough to effectively protect Australian businesses and consumers from the exercise of market power by the monitored airports.

³³ Productivity Commission, Economic Regulation of Airport – Inquiry report, Productivity Commission, 22 October 2019, p 2.

³³ Productivity Commission, Economic Regulation of Airport – Inquiry report, Productivity Commission, 22 October 2019, p 2.