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# **Charter Alliance between Virgin Australia Regional Airlines and Alliance Airlines**

Submission from Virgin Australia in response to Draft Determination and interested party feedback

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

**17 February 2023**

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## Executive summary

### Overview of submission

The Charter Alliance has and will continue to deliver net public benefits and should be re-authorised for five years. If authorisation is not granted it will prevent the pass through of material future benefits to customers and negatively impact customers that have commenced tender processes or struck bargains while the benefits of the Charter Alliance were in place. While the net public benefit is significantly greater under the grant of an unconditional authorisation, authorisation subject to appropriate conditions will result in better outcomes for customers than not granting authorisation at all.

The ACCC's Draft Determination accepts that the Charter Alliance will result in material public benefits in the form of improved services and the potential for efficiency benefits.

However, it proposes to deny authorisation based on an uncertain and unsupported concern that the removal of competition between Virgin Australia Regional Airlines (**VARA**) and Alliance Airlines (together, the **Applicants**) in the provision of FIFO services in Western Australia (**WA**) will materially increase the ability and incentives of the Applicants to exercise market power potentially enabling the Charter Alliance to unilaterally raise prices and reduce service levels.

This position does not take into account the competitive constraints faced by the Charter Alliance and the likely response from competitors to the Charter Alliance's improved services. Further it is inconsistent with the experience of market dynamics since the Charter Alliance was first authorised in 2017. We note in particular:

- the Applicants' combined estimated market shares in WA have remained constant since 2015 (based on weighted FIFO aircraft capacity) with Qantas's share remaining the largest, almost double that of Virgin Australia/VARA and almost three times that of Alliance Airlines;
- the ACCC has recognised that the Applicants will continue to face competition from Qantas;
- Qantas has the breadth and depth of network, bases, a national integrated Regular Public Transport (**RPT**)/charter offering, the fleet mix, fleet scale, schedule flexibility and connectivity and value-added services to tailor a solution to meet any customer's specifications as required, enabling customers to easily bypass the Charter Alliance;
- Qantas has the largest fleet of aircraft in Australia with a range of aircraft suitable for transport services to and from regional and remote resource locations and the ability to quickly respond to any potential attempt by the Applicants to reduce service levels or increase prices above competitive levels; and
- While the ACCC has indicated it is continuing to consult on this issue, the Draft Determination<sup>1</sup> has simultaneously expressed scepticism about the degree to which the Charter Alliance competitively constrains Qantas, while stating that the Charter Alliance increases the market power of the Applicants and the ability and incentives to exercise that market power in an anti-competitive manner. This position is fundamentally inconsistent. The Draft Determination acknowledges that

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<sup>1</sup> ACCC, Draft Determination, 4.88.



likelihood of its concerns manifesting is uncertain and notes that further consultation is needed on the Proposed Conduct in its totality to understand and assess the potential impact on the competitive dynamics.<sup>2</sup>

In response, Virgin submits that:

- The Charter Alliance has been in place since 2017. It has not materially enhanced the ability and incentive of the Applicants to unilaterally raise prices or reduce services, or to engage in coordinated conduct, and will not do so in the future. This is reflected in the tender outcomes and price-service offerings provided to customers and in the customer feedback received.
- The nature of tender-based competition for FIFO services in **WA** – with strong competition from Qantas, and further competition from 6 other localised competitors (Cobham, Skippers, Air North, Hevilift, Shoal Air, and Maroomba Airlines) means that any material adverse effect on competition within the authorisation period is unlikely.
- Changed conditions since consideration of the initial authorisation favour reauthorisation, with evidence of entry and expansion by competitors and the challenges of COVID-19 and administration delaying opportunities to realise benefits.
- As acknowledged by the ACCC, the same degree of public benefits cannot be achieved through other mechanisms such as wet-leasing arrangements.
- Denial of the authorisation will preclude the achievement and delivery of material benefits to FIFO customers across Australia in terms of enhanced products and services, operational efficiencies and increased competition and choice as against Qantas.
- Denying authorisation will also have negative implications for customers under existing contracts and tender processes that have already commenced. These negative implications can be avoided by unconditionally authorising the Proposed Conduct, or authorising the proposed conduct subject to appropriate conditions.

This submission made on behalf of Virgin Australia and VARA (together, **Virgin**) provides further evidence and information in support of the Charter Alliance, demonstrating that the Charter Alliance is likely to lead to significant public benefits and no material competitive detriment, and that therefore authorisation should be granted. It should be read alongside:

- the Applicants' Joint Submission in support of Application for Authorisation dated 27 May 2022;
- Virgin Australia's Supplementary Submission in support of Application for Authorisation dated 3 June 2022;
- Virgin Australia's Response to the ACCC's Request for Information dated 30 September 2022; and

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<sup>2</sup> ACCC, Draft Determination, 4.101.

