



Draft Determination

Application for authorisation AA1000615

lodged by

Virgin Australia Regional Airlines and Alliance Airlines

in respect of

an extension to the Charter Alliance Agreement

Authorisation number: AA1000615

Date: 21 October 2022

Commissioners: Cass-Gottlieb
Rickard
Keogh
Brakey
Crone
Carver

Summary

The ACCC proposes to **deny authorisation** in respect of an application by Virgin Australia Regional Airlines Pty Ltd (VARA), Virgin Australia Pty Ltd (together **Virgin Australia**), Alliance Airlines Pty Ltd and Alliance Aviation Services Ltd (together **Alliance**) (the Applicants). The Applicants are seeking authorisation to enter into, and give effect to, an extension of the Charter Alliance Agreement which provides for the Applicants to coordinate and jointly tender for and supply services to corporate customers, principally for fly-in fly-out (FIFO) employees. The ACCC is not currently satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public that would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

The ACCC authorised this conduct in 2017 for a period of 5 years and, on 8 June 2022, the ACCC granted interim authorisation to enable the Applicants to continue to engage in the conduct while the ACCC is considering the substantive application.

The ACCC adopts a forward-looking approach when applying the authorisation test assessing the likely effect of the proposed conduct on competition and/or the public benefits and detriments likely to result from the proposed conduct within the period for which authorisation is sought.

Based on the evidence provided to date to the ACCC, the ACCC is not satisfied that certain benefits claimed under the previous authorisation have been realised in the past 5 years to the extent claimed by the Applicants. The ACCC has taken into account this consideration and changes in market conditions since the previous authorisation was granted to inform its current assessment of the likelihood of future public benefits and detriments resulting from the Proposed Conduct in this application.

At this stage, the ACCC considers that the Proposed Conduct is likely to result in some public benefits, specifically:

- operational efficiencies in the form of cost savings, increased flexibility and optimisation of aircraft utilisation
- enhanced products and services in the form of a more extensive integrated charter and Regular Public Transport service offering and flight connectivity.

The ACCC considers that the Proposed Conduct is likely to result in public detriments as it will continue to largely eliminate competition between VARA and Alliance.

Based on market share data provided by Virgin Australia, the Charter Alliance Agreement will remove competition between two of the three leading FIFO service providers. Two suppliers (Qantas and the Applicants) will supply the majority of FIFO services.

The ACCC is concerned that the Proposed Conduct will materially enhance the ability and incentive of the Applicants to unilaterally raise prices or reduce services.

On balance, while the ACCC considers that some public benefit is likely to arise from the Proposed Conduct, the ACCC is not satisfied in all the circumstances that the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment constituted by the lessening of competition.

The ACCC has identified a number of issues that it will consider following the release of this draft determination. These include:

- the factors that customers consider when awarding a tender contract, in particular, the value that customers place on having a national, integrated charter and RPT solution with access to value-added benefits
- whether and the extent to which the Charter Alliance Agreement has promoted

competition by imposing an additional competitive constraint on Qantas, including by providing an integrated service offering, particularly on the East Coast and in Central Australia

- the extent to which the Proposed Conduct, considered in its totality, is likely to result in a loss of competition between the Applicants that is likely to materially enhance the ability and incentive of the Applicants to unilaterally raise prices or reduce services, and therefore also impact the likelihood of pass through of any efficiencies or cost savings realised from the Proposed Conduct.

The ACCC is also conscious that existing contracts are in place under the Charter Alliance Agreement and a final determination not granting authorisation would have implications for affected parties. The ACCC will consider any submissions on this issue.

The ACCC invites submissions in relation to this draft determination by 4 November 2022 before it makes its final determination.

1. The application for authorisation

- 1.1. On 27 May 2022, Virgin Australia Regional Airlines Pty Ltd (**VARA**), Virgin Australia Airlines Pty Ltd (together **Virgin Australia**), Alliance Airlines Pty Ltd and Alliance Aviation Services Ltd (together **Alliance**) (the **Applicants**) lodged an application for authorisation (AA1000615) with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The Applicants are seeking authorisation for 5 years to enter into, and give effect to, an extension of the Charter Alliance Agreement which provides for the joint tender and supply of services to corporate customers, principally for fly-in-fly-out (**FIFO**) employees.
- 1.3. This application for authorisation AA1000615 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. The ACCC previously granted authorisation (A91552 and A91553) in 2017 to enable the Applicants to enter into and give effect to the Charter Alliance Agreement for a period of 5 years, until 9 June 2022.
- 1.5. The Applicants also requested the ACCC grant urgent interim authorisation as the previous authorisation would expire shortly after the new application was lodged. On 8 June 2022, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act.¹
- 1.6. The interim authorisation remains in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until interim authorisation is revoked.

¹ See ACCC [Interim Authorisation Decision](#), 8 June 2022.

The Applicants

Virgin Australia

- 1.7. Virgin Australia is an airline that operates a network of domestic and international Regular Passenger Transport (**RPT**) services from its main hub at Brisbane Airport in Queensland. Together with its group companies including VARA, Virgin Australia Cargo Pty Ltd and Virgin Australia International Airlines Pty Ltd, Virgin Australia services all key segments of Australian domestic airline services, including leisure, corporate and government, regional and charter, and air freight.
- 1.8. In April 2020, Virgin Australia's parent company, Virgin Australia Holdings entered voluntary administration. In November 2020, private equity firm Bain Capital acquired Virgin Australia Holdings.

VARA

- 1.9. VARA (previously, Skywest) is headquartered at Perth Airport and was acquired by the Virgin Australia Group in April 2013. VARA operates charter and RPT services between Perth and 21 regional destinations in Western Australia (**WA**).
- 1.10. VARA is primarily focused on providing charter services to support the resources industry in WA. VARA's major charter clients include Rio Tinto Iron Ore, BHP Billiton Iron Ore, Chevron, Consolidated Minerals and Gold Fields. VARA also operates regional RPT services on behalf of Virgin Australia's mainline business in WA.

Alliance

- 1.11. Alliance is an ASX listed charter provider with regional charter bases in Brisbane, Townsville, Cairns, Adelaide, Perth, Melbourne and Darwin.
- 1.12. Alliance provides charter services to a range of regional sites and mines throughout Queensland, South Australia, the Northern Territory and WA. Alliance offers RPT services on a single route (Brisbane to Moranbah), which is largely contracted out to corporate customers on a block seat basis (where one customer books a large portion of the seats on an RPT service). Five of Alliance's charter services include similar proportions of incidental numbers of RPT seats (Adelaide to Olympic Dam, Perth to Kalgoorlie-Boulder, Brisbane to Weipa, Cairns to Weipa and Cairns to Groote Eylandt).
- 1.13. Alliance also provides specialised aviation services to airlines and clients including aircraft dry² and wet leasing³, airport management for a number of its FIFO customers, and some sales and leasing of spare parts and replacement engines, and ad hoc wheel maintenance services. Alliance's wet leasing customers are Qantas and Virgin, and its only dry leasing customer is Airnorth. Alliance has FIFO service relationships with BHP Billiton, Minerals and Metals Group, Gold Fields and Newmont Mining.
- 1.14. In February 2019, Qantas acquired a 19.9% shareholding in Alliance for \$60 million. The ACCC reviewed this acquisition and advised the parties in 2022 that it would not take any action at that time. On 5 May 2022, Qantas announced its intention to acquire the remaining shares in Alliance. This is discussed below from paragraph 2.3.

