



# 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: 5 May 2023

Commissioners: Cass-Gottlieb

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## Summary

On 27 May 2022, Virgin Australia Regional Airlines, Virgin Australia Airlines, Alliance Airlines and Alliance Aviation Services (all together the Applicants) lodged an application for authorisation.

The Applicants sought authorisation for 5 years for an extension of the Charter Alliance Agreement which provides for them to jointly tender and supply services to corporate customers, principally for fly-in-fly-out (FIFO) employees. Two relevant aspects of the Charter Alliance Agreement are that the parties agree to jointly tender for new charter opportunities (but can bid individually if a joint bid is not made) and to not compete for each other's specified pre-existing customers.

The ACCC previously granted authorisation to the Charter Alliance in 2017. Given this new application was made shortly before the previous authorisation expired, the Applicants sought, and the ACCC granted, interim authorisation to maintain the status quo while the ACCC undertook its assessment.

On 21 October 2022, the ACCC released a draft determination proposing to deny authorisation. With the 6-month statutory deadline to make a decision approaching, on 2 November 2022 the ACCC decided to extend the deadline to 24 May 2023, with the agreement of the Applicants.

Since the draft determination, the ACCC has received a number of submissions from the Applicants and interested parties (many of which were made on a confidential basis) and has met with a number of customers of the Charter Alliance. The ACCC has also had access to a number of internal documents from each of the Applicants. All of this information has been taken into account in making this Determination.

This application involves the second and third largest providers of FIFO services jointly tendering and co-ordinating services. The ACCC is concerned that continuing the Charter Alliance is likely to reduce the number of bidders in tender processes for charter services, particularly when there would only be one other large provider of these services, and so the potential incentives to reduce service levels or raise prices for FIFO charter services would remain.

The airlines have not demonstrated sufficient public benefit to outweigh the likely detriment from this proposed co-ordination to satisfy us that the conduct should be authorised.

Based on the information provided to it, the ACCC is not satisfied that the benefits claimed under the previous authorisation were realised over the past 5 years to the extent claimed by the Applicants. This consideration has informed the ACCC's assessment of the likelihood of public benefits in the current application.

The Applicants submitted that the Charter Alliance will result in public benefits principally from increased competition (with Qantas) in offering a combined charter and Regular Public Transport (RPT) service and efficiencies from integrating operations.

The ACCC has conducted market enquiries. While some customers value having a combined charter and RPT service offering, many do not. Many customers contract only for charter services and indicate that they would prefer Virgin Australia and

Alliance submit stand-alone bids. Further, some customers contract for charter and RPT services separately, even where both services were part of the same tender process. The ACCC considers that more effective competition can be achieved by Virgin Australia tendering (for charter, RPT services, or both) on a stand-alone basis, and Alliance (for charter services) on a stand-alone basis.

The ACCC accepts that the Charter Alliance is likely to result in some public benefit from greater operational flexibility for the Applicants and some cost savings. There are also likely to be some benefits from Alliance being able to offer frequent flyer points and lounge access to those customers that value them, but only to the extent these are available at lower cost than they could otherwise be acquired.

The ACCC considers the Charter Alliance is likely to result in public detriment by reducing the number of bidders in tender processes for charter services – particularly in circumstances where there would only be one other large provider of these services. High barriers to entry and expansion mean the threat of timely and sufficient entry or expansion by smaller providers is not likely to be an adequate constraint to prevent this detriment.

The commitment to not compete for each other's specified customers, while not always enforced thus far, has reduced, and is likely to reduce competition which would result in material detriment. The Charter Alliance is also likely to result in detriment by reducing incentives for the parties to invest and/or innovate in ways that would allow them to engage in head-to-head competition for charter and/or RPT services.

As a result, the ACCC is not satisfied that the likely benefits will outweigh the likely detriments resulting from the proposed conduct, so it has decided not to grant authorisation.

The Applicants requested that if the ACCC was not satisfied the test for authorisation was met, rather than deny the application, it grant conditional authorisation – essentially allowing the Applicants to continue to give effect to existing contracts entered into under the Charter Alliance Agreement for up to 5 years until they expire (including options to extend). The ACCC is not satisfied that, in the circumstances, by imposing a condition to vary the conduct as sought by the Applicants, the test for authorisation would be satisfied. Such a conditional authorisation would allow the parties to continue to share information, agree capacity and flight schedules, and agree which Applicant would operate relevant routes under those contracts. This would prolong much of the anticompetitive detriment of the arrangements for a further 5 years. In these circumstances, the ACCC has decided not to exercise its discretion to specify a condition.

The Applicants were aware of the possibility that the Charter Alliance Agreement would not be re-authorised when they entered into these contracts. Since issuing a draft determination proposing to deny authorisation, the ACCC has not had any customers express concern about the impact on existing contracts. The ACCC notes that the Applicants have previously advised that neither Virgin Australia nor Alliance would face material hurdles in re-establishing separate operations at the end of the authorisation term should the Charter Alliance not continue.

If, however, the Applicants consider that there would be public benefits from seeking a short additional period of authorisation to enable them to unwind the

**Charter Alliance, they are able to lodge a fresh application seeking authorisation for such a transitional period.**

**The ACCC has revoked the previous interim authorisation and granted a narrower interim authorisation to allow the Applicants to continue to give effect to existing contracts for a short period of time until this determination comes into effect.**

**This determination comes into effect on 27 May 2023 unless an application for review is lodged. Any application for review needs to be lodged directly with the Australian Competition Tribunal.**

## 1. The application for authorisation

- 1.1. On 27 May 2022, the Applicants: 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**), lodged an application for authorisation (AA1000615) with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA and may substantially lessen competition within the meaning of sections 45 and 47 of the CCA.
- 1.3. The Applicants sought authorisation for 5 years to 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 FIFO employees.
- 1.4. This application for authorisation AA1000615 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **CCA**). The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the CCA for arrangements that may otherwise risk breaching those provisions in the CCA, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.5. The ACCC previously granted authorisation (A91552 and A91553) in 2017 to enable the Applicants to enter into and give effect to the Charter Alliance for a period of 5 years, until 9 June 2022.
- 1.6. 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 CCA.<sup>1</sup>

### The draft determination and extension of the statutory timeframe

- 1.7. On 21 October 2022, the ACCC released a draft determination proposing to deny authorisation. The ACCC identified a number of issues that it would consider following the release of the draft determination. These issues, and submissions received post draft determination in relation to these issues are discussed in the ACCC's assessment below.
- 1.8. The ACCC must make a determination in relation to an application for authorisation within 6 months of receiving the application. The 6-month period can be extended by

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<sup>1</sup> ACCC, [Interim Authorisation Decision](#), 8 June 2022.

up to a further 6 months if the ACCC has prepared a draft determination and the applicants agree to the extension.

- 1.9. On 2 November 2022, the ACCC decided to extend the deadline by which a final decision must be made in this matter by 6 months, with the agreement of the Applicants. The statutory deadline was extended until 24 May 2023.<sup>2</sup>

## The Applicants

### Virgin Australia

- 1.10. Virgin Australia is an airline that operates a network of domestic and international 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.<sup>3</sup>
- 1.11. 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.<sup>4</sup>

### VARA

- 1.12. 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**).
- 1.13. 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

- 1.14. Alliance is an ASX listed charter provider with regional charter bases in Brisbane, Townsville, Rockhampton, Cairns, Adelaide, Perth, Melbourne and Darwin.
- 1.15. 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).<sup>5</sup>

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<sup>2</sup> ACCC, [ACCC to Applicants re Extension of Statutory Timeframe](#), 2 November 2022; Virgin Australia, [Virgin Australia to ACCC re Extension of Statutory Timeframe](#), 3 November 2022; Alliance Airlines, [Alliance Airlines to ACCC re Extension of Statutory Timeframe](#), 3 November 2022.

<sup>3</sup> The Applicants, [Application](#), 27 May 2022, pg. 6.

<sup>4</sup> The Applicants, [Application](#), 27 May 2022, pg. 7-8.

<sup>5</sup> Alliance Airlines, [Alliance Airlines' response to ACCC draft determination and interested party submission](#), 24 February 2023, pg. 2.

1.16. Alliance also provides specialised aviation services to airlines and clients including aircraft dry<sup>6</sup> and wet leasing<sup>7</sup>, 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 (amongst others).

### The Applicants’ fleet composition

1.17. The Applicants submit that the Charter Alliance has permitted the 2 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 – As submitted by the Applicants – The Applicants’ fleets as of 5 May 2023<sup>8</sup>**

Aircraft type	Passenger seats per aircraft	Number of aircraft in fleet
<b>Virgin Australia</b>		
Boeing 737-700 (B737-700)	128	2
Boeing 737-800 (B737-800)	176	75
		<b>Total: 77</b>
<b>VARA</b>		
Fokker 100 (F100)	100	8
Airbus 320 (A320)	168 to 180	7
		<b>Total: 15</b>
<b>Alliance Airlines</b>		
Fokker 70 (F70)	80	14
Fokker 100 (F100)	100	24
E190	94 to 100	33 <sup>9</sup> (28 in service)
		<b>Total: 71</b>

<sup>6</sup> A ‘dry lease’ is a leasing arrangement where the lessor provides an aircraft without also supplying crew, maintenance and insurance.

<sup>7</sup> A ‘wet lease’ is a leasing arrangement where one airline (the lessor) provides aircraft, crew, maintenance and insurance 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.

<sup>8</sup> The Applicants, [Application](#), 27 May 2022; Alliance Airlines, [Alliance’s response to ACCC draft determination and interested party submissions](#), 24 February 2023; Virgin Australia, [Virgin Australia’s response to ACCC draft determination and interested party submissions](#), 17 February 2023; See also Virgin Australia, [Our fleet](#).

<sup>9</sup> On 27 February 2023, Alliance announced that it would acquire an additional 30 E190 aircraft to be delivered between September 2023 and January 2026 – See Alliance, [Media Release](#), 27 February 2023.

## Wet leasing arrangements between the Applicants

- 1.18. In addition to the Charter Alliance, Virgin Australia and Alliance have an existing wet lease arrangement which is not contingent on the Charter Alliance.
- 1.19. 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, 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.

## The Proposed Conduct

- 1.20. On 15 November 2022, the Applicants updated the conduct for which authorisation is sought.<sup>10</sup> The updated conduct is described at paragraph 1.21 below.
- 1.21. The Applicants seek authorisation to continue to give effect to the Charter Alliance, in place since 2017, which enables the Applicants to:
- 1) jointly bid for, and contract with, corporate customers, including:
    - a. joint pricing and scheduling of services for those customers
    - b. agreeing not to compete for each other's specified pre-existing customers; and
    - c. agreeing for new charter opportunities, to cooperate and coordinate to bid jointly for the charter opportunity. Individual bids are permitted if a joint bid is not made
  - 2) agree not to supply services to each other's key competitors, with some limited exceptions
  - 3) offer eligible passengers of those customers access to the Velocity frequent flyer program
  - 4) offer eligible passengers of those customers access to Virgin Australia's airport lounges as part of an integrated corporate offering
  - 5) 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
  - 6) 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**).

- 1.22. The Applicants submit that despite the restriction described in paragraph 1.21.1.(b) above, the Charter Alliance has, on occasion, cooperated in relation to certain exclusive pre-existing customers. The exclusivity provision described in paragraph 1.21.2 above has not prevented Alliance supplying services, including wet lease services, to other airlines.

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<sup>10</sup> The Applicants, [Updated Conduct for which authorisation is sought](#), 15 November 2022.

- 1.23. The Charter Alliance 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.
- 1.24. The Charter Alliance 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 the Applicants have jointly bid for under the Charter Alliance. In each case, the customer has contracted for a dedicated charter service.
- 1.25. 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.
- 1.26. While the supply of services to corporate customers under the Charter Alliance may include an RPT service component on Virgin Australia's domestic network, the Charter Alliance does not extend to the supply of RPT services more generally.

## Proposed conditional authorisation

- 1.27. On 10 March 2023, the Applicants wrote to the ACCC making submissions setting out the detriments that would result for customers with existing contracts with the Applicants if the Commission decided not to grant the application for authorisation. Further, the Applicants requested that the Commission, if it was not satisfied that the test for authorisation had been met, grant authorisation subject to appropriate conditions that will reduce the detriment to customers for charter services.
- 1.28. This proposal for conditional authorisation is discussed in more detail in section 4 after the ACCC's assessment of the balance of likely public benefits and detriments associated with the Proposed Conduct.