- Virgin Australia's Further Supplementary Submission in support of Application for Authorisation dated 10 October 2022.

**Anticompetitive  
detriment  
unlikely**

The Charter Alliance has not and is unlikely to result in any material anticompetitive detriment.

There is no material overlap between the Applicants' operations outside of WA and the Charter Alliance will clearly enhance the competitive offer available to FIFO customers in that area. As the Draft Determination acknowledges,<sup>3</sup> this limited overlap will further reduce as Virgin Australia transitions its fleet away from Fokker 100 (**F100**) aircraft. Absent the Charter Alliance, there is less direct competition between Virgin Australia and Alliance Airlines than was the case in 2016, with increasing complementarity between their fleet and capabilities.

In Western Australia, there is unlikely to be any material adverse competitive effect in the provision of FIFO services (at all or at least within the 5 year authorisation period). The Applicants note the following:

- the fundamental rationale for the Charter Alliance is to provide a superior, more competitive product to corporate charter customers and, in doing so, increase the competitive position of Virgin Australia as against Qantas Group. This rationale is inconsistent with an effect of increasing prices or reducing service levels;
- the concern that the Charter Alliance would give the Applicants the ability and incentive to increase prices and reduce service levels does not reflect customer experience or market reality – it has not to date and there is no indication that it will in the future;
- tender outcomes and market shares do not reflect the Applicants having the market power to anticompetitively increase prices and reduce service levels;
- sophisticated mining (and other FIFO) customers of all sizes exercise strong bargaining power through their procurement processes and through contractual arrangements which provide contestable optionality, particularly in a world in which any services capable of being performed by the Charter Alliance can be performed by Qantas;
- there is strong competition from existing FIFO operators for new and renewed FIFO contracts;
- there is a history of both entry and expansion by existing FIFO operators in response to commercial opportunities in WA including fleet expansions by Qantas, Cobham since 2017 and the entry of Hevilift into WA FIFO service supply in 2021. More recently Aviair has been provided \$4 million in funding by the WA Government and is advanced in procuring Q400 aircraft which it will use for WA services later in 2023;
- the nature of competition for FIFO services demonstrates that economic conditions are not conducive to adverse unilateral or coordinated effects being likely. Competition for FIFO services takes place in a bidding market where:
  - customers control the tender requirements, participants, parameters and processes;

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<sup>3</sup> ACCC, Draft Determination, 4.93.

- tenders are diverse and tailored to the specific requirements of the customer at the time;
  - FIFO operators have a largely fixed cost base and rely on a number of key contracts with the charter customers to cover both the fixed and variable costs of their operations. Consequently, the loss of, or the opportunity to win, a charter contract can have a significant impact on a FIFO operator's profitability;
  - competition is lumpy with tenders being 'winner takes all' and long term in nature – such that each contest is likely to have a large impact relative to a supplier's total sales in a period;
  - there is no lock-in by which the outcome of one tender contest necessarily determines another;
  - 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);
  - there are a range of FIFO providers each with different capabilities, aircraft and cost structures; and
- the Applicants' existing customers will have the benefit of contractual provisions which provide pricing and product commitments from VARA and Alliance Airlines 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.

The Charter Alliance has been in place since 2017. If there was a material risk of a substantial lessening of competition one would expect there to be strong and consistent customer opposition to the continuation of the authorisation. This has not occurred. The cooperation of the Applicants in WA to allow more competitively compelling offers by combining the strengths of each Applicant not only in WA but also on the East Coast cannot be said to translate to a substantial lessening of competition in WA and over the past 5 years of the Charter Alliance's operation, there has been no evidence to support such a suggestion. This is acknowledged in the Draft Determination where the ACCC notes the uncertain nature of the Charter Alliance materially enhancing the ability and incentive of the Applicants to unilaterally raise prices or reduce service and that it will further consult on the Proposed Conduct in its totality to understand and assess the potential impact on competitive dynamics.<sup>4</sup>

The Charter Alliance has and will continue to increase competitive tension and promote further strong competition and better outcomes for customers.

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<sup>4</sup> ACCC, Draft Determination, 4.101.



