

Partner
Contact

Louise Klamka
Rebecca Dollisson
T [REDACTED]

Our ref

LXX:RMD:1050879



L 35, Tower Two, International Towers Sydney
200 Barangaroo Avenue,
Barangaroo NSW 2000 AUS
T +61 2 9263 4000 F +61 2 9263 4111
www.gtlaw.com.au

7 April 2023

Mr David Hatfield
Director
Competition Exemptions
Australian Competition and Consumer Commission

By email: david.hatfield@accg.gov.au

Copies: andrew.ng@accg.gov.au; marcello.saponaro@accg.gov.au; anna.pound@accg.gov.au
tanya.hobbs@accg.gov.au

Public register version – restriction of publication claimed in relation to part

Dear Mr Hatfield

AA1000615-1 - Virgin Australia & Alliance Airlines - Response to ACCC's request for additional information

We refer to:

- the joint application for authorisation of the Charter Alliance between Virgin Australia Airlines Pty Ltd, Virgin Australia Regional Airlines Pty Ltd (**VARA**) (together, **Virgin Australia**), Alliance Airlines Pty Limited and Alliance Aviation Services Ltd (together, **Alliance**) (the **Applicants**) lodged with the Australian Competition and Consumer Commission (**Commission**) on 27 May 2022 and the submissions in support of that application (**Authorisation Application**);
- the Applicants' supplementary submission dated 10 March 2023 which set out a proposed condition which would result in better outcomes for customers than the denial of authorisation; and
- the ACCC's email dated 23 March 2023 requesting additional information from the parties, including a list of all contracts likely to be in place under the Charter Alliance Agreement (**CAA**) as of 24 May 2023 and information about the Applicants' ability to unwind the Charter Alliance arrangements and re-establish separate operations should the Charter Alliance not continue.

We set out below a table containing the list of requested contract information and Virgin Australia's submissions regarding the ability to unwind the Charter Alliance arrangements should it not continue.

Information highlighted **pink** and **yellow** is confidential to Virgin Australia and provided on the basis set out in paragraph 5.7 of the *Guidelines for Authorisation of Conduct (non-merger)*. Virgin Australia requests that it is excluded from the public register as disclosure of this information would unreasonably and adversely affect Virgin Australia in respect of its lawful business, commercial and financial affairs. The confidential information of Virgin Australia highlighted yellow is confidential information that has not been shared with Alliance.

1 Conduct sought to be authorised if authorisation is granted subject to the Proposed Condition

In the ACCC's email dated 23 March 2023, you asked about the specific conduct, or aspects of the conduct, for which authorisation is sought and will or may be engaged in under authorisation subject to the Proposed Condition.

The Applicants submit that, if authorisation is granted subject to the Proposed Condition, it should extend to giving effect to the CAA but only to the extent that it relates to the existing contracts identified. This means that all of the conduct contemplated in the existing authorisation would continue, except that:

- It would not apply to any new bids or opportunities, whether they arise in relation to existing customers or new customers.
- The non-compete and customer allocation provisions set out in Schedule 1 of the CAA would not apply. Instead, neither Applicant would pursue or seek to win any part of the *contracted* business under the existing agreements from the other (including additional services/frequencies requested by the customer pursuant to the existing agreement). This would apply for the term of the existing agreements including options to renew (as set out in the table below) unless prior to the end of the existing agreement the customer goes to market through an RFP or tender for that part of the contracted business.

At a more general level, authorisation subject to the Proposed Condition would give the Applicants the flexibility to optimally service customer requirements and mitigate disruption, including by responding to any requests for additional services/frequencies made by the customer pursuant to the contract in place as of 24 May 2023. This cooperation pursuant to the existing contracts may include:

- sharing information about relevant routes (including in relation to costs, willingness to operate a route, capacity, utilisation, demand and pricing);
- agreeing capacity, flight schedules and aircraft type;
- agreeing which Applicant will operate relevant routes or frequencies under the contract;
- quickly responding to requests for additional capacity; and
- making available Velocity and Virgin lounge benefits to customers, even where Alliance is operating the flight services.

The authorisation subject to the Proposed Condition will mean that the Applicants will not compete in relation to the relevant contracted customers for the life of the contracts (as set out in the table below), but only to the extent of the existing contracted scope of works previously tendered for. Under the Proposed Condition, there will be no restriction on the Applicants competing to supply services under any new requests for tender released by the customer regardless of the scope of those services.