## Interim authorisation

- 1.29. The Applicants also requested interim authorisation to enable the Applicants to enter into and give effect to an extension of the Charter Alliance, including the joint tender and supply of services to corporate customers, principally for FIFO employees, while the ACCC was considering the substantive application.
- 1.30. On 8 June 2022, the ACCC granted interim authorisation in accordance with subsection 91(2) of the CCA.<sup>11</sup>

## 2. Background

### The previous Authorisation A91552 and A91553

- 2.1. The Applicants obtained authorisation for the Charter Alliance Agreement in 2017 (authorisations A91552 and A91553, which expired on 9 June 2022), and are currently seeking authorisation to continue to give effect to the same conduct.
- 2.2. The Applicants submit that since 2017, the Charter Alliance 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

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<sup>11</sup> See ACCC decision on the ACCC's [public register](#).



several successful joint tenders (details of which have been provided to the ACCC on a confidential basis).<sup>12</sup>

## 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% shareholding in Alliance Aviation Services Ltd for \$60m. In April 2022, the ACCC decided not to take any further action against Qantas' acquisition of the 19.9% holding in Alliance.
- 2.4. On 5 May 2022, Qantas announced its intention to acquire the remaining 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). The ACCC commenced a public review of this proposed acquisition on 18 May 2022. On 20 April 2023, the ACCC announced it would oppose the proposed acquisition.
- 2.5. If Qantas were to complete its acquisition of the remaining shares in Alliance, Virgin Australia submits that VARA would exercise its right to terminate the Charter Alliance 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 in WA include the Pilbara, the Kimberley, and the Goldfields. Key resource regions in Queensland include Mt Isa, the Galilee/Bowen Basin and the 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 also wet leases E190 aircraft from Alliance.<sup>13</sup> 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 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.<sup>14</sup>
- 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.<sup>15</sup> The Applicants note that Alliance has delivered good financial results throughout the pandemic, largely

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<sup>12</sup> The Applicants, [Application](#), 27 May 2022, pg. 17-18.

<sup>13</sup> On 23 February 2023, Alliance announced that it had increased the number of E190 wet lease aircraft options available to Qantas from 18 to 30 – See Alliance, [Media Release](#), 23 February 2023.

<sup>14</sup> The Applicants, [Application](#), 27 May 2022, pg. 8.

<sup>15</sup> Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, pg. 11.

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.<sup>16</sup>

### ***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.<sup>17</sup>
- 2.11. On 26 July 2022, the ACCC provided informal merger clearance to the parties for the proposed acquisition.<sup>18</sup> On 30 September 2022, Regional Express completed its acquisition of Cobham Aviation.<sup>19</sup>

### ***Entry of Bonza Airlines into the Australian aviation market***

- 2.12. On 12 January 2023, the Civil Aviation Safety Authority issued an Air Operator's Certificate (AOC) to a new Australian airline, Bonza, being the regulatory approval required by Bonza to fly scheduled passenger-carrying flights in Australia.<sup>20</sup>
- 2.13. Bonza submits that it will be focused on operating RPT services, rather than charter services.<sup>21</sup>

### ***Change in market conditions in the FIFO sector***

- 2.14. The ACCC's 2017 market inquiry 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 authorisation. This resulted in excess capacity in the FIFO sector and therefore operators were more incentivised to aggressively compete for corporate customers.<sup>22</sup>
- 2.15. 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.<sup>23</sup>

### ***Market shares***

- 2.16. 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).

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<sup>16</sup> The Applicants, [Application](#), 27 May 2022, pg. 8.

<sup>17</sup> Rex, [Media Release](#), 15 July 2022.

<sup>18</sup> Rex, [Media Release](#), 27 July 2022.

<sup>19</sup> Rex, [Media Release](#), 30 September 2022.

<sup>20</sup> CASA, [Media Release](#), 12 January 2023.

<sup>21</sup> Bonza, [File note of ACCC meeting with Bonza](#), 25 November 2022, pg. 1.

<sup>22</sup> ACCC, [Final Determination](#), 18 May 2017.

<sup>23</sup> See ABC News, [Mining boom could be on the way for Australia with record-breaking exploration spend](#), 14 February 2022.

2.17. 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 change in demand for its FIFO services by its customers in this region.
- Virgin Australia and Alliance operate largely complementary FIFO networks, with Virgin Australia concentrated in WA and Alliance on the East Coast.

**Table 2 – As submitted by Virgin Australia – Share of FIFO capacity in WA and on the East Coast/Central Australia<sup>24</sup>**

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%

2.18. The ACCC did not receive market share estimates from other parties as part of its assessment of this authorisation. While others may have different views on precise market shares, the ACCC considers that any potential differences are unlikely to materially impact its assessment of this authorisation application.

### 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, including FIFO customers, other airlines, airports, industry associations and government agencies/bodies.

<sup>24</sup> Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022.

- 3.3. Public submissions by the Applicants and interested parties are on the [Public Register](#) for this matter.
- 3.4. The issues raised by interested parties, and the Applicants' responses, are discussed in the ACCC assessment section below.

### Prior to draft determination

- 3.5. The ACCC received no submissions from interested parties in relation to the application and interim authorisation decision.
- 3.6. Prior to the draft determination, 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 under the Charter Alliance since 2017, including their views on the significance of the Charter Alliance (and the claimed benefits) for each of those opportunities. The Applicants submitted responses claiming confidentiality over part of the information provided.
- 3.7. The ACCC also issued information requests to some FIFO customers in relation to procurement processes involving Virgin Australia and/or Alliance pursuant to the Charter Alliance. Specifically, the ACCC sought customers' views on the impact of the Charter Alliance 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 (by Virgin Australia, VARA and/or Alliance). The ACCC did not receive any responses to the information requests.

### Following the draft determination

#### Interested party submissions following the draft determination

- 3.8. The ACCC identified a number of issues which it intended to explore with interested parties following the draft determination. These included, but were not limited to:
  - 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 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 corporate customers have countervailing and bargaining power when dealing with FIFO operators, and any non-price competition in the supply of charter services
  - 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 height of barriers to entry, if any, including the likelihood of new entry or expansion of smaller FIFO operators and the scale necessary to compete with the Charter Alliance.
- 3.9. The ACCC received submissions from a number of interested parties following the draft determination, some of which were provided to the ACCC on a confidential basis. Broadly, submissions made after the draft determination made the following points:

- Customers generally do not place significant value on the availability of an integrated charter and RPT service offering, improved connections between terminals at Perth Airport, or access to peak charter flight times when conducting tender processes. While some customers do not place significant value on having access to frequent flyer points and airport lounges, others placed significant weight on these value-added benefits and noted their importance to employee retention and recruitment.
- Customers generally prefer to have Virgin Australia and Alliance compete against each other for charter opportunities rather than having them make joint offers under the Charter Alliance, though some customers consider that the Charter Alliance's integrated offering may provide a greater competitive constraint against Qantas.
- Smaller FIFO operators (such as Cobham and Skippers) do not have the fleet capacity to effectively compete against larger operators (such as the Charter Alliance) for most tenders, and so may be excluded from tender processes as a result or considered as an option for the purpose of supplying limited low volumes of ad-hoc charter services.
- Customers do not have significant bargaining power when negotiating with airlines – though factors including the extent of services required, number of weekly flights required, number of airlines able to meet operational needs, and the airline they are negotiating with may affect the degree of their bargaining power.
- There are high barriers to entry and expansion for new and smaller operators providing FIFO services due to infrastructure and permit constraints, the cost of establishing an operational base in WA, building the necessary reputation among customers to win volumes off established incumbents, obtaining airport slots, aircraft, pilots and crew.

3.10. These and other issues raised by interested parties are set out as relevant in the ACCC's assessment section below.

## 4. ACCC assessment

- 4.1. Consistent with subsections 90(7) and 90(8) of the CCA, 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 from the conduct (**authorisation test**).
- 4.2. 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.
- 4.3. The ACCC previously granted authorisation (A91552 and A91553) in 2017 to enable the Applicants to enter into and give effect to the Charter Alliance for 5 years. Based on the materials provided to the ACCC, the ACCC considers that the Charter Alliance has not been as effective as claimed when it authorised these arrangements in 2017. A relatively weaker Charter Alliance than previously thought means that the likely benefits and, to a lesser extent, the likely detriments have been reduced. This is set out below.
- 4.4. On 21 October 2022, the ACCC released a draft determination proposing to deny authorisation.

## 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 its 2017 authorisations 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.<sup>25</sup>*

4.7. Virgin Australia also supports the ACCC's view that:<sup>26</sup>

- 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.
- 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. Alliance submits that in its experience, FIFO operators frequently and vigorously compete for work outside of where their established bases may be.<sup>27</sup>

4.9. The ACCC considers that the relevant areas of competition are informed by the degree of horizontal overlap between the Applicants. While there are several ways to identify this horizontal overlap, the ACCC does not consider it necessary to express a concluded view on the precise boundaries of the relevant areas of competition, as the ACCC's assessment of the benefits and detriments that would be likely to result from the Proposed Conduct does not turn on the precise scope of the relevant areas of competition.

4.10. Accordingly, the ACCC's view is broadly consistent with that expressed in paragraph 4.6 above. However, the ACCC notes that:

- a) Further to the unique demand requirements of FIFO customers in paragraph 4.7(a):
  - i. some customers require only charter services (and not RPT) based on the relevant routes on which the customer requires air transport for their FIFO employees
  - ii. some customers require charter services, which may also include an RPT component (on certain routes), but they generally acquire charter services, supplemented as needed by RPT services;

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<sup>25</sup> ACCC, [Final Determination](#), 18 May 2017, [91].

<sup>26</sup> Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, pg. 5.

<sup>27</sup> Alliance Airlines, [Alliance's response to ACCC draft determination and interested party submissions](#), 24 February 2023, pg. 3.

- iii. different types of FIFO customers may have different aircraft requirements based on the location of their operational sites, the number of passengers to be transported and infrastructure capabilities at the relevant airports.
- 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, and are not generally successful in winning, business outside of their established regional bases.

## Future with and without the Proposed Conduct

- 4.11. In the future with the Proposed Conduct, the Applicants will be able to continue to coordinate and cooperate with each other in accordance with the terms of the 2017 Charter Alliance with the Applicants generally prevented from competing for each other's charter customers. As the Applicants are seeking authorisation to continue to give effect to the whole 2017 Charter Alliance, we have considered the application on this basis.
- 4.12. 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. 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 aircraft in charter tender processes. However, Alliance may have incentive to enter into wet lease agreements with VARA for the supply of aircraft, crew, maintenance and insurance.
- 4.13. There are differences in the Applicants' operations between the east coast states and WA. We discuss the impact of these differences on the likely future without the Proposed Conduct below.

### East coast states (in particular Queensland)

- 4.14. In the future without the Proposed Conduct, the ACCC considers that Alliance will likely continue to provide charter services on the East Coast (in particular on routes within, to and from Queensland), leveraging its significant presence and operational capabilities in this region to provide a similar fleet offering and to the same destinations as under the Charter Alliance, but absent the ability to offer a combined scheduled RPT service or an in-house frequent flyer program. However, to the extent customers value them, it will remain open for Alliance to contract for frequent flyer points and/or lounge access through Virgin Australia or an alternative supplier albeit at a potentially higher cost.
- 4.15. Further, Alliance will likely continue to operate RPT services on a stand-alone basis on Brisbane-Moranbah (largely contracted out to corporate customers on a block seat basis), and incidental RPT volumes on its contracted services on Brisbane-Weipa, Cairns-Weipa and Cairns-Groote Eylandt.
- 4.16. As noted, there is currently no material overlap between the Charter Alliance partners' FIFO services outside of WA. In this respect, VARA has a limited charter presence on the East Coast and does not presently have suitable 100-seat or less aircraft in this region to be able to independently provide charter services to FIFO customers, without entering into wet lease arrangements.

- 4.17. The Applicants 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.<sup>28</sup>
- 4.18. The ACCC considers that the prospect of VARA expanding into a State or Territory outside of WA is unlikely especially given the barriers associated with any such interstate expansion (see paragraphs 4.211 to 4.214 below). Nonetheless, to the extent that such a possibility exists, the Charter Alliance Agreement substantially removes any incentive for VARA to seek to expand beyond WA and therefore eliminates the possibility of competition between VARA and Alliance in the East Coast (particularly Queensland).

## **Western Australia**

- 4.19. In the future without the Proposed Conduct, the ACCC considers that the Applicants would likely operate in competition with each other in relation to price, service, scheduling and on some aircraft fleet types, in respect of competitive tender processes for FIFO services in WA, including for each other's pre-existing customers.
- 4.20. Virgin Australia/VARA chose to rationalise the combined fleet available for FIFO contracts under the Charter Alliance during the period of the previous authorisation. The aircraft it now has available to service FIFO contracts are those with 100 seat capacity and above. As noted above, the authorisation has allowed VARA to utilise access to Alliance's fleet of F100's, in order to continue to offer customers competitive 100 seat aircraft services while phasing out its own aging F100s. The ACCC considers that without the Proposed Conduct, VARA is likely to attempt to retain and prolong its 100 seat capability or replace that capability with an alternative aircraft to compete against Alliance for new customers or to compete to win Alliance's pre-existing customers that have been previously served with 100 seat capacity aircraft. More specifically, the ACCC considers that VARA in the future without the Proposed Conduct in WA may potentially:
- seek to prolong the operational life of a small number of its existing F100 aircraft,
  - seek to acquire additional 100 seat capacity aircraft (by wet lease - albeit at increased operational cost), or
  - seek to replace the 100 seat capacity aircraft with B737-700 aircraft (to be introduced with the benefit of scale efficiencies derived from Virgin Australia's existing B737-800 operations) for some customers.
- 4.21. Based on the information before the ACCC, the extent to which VARA will be successful in implementing the above is likely to be affected by the unique requirements of customers including numbers of passengers to be transported, capability of airport/aerodromes in receiving aircraft larger than 100 seats and other factors. Given this, the ACCC considers that VARA is likely to compete against Alliance for some customers in WA in the future without the Proposed Conduct, but it is unclear if VARA is likely to compete effectively against FIFO operators with large 100 seat capacity aircraft fleets, namely Alliance and Qantas, for customers with a commercial or other preference for 100 seat aircraft.
- 4.22. Alliance's fleet of aircraft have traditionally been of 100 seat capacity and below. The ACCC considers that in the future without the Proposed Conduct, Alliance will likely continue to grow its fleet. The ACCC notes, for example, Alliance's recent

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<sup>28</sup> The Applicants, [Application](#), 27 May 2022, pg. 20.



announcement that it will acquire an additional 30 Embraer E-190s (configurable at 96-124 seats), bringing Alliance's E190 fleet to 63 aircraft, of which 30 will be wet leased to Qantas, and its total fleet to 101 aircraft.<sup>29</sup> Further, in the absence of the Proposed Conduct, the ACCC considers that Alliance is likely to continue to vigorously compete for new and existing customer opportunities on a stand-alone basis, leveraging its strong fleet and quality of service (reliability and on-time-performance).