² A 'dry lease' is a leasing arrangement where the lessor provides an aircraft without crew etc. Dry leases tend to be longer term arrangements.

³ A 'wet lease' is a leasing arrangement where one airline (the lessor) provides aircraft, crew, maintenance and insurance (**ACMI**) to another airline (the lessee), which markets and sells tickets for the flight and pays the operating airline by hours operated. This means the lessor receives a fixed payment for operating the flight and the lessee airline's revenue is dependent on tickets sold.

The Applicants' fleet composition

1.15. The Applicants submit that the Charter Alliance Agreement has permitted the two businesses to offer an integrated customer offering by combining their complementary operational footprints. Table 1 below identifies the aircraft type, the passenger seats per aircraft and the number of aircraft of each type in each of the Applicants' respective fleets.

Table 1 – The Applicants' fleets

Aircraft type	Passenger seats per aircraft	Number of aircraft in fleet
Virgin Australia		
Boeing 737	128 to 176	77 (used for domestic RPT and charter operations)
		Total: 77
VARA		
Fokker 100 (F100)	100	10
Airbus 320 (A320)	168 to 180	7
		Total: 17
Alliance Airlines		
Fokker 50 (F50)	50	5 ⁴
Fokker 70 (F70)	80	14
Fokker 100 (F100)	100	24
E190 jet	94 to 100	33 (17 in service, with remaining 16 settled but yet to be put into service)
		Total: 76

Source: The Applicants, [Application](#), 27 May 2022.

Wet leasing arrangements between the Applicants

1.16. In addition to the Charter Alliance Agreement, Virgin Australia and Alliance have an existing wet lease arrangement which is not contingent on the Charter Alliance Agreement.

1.17. Virgin Australia contracts Alliance to provide wet leasing for various RPT services, including on flights from Brisbane to Alice Springs, Brisbane to Emerald, Brisbane to Gladstone, Brisbane to Mount Isa, Brisbane to Newcastle and Brisbane to Rockhampton. Alliance provides aircraft, crew, maintenance and insurance (**ACMI**), with Virgin Australia retaining responsibility for all other inputs. The aircraft remain in Alliance's fleet with aircraft and crew in Alliance livery. Flights are sold as Virgin Australia services on the Virgin Australia code through Virgin Australia's distribution channels, and Virgin Australia makes scheduling and ticket pricing decisions.

⁴ Alliance announced on 8 August 2022 that it had committed to sell all 5 Fokker 50s and associated equipment.

The Proposed Conduct

1.18. The Applicants are seeking authorisation to enter into, and give effect to the Charter Alliance Agreement, which enables the Applicants to:

- jointly bid for, and contract with, corporate customers, including:
 - joint pricing and scheduling of services for those customers



- offer eligible passengers of those customers access to the Velocity frequent flyer program
- offer eligible passengers of those customers access to Virgin Australia's airport lounges as part of an integrated corporate offering
- cooperate in relation to check-in, airport operations, airport handling, service policies and other matters to improve the overall quality of service offered to corporate customers, and
- jointly optimise operations, including procurement and deployment of aircraft engines and spare parts, and maintenance and ground-handling services, to achieve cost savings and efficiencies

(the **Proposed Conduct**).

1.19. The Charter Alliance Agreement has been varied since the previous authorisation with a renewal term of 3 years until 9 June 2025, with an option to renew for a further 2-year term. No other amendments have been made beyond this renewal term.

1.20. The Charter Alliance Agreement is limited to operations in Australia. The Applicants submit that since 2017, the provision of charter services to resource companies forms the entirety of the work that the Applicants have jointly bid for under the Charter Alliance Agreement. In each case, the customer has contracted for a dedicated charter service.

1.21. The Applicants submit they have otherwise continued to independently supply air transport services to pre-existing customers, charter brokers and ad-hoc charter customers on a standalone basis.

1.22. While the supply of services to corporate customers under the Charter Alliance Agreement may include an RPT service on Virgin Australia's domestic network, the Charter Alliance Agreement does not extend to the supply of RPT services more generally.

2. Background

The previous Authorisation (A91552 and A91553)

2.1. The Applicants have been engaging in the same conduct that they are currently seeking authorisation for since 2017 (under authorisations A91552 and A91553). These authorisations expired on 9 June 2022.

- 2.2. The Applicants submit that since the previous authorisation, the Charter Alliance Agreement has allowed Alliance and VARA to jointly tender for and supply FIFO services on an integrated basis and provided them the opportunity to combine value-added services, which has resulted in several successful joint tenders (details of which have been provided to the ACCC on a confidential basis).⁵

Changes to the aviation industry since the previous authorisation

Qantas' proposed acquisition of Alliance Airlines

- 2.3. On 1 February 2019, Qantas announced it had acquired a 19.9% holding in Alliance Aviation Services Ltd for \$60m. In April 2022, the ACCC advised Alliance that it had completed its post-acquisition review of the transaction and would not be taking any further action at that time.
- 2.4. On 5 May 2022, Qantas announced its intention to acquire the remaining ordinary shares in Alliance (other than those already held by Qantas) for \$614 million by means of a scheme of arrangement under Part 5.1 of the *Corporations Act 2001* (Cth) between Alliance and the Scheme Shareholders. The ACCC commenced a public review of this proposed acquisition on 18 May 2022.
- 2.5. If Qantas completes its acquisition of the remaining shares in Alliance, Virgin Australia submits that VARA will exercise its right to terminate the Charter Alliance Agreement under contractual change of control provisions.
- 2.6. Qantas and Alliance both supply FIFO services to customers located in WA and Queensland. Key resources regions include Pilbara, Goldfields, Mt Isa, Galilee Basin and Surat Basin. These services may include contracted or ad-hoc charters, as well as RPT services, to airports located near mining and resources operations.
- 2.7. Qantas and Alliance also have a vertical relationship through wet leasing arrangements, with Qantas wet-leasing E190 aircraft from Alliance. These leasing arrangements are used by Qantas to deliver RPT services from bases in Adelaide, Darwin, Brisbane and Townsville.

Impact of COVID-19 on the aviation industry

- 2.8. The Applicants submit that there has been a shift in conditions in the aviation industry due to the COVID-19 pandemic. While the demand for RPT services substantially decreased during the pandemic as a result of movement restrictions and reduced customer confidence, the demand for long-term contract/charter services increased 35.4% in 2020-21 compared with pre-COVID levels, largely driven by the sustained activity in the resources sector. The demand for short-term and ad-hoc charter services has also increased during this period, though Alliance expects that this demand will fall as RPT services return to pre-COVID levels.⁶
- 2.9. Virgin Australia submits that smaller operators have been less impacted by COVID-19 lockdowns and related border closures as they solely provide charter services (demand for which has increased during the pandemic) as opposed to both charter and RPT services, and their operations are predominantly intra-state. This has allowed charter only operators to be able to grow their footprints and take advantage of the delay in VARA and Qantas returning to pre-COVID capacity levels.⁷ The Applicants

⁵ The Applicants, [Application](#), 27 May 2022, p 17-18.

⁶ The Applicants, [Application](#), 27 May 2022, p 8.

