

PUBLIC REGISTER VERSION - RESTRICTION OF PUBLICATION CLAIMED IN PART

TO Lyn Camilleri
General Manager, Competition Exemptions
Australian Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601
lyn.camilleri@accc.gov.au

COPY exemptions@accc.gov.au

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Dear Ms Camilleri

Virgin Australia & Alliance Airlines application for authorisation - AA1000615 - market inquiries

We refer to the application for authorisation lodged with the Australian Competition and Consumer Commission (ACCC) by Virgin Australia Airlines Pty Ltd (**Virgin**), Virgin Australia Regional Airlines Pty Ltd (**VARA**) and Alliance Aviation Services Limited (**Alliance**) on 27 May 2022 (**Authorisation Application**) and also refer to:

- the Draft Determination published by the ACCC on 21 October 2022 (**Draft Determination**);
- file note summaries of feedback from various market participants which were prepared by the ACCC and published on the ACCC's public register (**Market Participant Feedback Summaries**); and
- the ACCC's letter dated 24 January 2023 attaching a summary of issues raised in market inquiries following the Draft Determination (**Market Feedback Letter**).

Confidentiality

Where information in this letter is confidential to Alliance, this has been indicated with the words '**[Commercial in Confidence]**'. In relation to information over which a claim of confidentiality has been made, Alliance requests that the ACCC treat the information as confidential in accordance with paragraphs 5.3 - 5.7 of the ACCC's Guidelines for Authorisation of Conduct (non-merger) and acknowledges that:

- (a) there is no restriction on the internal use, including future use, that the ACCC may make of the information, provided that it is strictly consistent with its statutory function;
- (b) the confidential information may be disclosed to the ACCC's external advisors and consultants on the condition that each such advisor or consultant will be informed of the obligation to treat the information as confidential; and

- (c) the ACCC may disclose the confidential information to third parties if compelled by law or in accordance with sections 89(7) or 155AAA of the Competition and Consumer Act 2010 (Cth).

Alliance's response

By way of general comments:

- (d) Alliance notes that the Draft Determination draws a number of broad conclusions based on specific factual information given by Alliance in response to a confined question (for example, in its 13 September 2022 response to an ACCC request for specific information (**Alliance RFI Response**)). Alliance considers the factual content of Alliance's response does not always support the broad conclusions drawn by the ACCC, particularly given the context in which Alliance responded to specific questions contained in the relevant request for information.
- (e) There are also challenges in engaging with the Market Participant Feedback Summaries, noting that these are file note summaries prepared by ACCC staff based on discussions between the market participant and the ACCC, rather than submissions prepared by market participants themselves. Those summaries do not provide details of what was said in those meetings by the market participants, which precludes Alliance in being able to consider and respond with precision to their content or the matters raised by market participants.
- (f) Alliance further observes that some feedback contained within the Market Participant Feedback Summaries appears to be unrelated to the Authorisation Application. For example, the file note of the ACCC's discussions with Bonza appears to raise concerns about wet leasing, which are not relevant to the Authorisation Application because the Charter Alliance Agreement (**CAA**) is entirely separate from and unrelated to Alliance's decisions as to wet leasing. Similarly, Rex's submission in relation to access to flight simulators is unrelated to the Authorisation Application and Alliance therefore does not consider it relevant to the ACCC's considerations.

Otherwise, Alliance provides the following responses to various matters arising from the Draft Determination, Market Participant Feedback Summaries and Market Feedback Letter.

Alliance's services and fleet

It is not correct to characterise Alliance as offering "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".¹ Alliance does not consider that it provides "scheduled RPT flights" or that it has any meaningful presence in RPT services. Alliance offers some RPT services on a single route (Brisbane to Moranbah), which is largely contracted out to corporate customers on a block seat basis. As part of its agreements with some charter customers, Alliance also operates a small number of incidental RPT volumes on its contract charter services on Adelaide-Olympic Dam, Perth-Kalgoorlie-Boulder, Brisbane-Weipa, Cairns-Weipa, and Cairns-Groote Eylandt.

Alliance notes that Table 1 of the Draft Determination contains some out-dated information about its fleet composition, which has since changed, such that:

- Alliance no longer has any Fokker 50 aircraft in its fleet, having sold its 5 F50s; and
- as of the date of this letter, 28 of the 33 E190 aircraft in Alliance's operational fleet were in service.²

¹ Draft Determination, 4.69.

² Alliance, *Results Presentation 1H FY2023* (8 February 2023).

Risk of coordinated effects

In respect of the ACCC's preliminary view that there are "market features along with a number of changes that have occurred in the FIFO market since 2018 which increase the likelihood and risk of coordination among FIFO suppliers",³ Alliance's strong view is that Qantas' 19.9% holding in Alliance has had no impact on any risk of coordinated effects. The holding has not resulted in Qantas having any influence or input into the conduct of Alliance's business.