- 4.23. In addition to competing in some tenders, the ACCC considers that in the absence of the Proposed Conduct, the Applicants would also not engage in any of the broader coordination permitted by the Charter Alliance in relation to check-in, airport operations, service policies, frequent flyer programs, lounges, joint procurement and deployment of aircraft parts, and ground-handling services.
- 4.24. The benefits and detriments associated with this broader co-ordination are discussed further below. However, the ACCC notes that the lack of broader co-ordination via the Charter Alliance would not preclude the Applicants from offering these services individually. Each of the Applicants could also choose to outsource these services, including to each other, on normal commercial terms.
- 4.25. The ACCC also considers that in the absence of the exclusivity requirements in the Charter Alliance Agreement, the Applicants would have an incentive to offer many of these other services to a broader range of potential customers or competitors (in relation to wet leasing services). The effect of the Proposed Conduct is to reduce the ability and/or incentive of the Applicants to offer these broader services to entities which are also competitors in the supply of FIFO charter services. The effect of this aspect of the Proposed Conduct upon competition is also discussed further below.

## Public benefits

- 4.26. The CCA 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.*<sup>30</sup>

- 4.27. 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:
- increased competition to offer a combined charter/RPT service
  - efficiencies from integration of VARA and Alliance's operations
    - product and service efficiencies
      - access to complementary fleet sizes, leading to:

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<sup>29</sup> See Alliance, [Media Release](#), 27 February 2023.

<sup>30</sup> 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.

- better scheduling and fewer flight delays
- avoiding costs of expanding fleet and operation bases
- reducing aircraft, crew, maintenance and insurance costs including avoiding costs of replacing F100 engines
  - frequent flyer benefits and other value adds
- operational efficiencies and reduced costs at Perth Airport
  - alignment of procedures and processes
  - reduced variable costs.<sup>31</sup>

### Increased competition to offer a combined charter/RPT service

- 4.28. Prior to the draft determination, the Applicants submitted that the Charter Alliance would promote competition between suppliers of FIFO services, including by providing an alternative integrated offer to customers.<sup>32</sup>
- 4.29. The Applicants submitted that the Charter Alliance enabled VARA and Alliance to submit joint tenders which provide a national, integrated RPT and charter solution by combining their complementary fleets.<sup>33</sup> The Charter Alliance enabled VARA to provide a national charter solution to corporate customers through access to Alliance's national charter network and enabled 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.<sup>34</sup>
- 4.30. Virgin Australia submitted that without the Charter Alliance, Qantas would be the only operator able to provide a full suite of corporate-related services which include charter, RPT, frequent flyer and lounge benefits nationally.<sup>35</sup>
- 4.31. In the draft determination, the ACCC indicated that it would consult with market participants on the extent of this benefit, including whether customers required or valued such an integrated service offering when conducting tender processes.
- 4.32. In response to the draft determination, Virgin Australia submits that the ability of the Charter Alliance to offer an integrated solution for customers to compare and assess (and potentially use to negotiate a better offer from a competitor) remains a valuable benefit even if customers are ultimately willing to split out services between providers.
- 4.33. Virgin Australia submits that the ability to offer an alternative integrated solution prevents Qantas from relying on being the only operator capable of providing such a solution where that is required by the customer, providing further choice for customers, and increasing competitive tension.<sup>36</sup>

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<sup>31</sup> The Applicants, [Application](#), 27 May 2022, pg. 24.

<sup>32</sup> The Applicants, [Application](#), 27 May 2022, pg. 5.

<sup>33</sup> The Applicants, [Application](#), 27 May 2022, pg. 21.

<sup>34</sup> Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, pg. 9.

<sup>35</sup> Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, pg. 12.

<sup>36</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023 pg. 26.

### *Interested party views*

- 4.34. A number of parties including Sandfire and other confidential parties do not consider the availability of an integrated charter and RPT offering under the Charter Alliance as a benefit.
- 4.35. Roy Hill submits that it is willing to split out charter and RPT services between different airlines if that would provide the best price across each service but recognises there are synergies that can be achieved by contracting with a single airline.<sup>37</sup>
- 4.36. Gold Fields submits that the significance of having a single operator providing an integrated service across different projects depends largely on the cyclical nature of each contract but recognises that there are benefits in dealing with a consistent partner across projects.<sup>38</sup>

### *ACCC view*

- 4.37. Alliance offers charter services through an extensive Australia wide network but only offers a very limited range of RPT services. Specifically, Alliance offers RPT services on a single route (Brisbane to Moranbah), which is largely contracted out to corporate customers on a block seat basis and a small number of charter services which 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).
- 4.38. 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.
- 4.39. While the Charter Alliance 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 only a small number of customers actually require a single airline or alliance providing such a service.
- 4.40. The ACCC's market inquiries showed that several corporate customers are willing to conduct split tender processes for their charter and RPT needs and across different regions or routes, awarding contracts to different service providers, which may or may not include access to value-added benefits. Indeed, some customers that tendered for combined charter and RPT services still ultimately contracted with separate providers.
- 4.41. The ACCC has assessed the likelihood and potential extent of the Charter Alliance promoting competition between FIFO suppliers separately for the East Coast/Central Australia and WA.

### **East Coast and Central Australia**

- 4.42. Prior to the draft determination, Virgin Australia submitted 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 aircraft (between 80-176 seats) which can more strongly compete with Qantas, which can offer aircraft at various capacities (between 36-180 seats and beyond).

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<sup>37</sup> Roy Hill, [File note of meeting with Roy Hill](#), 15 December 2022, pg. 2.

<sup>38</sup> Gold Fields, [File note of meeting with Gold Fields](#), 27 September 2022, pg. 2.

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.

- 4.43. Virgin Australia further submitted that extending the Charter Alliance 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 in Central Australia.<sup>39</sup>
- 4.44. In its draft determination, the ACCC noted that confidential tender data received from Alliance suggested that the parties did not rely on the Charter Alliance to a significant extent on the East Coast.
- 4.45. In its draft determination, the ACCC concluded that the information provided by the Applicants did not support a view that this benefit had been realised by the Applicants under the previous authorisation, and so it was unlikely that this benefit would be realised in the future if the Proposed Conduct was authorised.
- 4.46. In response to the draft determination, Virgin Australia provided bid documents which it submits contradicts Alliance's submission that it has only made independent bids on the East Coast and in Central Australia and shows that the Charter Alliance has enhanced Alliance's charter value proposition in joint bids in these regions through the provision of RPT services by Virgin Australia, value added services, and additional capacity support.<sup>40</sup>
- 4.47. Virgin Australia further submits that the fewer joint tenders and successful charter outcomes the parties have achieved in Queensland can be attributed to:<sup>41</sup>
  - the smaller scale of the East Coast charter market compared to the WA charter market, with resource customers in this region typically requiring smaller aircraft (100 seats or less) for their charter services, which Alliance has historically been able to service independently
  - the lack of charter opportunities as the industry recovered from a mining downturn in previous years. The outlook is likely to remain similarly level in the future unless large scale renewables projects emerge; and
  - the provisions of the Charter Alliance, which provide for Alliance to be the operating airline for new charter opportunities requiring capacity of 100 seats or less in Queensland.
- 4.48. Virgin Australia also submits that since 2017 it has provided block seat RPT services to charter customers using aircraft wet leased from Alliance. Virgin Australia submits that the Charter Alliance has allowed it to contest RPT services more effectively against Qantas on the East Coast by incentivising Alliance to allow Virgin Australia to

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<sup>39</sup> Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, pg. 10-11.

<sup>40</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 27.

<sup>41</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 29-30.

access wet lease capacity on more favourable terms, which Alliance would not be incentivised to do absent the Charter Alliance.<sup>42</sup>

- 4.49. One resource customer submits that the Charter Alliance will promote competition on the East Coast by creating a viable competitor to Qantas through the combination of the Applicants' complementary fleets.
- 4.50. The ACCC does not consider that the ability of the Applicants to jointly compete for contracts under the Charter Alliance on the East Coast and in Central Australia is likely to significantly increase the competitive options available to customers for the reasons below.
- 4.51. First, the ACCC considers that only a small segment of customers require operators to offer a national integrated charter and/or RPT service. The ACCC's market inquiries suggest that:
- many customers only require charter services to and from the airport proximate to their operational sites and do not acquire an 'integrated' charter and/or RPT offering;
  - several customers are willing to conduct split tender processes for their charter and RPT services based on different routes, and award separate contracts to different service providers. This includes customers with operational sites in many locations on a national basis.
- 4.52. Second, as noted at paragraph 4.44 above, the Applicants have not relied on the Charter Alliance to a significant extent in the East Coast. In the East Coast (particularly Queensland), Alliance is serving customers with its own fleet and leveraging its own regional base infrastructure and brand. Accordingly, the ACCC considers that, with or without the Charter Alliance, Alliance is likely to continue to vigorously compete for customer opportunities in the East Coast (particularly Queensland) against the existing FIFO operators.
- 4.53. Third, market conditions for East Coast charter services are such that coordination and joint bids under the Charter Alliance remain unlikely into the future. In particular, the ACCC considers that the demand for smaller aircraft (100 seats or less) in the East Coast and the ongoing downturn in mining activity in the region will reduce the likelihood of the Charter Alliance submitting joint bids, particularly when Alliance has the presence and fleet capacity in the region to service the vast majority of corporate customers independently.
- 4.54. Fourth, the ACCC considers that absent the Charter Alliance, it will remain open for Virgin Australia to continue to provide block seat RPT services using F100 aircraft wet leased from Alliance in the East Coast. This is because these services are provided with wet leased Alliance aircraft pursuant to the wet lease agreement between Virgin Australia and Alliance which is separate to, and independent of, the Charter Alliance.
- 4.55. The ACCC recognises competitive bids by the Applicants for services in the East Coast and Central Australia may theoretically be incrementally improved by the Charter Alliance being able to offer combined charter and RPT services, and that to the extent it imposed additional competitive constraint on Qantas, this would result in public benefit.

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<sup>42</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 29.

4.56. However, for the reasons outlined above, the ACCC considers that the extent of any such benefit is likely to be small because the level of constraint the Applicants can provide can largely be otherwise achieved without the Charter Alliance.

## **Western Australia**

4.57. Prior to the draft determination, Virgin Australia submitted that the Charter Alliance has enabled the Applicants to compete against Qantas in WA more effectively than either airline could have done alone.<sup>43</sup>

4.58. Following the draft determination, Virgin Australia submits that the Charter Alliance's ability to offer a national, integrated charter/RPT solution with value-added benefits across a range of fleet types is valued by customers even where this full solution is ultimately not required by the customer, the Charter Alliance is not awarded the tender, or the tender is ultimately split up and awarded to different operators.

4.59. Virgin Australia further submits that the Charter Alliance gives customers the ability to assess and compare an integrated charter/RPT solution with value-added benefits against solutions proposed by other operators and potentially leverage it in negotiations to obtain a better offer from one of the Charter Alliance's competitors. This increases customers' bargaining power and places an additional competitive constraint on Qantas by creating another provider capable of offering a comparable solution.<sup>44</sup>

### *Interested party views*

4.60. A resource customer submits that where Alliance is unable to provide services, there may be a benefit from Virgin Australia and Alliance jointly bidding as this may elicit a stronger competitive response from Qantas.

4.61. Another resource customer submits that it experienced a competitive response from Qantas in response to the Charter Alliance's offering.

4.62. Rio Tinto submits that it has not had any interactions with the Charter Alliance and has never received a joint bid under the Charter Alliance in relation to any of its contracts or requests for tenders.<sup>45</sup>

### *ACCC view*

4.63. The ACCC acknowledges that the broader mix of aircraft available to the Applicants under the Charter Alliance 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 is unlikely to impose significantly greater competitive constraint on Qantas. To the extent Virgin Australia and Alliance's fleet range are available to customers outside the Charter Alliance, the competitive constraint on Qantas is not a function of the Charter Alliance.

4.64. As noted above, the ACCC's market inquiries suggest that most corporate customers do not require an integrated charter and RPT solution. In this regard, the ACCC understands that it is not uncommon for operators to submit non-compliant bids in response to tender processes involving charter and RPT services, and that doing so does not necessarily preclude an operator from securing the particular portion of the

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<sup>43</sup> Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, pg. 12.