⁷ Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, p 11.

note that Alliance has delivered good financial results throughout the pandemic, largely due to Alliance's focus on contract and charter flight services. This is in contrast to Virgin Australia/VARA (as an integrated RPT/charter operator) which have suffered significantly from the decrease in demand for RPT services and related border closures due to the pandemic.⁸

Acquisition of National Jet Express (Cobham Aviation) by Regional Express

2.10. On 15 July 2022, Regional Express announced it had signed an agreement which would result in its subsidiary Rex Freight and Charter acquiring 100% of National Jet Express, the regional services arm of Cobham Aviation, for \$48 million.⁹

2.11. On 26 July 2022, the ACCC provided informal merger clearance to the parties for the proposed acquisition.¹⁰ On 30 September 2022, Regional Express completed its acquisition of Cobham Aviation.¹¹

Change in market conditions in the FIFO sector

2.12. The ACCC's 2017 market inquires suggested that the mining industry in WA was in the midst of a downturn in employment and mining activity during the time of the previous authorisations. This resulted in excess capacity in the FIFO sector and therefore operators were more incentivised to aggressively compete for corporate customers.¹²

2.13. The ACCC notes that the demand for FIFO services is subject to fluctuations that are dependent on mining operations. In this regard, the ACCC understands that more recently the mining industry in WA has been experiencing a sustained period of substantial growth in activity.¹³

Market shares

2.14. Virgin Australia has provided its estimates of FIFO capacity shares (in 2015 and in 2022) based on weighted aircraft capacity in WA and on the East Coast and Central Australia (as shown in Table 2 below).

2.15. Virgin Australia submits that the market share data demonstrates that:

- In WA, the Applicants' combined market share has remained constant since 2015 at 37%, while Qantas remains larger than a combined Virgin Australia and Alliance.
- On the East Coast and Central Australia, the Applicants' combined market share has increased slightly by 4%, while Qantas' market share has decreased by 19%. The reduction in Qantas' share is largely driven by the reduction in FIFO services demand in this region.
- Virgin Australia and Alliance operate largely complementary FIFO networks, with Virgin Australia concentrated in WA and Alliance on the East Coast.

⁸ The Applicants, [Application](#), 27 May 2022, p 8.

⁹ Rex, [Media Release](#), 15 July 2022.

¹⁰ Rex, [Media Release](#), 27 July 2022.

¹¹ Rex, [Media Release](#), 30 September 2022.

¹² ACCC, [Final Determination](#), 18 May 2017.

¹³ See ABC News, [Mining boom could be on the way for Australia with record-breaking exploration spend](#), 14 February 2022.

Table 2 – Share of FIFO capacity in WA and on the East Coast/Central Australia

Supplier	WA		East Coast/Central Australia	
	2015	2022	2015	2022
Qantas	47%	42%	38%	17%
VA / VARA	27%	22%	-	2%
Alliance Airlines	10%	15%	39%	41%
Cobham	12%	10%	1%	10%
Skippers	4%	8%	-	-
Air North	-	2%	3%	9%
Hevilift	1%	1%	-	10%
Pel-Air	-	-	7%	6%
JetGo			3%	-
Skytrans	-	-	7%	4%
Corporate Air			2%	1%

Source: Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties.
- 3.3. The ACCC received no submissions from interested parties in relation to the application and interim authorisation decision during the consultation period.
- 3.4. The ACCC requested further information from each of Virgin Australia and Alliance seeking further detail on the charter opportunities which were jointly bid for by the Applicants since 2017, including their views on the significance of the Charter Alliance Agreement (and the claimed benefits) for each of those opportunities. The Applicants submitted responses claiming confidentiality on part of the information provided.
- 3.5. The public versions of the Applicants' responses to the ACCC's requests for information are on the ACCC's [Authorisations public register](#).
- 3.6. The ACCC also contacted some FIFO customers in relation to procurement processes involving Virgin Australia and/or Alliance pursuant to the Charter Alliance Agreement. Specifically, the ACCC sought customers' views on the impact of the Charter Alliance Agreement since authorisation was granted in 2017, including how it may have benefited them in their tender processes, as well as the extent of incremental services provided to each customer pursuant to the Charter Alliance Agreement (by Virgin Australia, VARA and/or Alliance).
- 3.7. The ACCC's requests for information to FIFO customers are on the ACCC's [Authorisations public register](#).

4. ACCC assessment

- 4.1. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of sections 45(1)(a), (b) and (c) and 47 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the Proposed Conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).
- 4.2. The ACCC previously granted authorisation (A91552 and A91553) in 2017 to enable the Applicants to enter into and give effect to the Charter Alliance Agreement for a period of 5 years.
- 4.3. The ACCC adopts a forward-looking approach when applying the authorisation test assessing the likely effect of the proposed conduct on competition and/or the public benefits and detriments likely to result from the proposed conduct within the period for which authorisation is sought.
- 4.4. Based on the evidence provided to date to the ACCC, the ACCC is not satisfied that certain benefits claimed under the previous authorisation have been realised in the past 5 years to the extent claimed by the Applicants. The ACCC has taken into account this consideration and changes in market conditions since the previous authorisation was granted to inform its current assessment of the likelihood of public benefits and detriments resulting from the Proposed Conduct in this application.

Relevant areas of Competition

- 4.5. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.6. The Applicants support the definition of the relevant area of competition identified by the ACCC in 2017 being:

*The provision of FIFO services (inclusive of charter and RPT services) to corporate customers within Australia, and particularly within Western Australia being the one state or territory where there is significant horizontal overlap between FIFO services provided by the Applicants.*¹⁴
- 4.7. Virgin Australia also supports the ACCC's view that:
 - a) corporate customers generally have unique requirements when procuring FIFO services and will often contract for FIFO services on a route-by-route basis, with the origin, destination and scheduling of services being determined in accordance with the operational requirements of the customer, and
 - b) FIFO service operators are generally regional in scope with services generally offered directly to and from specific worksites from dedicated operating bases ('out and back services'). Given the nature of FIFO services, operational efficiencies and maximising aircraft utilisation are best achieved through operating regionally.
- 4.8. At present, the ACCC's view is consistent with that expressed in paragraph 4.6 above. The ACCC also notes that:

¹⁴ ACCC, [Final Determination](#), 18 May 2017, [91].

- a) following from 4.7(a), these services will sometimes include an RPT component, but they are generally charter services, supplemented as needed by RPT services to the origin point of the charter service, and
- b) following from 4.7(b), much of the other infrastructure necessary to provide FIFO services such as staff and ground handling services are required to be sourced by region. Accordingly, FIFO operators do not generally compete for business outside of their established regional bases.

Future with and without the Proposed Conduct

- 4.9. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.10. The ACCC considers that in the future with the authorisation, the Applicants will be able to continue to coordinate and cooperate with each other in accordance with the terms of the Charter Alliance Agreement. In this respect, the Applicants would likely continue to engage in similar arrangements.
- 4.11. The Applicants submit that absent the authorisation, they would not have the commercial incentive to cooperate with each other to the extent permitted under the Charter Alliance Agreement. VARA would have no incentive to offer Alliance access to frequent flyer benefits, and likewise, Alliance would have no incentive to allow VARA to use its aircrafts in charter tender processes. However, Alliance may have the incentive to enter into wet lease agreements with VARA for the supply of ACMI (unless and until Qantas completes its proposed acquisition of Alliance).
- 4.12. The Applicants also submit that in the future without the Proposed Conduct, it is highly unlikely that VARA will expand its FIFO operations into states and territories other than WA, due to VARA's strategic focus on the WA market.¹⁵
- 4.13. Without the Proposed Conduct, the ACCC considers that the Applicants would operate in direct competition with each other in relation to price, service, scheduling, and all other aspects of their offer in respect of competitive tender processes for charter services in WA [REDACTED]. The Applicants would also not engage in any of the broader coordination contemplated in the Charter Alliance Agreement in relation to check-in, airport operations, service policies, frequent flyer programs, lounges, joint procurement and deployment of aircraft parts, and ground-handling services.