Enhanced fleet capacity

There are instances of Alliance and VARA leveraging one another's fleet capacity to provide continuity of charter services, including the following examples:

- **[Commercial in Confidence]**

In relation to the feedback that it is difficult for Alliance to submit compliant bids for tenders that require larger sized aircraft, Alliance notes that its current fleet is comprised of aircraft up to 100 seats in capacity. In this respect, Alliance and Virgin Australia have complementary fleets.

Promotion of competition

The Draft Determination observes that the Applicants have jointly bid for a total of nine tenders between May 2017 and June 2022, based on the Alliance RFI Response.⁴ **[Commercial in Confidence]**

Alliance refers to the ACCC's preliminary view that it "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"⁵, and that "Alliance did not identify any opportunity on the East Coast and in Central Australia that was jointly bid for under the Charter Alliance Agreement".⁶ **[Commercial in Confidence]**

Alternative suppliers of charter services

The feedback that airlines like Cobham and Skippers do not (at the present time) have sufficient scale and fleet composition to effectively compete is incorrect and does not reflect the realities of competition for charter services. Alliance considers that an airline's point to point capability is more important than its national scale for it to be able to compete effectively in order to supply charter services to customers. To be able to successfully tender for charter services, an operator simply needs to be able to supply the capacity and close to the schedule requested by the customer on a particular route.

Alliance considers that the ACCC's preliminary view that FIFO operators do not generally compete for business outside of their established regional bases⁷ is not correct. Alliance's experience is that FIFO operators frequently and vigorously compete for work outside of where their established bases may be. For example:

- **[Commercial in Confidence]**

- Following its acquisition of Cobham in September 2022, Rex has also announced its intention to expand the Cobham charter arm of its business in Queensland and Northern Territory.

³ Draft Determination, 4.106.

⁴ Draft Determination, 4.84.

⁵ Draft Determination, 4.77.

⁶ Draft Determination, 4.76.

⁷ Draft Determination, 4.8(b).

Alliance is not aware of any instances where Cobham or Skippers Aviation (or any other operator) have been excluded from procurement processes for charter services by reason of their overall fleet capacity. **[Commercial in Confidence]**

Bargaining power

The feedback in relation to bargaining power of customers does not explain why market participants consider that charter customers do not have bargaining power. There is no stated evidentiary basis on which to make the statement that, “*The Applicants’ claim that many of the parties they deal with have bargaining power is not correct*”.⁸

Alliance is of the view that charter customers possess significant bargaining power, which is the case regardless of the customer’s weekly flight volume requirements. For example, during procurement processes, a customer will typically present a draft contract based on their own template, with limited opportunity for tenderers to negotiate key terms. Customers have noted that proposed amendments to the standard template as part of a tenderer’s response will reduce the likelihood of that tenderer being successful.

Customer bargaining power is also exhibited through industry standard protections that have been negotiated over time by customers and are not routinely built into those charter services contracts, and which do not depend on the size of the customer or the volume of services they acquire, including:

- termination for convenience in the customer’s favour, which provide for the contract to be terminated, **[Commercial in Confidence]** giving customers leverage to threaten to switch operators for a better price or service;
- non-exclusivity, meaning that customers may engage multiple operators for the same route;
- no minimum volume requirements; and
- penalties for failure to meet performance standards, which may also enliven ‘show cause’ or ‘termination for cause’ rights in favour of the customer.

Charter customers also exercise bargaining power both between and during contract terms by regularly undertaking informal benchmarking and price testing.

Barriers to entry

Feedback that there are high barriers to entry for new and smaller FIFO operators due to difficulties in accessing planes, pilots and crew does not reflect the realities of aircraft availability. Access to aircraft is not a prohibitive barrier to entry or expansion in the supply of charter services. There are several options for new or existing carriers to lease or acquire aircraft, including a plentiful global supply of various Embraer, Boeing and Airbus aircraft which could be deployed in Australia in the short and medium term.

By way of example, Alliance understands from public sources that:

- since July 2019, Cobham has leased and taken delivery of at least 6 Embraer 190 and 8 Q400 aircraft, under leasing arrangements with AerCap, TrueNoord, Chorus Aviation and others;
- in 2022, Virgin Australia announced that a total of 8 new Boeing 737 MAX 8 aircraft would join its fleet, with the first aircraft entering into service in the first quarter of 2023. Alliance understands that four of these aircraft are leased from China Aircraft Leasing Company; and
- Bonza has leased 3 Boeing 737 MAX 8 aircraft and is understood to have a further 6 aircraft on order. Alliance understands that at least one of these aircraft is leased from SMBC Aviation Capital.

⁸ ACCC to Applicants re summary of feedback from market inquiries, 24 January 2023.

Please let us know if you would like to discuss further.

Yours sincerely

**Caroline Coops | Partner
King & Wood Mallesons**

T +61 [REDACTED]

M +61 [REDACTED]

F +61 3 9643 5999

E [REDACTED]

Partner profile

**Natalie Stianos | Senior Associate
King & Wood Mallesons**

T +61 [REDACTED]

M +61 [REDACTED]

F +61 3 9643 5999

E [REDACTED]