<sup>44</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 30.

<sup>45</sup> Rio Tinto, [File note of meeting with Rio Tinto](#), 28 November 2022, pg. 1.

tender which they bid for with suitable aircraft types (whether charter or RPT). However, to the extent there are customers that require an integrated charter and RPT solution in WA, the ACCC accepts that there are likely to be benefits in the Charter Alliance providing an alternative and comparable solution to Qantas, though the ACCC considers that the number of customers who require such a service is small.

- 4.65. The ACCC recognises that there may be situations where an unsuccessful joint bid by the Applicants may in and of itself provide additional competitive constraint on Qantas (over and above independent bids by the Applicants) and this may result in Qantas, as the incumbent or competitive bidder, improving its offer to customers. However, based on the information available, the ACCC is not satisfied that the Charter Alliance has imposed a significant degree of additional competitive constraint on Qantas in WA as compared to the Applicants bidding independently.
- 4.66. The ACCC notes that feedback from customers regarding Alliance's fleet size and range, offering its F70 and F100 aircraft, its quality of services and its cost competitive position in the WA market, supports the view that Alliance is likely the main proponent for successful tenders made under the Charter Alliance for customers that are best served by 100 seat aircraft.
- 4.67. The ACCC notes that Alliance, with a considerably larger F70/F100 fleet of 38 aircraft compared to Virgin Australia's fleet of 8 F100s, has the capacity and fleet range to operate the majority of services required in WA, without the Charter Alliance. Conversely, Virgin Australia does not have the F100 fleet size to operate the majority of 100-seat services required in WA – particularly given Virgin's announced intention to further reduce its F100 fleet. The ACCC understands that in at least 2 tenders, the Charter Alliance's joint bid was unsuccessful, but the customer went on to award (some) services to Alliance in its own right.

### Efficiencies from integration of VARA and Alliance's operations

- 4.68. 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.
- 4.69. The Applicants submit that the Charter Alliance 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.<sup>46</sup>
- 4.70. The ACCC has assessed the likely extent of operational efficiencies claimed by the Applicants within each of the following categories:
- product and service efficiencies
  - operational efficiencies and reduced costs at Perth Airport.

### Product and service efficiencies

- 4.71. The Applicants submit that public benefits in the form of product and service efficiencies have been realised under the Charter Alliance, including:
- access to complementary fleet sizes, leading to:

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<sup>46</sup> The Applicants, [Application](#), 27 May 2022, pg. 21-23.

- better scheduling and fewer flight delays
- avoiding costs of expanding fleet and operation bases
- reducing aircraft, crew, maintenance and insurance costs including avoiding costs of replacing F100 engines,
- frequent flyer benefits and other value adds.<sup>47</sup>

4.72. The Applicants submit that the above efficiencies in products and services offered under the Charter Alliance flow directly to customers.

### ***Access to complementary fleet sizes***

4.73. 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 Virgin Australia and VARA's fleet of higher capacity aircraft.<sup>48</sup>

4.74. 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.<sup>49</sup>

4.75. The Applicants submit that the Charter Alliance has allowed VARA and Alliance to improve efficiency and flexibility, reduce both fixed and variable costs and pass those cost reductions on to customers.

4.76. The key operational efficiencies resulting from access to complementary fleet sizes that the Applicants claim result from the Charter Alliance are discussed below.<sup>50</sup>

### **Better scheduling and less flight delays**

4.77. 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.<sup>51</sup>

4.78. 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 used Alliance aircraft to operate a total of 1124 sectors, inclusive of ad-hoc

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<sup>47</sup> The Applicants, [Application](#), 27 May 2022, pg. 24.

<sup>48</sup> The Applicants, [Application](#), 27 May 2022, pg. 22; Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, pg. 9.

<sup>49</sup> Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, pg. 9.

<sup>50</sup> The Applicants, [Application](#), 27 May 2022, pg. 21-23.

<sup>51</sup> The Applicants, [Application](#), 27 May 2022, pg. 23-24.



services. VARA also requested Alliance capacity during times of fleet availability limitations due to unscheduled aircraft maintenance events.<sup>52</sup>

- 4.79. Alliance submits that there are instances of Alliance and VARA leveraging one another's fleet capacity to provide continuity of charters services.<sup>53</sup>
- 4.80. Virgin Australia provided examples of specific customers that have benefited from better scheduling and fewer flight delays under the Charter Alliance.<sup>54</sup>

#### *Interested party views*

- 4.81. Regis Resources submits that flexibility in aircraft sizes, time slot availability to meet FIFO demands, and surplus fleet (as opposed to single aircraft) are important factors when awarding aviation contracts.<sup>55</sup>
- 4.82. Gold Fields submits that the Charter Alliance (with its combined fleet capacity) has worked well for Gold Fields, as there has been an increase in demand for ad hoc services since the pandemic. Gold Fields submits that the key reason for it switching suppliers for the Granny Smith contract in 2020 from Cobham to Alliance (pursuant to the Charter Alliance) was the desire to have aircraft with larger seating capacity.<sup>56</sup>
- 4.83. Rio Tinto submits that the ability of Alliance and Virgin Australia under the Charter Alliance to provide ad hoc services for each other may be an advantage for customers who are not contracted; however, Rio Tinto has KPIs in its (separate) contracts with Virgin and Alliance, that include availability of aircraft.<sup>57</sup>
- 4.84. One resource customer submits that it does see a benefit to a complementary fleet and footprint, as this will increase competition with the other major airlines.
- 4.85. Consolidated Minerals submits that the ability to source alternative aircraft under the Charter Alliance is attractive; however, it has not required the use of the cross-hire service during the past 5 years.<sup>58</sup>
- 4.86. Virgin Australia submits in response that the fact that Virgin Australia has managed to service this contract without having to call upon Alliance's F100 capacity does not remove the benefit to Consolidated Minerals of having that capacity available to ensure business continuity.<sup>59</sup>
- 4.87. Roy Hill submits that it has seen no firsthand evidence of benefits from Virgin Australia and Alliance combining their fleets, but the concept is potentially valuable if it provides greater flexibility/more options from having access to a larger fleet of aircraft. Roy Hill

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<sup>52</sup> Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, pg. 4, 12.

<sup>53</sup> Alliance Airlines, [Alliance Airlines' response to ACCC draft determination and interested party submissions](#), 24 February 2023, pg. 3.

<sup>54</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 24.

<sup>55</sup> Regis Resources, [File note of meeting with Regis Resources](#), 29 November 2022, pg. 1-2.

<sup>56</sup> Gold Fields, [File note of meeting with Gold Fields](#), 27 September 2022, pg.1.

<sup>57</sup> Rio Tinto, [File note of meeting with Rio Tinto](#), 28 November 2022, pg. 2.

<sup>58</sup> Consolidated Minerals, [Submission from Consolidated Minerals in response to the draft determination](#), 8 March 2023, pg. 1.

<sup>59</sup> Virgin Australia, [Virgin Australia's response to submission from Consolidated Minerals](#), 20 March 2023, pg. 2.

submits that some smaller resource companies may find the Charter Alliance useful for its expanded fleet capacity.<sup>60</sup>

- 4.88. Sandfire submits that it occasionally charters extra flights to its WA mine site, so the availability of additional ad-hoc flights would be a benefit to Sandfire. Further, that peak charter flight times are very important to Sandfire.<sup>61</sup>
- 4.89. One resource customer has not experienced any benefit from VARA being able to leverage Alliance's fleet in order to provide continuity of service during times of disruption or capacity constraints.
- 4.90. Another resource customer submits that it appreciates having the ability to access flights during peak charter flight times; however, the lack of airport slots around Perth is the key factor on service levels regardless of airline.
- 4.91. A resource customer submits that it is likely that contracting with Virgin Australia alone would result in much the same outcome as dealing with the Charter Alliance.

#### *ACCC view*

- 4.92. The ACCC accepts that the broader mix of aircraft available to the Applicants under the Charter Alliance is likely to result in public benefit from increased flexibility and optimisation of aircraft utilisation, leading to efficiencies through better service scheduling and reduced flight delays.
- 4.93. However, the ACCC notes that wet leasing arrangements are able to provide a degree of operational flexibility by providing airlines with access to aircraft in addition to their own fleets. Absent the Charter Alliance, it would be open to the Applicants to enter into wet lease agreements with each other and/or with other airlines such as Qantas or Cobham (though it is unclear whether these parties have the capacity and incentives to offer wet leasing services to the Applicants in practice). The ACCC notes that absent the Charter Alliance, the parties would no longer face a contractual restriction preventing them entering into wet lease arrangements. Accordingly, the applicants could explore wet-leasing arrangements with other aviation providers in the industry (albeit, these options may be at increased operational cost).
- 4.94. The ACCC considers that the Charter Alliance is likely to result in some public benefit by providing operational flexibility for both parties at a lower cost than alternative arrangements such as wet leasing from other providers in the industry. There would also be greater certainty of supply under the Charter Alliance.

#### Avoiding costs of expanding fleet and operating bases, and reducing aircraft, crew, maintenance and insurance costs

- 4.95. 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.<sup>62</sup> Further, the Charter Alliance 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.
- 4.96. The Applicants also submit that the Charter Alliance has allowed VARA and Alliance to achieve aircraft, crew, maintenance and insurance cost savings, particularly in relation

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<sup>60</sup> Roy Hill, [File note of meeting with Roy Hill](#), 15 December 2022, pg. 3.

<sup>61</sup> Sandfire Resources, [File note of meeting with Sandfire Resources](#), 25 November 2022, pg. 1.

<sup>62</sup> The Applicants, [Application](#), 27 May 2022, pg. 22.

to maintenance costs for F100 engines and major components.<sup>63</sup> 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. Virgin Australia 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.<sup>64</sup>

- 4.97. The Applicants submit that these cost savings have enabled both parties to maintain a competitive cost base and the cost savings from avoiding engine replacement costs (quantification was provided to the ACCC on a confidential basis) have allowed VARA to avoid passing on significant cost increases to customers in the form of increased charter prices. 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.<sup>65</sup>
- 4.98. Virgin Australia also submits that having access to Alliance's wider geographical operating base network under the Charter Alliance 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.<sup>66</sup>

#### *ACCC view*

- 4.99. The ACCC accepts that combining fleet capacity and operating base networks allows the Applicants to address capacity issues and provide a national solution to customers, while avoiding costs associated with expanding the aircraft fleet, or expanding operating bases.
- 4.100. However, the ACCC considers that it is unclear what the Applicants' future fleet 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. Absent the Charter Alliance, it would be open for the Applicants to wet lease aircraft from other suppliers (including from each other) to avoid the costs of fleet expansion, albeit at potentially increased operational cost.
- 4.101. The ACCC considers that in the future without the Proposed Conduct, Virgin Australia could seek to prolong the operational life of a small number of its existing F100 aircraft, seek to acquire additional 100 seat capacity aircraft capacity (by wet lease) or seek to use B737-700 aircraft (with the benefit of scale efficiencies derived from Virgin Australia's existing B737-800 operations) for some customers.
- 4.102. The ACCC accepts that under the Charter Alliance, VARA has achieved some cost savings in relation to maintenance of its F100 engines and major components. However, the ACCC considers that in the future without the Proposed Conduct, it

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<sup>63</sup> The Applicants, [Application](#), 27 May 2022, pg. 22-23.

<sup>64</sup> Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, pg. 12; Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions, 17 February 2023](#), pg. 34-35.

<sup>65</sup> Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, pg. 9; Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, pg. 10.

<sup>66</sup> Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, pg. 10.

would be open to the Applicants to engage in a competitive procurement process for heavy maintenance services (or for other relevant services) and are likely to achieve a similar level of pricing tension to that achieved under the Charter Alliance.

- 4.103. In relation to the Charter Alliance 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,<sup>67</sup> this seems unlikely to change in the future. 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.
- 4.104. Therefore, the ACCC is not satisfied based on the information before it that the Charter Alliance would be likely to result in a significant public benefit in the form of cost savings from avoiding the fleet expansion, accessing each other's operating bases, and reducing aircraft, crew, maintenance and insurance costs. Further, the Applicants have not provided evidence of how these cost savings (if present) have been passed through to customers.

### ***Frequent flyer benefits and other value adds***

- 4.105. The Applicants submit that the Charter Alliance 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.<sup>68</sup>
- 4.106. Virgin Australia submits that for many resource industry customers, the ability to offer their employees the chance to earn points is an important recruitment and retention benefit. Virgin Australia submits that absent the Charter Alliance, 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.<sup>69</sup>
- 4.107. 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.<sup>70</sup>
- 4.108. Virgin Australia also submits that the ability to offer frequent flyer benefits allows greater competitive constraint to be placed on Qantas. Virgin Australia submits that without the Charter Alliance, only Qantas can offer these value-added benefits across its charter and RPT network, meaning that customers who value these benefits, or want the option to consider them, have only a single operator to choose from. The Charter Alliance extends this benefit to more customers and creates competitive tension in doing so.<sup>71</sup>

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<sup>67</sup> The Applicants, [Application](#), 27 May 2022, pg. 20.

<sup>68</sup> The Applicants, [Application](#), 27 May 2022, pg. 24.

<sup>69</sup> Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, pg. 13.

<sup>70</sup> Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, pg. 3, 13.