Public benefits

- 4.14. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*¹⁶

¹⁵ The Applicants, [Application](#), 27 May 2022, p 20.

¹⁶ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

4.15. The Applicants submit that the public benefits identified by the ACCC in its final determination relating to the previous authorisation have been realised over the past 5 years and will continue to be realised if the Proposed Conduct is authorised again. Specifically, they submit that the Proposed Conduct will result in public benefits in the form of:

- operational efficiencies
- enhanced products and services, and
- promoting competition between FIFO operators.

4.16. The ACCC's assessment of the likely public benefits from the Proposed Conduct is as follows.

Operational efficiencies

4.17. The ACCC has previously accepted that improved operating efficiencies and/or avoidance of duplicated fixed costs through airline alliances are likely to result in a public benefit. However, the ACCC has generally not placed a significant weight on this as a public benefit absent strong evidence about how such savings will be achieved and whether they are likely to be passed on to customers.

4.18. The Applicants submit that the Charter Alliance Agreement has resulted in a number of operational efficiencies, which have allowed VARA and Alliance to improve efficiency and flexibility, reduce both fixed and variable costs and pass those cost reductions on to customers. The Applicants submit the key operational efficiencies that have been realised under the Charter Alliance Agreement include:¹⁷

- alignment of procedures and processes at Perth Airport
- access to complementary fleet sizes
- avoiding costs of expanding fleet
- reducing Aircraft, Crew, Maintenance and Insurance (ACMI) costs including avoiding costs of replacing F100 engines,
- reducing variable costs.

4.19. The ACCC has assessed the likely extent of operational efficiencies claimed by the Applicants within each of the following categories. Where applicable, these categories also account for possible efficiencies resulting from the provision of an integrated national charter and RPT offering.

Alignment of procedures and processes at Perth Airport

4.20. The Applicants submit that VARA and Alliance have aligned their airport and ground handling procedures and processes at Perth Airport for Charter Alliance customers, which has reduced costs and improved T1 (international terminal) to T2 (VARA/Alliance domestic terminal) connections at Perth Airport, reducing connection transfer times for FIFO passengers, especially during times of schedule disruptions.¹⁸

¹⁷ The Applicants, [Application](#), 27 May 2022, p 21-23.

¹⁸ The Applicants, [Application](#), 27 May 2022, p 22.

- 4.21. Virgin Australia also submits that VARA and Alliance have carried out necessary training (for relevant staff members) on operating on each other's aircraft to enable safe and efficient aircraft cross-hire between both parties. This, Virgin Australia submits, will enable either party to respond quickly and flexibly to charter customers' requirements and access each other's available fleet capacity to meet charter customers' changing schedule requirements that may not be adequately supported by either party on its own.¹⁹
- 4.22. While the ACCC accepts that the Charter Alliance Agreement is likely to result in some operational efficiencies (and therefore cost savings) through the alignment of procedures and processes at Perth Airport, it is not satisfied that these cost savings will necessarily be passed through to customers, including because there will be reduced competition in the market as a result of the Charter Alliance Agreement largely eliminating competition between the Applicants in WA.
- 4.23. To the extent there may be improved connections and reduced connection transfer times for FIFO passengers, this has been considered in paragraph 4.50 below.

Access to complementary fleet sizes

- 4.24. The Applicants submit that combining fleets gives each party access to a diverse range of aircraft, fleet scalability and unlocks operational flexibility, which gives VARA access to Alliance's 80-seat and 100-seat F70 and F100 aircraft (particularly as VARA gradually retires and replaces its F100 aircraft) and gives Alliance access to VA and VARA's fleet of higher capacity aircraft including 168 to 180 seat A320s and B737s.²⁰
- 4.25. Virgin Australia submits that having access to each other's available fleet types and established set of operations permits either party to respond quickly and flexibly to charter customers' requirements, by scaling up and down numbers of aircraft and aircraft type in response to changes, to most efficiently service customer needs.²¹
- 4.26. Virgin Australia submits that in a future without the Proposed Conduct where VARA and Alliance may utilise lease arrangements to obtain complementary fleet capacity:
- the parties would need to independently lease different fleet types (as well as additional aircraft of the same fleet type), which would be highly cost-prohibitive due to these fleets being sub-scale
 - it would add complexity and cost to business operation due to issues relating to recruiting, training, and maintenance,
 - it does not provide a complete solution that would enable VARA and Alliance to collaborate to respond to customers' needs across a range of services and does not allow for incremental and ad-hoc additions of capacity.²²
- 4.27. In the previous authorisation in 2017, the ACCC considered that the broader mix of aircraft available to the Applicants under the Charter Alliance Agreement was likely to result in efficiencies through increased flexibility and optimisation of aircraft utilisation.
- 4.28. The ACCC notes that wet lease arrangements are able to provide a degree of operational flexibility by providing airlines with access to aircraft in addition to their own

¹⁹ Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 8-9.

²⁰ The Applicants, [Application](#), 27 May 2022, p 22; Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 9.

²¹ Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 9.

²² Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 9-10.

fleets. Absent the Charter Alliance Agreement, it would be open to the Applicants to enter into wet lease agreements with each other and/or with other airlines. While wet leasing arrangements provide each airline with a degree of operational flexibility, the ACCC considers that the Charter Alliance Agreement is likely to provide a greater degree of flexibility at a lower cost allowing either party to respond more quickly and flexibly to customer needs than would otherwise be the case.

Avoiding costs of expanding fleet and operating bases

- 4.29. The Applicants submit that by combining fleet capacity (and through cross-hire arrangements), VARA and Alliance have not had to unnecessarily invest in additional aircraft, where doing so would be uneconomical.²³ This has enabled both parties to maintain a competitive cost base and submit compelling price proposals to charter customers. For example, Virgin Australia submits that having access to Alliance's F100 fleet has allowed VARA to avoid the need to invest in an ageing fleet platform, while permitting it to address any short-term capacity gaps in servicing its contracted clients and provide conforming bids where F100 aircraft are required.²⁴
- 4.30. Virgin Australia also submits that having access to Alliance's wider geographical operating base network under the Charter Alliance Agreement has allowed VARA (whose only operational base is in Perth) to participate in the provision of a national charter solution to customers while avoiding the prohibitive costs of expanding its operating bases to other States or Territories.²⁵
- 4.31. The ACCC notes that the Applicants have provided examples of how combining fleet capacity and operating bases has allowed the Applicants to address capacity issues, make more conforming bids or provide a national solution. The ACCC acknowledges that this may be a public benefit arising from the Charter Alliance Agreement as assessed as enhanced services or promoting competition. However, it is unclear what the Applicants' future fleet or operating base expansion plans would be in the future without the Proposed Conduct and therefore it is unclear the extent of any cost savings from the avoidance of expanding their fleet or operating bases. The ACCC considers the avoidance of costs associated with undertaking conduct that would not have otherwise been undertaken in any case, is not a cost saving.
- 4.32. The Applicants have not provided evidence of how these cost savings (if present) have been passed through to their customers.
- 4.33. In relation to the Charter Alliance Agreement providing VARA access to Alliance's operating bases specifically, the ACCC understands that VARA has not utilised these bases to participate in the provision of a national charter solution since 2017. Given VARA's strategic focus on the WA market,²⁶ this is unlikely to change in the future with the authorisation. Further, the ACCC notes that as VARA has indicated it is highly unlikely that it would consider expanding its FIFO operations into states and territories other than WA without the authorisation, it is unclear what this claimed cost saving is relative to.
- 4.34. Therefore, the ACCC is not satisfied that the Charter Alliance Agreement would be likely to result in a public benefit from VARA avoiding the costs of expanding its operating fleet and operating bases.