As per the Authorisation Application, the Applicants are seeking authorisation (whether subject to the Proposed Condition or not) in relation to the following provisions: cartel provisions within the meaning of Division 1 of Part IV of the Act; sections 45(1)(a) and (b) in relation to provisions of contracts, arrangements or understandings that are likely to have the effect of substantially lessening competition in a market; section 45(1)(c) in relation to concerted practices; and section 47 in relation to exclusive dealing. For the avoidance of doubt, the Applicants do not consider the Charter Alliance Agreement has the purpose, effect or likely effect of substantially lessening competition, in contravention of sections 45(1) and (b) in relation to anti-competitive agreements; section 45(1)(c) in relation to concerted practices and s 47 in relation to exclusive dealing. However, the Applicants seek authorisation in relation to these provisions for completeness and out of an abundance of caution.

We note that the terms of all existing contracts (including any options to renew) end within the proposed five-year authorisation term.

2 List of contracts under the CAA likely to be in place as of 24 May 2023

Virgin Australia notes that where capacity support has been mentioned in the table below as an example of how authorisation of the Charter Alliance would enable the Applicants to provide a continuous service to the customer, the same efficiency and operational flexibility of capacity support cannot be achieved through other mechanisms such as wet-leasing arrangements (as acknowledged by the ACCC in its Draft Determination),¹ and these arrangements are likely to be more costly and involve less certainty of supply.

We have included detail in the table below of the ways in which the CAA is currently used to supply the relevant services under each contract and would be likely to be required for the remaining life of those contracts. This is not intended to limit the breadth of the conduct sought to be authorised as described in section (1) above.

Customer	Commencement date	Expiry date	Term (including any options to renew)	Operating airline	Significance of the CAA in providing a continuous service to the customer
[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	<ul style="list-style-type: none"> • The Charter Alliance enables the customer to have access to two operators' larger combined fleet and additional aircraft capacity support at both ports. This results in greater flexibility, better scheduling and fewer flight delays, which could not be provided to the same extent by either operator independently. • VARA has used Alliance's F100 capacity to service its contract with the customer, for example: <ul style="list-style-type: none"> – Recovery services and additional ad hoc flights were able to be provided on Alliance aircraft at short notice to support the customer's requirements (including [RESTRICTION OF PUBLICATION CLAIMED] services

¹ ACCC, Draft Determination, 4.31.

Customer	Commencement date	Expiry date	Term (including any options to renew)	Operating airline	Significance of the CAA in providing a continuous service to the customer
					<p>on F100 aircraft in February and March 2023);</p> <ul style="list-style-type: none"> - VARA uses Alliance’s F100 aircraft to service its [RESTRICTION OF PUBLICATION CLAIMED] services from Perth to [RESTRICTION OF PUBLICATION CLAIMED]. • [RESTRICTION OF PUBLICATION CLAIMED] • The customer has access to Virgin Australia’s Velocity Frequent Flyer program, including the option to earn Frequent Flyer Points (FFP) [RESTRICTION OF PUBLICATION CLAIMED], and access to Virgin Australia and Alliance lounges for eligible passengers.
[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	<ul style="list-style-type: none"> • The customer has received additional aircraft capacity support from VARA via the Charter Alliance, including for recovery services or changes in operational requirements. This flexibility could not be provided to the same extent by Alliance independently. For example, in the past VARA operated the customer’s [RESTRICTION OF PUBLICATION CLAIMED]. • The customer has access to Virgin Australia’s Velocity Frequent Flyer program under the Charter Alliance, with passengers

Customer	Commencement date	Expiry date	Term (including any options to renew)	Operating airline	Significance of the CAA in providing a continuous service to the customer
					<p>able to earn FFP on both Virgin Australia and Alliance Airlines services and complimentary access into Virgin Australia and Alliance departure lounges for eligible passengers holding either a Virgin Australia or an Alliance boarding pass to [RESTRICTION OF PUBLICATION CLAIMED].</p>
[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	<ul style="list-style-type: none"> • Access to both operators' combined fleet and capability, and additional aircraft capacity support from Alliance via the Charter Alliance allows the customer to have access to ad-hoc and disruption recovery services as required. • [RESTRICTION OF PUBLICATION CLAIMED] • [RESTRICTION OF PUBLICATION CLAIMED]
[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	<ul style="list-style-type: none"> • Under the Charter Alliance the customer has access to both operators' combined fleet capacity and complementary fleet types, providing greater flexibility, improved flight scheduling and fewer delays. • From time to time the customer requests services on both F100 and A320 aircraft, the latter of which Alliance does not have in its fleet. Under the Charter Alliance, the customer has access to capacity support for