<sup>71</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 25.

### *Interested party views*

- 4.109. Regis Resources submits that access to frequent flyer points and airport lounges are not important factors for it when awarding an aviation contract.<sup>72</sup>
- 4.110. A resource customer submits that lounge access and frequent flyer points are not very important to its consideration, although it would accept them if offered for free but has not accepted them as paid-for options in the past.
- 4.111. Another resource customer submits that even though access to frequent flyer points and airport lounges is important for employee retention and recruitment, it is not a determinative factor when deciding whether to award a contract to Qantas, Alliance, or Virgin Australia.
- 4.112. Bonza submits that it will not be providing traditional frequent flyer programs or airport lounges to customers.<sup>73</sup>
- 4.113. Conversely, Gold Fields submits that access to the Virgin Frequent Flyer program and lounge access (at a competitive price point) was an important factor which influenced Gold Fields' decision to award contracts to VARA and Alliance under the Charter Alliance. Frequent flyer programs are something that Gold Field's employees value and the business would otherwise purchase or pay for it under a different arrangement if there was an independent bidder that did not have an in-house frequent flyer program.<sup>74</sup>
- 4.114. A resource customer submits that having access to frequent flyer points is important to FIFO employees. Having access to Airport lounges is also important to FIFO employees (particularly at Perth Airport and given no meals are served on charter flights), and this is achieved as part of the frequent flyer program (because employees have Platinum or Gold status and qualify for lounge access). These benefits are important considerations for employee retention and recruitment.
- 4.115. Rio Tinto submits that having access to frequent flyer programs and airport lounges is important for employee recruitment and is utilised by Rio Tinto to differentiate itself as a potential employer.<sup>75</sup>
- 4.116. A resource customer submits that it sees benefit in accessing Velocity Frequent Flyer program and Virgin Australia's lounges on Alliance Services, as FIFO workers do find these reward programs beneficial.

### *ACCC view*

- 4.117. While the ACCC recognises the ability to offer frequent flyer benefits provides choice and enhanced services for customers, the ACCC has found through its customer consultation that the value that customers place on this can differ greatly, as outlined above.
- 4.118. The ACCC accepts that where permitted, passengers value the ability to use points earned while travelling for business with their employer's preferred airline. Similarly, 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

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<sup>72</sup> Regis Resources, [File note of meeting with Regis Resources](#), 29 November 2022, pg. 2.

<sup>73</sup> Bonza, [File note of meeting with Bonza](#), 25 November 2022, pg. 1.

<sup>74</sup> Gold Fields, [File note of meeting with Gold Fields](#), 27 September 2022, pg. 2.

<sup>75</sup> Rio Tinto, [File note of ACCC meeting with Rio Tinto](#), 28 November 2022, pg.2.

frequent flyer program. Also, access to Virgin Australia lounges when flying with Alliance is likely to be valued by eligible passengers.

- 4.119. Therefore, the ACCC understands that an offer of frequent flyer benefits and access to airport lounges may be important for recruitment and retention of some customer employees. However, it does come at a cost to the employer, and the costs associated are not considered by some customers as an overall commercial benefit.
- 4.120. The ACCC considers that without the Proposed Conduct, there remains sufficient scope for Alliance to compete for charter contracts if it chose not to offer an in-house frequent flyer program or other value-added services. It could also acquire these services separately from airline providers, including other than Virgin Australia. The ACCC accepts, however, that Alliance is likely to be able to acquire these services at a somewhat lower cost through the Charter Alliance, and potentially on a broader range of flights than would otherwise be possible.
- 4.121. While the ACCC considers that having access to frequent flyer programs and value-added services is valued by some charter customers and their employees, the ACCC is not satisfied that in this respect the Charter Alliance will significantly improve the competitive outcomes of tender processes or significantly increase competition between airlines.

## **Operational efficiencies and reduced costs at Perth Airport**

### ***Alignment of procedures and processes***

- 4.122. 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 connections between T1 (international terminal) and T2 (VARA/Alliance domestic terminal), reducing transfer times for FIFO passengers, especially during times of schedule disruption.<sup>76</sup>
- 4.123. Virgin Australia provided specific examples of Charter Alliance customers that have benefitted from the alignment of procedures and processes at Perth Airport and the resulting improved quality of FIFO services. These customers benefitted from access to quick and flexible additional capacity support, improved connections and reduced connection transfer times between charter services delivered by Alliance at Terminal 2 and RPT services delivered by Virgin Australia at Terminal 1. Gold Fields has also acknowledged that its passengers appreciated their services being located at the terminals at Perth Airport, compared with Skippers or Cobham who are not located at the terminals.<sup>77</sup>
- 4.124. 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.<sup>78</sup>

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<sup>76</sup> The Applicants, [Application](#), 27 May 2022, pg. 22.

<sup>77</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 32.

<sup>78</sup> Virgin Australia, [Virgin Australia's response to ACCC request for information](#), 30 September 2022, pg. 8-9.

### *Interested party views*

- 4.125. Some resource customers submitted that they experienced some benefits from improved connections between terminals at Perth Airport.
- 4.126. Gold Fields submits that it did not experience any real benefit from the Charter Alliance through improved connections between terminals at Perth airport. However, staff appreciate the ability to go through the nicer terminals to board their flights, compared to the alternative with Skippers or Cobham (who are not located at the terminals). Only a small (but not insignificant) number of staff board RPT flights following a company scheduled charter flight.<sup>79</sup>
- 4.127. Regis Resources submits that Skippers, its currently preferred airline provider, operates from the General Aviation area of Perth Airport, which has its own carpark and frequent taxis, and provides for easy movement of FIFO workers. Regis Resources prefers to land at the General Aviation area (rather than at the Terminals) due to generally better luggage handling (on account of fewer airlines operating), and that all travellers are FIFO workers, so there are no delays relating to other travellers or tourists.<sup>80</sup>

### *ACCC views*

- 4.128. The ACCC accepts that the Charter Alliance is likely to result in some operational efficiencies through the alignment of procedures and processes at Perth Airport.
- 4.129. The ACCC accepts that the Applicants have likely achieved cost savings by aligning their airport and ground handling procedures and processes at Perth Airport. However, the ACCC remains uncertain of the scale of these cost savings, and the extent to which these cost savings have and will continue to be passed through to customers.

### ***Reduced variable costs***

- 4.130. The Applicants submit that the Charter Alliance increased the Applicants' bargaining power in respect of Perth Airport's per passenger taxes, resulting in a reduction of per passenger taxes paid by VARA which was generally passed on to customers in its entirety.<sup>81</sup>
- 4.131. Virgin Australia submits that charges are negotiated individually between each airline and Perth Airport. The Charter Alliance has increased the competitiveness of the Applicants' product and service offering and has allowed the Applicants to bid for (and win) a number of tenders which they would be unable to bid for on a standalone basis. In turn, this has increased passenger numbers at each terminal and increased VARA's ability to negotiate charges with Perth Airport. VARA would have been unable to increase its passenger numbers to the same extent without the Charter Alliance (for example simply due to growth in the WA resource industry).<sup>82</sup>
- 4.132. Virgin Australia submits that the Applicants have not unilaterally increased prices since the Charter Alliance was authorised in 2017 and have been able to better service customer needs and requirements than either party could on a standalone basis. It

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<sup>79</sup> Gold Fields, [File note of meeting with Gold Fields](#), 27 September 2022, pg. 2.

<sup>80</sup> Regis Resources, [File note of meeting with Regis Resources](#), 29 November 2022, pg. 1.

<sup>81</sup> The Applicants, [Application](#), 27 May 2022, pg. 22-23.

<sup>82</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 35.

submits that this shows that the efficiencies and cost savings mentioned above have continued to be passed through to customers in the form of lower fares and better services than would be possible without the Charter Alliance.<sup>83</sup>

#### *ACCC views*

- 4.133. The ACCC accepts that VARA has been able to negotiate reductions of per passenger taxes at Perth Airport, and that this might be due to an increase in its passenger numbers at the Perth terminals because of the Charter Alliance.
- 4.134. However, the ACCC has not had confirmation from Perth Airport whether any recent reductions in airport taxes paid by Alliance or VARA, individually, were attributable to factors that would have occurred with or without the operation of the Charter Alliance. Therefore, it is unclear if in the future, with or without the Proposed Conduct, the Applicants will have the ability to negotiate similar reduced airport taxes at Perth Airport.
- 4.135. The ACCC remains uncertain whether cost savings, if attributable to the operation of the Charter Alliance, have been passed through to customers. Based on the information available, the ACCC is unable to consider whether, if cost savings could be realised, they would be passed on to consumers and thus is unable to assess the extent of any potential public benefit. The ACCC accepts that the Applicants have not increased prices since the Charter Alliance was authorised in 2017, but it remains unclear whether cost savings from reduced airport taxes have been passed through to customers, or whether the pricing offered by the Applicants since 2017 is due to other economic or competitive factors.
- 4.136. To the extent that the reduced airport taxes make those charges closer to an efficient level, this would be a public benefit— particularly when any savings have been passed through to customers.

#### *ACCC conclusion on public benefit*

- 4.137. The ACCC considers that the Proposed Conduct is likely to result in some public benefits. Based on the information received, the ACCC is not satisfied that all benefits claimed by the Applicants under the previous authorisation have been realised over the previous 5-year period. While the ACCC's assessment is forward looking, this has informed the ACCC's current assessment of the likelihood of future public benefits and detriments resulting from the Proposed Conduct in this application.
- 4.138. The ACCC's market inquiries suggest that most corporate customers do not require an integrated charter and RPT solution. To the extent there are customers that require an integrated charter and RPT solution in WA, the ACCC accepts that there are likely to be benefits in the Charter Alliance providing an alternative and comparable solution to Qantas, though the ACCC considers that the number of customers who require such a service is very small. Further, it should be noted that Virgin Australia, without the Proposed Conduct, can itself offer an 'integrated RPT and charter solution', albeit not to the same extent as it could with the Proposed Conduct.
- 4.139. The ACCC accepts that the Charter Alliance may enhance the Applicants' competitiveness in WA by better allowing them to offer aircraft with capacities similar to those offered by Qantas, and this may result in Qantas, as the incumbent or primary competing bidder, improving its offer to customers. However, the ACCC considers that this expanded fleet capacity under the Charter Alliance is unlikely to impose

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<sup>83</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 35.



significantly greater competitive constraint on Qantas as compared to the Applicants bidding independently.

- 4.140. The ACCC accepts that combining fleet capacity and operating base networks allows the Applicants to address capacity issues, make some more conforming bids and provide a national solution to customers, while likely avoiding costs associated with individually expanding aircraft fleet, expanding operating bases, and aircraft, crew, maintenance and insurance costs. However, the ACCC is not satisfied there would be sufficient cost savings to constitute a significant public benefit. Further, the Applicants have not provided evidence of how any cost savings have been passed through to their customers under the previous authorisation.
- 4.141. The ACCC accepts that the Applicants will have access to complementary fleet sizes pursuant to the Charter Alliance and this is likely to result in some public benefit by providing operational flexibility for both parties at a lower cost than alternative arrangements such as wet leasing from other providers in the industry. There would also likely be greater certainty of supply under the Charter Alliance.
- 4.142. While the ACCC considers that having access to frequent flyer programs and value-added services is valued by some charter customers and their employees, these services are available outside of the Charter Alliance. The ACCC is not satisfied that in this respect the Charter Alliance will significantly improve the competitive outcomes of tender processes or significantly increase competition between airlines.
- 4.143. The ACCC accepts that the Applicants have likely achieved cost savings by aligning their airport and ground handling procedures and processes at Perth Airport, and by VARA negotiating greater reductions of per passenger taxes at Perth Airport pursuant to the Charter Alliance. The ACCC remains uncertain, however, whether cost savings, if attributable to the operation of the Charter Alliance, have been passed through to customers. To the extent that cost savings from reduced airport taxes that reflect greater efficiencies from the Charter Alliance would be passed through to customers, this would be a public benefit. However, the ACCC is not satisfied that there would be sufficient cost savings to constitute a significant public benefit.

## Public detriments

- 4.144. The CCA 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.<sup>84</sup>*

- 4.145. The ACCC considers that the following detriments are relevant to its assessment of the Proposed Conduct:

- loss of competition in the provision of charter services
  - direct loss of bidders in tender processes
  - decreased ability to offer wet leasing, maintenance services, access to parts
  - impact on dynamic competition

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<sup>84</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- decreased ability by customers to spread operational risk between suppliers.

4.146. The ACCC has considered below whether there is likely to be any mitigation of the relevant detriments in the form of the ability for competitors to enter or expand or the ability for customers to exert bargaining power.

### Loss of competition in the provision of charter services

4.147. Based on Virgin Australia's market share data (see Table 2 above), the Charter Alliance will remove competition between 2 of the 3 largest FIFO service providers in the WA market. More importantly, 2 suppliers (Qantas and the Applicants) supply and will likely continue to supply around 79% of FIFO services in the WA market. Qantas remains the largest operator in WA with an estimated market share of 42%.<sup>85</sup>

4.148. VARA has a limited charter presence on the East Coast of Australia, (2% of the market) and there is no material overlap between the Charter Alliance partners' FIFO services outside of WA.