²³ The Applicants, [Application](#), 27 May 2022, p 22.

²⁴ Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, p 9; Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 10.

²⁵ Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 10.

²⁶ The Applicants, [Application](#), 27 May 2022, p 20.

Reduced ACMI costs, including avoiding costs of replacing F100 engines

- 4.35. The Applicants submit that the Charter Alliance Agreement has allowed VARA and Alliance to achieve ACMI cost savings, particularly in relation to maintenance costs for F100 engines and major components.²⁷ Virgin Australia submits that an example of this was in 2017 and 2018, when VARA entered into an arrangement for the maintenance of F100 aircraft with Alliance's supplier of heavy maintenance services. It claims that this introduced pricing tension with VARA's heavy maintenance service provider, which subsequently reduced its rates for VARA (quantification was provided to the ACCC on a confidential basis). Virgin Australia submits that VARA would have been unable to introduce this pricing tension with its supplier without its relationship with Alliance.²⁸
- 4.36. The ACCC considers that it is unclear why, absent the Charter Alliance Agreement, it would not be open to VARA to engage in a competitive procurement process for heavy maintenance services (or for other relevant services) and achieve the same or similar level of pricing tension than what it submitted was achieved under the Charter Alliance Agreement. Therefore, the ACCC is not satisfied based on this information that the Charter Alliance Agreement would be likely to result in a public benefit in the form of cost savings from reduced ACMI costs.
- 4.37. The Applicants also submit that the Charter Alliance Agreement has enabled VARA to avoid incurring costs of replacing its F100 aircraft engines by taking advantage of Alliance's spare aircraft parts, inventory, and F100 fleet capacity. Virgin Australia submits that the cost savings from avoiding engine replacement costs (quantification was provided to the ACCC on a confidential basis) has allowed VARA to avoid passing on significant cost increases to customers in the form of increased charter prices.²⁹
- 4.38. While the ACCC recognises that the Charter Alliance Agreement has enabled the Applicants to achieve some cost savings from avoiding costs of replacing its F100 engines, the ACCC also notes that VARA currently plans to gradually retire its F100 aircraft from its fleet from first quarter 2023.³⁰ Therefore, the ACCC considers that any benefit from avoiding costs of replacing F100 engines is likely to be reduced compared to the previous authorisation in 2017, is limited to the current lifespan of VARA's F100 aircraft, and in any case, will likely exist with or without the Charter Alliance Agreement following the retirement of VARA's F100 aircraft.

Reduced variable costs

- 4.39. The Applicants submit that the Charter Alliance Agreement increased the Applicants' bargaining power in respect of Perth Airport's per passenger taxes, resulting in reductions of per passenger taxes paid by VARA which was generally passed on to customers in its entirety.³¹
- 4.40. While the ACCC recognises that VARA was able to negotiate reductions of per passenger taxes at Perth Airport and pass on these reductions to customers, it is unclear whether these cost savings were attributable to the operation of the Charter Alliance Agreement. Given both VARA and Alliance negotiate aeronautical charges with Perth Airport individually, it is unclear whether the cost reduction, and

²⁷ The Applicants, [Application](#), 27 May 2022, p 22-23.

²⁸ Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 12.

²⁹ The Applicants, [Application](#), 27 May 2022, p 22-23; Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 12.

³⁰ Virgin Australia, [Fleet growth positions Virgin Australia for higher capacity, lower emissions](#), 29 April 2022.

³¹ The Applicants, [Application](#), 27 May 2022, p 22-23.

consequently any potential benefit to consumers, was largely attributable to some other factor that would have occurred with or without the operation of the Charter Alliance Agreement, such as the emerging growth trend of WA's resource industry. The ACCC is therefore not satisfied that the reduction of per passenger taxes at Perth Airport paid by VARA would have been any different with or without the operation of the Charter Alliance Agreement.

- 4.41. It is unclear in the future with the Proposed Conduct that the Charter Alliance Agreement is likely to result in reduced variable costs for VARA through an improved negotiating position with Perth Airport. The ACCC will further test this issue with market participants following this draft determination.

Conclusion on operational efficiencies

- 4.42. The ACCC recognises that the Charter Alliance Agreement has resulted in some operational efficiencies, resulting in cost savings for the Applicants.
- 4.43. The ACCC considers that efficiencies are a public benefit in and of themselves. However, the ACCC gives greater weight to the realisation of efficiencies where they are likely to be passed through to consumers in the form of lower fares or better services.
- 4.44. The ACCC considers that the likelihood of efficiencies achieved by the Charter Alliance being passed through to users and the degree of such pass through will depend on competitive conditions region to region (particularly in WA where many of the operational synergies will be primarily realised) and year to year.
- 4.45. As discussed at paragraphs 4.94 to 4.101 below, the ACCC considers that the Charter Alliance Agreement will largely eliminate competition between VARA and Alliance in WA. The ACCC is concerned that this will materially enhance the ability and incentive of the Applicants to engage in unilateral conduct and be less likely to pass through any cost savings realised.
- 4.46. As such, while the ACCC recognises that the Charter Alliance Agreement is likely to lead to some efficiencies, and therefore cost savings, through the integration of services, alignment of procedures at Perth Airport and access to complementary fleets, as it is unclear that that these cost savings are likely to be passed through to customers, the ACCC has placed less weight on these cost savings in assessing public benefit.

Enhanced products and services

- 4.47. The Applicants submit that public benefits in the form of an enhanced product and service offering have been realised under the Charter Alliance Agreement, including:
- better scheduling and fewer flight delays,
 - frequent flyer benefits and other value adds.³²
- 4.48. The Applicants submit that the above enhancements in products and services offered under the Charter Alliance Agreement flow directly to customers.
- 4.49. At this stage, the ACCC considers that the ability to provide a national, integrated charter and RPT service solution under the Charter Alliance Agreement may constitute

³² The Applicants, [Application](#), 27 May 2022, p 24 [REDACTED]

an enhanced product and service offering. Therefore, the ACCC has also assessed it under this category of claimed public benefit.

Better scheduling and less flight delays

- 4.50. The Applicants submit that the ability to jointly schedule services, access to a larger fleet, and access to a larger pool of pilots and cabin crew has allowed the Applicants to optimise the timing and frequency of their services to offer better flight times (including during peak FIFO flying times) and better flight connectivity, and to reduce the risk of missed connections and lost luggage.³³
- 4.51. Virgin Australia submits that VARA has also used Alliance's aircraft on various occasions on an ad-hoc basis to ensure schedule integrity for customers during times of limited aircraft availability. In total, between June 2017 and 16 September 2022, VARA has utilised Alliance aircraft to operate a total of 1124 sectors, inclusive of ad-hoc services. VARA also requested Alliance capacity during times of fleet availability limitations due to unscheduled aircraft maintenance events.³⁴
- 4.52. The ACCC accepts that that the ability to optimise the timing and frequency of services under the Charter Alliance Agreement is likely to result in efficiencies through better scheduling of services and reduced flight delays.