Customer	Commencement date	Expiry date	Term (including any options to renew)	Operating airline	Significance of the CAA in providing a continuous service to the customer
					<p>Alliance’s charter services on F70 and F100 aircraft on VARA’s larger A320/B737 aircraft.</p> <ul style="list-style-type: none"> The customer also has access to Virgin Australia’s Velocity Frequent Flyer program.
<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<ul style="list-style-type: none"> Under the Charter Alliance, VARA currently utilises Alliance’s additional fleet capacity to service the contract and mitigate delays and disruptions. For example, between June 2017 and September 2022, VARA accessed Alliance’s F100 capacity to support more than [RESTRICTION OF PUBLICATION CLAIMED] sectors to support [RESTRICTION OF PUBLICATION CLAIMED] schedule. Since August 2022, VARA has used Alliance’s F100 aircraft to service its [RESTRICTION OF PUBLICATION CLAIMED] services from Perth to [RESTRICTION OF PUBLICATION CLAIMED] to support the customer’s schedule requirements. [RESTRICTION OF PUBLICATION CLAIMED] The Charter Alliance also gives the customer access to a mix of fleet types. We note that the customer currently has access to Virgin Australia’s Velocity

Customer	Commencement date	Expiry date	Term (including any options to renew)	Operating airline	Significance of the CAA in providing a continuous service to the customer
					<p>Frequent Flyer program on its contracts with both VARA (WA ports) and Alliance (QLD ports).</p>
<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<ul style="list-style-type: none"> VARA has utilised Alliance Airlines' F100 capacity under the Charter Alliance to support the customer's schedule requirements. For example, VARA has cross-hired Alliance Airlines' F100 aircraft to operate [RESTRICTION OF PUBLICATION CLAIMED] services between [RESTRICTION OF PUBLICATION CLAIMED] during FY22 due to VARA aircraft capacity limitations. [RESTRICTION OF PUBLICATION CLAIMED]
<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<p>[RESTRICTION OF PUBLICATION CLAIMED]</p>	<ul style="list-style-type: none"> Under the Charter Alliance the customer has access to additional capacity support from Alliance on F100 aircraft for ad-hoc and disruption recovery services. [RESTRICTION OF PUBLICATION CLAIMED]

Customer	Commencement date	Expiry date	Term (including any options to renew)	Operating airline	Significance of the CAA in providing a continuous service to the customer
[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	[RESTRICTION OF PUBLICATION CLAIMED]	<ul style="list-style-type: none"> The customer has access to VARA's additional F100 aircraft capacity via the Charter Alliance for ad-hoc and disruption recovery services, as well as access to Virgin Australia's Velocity Frequent Flyer program (including FFP and lounge access for eligible passengers).

3 Unwinding Charter Alliance arrangements should the Charter Alliance not continue

At this stage, the Applicants do not anticipate any new joint tender opportunities arising before 24 May 2023 and are not currently awaiting the results of any joint tenders. This is reflected in the list of contracts provided in the table above which only includes existing customer contracts that have already commenced. With the exception of the continuation of existing contracts outlined above which rely on the continuation of the CAA, the parties can quickly unwind the Charter Alliance by ceasing cooperation on a forward-looking basis.

Neither party would face material hurdles in re-establishing separate operations at the end of the Charter Alliance. Granting authorisation with or without the Proposed Condition does not risk creating arrangements that cannot be effectively and efficiently unwound at the end of the authorisation term. However, once the Charter Alliance ceases, the Applicants will be limited in their ability to service customers who require a mix of fleet, or scale of fleet, that either party does not supply independently.

Compared to the situation during the initial authorisation application in 2017 when VARA had 14 F100s and 2 A320s at its disposal and there was depressed demand for FIFO services due to the downturn in employment and mining activity in WA, **[RESTRICTION OF PUBLICATION CLAIMED]**. As noted in the Draft Determination, such arrangements are inferior to the flexibility, cost and ability to quickly and optimally respond to customer requirements provided under the Charter Alliance.

While the Applicants will be able to independently operate their businesses, if the Charter Alliance ceases, this also means that they will no longer:

- be able to deliver FIFO customers the enhanced product and service offerings that neither could provide on a stand-alone basis including due to access to cost savings and operational efficiencies; or
- have the capacity to promote competition as effectively between FIFO operators.

The Proposed Condition prevents sub-optimal results for customers by allowing existing contracts to be serviced with the flexibility and ability to best use the complementary strengths of each Applicant to optimally respond to customer needs and circumstances as per the risk tolerance of the customer to business change, delay and disruption and in accordance with the competitive bargain struck by the customer. It would be very difficult to service these contracts without any risk or detriment to the customer (including contractual breach risks) without the ability to continue cooperation under the CAA for the commercial life of the contracts. This is particularly the case given the changed market conditions, fleet mix and fleet scales of the Applicants since the initial authorisation application in 2017.

If it would be of assistance, Virgin Australia would be happy to discuss further with the ACCC the information provided in this responding submission.

Yours faithfully
Gilbert + Tobin



Louise Klamka
Partner



Rebecca Dollisson
Special Counsel