### Direct loss of bidders in tender processes

4.149. The Applicants acknowledge that the Charter Alliance removes competition between Virgin Australia and Alliance.<sup>86</sup>

4.150. Virgin Australia submits that the Charter Alliance has not anticompetitively raised prices or reduced service levels to customers, in fact, it has been able to provide customers better services more efficiently. Virgin Australia submits that the ability to increase prices above competitive levels or reduce service levels is also constrained by contractual provisions and the nature of the tender process.<sup>87</sup>

4.151. Virgin Australia submits that the Charter Alliance's existing customers will typically have the benefit of existing contractual provisions which provide pricing and product commitments from VARA and Alliance that were agreed following a competitive tender process. At the same time, existing customers have demonstrated that they can test the market at any time during the life of the contract and press for better price and supply terms.<sup>88</sup>

4.152. Virgin Australia submits that the following characteristics of the tender process for FIFO services mitigates the ability to engage in anticompetitive conduct, including:<sup>89</sup>

- Customers include sophisticated mining and resource companies with significant procurement experience.
- Customers control the tender requirements, participants, parameters and processes.

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<sup>85</sup> Virgin Australia, [Additional submission from Virgin Australia](#), 3 June 2022, pg. 8.

<sup>86</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 20.

<sup>87</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 11.

<sup>88</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 11.

<sup>89</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 12-13.

- Tenders are diverse and tailored to the specific requirements of the customer at the time.
- There is little transparency in supply terms (including the price) negotiated by the customers controlling the tenders.
- FIFO contracts do not commit a customer to provide the supplier with a guaranteed contracted revenue (no VARA contracts have guaranteed revenues), there is not regular, repeated competitive interaction in relation to specific customers given the long-term nature of FIFO contracts (generally several years).
- Qantas can provide any services that can be provided by the Charter Alliance, enabling customers to bypass the Charter Alliance and negating any ability to acquire, or exercise, market power.

*Interested party views*

- 4.153. Sandfire submits that there are not many airlines in the charter market with sufficient scale and fleet availability to meet Sandfire's operational requirements. Therefore, it considers that the loss of a potential bidder (in VARA or Alliance) as a result of the Charter Alliance will result in less competitive outcomes and a less competitive FIFO market. Sandfire has only been receiving bids from 4-5 airlines each tender process.<sup>90</sup>
- 4.154. A resource customer submits it would prefer to have Alliance as an additional bidder in its tenders rather than have Alliance supporting VARA in its bid. It considers that both VARA and Alliance could submit complying bids. It has had no visibility on Alliance's service offering because it has not bid separately. But Alliance appears to be cost competitive based on its provision of ad hoc services. The market appears to be very thin despite the explosion of charter work with Covid and a significant upturn in the mining sector.
- 4.155. Another resource customer submits that its preference is to continue to have multiple providers deliver charter services to its WA mines, rather than have Virgin Australia and Alliance jointly bid under the Charter Alliance.
- 4.156. Consolidated Minerals submits that Virgin Australia and Alliance operate a charter F100 fleet, and considers the best opportunity to secure long term, low-cost aviation services is when the 2 main providers of F100 aircraft are able to compete with one another in the same market in terms of rates, prices and service levels. Consolidated Minerals also submits that if Virgin Australia and Alliance are unable or unwilling to compete with one another, it will not derive the benefits of participating in a competitive market environment by having limited, or no access to lower cost aircraft. It therefore may have to accept suboptimal outcomes such as being forced to utilise higher cost aircraft as well as incurring increased capital costs to accommodate the alternative aircraft available to service the Woodie airstrip.<sup>91</sup>
- 4.157. In response to Consolidated Minerals, Virgin Australia submits that it and Alliance are not the only, or even the main, providers of F100 aircraft. Importantly, Network Aviation (a subsidiary of Qantas) has more than double Virgin Australia's current F100 fleet, Virgin Australia is transitioning out of the F100 aircraft, Skippers also operates F100s, and Virgin Australia understands that Consolidated Minerals previously shortlisted Cobham who provided a proposal using E190 aircraft. As such, Consolidated Minerals

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<sup>90</sup> Sandfire Resources, [File note of meeting with Sandfire Resources](#), 25 November 2022, pg. 1.

<sup>91</sup> Consolidated Minerals, [Submission from Consolidated Minerals in response to the draft determination](#), 8 March 2023, pg. 1-2.

would still be capable of conducting a competitive tender process for these services with the Charter Alliance.<sup>92</sup>

- 4.158. Gold Fields submits that in relation to Gold Fields' Agnew/Leinster and Gruyere (2019) and Granny Smith (2020) tender processes, the Applicants submitted a joint bid for each contract under the Charter Alliance. This initially raised concerns for Gold Fields; however, the practical effect of this decision on Gold Fields was negligible given the ability to still secure a comparative price relative to previous contracts with incumbent suppliers. Gold Fields submits that it is difficult to compare the impact of the Charter Alliance as Gold Fields does not know what the pricing would have been absent the Charter Alliance.<sup>93</sup>
- 4.159. A resource customer submits that the loss of competition between the Applicants is more than offset by the enhanced ability for the Applicants to compete with the incumbent airlines. It considers that there is unlikely to be an ability for the Applicants to unilaterally raise prices, given the competition on the relevant routes.
- 4.160. Roy Hill submits that smaller operators with different tender or operational requirements may prefer to have Virgin Australia and Alliance compete against each other.<sup>94</sup>
- 4.161. A resource customer submits that in a situation where Qantas and Virgin Australia would be the only choices of provider (because Alliance is not a viable option), there may be a benefit from Virgin Australia and Alliance jointly bidding as this may elicit a stronger competitive response from Qantas, but it has seen no evidence of this.
- 4.162. Regis submits that 3 bidders in a tender process for charter services is sufficient to get a reasonable outcome. Further, it is not concerned whether Virgin Australia and Alliance submit a joint bid or independent bids in response to tender processes – there is a benefit to having a broader solution and economies of scale from a joint offering and discounts on repeat flights.<sup>95</sup>
- 4.163. Bonza submits that it sees some very limited benefit of the Charter Alliance in the FIFO market, in that it levels off competition between other larger FIFO providers and the Applicants.<sup>96</sup>
- 4.164. One resource customer submits that if it needs to utilise larger aircraft, which Alliance does not currently possess, it will likely contract with Virgin Australia alone which would result in much the same outcome as dealing with the Charter Alliance. In its view Qantas may prefer to compete with Virgin Australia and Alliance together as an alliance, rather than individually. It would have 3 offerings to price against - Alliance F100, Virgin Australia A320 and RPT - rather than 2 separate F100 bids to compete against.

#### *ACCC view*

- 4.165. Market share information provided by the Applicants indicates that the Charter Alliance will likely remove competition between 2 of the 3 largest FIFO service providers. With

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<sup>92</sup> Virgin Australia, [Virgin Australia's response to submission from Consolidated Minerals](#), 20 March 2023, pg. 3.

<sup>93</sup> Gold Fields, [File note of meeting with Gold Fields](#), 27 September 2022, pg. 1.

<sup>94</sup> Roy Hill, [File note of meeting with Roy Hill](#), 15 December 2022, pg. 3.

<sup>95</sup> Regis Resources, [File note of meeting with Regis Resources](#), 29 November 2022, pg. 2.

<sup>96</sup> Bonza, [File note of meeting with Bonza](#), 25 November 2022, pg. 2.

the Proposed Conduct, 2 suppliers (Qantas and the Applicants) will likely continue to supply the majority of FIFO services in WA.

- 4.166. Although the ACCC has seen varied opinions from customers as to the potential loss of a bidder in the market, there is clearly customer concern regarding the competitive outcomes of tender processes with the Proposed Conduct.
- 4.167. The ACCC notes the Applicants' submission that they have not anticompetitively raised prices or reduced service levels to customers over the duration of the authorisation. However, the ACCC considers that, with the removal of competition between 2 of the 3 largest FIFO service providers, incentives remain for the Applicants to raise prices or reduce service levels when tendering to supply charter services in WA, especially considering the Applicants' enhanced market position since the previous authorisation.
- 4.168. The ACCC considers there is likely to be material public detriment from the reduction in competition for the supply of FIFO services in WA resulting from the Charter Alliance. There is also an increased risk of detriment from coordination in pricing between Qantas and a combined Charter Alliance than if Virgin Australia and Alliance are setting prices and tendering separately.

#### **Decreased ability to offer wet leasing, maintenance services, access to parts**

- 4.169. The Charter Alliance Agreement provides that the Applicants agree not to supply services to each other's key competitors, with some limited exceptions.
- 4.170. The Applicants submit that the exclusivity provision in the Charter Alliance Agreement has not prevented Alliance supplying services, including wet lease services, to other airlines.
- 4.171. Rex submits that that the ACCC should not allow any restrictions to be imposed on Alliance providing access to E190 simulators or supplying E190 parts and that these should be available on fair market conditions.<sup>97</sup>
- 4.172. Bonza submits that it sees Alliance as a potential major supplier in situations of operational disruption and is concerned that Virgin Australia could direct Alliance to refuse to supply it under the Charter Alliance. Further, Bonza submits that there needs to be safeguards in place to ensure aircraft leasing to Bonza in such circumstances occurs at market cost and not as a punitive cost to Bonza.<sup>98</sup>
- 4.173. Alliance submits that Rex's concerns regarding access to E190 simulators and Bonza's concerns regarding wet leasing are not relevant to the application for authorisation, as these issues are entirely separate to and unrelated to the Charter Alliance.<sup>99</sup>
- 4.174. Virgin Australia submits that the Charter Alliance will not prevent other airline services providers (such as Bonza) from accessing ad-hoc charter services or Rex from accessing E190 simulators or parts.<sup>100</sup>

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<sup>97</sup> Rex, [File note of meeting with Rex](#), 18 November 2022, pg. 1.

<sup>98</sup> Bonza, [File note of meeting with Bonza](#), 25 November 2022, pg. 1.

<sup>99</sup> Alliance Airlines, [Alliance Airlines' response to ACCC draft determination and interested party submissions](#), 24 February 2023, pg. 2.

<sup>100</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submission](#), 17 February 2023, pg. 18.

### *ACCC view*

- 4.175. The ACCC is of the view that the exclusivity provision of the Charter Alliance Agreement limits Virgin Australia and Alliance's ability to wet lease aircraft to any key competitors. While we understand the parties have on occasion wet leased aircraft to competitors, we still consider that the exclusivity provision limits their ability to do so. This view is supported by confidential documents obtained by the ACCC.
- 4.176. The ACCC considers that the restrictions under the exclusivity provision of the Charter Alliance Agreement are likely to result in some detriment by reducing competition in the provision of charter services. These restrictions will also likely diminish any constraint that smaller competitors could provide on the larger operators in the market because it will be harder for them to wet lease aircraft. This will negatively impact competitive outcomes for customers.

### **Impact on dynamic competition**

- 4.177. The ACCC considers that the Charter Alliance is likely to result in detriments from reduced dynamic competition between the Applicants over time.
- 4.178. Alliance's fleet of aircraft have traditionally been of 100 seat capacity and below. The ACCC considers that pursuant to the Proposed Conduct and while Alliance has access to Virgin Australia's operational assets, Alliance is less likely to innovate in seeking to compete to provide services to customers that demand more than 100 seat capacity. Alliance is less likely to grow its fleet into larger sized aircraft, or expand its operational bases. The exclusive provisions in the Charter Alliance reduce Alliance's incentives to be flexible in wet leasing aircraft to other providers, reducing competition in the wider aviation market.
- 4.179. Similarly, the authorisation has allowed VARA to access Alliance's fleet of F100's in order to continue to offer customers competitive 100 seat aircraft services while phasing out its own F100s fleet. The Charter Alliance reduces VARA's incentives to explore alternative ways to provide these services to customers or to compete with Alliance. Over time, the Charter Alliance increases the likelihood of the parties making structural changes in their respective fleets to further reduce any fleet type overlap between them, further reducing the likelihood of them competing in the future.

### **Increased operational risk for customers**

- 4.180. Some customers for FIFO charter services, although not all, reported that they prefer to acquire services from a number of suppliers in order to reduce risk. By maintaining a relationship with a number of suppliers, a customer can increase the probability that it will be able to acquire ad hoc services in the case that one operator is unable to supply its contracted services. The customer may be able to acquire additional services through its remaining suppliers or shift existing services from other routes onto the problematic routes, allowing it to maintain operations.
- 4.181. For these FIFO customers, reliability of operations is more valued than any minor cost increases from spreading their charter needs across a variety of suppliers. These customers also do not consider that the operational support provided by the Applicants to each other through the Charter Alliance is a sufficient measure to replace their ability to spread risk between the Applicants as they would choose without the Charter Alliance.

### *Interested party views*

- 4.182. One resource customer submits that the award of different scopes of work to 2 operators acts to de-risk services.