Frequent flyer benefits and other value adds

- 4.53. The Applicants submit that the Charter Alliance Agreement has enabled Alliance's passengers to benefit from access to the Velocity Frequent Flyer program, including the accrual of frequent flyer points, in-flight entertainment and Velocity member lounge access.³⁵
- 4.54. Virgin Australia submits that for many resources customers, the ability to offer their employees the chance to earn points is an important employee recruitment and retention benefit. Virgin Australia submits that absent the Charter Alliance Agreement, passengers travelling on Alliance-operated charter services would be unable to earn and redeem frequent flyer points as Alliance does not (and would not) operate its own frequent flyer program.³⁶
- 4.55. Virgin Australia also submits that the ability to offer frequent flyer benefits has assisted in the Charter Alliance's competitiveness in responding to tenders and allows greater competitive constraint to be placed on Qantas by providing customers who want this benefit with a choice of operators. Virgin Australia submits that even if these services are not specifically required in a request for tender, the ability to provide them delivers choice and enhanced service for customers and their employees.³⁷
- 4.56. Whilst the ACCC recognises the ability to offer frequent flyer benefits provides choice and enhanced services for customers, the value that customers place on this may differ.
- 4.57. Further, the ACCC understands that access to frequent flyer benefits is just one way employers can offer benefits to employees, which comes at a cost to the employer. However, the ACCC accepts that the Proposed Conduct would allow the Applicants to

³³ The Applicants, [Application](#), 27 May 2022, p. 23-24.

³⁴ Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 4, 12.

³⁵ The Applicants, [Application](#), 27 May 2022, p. 24.

³⁶ Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 13.

³⁷ Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p 3, 13.

provide these services at a lower cost, and potentially on a broader range of flights than without the Proposed Conduct.

- 4.58. The ACCC will explore this issue further with customers following this draft determination.
- 4.59. The ACCC accepts that where permitted, passengers value the ability to travel for leisure using points earned while travelling for business with their employer's preferred airline. The ACCC considers that the ability to accrue Velocity frequent flyer points on Alliance flights is likely to be valued by passengers who use Alliance services and are members of the Velocity frequent flyer program. Similarly, access to Virgin Australia lounges when flying with Alliance is likely to be valued by eligible passengers.
- 4.60. Therefore, while having access to frequent flyer programs does provide some public benefit to the employees of charter customers, the ACCC is not satisfied that this feature will significantly impact the competitive outcomes of tender processes run by corporate customers by promoting competition.
- 4.61. The ACCC considers that absent access to Virgin Australia's frequent flyer program under the Charter Alliance Agreement, there remains sufficient scope for Alliance to compete for charter contracts despite not being able to offer an in-house frequent flyer program or other value-added services.

National integrated charter and RPT service offering

- 4.62. The ACCC recognises that to the extent certain corporate customers value having an integrated national charter and RPT service offering, the Charter Alliance Agreement is likely to provide increased choice for these customers, and therefore may result in some public benefit.

[REDACTED]

Based on confidential information provided by Virgin Australia, the ACCC understands that between [REDACTED] there were [REDACTED] charter opportunities for which the Applicants entered a joint bid where the customer specifically requested both charter and RPT services. [REDACTED] resulted in the customer awarding both charter and RPT portions to a single provider.³⁹

- 4.63. The ACCC also recognises that, to the extent that these integrated services are offered and provided under the Charter Alliance Agreement, there is likely to be some public benefit resulting from the Proposed Conduct regardless of the significance placed on this factor by customers when deciding which provider to award tender contracts to. The extent of the public benefit will depend on the extent that the customer and their employees value such a service. The ACCC will consult further with market participants to assist in assessing the extent of this benefit.

Conclusion on enhanced products and services

- 4.64. In conclusion, the ACCC considers that the Charter Alliance Agreement is likely to result in some public benefits by allowing the Applicants to offer better flight times and to reduce the risk of missed connections, and through eligible Alliance passengers

³⁸ [REDACTED]

³⁹ Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, p. 3.

being able to accrue Velocity frequent flyer program points and/or access Virgin Australia lounges.

- 4.65. Further, the ACCC considers there is the potential that the Charter Alliance Agreement will result in some small public benefits from the provision of a national integrated solution to corporate customers who demand and value this form of service.

Promotion of competition

- 4.66. The Applicants submit that the Charter Alliance Agreement will promote competition between suppliers of FIFO services, including by providing an alternative integrated offer to customers.
- 4.67. The Applicants submit that the Charter Alliance Agreement enables VARA and Alliance to submit joint tenders which provide a national, integrated RPT and charter solution by combining their complementary fleets.⁴⁰ The Charter Alliance Agreement enables VARA to provide a national charter solution to corporate customers through access to Alliance's national charter network and enables Alliance to offer an integrated RPT and charter offering by utilising Virgin Australia's RPT operations, in addition to value-added services such as Virgin Australia's frequent flyer program.⁴¹
- 4.68. Virgin Australia submits that many major resource companies carry out competitive tender processes for both charter and RPT services and require a national charter solution. In this regard, the Charter Alliance Agreement will enable the Applicants to continue to submit joint tenders which provide a more compelling joint proposition than standalone proposals.⁴²
- 4.69. As noted, Alliance offers charter services through an extensive Australia wide network but only offers a very limited range of RPT services. Specifically, Alliance offers a small number of scheduled RPT flights to a limited number of destinations (Adelaide-Olympic Dam, Perth/Kalgoorlie-Boulder; Brisbane-Moranbah; Brisbane/Weipa; Cairns/Weipa; and Cairns/Groote Eylandt) which are almost entirely contracted out to corporate customers on a block seat basis. VARA currently only offers charter services in WA and operates a limited number of RPT services on behalf of Virgin Australia in WA.
- 4.70. Accordingly, while there is significant overlap between the Applicants' operations in relation to charter services in WA, the Applicants' services elsewhere are largely complementary, with VARA (through Virgin Australia) having a strong RPT presence and no charter service operations and Alliance having an extensive charter service network but minimal RPT operations.
- 4.71. While the Charter Alliance Agreement provides an opportunity for the Applicants to offer a national integrated charter and RPT service which neither airline could offer on its own, in practice it appears that only a narrow segment of customers actually seek or value having a single airline or alliance providing such a service. The ACCC will further test this issue with market participants following this draft determination.
- 4.72. The ACCC understands that corporate customers are willing to conduct split tender processes for both their charter and RPT needs and across different regions or routes,

⁴⁰ The Applicants, [Application](#), 27 May 2022, p 21.

⁴¹ Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, p 9.

⁴² Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, p 9.

[REDACTED]

4.73. Accordingly, the ACCC has assessed the likelihood and potential extent of the Charter Alliance Agreement promoting competition between FIFO suppliers separately for the East Coast/Central Australia, and WA.

East Coast and Central Australia

4.74. Virgin Australia submits that the Applicants have been able to provide a more extensive product and service offering on the East Coast and Central Australia, which has allowed the Applicants to compete with Qantas for contested contracts. In particular, the Applicants are able to offer a complementary fleet of aircrafts (between 80-176 seats) which can more strongly compete with Qantas, who can offer aircrafts at various capacities (between 36-180 seats and beyond). While the Applicants have not successfully won any contracts from Qantas under the Charter Alliance, they contend that they have developed compelling offers which have forced Qantas to respond, including to maintain its position as incumbent supplier in some cases.

4.75. Virgin Australia submits that extending the Charter Alliance Agreement would enable the Applicants to continue to compete with Qantas and other operators on the East Coast and Central Australia. In the absence of the Charter Alliance, Virgin Australia contends that Qantas would be the only major FIFO operator supplying integrated charter solutions on the East Coast and Central Australia.⁴⁴

4.76. To better understand the impact that the Charter Alliance Agreement has had on competition on the East Coast and in Central Australia, the ACCC asked Alliance for confidential tender data outlining all opportunities for which the Applicants had jointly bid under the Charter Alliance Agreement. In response, [REDACTED]

[REDACTED]

The ACCC will explore this aspect further in its assessment.