- 4.183. Rio Tinto submits that it contracts with a variety of different providers across charter and RPT services to ensure security of supply by spreading the risk of failure by one supplier (which is the primary reason), to share the available work across the smaller providers and to participate in fixed airfares for the public.<sup>101</sup>
- 4.184. Further, Rio Tinto submits that while contracting with different providers does allow it to achieve some price advantages by creating competition, its primary focus is ensuring security of supply for the Rio Tinto Group's operations. With more suppliers, Rio Tinto is able to manage risks more effectively.<sup>102</sup>
- 4.185. Conversely, Regis Resources submits that it prefers a single aviation provider, to reduce further complexities and risk. Contracting with multiple airlines will be more confusing for the workforce if arrangements change periodically.<sup>103</sup>
- 4.186. Gold Fields submits that having a consistent aviation partner across all its projects allows for these services to be provided consistently across the Gold Fields group.<sup>104</sup>

#### *ACCC view*

- 4.187. The ACCC understands from its market enquiries that some customers consider it important to maintain a variety of charter suppliers in the market in order to ensure that a reasonably wide choice of supplier exists, and to minimise operational risks. As a result, the proposed conduct is likely to result in some detriment by reducing the number of major operators supplying FIFO services in WA and hence the ability for customers to diversify their contracts with more suppliers is reduced.

#### **Competitive constraint imposed by smaller FIFO operators**

- 4.188. The Applicants submit that smaller FIFO operators such as Cobham, Skippers, Air North and Hevilift have the capacity and do in fact compete vigorously against the Charter Alliance.<sup>105</sup>
- 4.189. Virgin Australia submits that FIFO operators with smaller scale operations can effectively constrain the Charter Alliance despite not providing the same breadth of services.<sup>106</sup>
- 4.190. Alliance submits that an airline's point to point capability is more important than its national scale for it to be able to compete effectively against the Charter Alliance. Alliance notes that 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.<sup>107</sup>

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<sup>101</sup> Rio Tinto, [File note of meeting with Rio Tinto](#), 28 November 2022, pg. 2.

<sup>102</sup> Rio Tinto, [File note of meeting with Rio Tinto](#), 28 November 2022, pg. 2.

<sup>103</sup> Regis Resources, [File note of meeting with Regis Resources](#), 29 November 2022, pg. 2.

<sup>104</sup> Gold Fields, [File note of meeting with Gold Fields](#), 27 September 2022, pg. 2.

<sup>105</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submission](#), 17 February 2023, pg. 16; Alliance Airlines, [Alliance Airlines' response to ACCC draft determination and interested party submissions](#), 24 February 2023, pg. 3-4.

<sup>106</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submission](#), 17 February 2023, pg. 15-16.

<sup>107</sup> Alliance Airlines, [Alliance Airlines' response to ACCC draft determination and interested party submissions](#), 24 February 2023, pg. 3.

### *Interested party views*

- 4.191. A resource customer submits that Cobham does not have the fleet depth, or Skippers the reliability of service, to compete for its tenders.
- 4.192. Another resource customer submits that the Charter Alliances' closest competitors for its services (contracted or ad-hoc) are Qantas, Cobham and Skippers. However, it notes that Skippers has a limited capacity to respond because it only has 2 100-seat aircraft. It also notes that Hevilift does not compete with the Charter Alliance as it only has 70 seat turbo-prop planes.
- 4.193. Roy Hill submits that its aviation needs are substantial, so most operators (other than Qantas and Virgin Australia) do not have the fleet capacity and composition (of larger planes) to provide an overall package that can effectively compete for its tenders.<sup>108</sup>
- 4.194. Gold Field submits that the key reason it switched providers from Skippers to the Charter Alliance was concerns over Skippers' ability to provide services to the mine as it moved from construction phase to operational phase.<sup>109</sup>
- 4.195. Sandfire submits that Network Aviation (a subsidiary of Qantas) are the Charter Alliance's closest competitors for its tender processes.<sup>110</sup>
- 4.196. Rio Tinto submits that it contracts with a variety of different providers to share the available work across smaller providers.<sup>111</sup>
- 4.197. Regis Resources submits that its scheduled and ad-hoc charter flights are currently provided by Skippers. Regis submits that it is uncertain as to whether AirNorth and Hevilift can compete for its work.<sup>112</sup>

### *ACCC view*

- 4.198. The ACCC does not agree with the Applicants' submissions that there are several smaller FIFO operators that are capable of imposing a strong competitive constraint on the Charter Alliance. Further, to the extent that the Proposed Conduct decreases the Applicants' ability and incentives to offer wet leasing, maintenance services and access to parts, this is likely to further affect the ability of smaller competitors to offer a strong competitive constraint.
- 4.199. The ACCC's market inquiries indicate that smaller FIFO operators do not impose a strong competitive constraint on the Applicants in the supply of long-term contracted charter services, particularly for customers who require a larger number of flights. While some customers considered that smaller operators are viable options, most of the larger customers considered that Qantas, Virgin Australia, and Alliance are the only airlines with sufficient fleet scale and composition to meet their operational demands. It follows that larger customers generally view smaller operators as a provider of ad-hoc charter services, rather than as alternative providers for long-term contracted work. The ACCC notes that some larger resource companies have excluded smaller operators, including Cobham and Skippers, from tender processes because of concerns relating to their lack of fleet depth or reliability of service.

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<sup>108</sup> Roy Hill, [File note of meeting with Roy Hill](#), 15 December 2022, pg. 2.

<sup>109</sup> Gold Fields, [File note of meeting with Gold Fields](#), 27 September 2022, pg. 1.

<sup>110</sup> Sandfire Resources, [File note of meeting with Sandfire Resources](#), 25 November 2022, pg. 2.

<sup>111</sup> Rio Tinto, [File note of meeting with Rio Tinto](#), 28 November 2022, pg. 2.

<sup>112</sup> Regis Resources, [File note of meeting with Regis Resources](#), 29 November 2022, pg. 1-2.



- 4.200. The ability of a smaller operator to impose a constraint on the Charter Alliance will depend on the operational requirements of the particular customer (and whether the customer considers the operator as a viable option) and the capacity of the airline to provide the service. In this regard, the ACCC considers that smaller operators do not possess the fleet composition or available capacity of aircraft to compete with (and impose a sufficient competitive constraint on) the Charter Alliance for the substantial amount of work required by larger resource companies. Indeed, the ACCC considers that once a smaller operator has committed to service a particular contract, their ability to service (particularly larger) contracts moving forward will be greatly limited due to their lack of fleet depth.
- 4.201. The ACCC recognises that smaller operators can submit non-compliant bids to a tender and customers have the option to split their tenders between providers. However, the ACCC notes that while most customers are willing to split the charter and RPT components of their tenders because they do not require an integrated service offering, they are generally less likely to split individual routes or geographical locations within the charter or RPT components. For this reason, most customers are likely to view non-compliant bids within a charter or RPT service less favourably than a fully compliant bid. The ACCC understands that some customers have specifically ruled out or will exclude non-compliant bids from operators who are unable to provide the requested schedule or aircraft type.
- 4.202. Accordingly, while the ACCC recognises that the Applicants will continue to face competition from Qantas, which has a broad network and a wide range of aircraft, the extent of constraint exerted by the smaller operators is confined to certain regions and certain customers requiring smaller aircraft types and will also depend on the capacity of aircraft available to the smaller operator at the time of a particular tender.

#### Discussion of potential mitigating factors to the likely loss of competition

- 4.203. The impact of likely detriments from reduced competition discussed above could be mitigated by the entry of new service providers or if customers had substantial bargaining power. Each of these of discussed below.

#### Barriers to entry and expansion

- 4.204. The Applicants submit that other operators have the ability and incentive to expand their operations or enter the market in response to commercial opportunities in WA or in response to any attempt by the Charter Alliance to raise prices above a competitive level.<sup>113</sup>

#### *Interested party views*

- 4.205. A resource customer submits that there are high barriers for entry of new providers and expansion by existing providers due to infrastructure and permit constraints at regional airports.
- 4.206. Sandfire submits that there may be high barriers to entry and expansion into the WA FIFO market due to the costs of establishing an operational base in WA to provide charter services in the State and the lack of experience of newer airlines.<sup>114</sup>

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<sup>113</sup> The Applicants, [Application](#), 27 May 2022, pg. 13; Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 16-18.

<sup>114</sup> Sandfire Resources, [File note of meeting with Sandfire Resources](#), 25 November 2022, pg. 2.

- 4.207. Similarly, Rio Tinto submits that barriers for new entrants are significant due to the costs for airlines to enter the market and the risks for customers to contract with a new entrant, who must be in a position to guarantee supply, which is difficult.<sup>115</sup>
- 4.208. Roy Hill submits that there are significant barriers to entry for new airline services providers, particularly to reach the scale of operation that it requires.<sup>116</sup>
- 4.209. Bonza submits that it is very difficult for smaller FIFO operators such as AirNorth and Hevilift to compete with larger FIFO operators, like the Charter Alliance. While smaller operators are viable cost alternatives to the larger operators, their limited breadth of service offering restricts their ability to bring sufficient competitive tension to the charter market. In this respect, Bonza submits that the Charter Alliance will significantly negatively impact the competitive position of smaller operators across the Australian FIFO market.<sup>117</sup>
- 4.210. In response, Alliance submits that the 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. Alliance submits that access to aircraft is not a prohibitive barrier to entry or expansion as there are several options for new or existing carriers to lease or acquire aircraft.<sup>118</sup> In addition, Virgin Australia submits that the Charter Alliance has not and will not raise barriers to entry to the FIFO market, such as access to infrastructure, airport real estate or government funding.<sup>119</sup>

#### *ACCC view*

- 4.211. The ACCC considers that 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 including:
- the cost of establishing a regional base including infrastructure at airports and maintenance facilities in WA
  - investments to build the necessary reputation and track-record for reliable service among customers to win volumes off established incumbents
  - lead-times associated in obtaining airport slots, and achieving regulatory accreditations
  - investments and lead times associated with acquiring relevant aircraft; and
  - investments and lead-times associated with recruiting and training pilots and crew.

These costs are unlikely to be recovered if an entrant subsequently decides to exit.

- 4.212. The ACCC recognises that Hevilift has recently expanded its operations into WA following the previous authorisation. However, based on information provided by

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<sup>115</sup> Rio Tinto, [File note of meeting with Rio Tinto](#), 28 November 2022, pg. 2.

<sup>116</sup> Roy Hill, [File note of meeting with Roy Hill](#), 15 December 2022, pg.3.

<sup>117</sup> Bonza, [File note of meeting with Bonza](#), 25 November 2022, pg. 2.

<sup>118</sup> Alliance Airlines, [Alliance Airlines' response to ACCC draft determination and interested party submission](#), 24 February 2023, pg. 4.

<sup>119</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submission](#), 17 February 2023, pg. 18.

resource customers, 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 Charter Alliance. Additionally, while there is some evidence of smaller existing operators expanding their operations to a limited extent in recent years, the ACCC is not satisfied, based on market feedback, that smaller operators have expanded their operations on the scale necessary, or built up the required reputation among customers, to effectively constrain the Charter Alliance.

- 4.213. The ACCC notes that new entrants also have to overcome incumbency advantages of existing players that are known to customers and have existing contracts. For example, Sandfire and another resource customer both had a strong preference to retain the services of their incumbent charter providers due to their strong performance under previous contract(s).<sup>120</sup>
- 4.214. The ACCC considers that there are significant barriers to entry and expansion in the provision of FIFO services. As a result, the threat of entry or expansion by competitors is not likely to significantly mitigate competitive detriments likely to result from the Proposed Conduct.

### **Customer bargaining power**

- 4.215. Virgin Australia submits that FIFO operators have a largely fixed cost base and rely on a number of key long-term customer contracts to cover both the fixed and variable costs of their operations. Consequently, the loss of a contract opportunity can have a significant and sustained impact on a FIFO operator's profitability. This provides the charter customer with significant commercial leverage and the FIFO operator with a strong incentive to aggressively compete for each contract. These dynamics apply to all charter operators.<sup>121</sup>
- 4.216. Further, Virgin Australia submits that the tender process, participants and service requirements are determined by the customers and they have the ability to exert pressure on FIFO operators in tender and RFP processes and during the contractual term. Virgin Australia notes that FIFO contracts typically also contain provisions that prevent operators from unilaterally increasing prices or reducing service levels during the term of the contract.<sup>122</sup>
- 4.217. Alliance submits 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.<sup>123</sup>
- 4.218. Alliance also submits that customer bargaining power is exhibited through industry standard protections that have been negotiated over time by customers and are not

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<sup>120</sup> Sandfire Resources, [File note of meeting with Sandfire Resources](#), 25 November 2022, pg. 1.

<sup>121</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 14.

<sup>122</sup> Virgin Australia, [Virgin Australia's response to ACCC draft determination and interested party submissions](#), 17 February 2023, pg. 14.

<sup>123</sup> Alliance Airlines, [Alliance's response to ACCC draft determination and interested party submissions](#), 24 February 2023, pg. 4.

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:<sup>124</sup>

- termination for convenience in the customer's favour, which provide for the contract to be terminated, 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.

4.219. Further, Alliance submits that charter customers also exercise bargaining power both between and during contract terms by regularly undertaking informal benchmarking and price testing.<sup>125</sup>

#### *Interested party views*

4.220. Roy Hill submits that the bargaining power it possesses will depend on the contract and the extent of services required.<sup>126</sup>

4.221. Rio Tinto submits that the bargaining power it possesses will depend on the airline it is negotiating with. The ability to generate revenue is also a factor – since Rio Tinto requires many flights, it will attract interest from airlines who want to secure market share.<sup>127</sup>

4.222. Regis submits that it considers itself as having mid-tier requirements (aircraft of 100 seats and below), and so has some leverage when conducting tender processes, but not the same leverage as companies with tier one requirements (such as Rio Tinto). Regis also has a 3-5 year forward looking approach, which provides confidence to its aviation partner.<sup>128</sup>

#### *ACCC view*

4.223. The ACCC's market inquiries supports the view that some large, sophisticated, and well-resourced companies with procurement expertise have a degree of bargaining power in their negotiations with most FIFO operators in WA. This is reflected in both the terms of contracts entered into and customers testing the market and re-negotiating during the term of existing contracts to obtain in-contract concessions. However, the ACCC notes that the degree of bargaining power will vary across large resource companies, and is dependent on the size of the contract, extent of services required, number of weekly flights required, the airline they are negotiating with, and the number and quality of FIFO operators able to meet a customer's needs.

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<sup>124</sup> Alliance Airlines, [Alliance's response to ACCC draft determination and interested party submissions](#), 24 February 2023, pg. 4.

<sup>125</sup> Alliance Airlines, [Alliance's response to ACCC draft determination and interested party submissions](#), 24 February 2023, pg. 4.

<sup>126</sup> Roy Hill, [File note of meeting with Roy Hill](#), 15 December 2022, pg. 2.

<sup>127</sup> Rio Tinto, [File note of meeting with Rio Tinto](#), 28 November 2022, pg. 3.

<sup>128</sup> Regis Resources, [File note of meeting with Regis Resources](#), 29 November 2022, pg. 2.

4.224. The ACCC considers that the bargaining power of some customers may, to some extent, mitigate potential detriments from the Charter Alliance. However, the degree to which this actually occurs will depend on the individual characteristics of the resource company, the particular tender and the availability of viable alternative options for supply. To the extent that the Charter Alliance removes a viable alternative bidder for resource companies, this is likely to reduce customer bargaining power.

#### ACCC conclusion on public detriments

4.225. The ACCC considers that the Proposed Conduct is likely to reduce competition in the provision of charter services from the direct loss of a participant (VARA or Alliance - 2 of the 3 largest FIFO service providers) in procurement processes which will result in a material detriment.

4.226. The ACCC considers that the exclusivity provision of the Charter Alliance Agreement limits the Applicants' ability to wet lease aircraft to its key competitors limiting options for other small competitors. This will likely diminish any constraint that small competitors could provide on the larger operators in the market and negatively impact competitive outcomes for customers.

4.227. The ACCC considers that the Charter Alliance will reduce dynamic competition between the Applicants. This is likely to result in detriments by reducing innovation and investment by both parties in providing services and by increasing the likelihood of the parties making structural changes to reduce or inhibit the competitive overlap between the parties, thus reducing the likelihood of them competing in the future.

4.228. For the reasons indicated above, the ACCC does not consider that the detriment from this reduction in competition from the Charter Alliance is likely to be sufficiently mitigated by factors including customer bargaining power, constraint from smaller operators, or through the entry and expansion of smaller operators.

#### Balance of public benefit and detriment

4.229. The ACCC considers that the Proposed Conduct is likely to result in some public benefits, including:

- To the extent there are customers that require it, an integrated charter and RPT solution in WA, such that the Charter Alliance provides alternative and comparable FIFO services to Qantas.
- The combined fleet capacity and operating base networks allowing the Applicants to address capacity issues, and provide a national solution to customers, while they likely avoid costs associated with individually expanding aircraft fleet, expanding operating bases, and aircraft, crew, maintenance and insurance costs.
- Access to complementary fleet sizes, thereby providing operational flexibility for both parties at a lower cost than alternative arrangements such as wet leasing from other providers in the industry.
- Ability to provide frequent flyer programs and value-added services, where demanded by some charter customers and their employees, to the extent that these services are at a lower cost than they could be otherwise acquired.
- Cost savings to the Applicants by aligning their airport and ground handling procedures and processes at Perth Airport.

4.230. Based on the information received, the ACCC is not satisfied that all benefits claimed by the Applicants are likely to be realised as a result of the Charter Alliance. Further,

the ACCC is not satisfied that all cost savings attributable to the operation of the Charter Alliance will be passed through to customers. The ACCC adopts a forward-looking approach when applying the authorisation test. Based on the information provided to it, the ACCC is not satisfied that the benefits claimed under the previous authorisation were realised over the past 5 years to the extent claimed by the Applicants. This has informed the ACCC's assessment of the likelihood of public benefits resulting from the Proposed Conduct in the current application.

4.231. The ACCC considers that the Proposed Conduct is likely to result in public detriment. The ACCC does not consider that the reduction in competition from the Charter Alliance is likely to be sufficiently mitigated by factors including customer bargaining power, constraint from smaller operators, or through the entry and expansion of smaller operators.

4.232. Likely public detriments from the Proposed Conduct include:

- A reduction in competition in the provision of charter services from the direct loss of a bidder (VARA or Alliance - 2 of the 3 largest FIFO service providers) in tender processes which will likely result in material detriment.
- The exclusivity provision of the Charter Alliance Agreement will limit the Applicants' ability to wet lease aircraft to competitors, and this will likely diminish any constraint that small competitors could provide on the larger operators in the market, and negatively impact competitive outcomes for customers.
- A reduction in dynamic competition between the Applicants. This is likely to result in detriments by reducing innovation and investment by both parties in providing services and by increasing the likelihood of the parties making structural changes to reduce or inhibit the competitive overlap between the parties, thus reducing the likelihood of them competing in the future.

4.233. For the reasons outlined in this 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 has decided to deny authorisation.

## 5. The Applicants' proposed condition

5.1. As noted above, the Applicants have requested that the Commission, if it was not satisfied that the test for authorisation had been met, grant authorisation subject to appropriate conditions that will reduce the detriment to customers for charter services. The Applicants submitted that if the ACCC were not satisfied that the test for authorisation was met, it is in the interests of continuity of service for customers who are already acquiring services from the Applicants pursuant to the Charter Alliance that, rather than deny authorisation, the ACCC should grant authorisation on the condition that:

*The Proposed Conduct be limited to conduct necessary to give effect to contracts with customers that are in place under the Charter Alliance on the date the final determination in this matter comes into force, for the term of those contracts (including any options to renew).*

### The Applicants' submission

5.2. The Applicants submitted that this condition essentially takes the form of limiting authorisation to a subset of the Proposed Conduct relating to existing customer

contracts for the commercial life of those contracts. Virgin Australia notes that all existing contracts under the Charter Alliance will expire within 5 years of the date of the final determination (including options to extend).

- 5.3. The Applicants maintained that the ACCC should be satisfied that the Proposed Conduct results in a net public benefit overall, such that authorisation should ultimately be granted. If, however, the ACCC were not so satisfied, it argued that authorisation subject to the proposed condition:
- still allows some public benefit
  - addresses the perceived potential public detriment articulated by the ACCC
  - avoids the detriment that would flow from not granting authorisation
  - is in all circumstances better than denial of authorisation altogether.

### The ACCC view

- 5.4. The ACCC is not satisfied that the Proposed Conduct would result, or be likely to result, in a benefit to the public and the benefit would outweigh the detriment from the conduct. The ACCC has considered the Applicants' submission above and it is not satisfied that it is appropriate to exercise its discretion to impose a condition in the circumstances. The ACCC accepts that avoiding the disruption of existing customer contracts by imposing a condition to vary the Proposed Conduct is likely to result in some potential benefits. However the ACCC notes that: no existing customers of the Charter Alliance have raised any concerns (or responded to the ACCC) in relation to this issue; the ACCC is also concerned that allowing the Applicants to continue to give effect to existing contracts (including options to extend) would allow the parties to continue to share information, agree capacity and flight schedules and agree which Applicant would operate relevant routes under those contracts, which would prolong much of the detriment deriving from the anticompetitive arrangements for another 5 years. As a result, the ACCC is not satisfied that by imposing a condition as sought by the Applicants, the test for authorisation would be met, either by increasing the likely public benefit or reducing the likely public detriments, and as such it does not consider it appropriate to exercise its discretion in the circumstances.

### Option to lodge a new application for authorisation to cover a transitional period to unwind the Charter Alliance

- 5.5. The ACCC notes that, in 2017, during the assessment of the previous Virgin Alliance authorisation application, the Applicants advised that, if at the end of the 5-year period sought, the conduct was not reauthorised, the Charter Alliance could be unwound within a 6-month period. The Applicants proposed to apply for reauthorisation 12 months before the expiration of the term of authorisation allowing 6 months for the authorisation process to run and, in the event that the conduct was not reauthorised, a further 6 months to facilitate the unwinding of the Charter Alliance before the authorisation expired.
- 5.6. The parties submitted that neither Virgin Australia nor Alliance would face material hurdles in re-establishing separate operations at the end of the authorisation term should the Charter Alliance not continue. The Applicants provided a detailed confidential breakdown of the steps they would need to take to unwind the Charter Alliance.
- 5.7. The ACCC sought further information from the Applicants on whether the 6-month period for unwinding the Charter Alliance as advised in the course of the assessment of the 2017 authorisation is still relevant. In response, the Applicants submitted that

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, and will no longer have the capacity to promote competition as effectively between FIFO operators.

- 5.8. The ACCC also sought submissions from relevant customers as to the impact on their business of the potential unwinding of the Charter Alliance. It did not receive any submissions on this point. Nonetheless, the ACCC acknowledges that there may be public benefits associated with providing for a short, orderly unwinding of arrangements and existing contracts made under the Charter Alliance.
- 5.9. The ACCC considers that, should the Applicants wish to seek authorisation of a short period to unwind the existing contracts, this would most appropriately be done by lodging a new application for authorisation.
- 5.10. As noted above, the ACCC is not satisfied that by specifying a condition to vary the Proposed Conduct to allow the Applicants to give effect to their existing contracts for 5 years, the net public benefit test would be met. However, the ACCC considers that it is appropriate under the circumstances to enable the Applicants to continue to give effect to their existing contracts under the Charter Alliance for a very short period of time to provide an opportunity for them to consider whether to lodge a new application for authorisation.
- 5.11. In the circumstances, the ACCC has decided to vary the scope of the conduct the subject of the interim authorisation granted on 8 June 2022 to a subset of the Proposed Conduct to enable the Applicants to only give effect to their existing contracts under the Charter Alliance until this determination comes into effect.

## 6. Determination

### The application

- 6.1. On 27 May 2022, the Applicants lodged an application for authorisation (AA1000615) with the ACCC under subsection 88(1) of the CCA.
- 6.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA and may substantially lessen competition within the meaning of sections 45 and 47 of the CCA.
- 6.3. On 15 November 2022, the Applicants updated the conduct for which authorisation was sought.<sup>129</sup> The Applicants sought authorisation to continue to give effect to the Charter Alliance, in place since 2017, enabling the Applicants to:
  - 1) jointly bid for, and contract with, corporate customers, including:
    - a. joint pricing and scheduling of services for those customers
    - b. agreeing not to compete for each other's specified pre-existing customers; and
    - c. agreeing for new charter opportunities, to cooperate and coordinate to bid jointly for the charter opportunity. Individual bids are permitted if a joint bid is not made

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<sup>129</sup> The Applicants, [Updated Conduct for which authorisation is sought](#), 15 November 2022.



- 2) agree not to supply services to each other's key competitors, with some limited exceptions
- 3) offer eligible passengers of those customers access to the Velocity frequent flyer program
- 4) offer eligible passengers of those customers access to Virgin Australia's airport lounges as part of an integrated corporate offering
- 5) 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
- 6) 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.<sup>130</sup>

## Interim authorisation

6.4. On 8 June 2022, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act,<sup>131</sup> to enable the Applicants to enter into and give effect to an extension of the Charter Alliance, including the joint tender and supply of services to corporate customers, principally for FIFO employees, while the ACCC was considering the substantive application.

6.5. On 5 May 2023, the ACCC decided to:

- revoke the interim authorisation granted on 8 June 2022, and
- grant interim authorisation to enable the Applicants to engage in the Proposed Conduct (as outlined in paragraph 6.3 above) only to the extent necessary to continue to give effect to their existing contracts (as of the date of this determination)<sup>132</sup> with corporate customers for the period during which this interim authorisation will remain in effect. This interim authorisation does not enable the Applicants to jointly bid for new opportunities or enter into new contracts, or exercise or allow optional extensions to existing contracts.

This interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until it is revoked.

## The authorisation test

6.6. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

6.7. For the reasons outlined in this determination, the ACCC is not satisfied, in all the circumstances, that the Proposed Conduct (outlined above in paragraph 6.3) would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.

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<sup>130</sup> The Applicants provided the ACCC with a version of the Charter Alliance Agreement dated 17 August 2017.

<sup>131</sup> See ACCC decision on the ACCC's [public register](#).

<sup>132</sup> The Applicants, [Applicants' response to ACCC information request](#), 7 April 2023, pg. 3-8.

- 6.8. Therefore, the ACCC has decided not to grant authorisation to application AA1000615. In accordance with subsection 90(1)(b), the application is dismissed.
- 6.9. This determination is made on 5 May 2023. Any application to the Australian Competition Tribunal for review of the determination must be made on or before 26 May 2023.