4.77. The ACCC does not consider that the ability of the Applicants to jointly compete for contracts under the Charter Alliance Agreement on the East Coast and Central Australia is likely to significantly increase the competitive options available to customers for the reasons below.

4.78. First, the Applicants [REDACTED] on the East Coast and/or in Central Australia.

4.79. Second, the ACCC considers that only a narrow segment of customers require operators to offer a national integrated charter and/or RPT service at the exclusion of

⁴³ Alliance Airlines, [Alliance's response to ACCC request for information](#), 13 September 2022.

⁴⁴ Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, p 10-11.

⁴⁵ [REDACTED]

those who are unable to provide this integrated service. The ACCC understands that most customers are willing to conduct split tender processes for their charter and RPT needs.

- 4.80. The ACCC recognises competitive bids by any of the Applicants for services on the East Coast and Central Australia may be incrementally improved by the Charter Alliance Agreement (such as through RPT services, cost savings that are passed through, the availability of additional support capacity or through value-added services) and that this may impose additional competitive constraint on Qantas. However, based on the information available to the ACCC to date, the extent of any such benefit is unclear. The ACCC considers that the information provided to date does not support a view that this benefit has been realised by the Applicants under the previous authorisation.
- 4.81. The ACCC considers it is unlikely that this benefit will be realised in the future if the Proposed Conduct is authorised, based on the information available. Therefore, at this stage the ACCC is not satisfied that the Proposed Conduct is likely to result in any material public benefit in the form of improved competition on the East Coast and Central Australia. The ACCC will further explore the potential for any pro-competitive outcomes arising from the Proposed Conduct on the East Coast and Central Australia.

Western Australia

- 4.82. Virgin Australia submits that the Charter Alliance Agreement has enabled the Applicants to compete against Qantas in WA more effectively than either airline could have done alone.⁴⁹
- 4.83. The ACCC acknowledges that the broader mix of aircraft available to the Applicants under the Charter Alliance Agreement may enhance their competitiveness in WA by allowing them to offer aircraft with capacities similar to those offered by Qantas. However, the ACCC considers that this expanded fleet capacity under the Charter Alliance Agreement is unlikely to impose significantly greater competitive constraint on Qantas.
- 4.84.
- 4.85. The ACCC recognises that, to the extent there may be situations where under the Charter Alliance Agreement, the Applicants submitting an unsuccessful joint bid may in and of itself provide additional competitive constraint on Qantas (over and above if, absent the Charter Alliance Agreement, the Applicants both bid independently) and this may require Qantas, as the incumbent or competitive bidder, to improve its offer to customers. However, based on the information available to date, the ACCC is not satisfied that the Charter Alliance Agreement has imposed a significant degree of

⁴⁷ Alliance Airlines, [Alliance's response to ACCC request for information](#), 13 September 2022.

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⁴⁹ Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, p 12.

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additional competitive constraint on Qantas in WA as compared to the Applicants bidding independently.

- 4.86. The ACCC understands that it is not uncommon for operators to submit non-compliant bids in response to a tender, and that doing so does not necessarily preclude an operator from successfully winning some or all work under a particular tender.
- 4.87. Further, the ACCC notes that it is not uncommon for customers to award different routes under the same charter portion of a tender to separate operators, to fill the requirements of the tender.
- 4.88. The ACCC notes that further consultation with market participants may elicit additional information to assist in assessing the extent of this possible benefit through increased competitive constraint on Qantas.

Public detriments

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

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*⁵¹

- 4.90. In conducting its assessment of any likely public detriments, the ACCC has considered whether the Proposed Conduct may have:
- unilateral effects, and
 - coordinated effects.

Unilateral effects

- 4.91. One of the main ways in which an airline alliance can lessen competition is through unilateral effects. An alliance can have unilateral effects if it removes or weakens competitive constraints in such a way that the alliance partners find it profitable to raise prices, restrict output or otherwise exercise any market power they may acquire as a result of the alliance, despite any expected response from other competitors.
- 4.92. The Applicants submit that any potential risk of unilateral effects will be mitigated by the following factors:
- there are many competitors to the Charter Alliance, in particular large operators such as Qantas
 - there are many smaller competitors who successfully compete with the Charter Alliance and Qantas, such as Skippers, Cobham and HEVILIFT, and
 - most (if not all) FIFO customers are resource companies who have significant bargaining power which they may exercise through their procurement processes.⁵²
- 4.93. Outside of WA, there is currently no significant overlap in FIFO services supplied by VARA and Alliance. The ACCC considers that this is likely to remain the case without the Charter Alliance Agreement. The ACCC also notes that the competitive overlap between VARA and Alliance will likely reduce as VARA's remaining 10 Fokker 100 aircraft move closer to the end of their life spans in the next 5 years.

⁵¹ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

⁵² Applicants, [Application](#), 27 May 2022, p 24.

- 4.94. In WA, the Applicants each supply charter and some RPT services. The ACCC considers that the Charter Alliance Agreement has largely eliminated the competition between VARA and Alliance for the majority of charter opportunities in WA. This includes opportunities that fall within the scope of a joint bid under the Charter Alliance Agreement, [REDACTED]
- 4.95. The ACCC is concerned that the elimination of this rivalry will increase the incentive for the Applicants to unilaterally raise prices when tendering to supply charter services in WA. The ACCC considers this is likely for a number of reasons.
- 4.96. First, based on Virgin Australia's market share data (see Table 2 above), the Charter Alliance Agreement will remove competition between two of the three leading FIFO service providers. More importantly, 2 suppliers (Qantas and the Applicants) supply and will likely continue to supply the majority of FIFO services. Further consultation with interested parties may elicit additional information to assist in assessing market shares.
- 4.97. While the ACCC recognises that the Applicants will continue to face competition from Qantas, which has a broad network and a wide range of seat capacity aircraft, the extent of constraint exerted by suppliers including Cobham and to a lesser extent Skippers, is confined to certain regions and customers. Further consultation with market participants may elicit additional information to assist in assessing the extent of this competition. Further, the ACCC considers that the Applicants' enhanced market position since the previous authorisation (according to Virgin Australia's market share data above) combined with the [REDACTED] will likely provide the Applicants with a degree of freedom to profitably raise prices.
- 4.98. Second, it does not appear that smaller providers of FIFO services impose a strong competitive constraint on the Applicants.
- 4.99. Third, new entry into the provision of FIFO services in WA on the scale necessary to compete with the major operators does not appear to be likely, even in the event the Applicants raise prices. A decision to commence offering FIFO services is likely to involve significant costs not least being the cost of establishing a base in WA. These costs are unlikely to be recovered if an entrant subsequently decides to exit. While the ACCC recognises that Hevilift has recently expanded its operations into WA following the previous authorisation, the ACCC is not satisfied that Hevilift, which does not operate jet aircraft, has the operational capability or fleet scale that is likely to meaningfully constrain the Applicants under the Charter Alliance Agreement. Further consultation with market participants may elicit additional information to assist in the assessment of barriers to entry.
- 4.100. The ACCC does recognise that there is scope for synergies and complementarities that may result from the Charter Alliance Agreement to enable the Applicants to reduce costs and make better, not worse, offers to customers. Such synergies and complementarities may, at least to some degree, offset the effect of the increase in concentration on the incentives for the Applicants to compete aggressively.
- 4.101. However, notwithstanding this, the ACCC is concerned that the Charter Alliance Agreement will materially enhance the ability and incentive of the Applicants to unilaterally raise prices or reduce service, and the associated public detriment, whilst uncertain is likely to be significant. In this regard, the ACCC will further consult with interested parties on the Proposed Conduct in its totality to understand and assess the potential impact on the competitive dynamics.

Co-ordinated effects

- 4.102. Another potential source of competitive harm from the Charter Alliance Agreement is that it may increase the risk of coordinated conduct among airlines supplying FIFO services. Coordinated conduct in this sense involves competing airlines recognising and accommodating their mutual interdependence (explicitly or tacitly) by not competing as aggressively as they otherwise would.
- 4.103. The Applicants submit:
- the Charter Alliance has not resulted in any co-ordinated conduct among suppliers of FIFO services, including in WA. Suppliers of FIFO services have continued to compete aggressively for customers, driven by excess capacity as a result of the COVID-19 pandemic, fleet expansions by existing operators, and competition from new entrants
 - any accommodating commercial strategies between suppliers of FIFO services, including in WA, are unlikely to occur in the future as the nature of FIFO services entails those commercial terms, including prices, usually remaining confidential between the contract parties. Furthermore, the services required are tailored to each customer such that multiple airlines are rarely providing the same service on the same route, and the long-term nature of FIFO contracts means that operators are only periodically competing for customers, and
 - customers' strong bargaining power in contract negotiations with suppliers of FIFO services, and the existence of other viable alternatives such as Qantas and Cobham and other smaller and medium operators, further mitigates the possibility of coordinated conduct.⁵³
- 4.104. As noted previously, based on Virgin Australia's market share data (see Table 2 above), the Charter Alliance Agreement reduces the number of independent major suppliers of FIFO services in WA which have sufficient scale and fleet composition to compete for larger corporate customers. The ACCC considers this could alter the nature of interdependence between competitors such that coordinated, rather than competitive conduct, is more likely, complete, or sustainable.
- 4.105. If the remaining major independent suppliers recognise that any short-term benefits from competition will likely be eroded by lost sales once their remaining competitors respond, they may individually decide to engage in a strategy of accommodating each other by not competing as strongly as they currently do. This type of behaviour (tacit collusion) does not require explicit agreement between FIFO operators. Rather, they may signal to each other that they will not compete on price or other aspects of their offers. All else being equal, the smaller the number of competitors in a market, the greater the ability and incentive to engage in such a strategy.
- 4.106. The ACCC also considers there are market features along with a number of changes that have occurred in the FIFO market since 2017 which increase the likelihood and risk of coordination among FIFO suppliers, including:
- Qantas' acquisition of 19.9% of Alliance increases the risk of collusion and coordination between the 3 largest FIFO suppliers in WA

⁵³ Applicants, [Application](#), 27 May 2022, p 25.

- the increase in demand for FIFO services in WA in recent years is likely to result in a shortfall in capacity leading to reduced incentive for FIFO operators to compete aggressively in the sector
 - there is generally a low number of bidders for each specific tender.
- 4.107. On the other hand, there are a number of characteristics of the manner in which FIFO services are provided that tend to mitigate concerns about the greater potential for coordinated conduct as a result of the Charter Alliance Agreement.
- 4.108. It is difficult for charter service providers to anticipate the actions and reactions from their competitors and devise accommodating commercial strategies accordingly because, unlike RPT services:
- there is little transparency about prices charged for FIFO services – FIFO services are negotiated, usually through tender, with supply terms, including price, remaining confidential between the parties
 - customer FIFO service requirements are diverse and specific, and generally the customer will appoint a single airline on each route such that competing airlines are rarely operating on the same routes or providing broadly equivalent services, and
 - the sustainability of coordination rests upon repeated interaction, since the prospect of future retaliation discourages firms from pursuing more competitive strategies. However, FIFO contracts are long term in nature (generally several years) such that there is not regular, repeated competitive interaction in relation to specific customers – in this sense there is periodic competition for segments of the market rather than ongoing competition in the market.
- 4.109. In addition, the ACCC understands that there may be a significant amount of non-price competition in competing to supply charter services. Other factors that customers may identify as being particularly important in choosing a charter service provider include fleet mix, scheduling flexibility, reliability and back up support. It may be more difficult for airlines to coordinate in relation to these aspects of their service offerings.
- 4.110. However, these characteristics do not eliminate the risk of coordinated conduct. For example, coordinated conduct among FIFO service providers could simply take the form of a tacit understanding to not compete as aggressively for customers who are currently supplied by other operators as their contracts come up for renewal. Where there are fewer firms supplying services, there is a greater risk of tacit collusion, particularly in circumstances where two suppliers (Qantas and the Applicants) will supply the majority of FIFO services in WA. This is exacerbated by the fact that Qantas acquired 19.9% of Alliance in 2019, which may increase the risk of tacit collusion due to the common ownership interest.
- 4.111. In conclusion, the ACCC considers that, in the future with the Proposed Conduct, there is likely to be increased risk of coordinated conduct occurring in WA. However, having regard to the factors discussed above, the ACCC considers that any increase in the likelihood of coordinated conduct occurring in WA, and the resulting public detriment, is uncertain and unlikely to be significant.

Balance of public benefit and detriment

- 4.112. The ACCC considers that the Charter Alliance Agreement is likely to result in some public benefits in the form of:
- operational efficiencies in the form of cost savings, increased flexibility and optimisation of aircraft utilisation. While these efficiencies are a public benefit in and of themselves, the ACCC has placed less weight on them given the ACCC's concern that the Charter Alliance Agreement may result in a lessening of competition, and thus it is unlikely that the benefits of these efficiencies will substantially be passed through to customers
 - enhanced products and services through the provision of a more extensive integrated charter and RPT service offering, and the connectivity of flights.
- 4.113. Based on the evidence provided to date to the ACCC, the ACCC is not satisfied that certain benefits claimed under the previous authorisation have been realised in the past 5 years to the extent claimed by the Applicants. The ACCC has taken into account this consideration and changes in market conditions since the previous authorisation was granted to inform its current assessment of the likelihood of future public benefits and detriments resulting from the Proposed Conduct in this application.
- 4.114. The ACCC considers that it is unclear to what extent the claimed benefits are likely to result from the Proposed Conduct in the period of authorisation sought.
- 4.115. The ACCC considers that the Charter Alliance is likely to result in public detriment. The Charter Alliance is likely to lessen competition for the provision of FIFO services in WA. It will largely eliminate competition between VARA and Alliance, two of the three leading FIFO service providers, based on Virgin Australia's market share data. More importantly, 2 suppliers (Qantas and the Applicants) will supply the majority of FIFO services. The ACCC is concerned that this will materially enhance the ability and incentives of the Applicants to unilaterally raise prices, reduce service levels or reduce the intensity of competition.
- 4.116. For the reasons outlined in this draft determination, while the ACCC considers that some public benefit is likely to arise from the Proposed Conduct, the ACCC is not satisfied, in all the circumstances, that the Proposed Conduct is likely to result in a public benefit that would outweigh the public detriment that would be likely to result from the Proposed Conduct, including any lessening of competition. Accordingly, the ACCC does not propose to grant authorisation.

5. Draft determination

The application

- 5.1. On 27 May 2022, the Applicants lodged application for authorisation AA1000615 with the ACCC, seeking authorisation under subsection 88(1) of the Act. The Applicants seek authorisation for the Proposed Conduct defined at paragraph 1.18.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is not satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public that would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes not to grant authorisation.
- 5.6. This draft determination is made on 21 October 2022.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination, by 4 November 2022. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.