**Denial of authorisation prevents the achievement and delivery of further material benefits to FIFO customers across Australia**

The Charter Alliance has resulted in, and will continue to result in, the pass through of significant public benefits to FIFO customers, including:

- enhanced product and service offerings;
- the promotion of competition between FIFO operators; and
- operational efficiencies.

Any reduction in competition in the WA FIFO market as a result of the Charter Alliance will be outweighed by these benefits such that FIFO customers would be left worse off if reauthorisation is denied.

Contrary to the implications of the Draft Determination, it is not only those customers seeking a national integrated charter/RPT offer that benefit from the Charter Alliance. The capacity to challenge Qantas' ability to leverage its unique proposition (with a broad and deep network and operational capabilities, bundled discounts, fleet scale and composition with the widest range of seat capacity aircraft and value-added services) increases the ability for customers to force Qantas to 'sharpen its pencil' and provide more competitive responses to the customer's particular requirements. As noted in the Draft Determination, other factors that customers may identify as being particularly important in choosing a charter service provider include fleet mix, scheduling flexibility, reliability and back up support. This is regardless of whether the customer is looking for an integrated national RPT/charter service provider. Under the Charter Alliance, the Applicants are better able to provide these features and a more comparable competitive offer.

For those that prefer an integrated offer, the Charter Alliance provides an alternative to Qantas that would not exist with the Applicants operating independently.

As noted in the Draft Determination, compared to wet leasing arrangements the Charter Alliance provides a greater degree of flexibility at a lower cost allowing either party to respond more quickly and flexibly than would otherwise be the case.

**Changed conditions in the aviation industry further support the arguments for authorisation and its delivery of net public benefits**

Due to the nature of FIFO service supply and competition, with valuable, lumpy, long-term contracts, FIFO operators are incentivised to aggressively compete for corporate customers even if there is no longer excess capacity in the FIFO sector (as there was when the initial authorisation was being considered).

Regardless of the specific conditions at the time, FIFO contracts typically last three to five years and operators are incentivised to aggressively compete to secure those contracts as and when they arise. This is essential to cover fixed costs and buffer against the irregularity and uncertain scope and outcome of future opportunities. Excess capacity in the FIFO sector may be a sufficient condition to incentivise the Applicants to aggressively compete, but it is not a necessary one.

Other changes that have occurred in the industry since the previous consideration of the Charter Alliance further support the incentive for the Applicants to continue to aggressively compete for corporate customers and support the re-authorisation of the Charter Alliance. These include the entry and expansion of other FIFO operators, the cycles of exploration and extraction in different geographic areas of Australia, Virgin Australia's experiences of fleet transition, and its journey through voluntary administration and the impact of COVID-19.



**Authorisation should not be denied but be granted or granted subject to appropriate conditions**

Denying authorisation would result in detriments, some of which could be avoided through conditions.

If, following the receipt of additional information, the ACCC is not satisfied that the test for authorisation has been met, the ACCC should be mindful of the impact on continuity of service and minimise the detriment to customers who have struck bargains or commenced tender processes with the benefit of the Charter Alliance. Rather than deny authorisation, the ACCC should grant authorisation subject to conditions. The conditions proposed by the Applicants will be provided in a further supplementary submission.

The net public benefit is significantly greater under an unconditional authorisation given the significant competitive constraint and more competitively compelling price-service offerings that the combination of the Applicants' strengths can provide for all FIFO customers. However, authorisation subject to the proposed conditions:

- 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; and
- is in all circumstances better than denial of authorisation altogether.

# 1 The Charter Alliance has not and cannot give the Applicants the ability or incentive to unilaterally raise prices or reduce services

## 1.1 Overview

The Draft Determination accepts that the Charter Alliance is likely to result in public benefits, specifically:

- operational efficiencies in the form of cost savings, increased flexibility and optimisation of aircraft utilisation; and
- enhanced products and services through the provision of a more extensive integrated charter and RPT service offering and flight connectivity.<sup>5</sup>

However, the ACCC's Draft Determination notes a concern that, in enabling the provision of these benefits, the removal of competition between VARA and Alliance Airlines in the provision of FIFO services in WA will materially increase the ability and incentives of the Applicants to exercise market power acquired as a result of the Charter Alliance to unilaterally raise prices and reduce service levels, despite any expected response from other competitors. This is the only potential public detriment posed to result from the Charter Alliance.

The Draft Determination also suggests this ability and incentive will be greater than was the case during the ACCC's consideration of the previous authorisation when there was a downturn in the WA mining industry and excess capacity in the FIFO sector. The Draft Determination notes that this concern has negatively impacted the ACCC's weighting of accepted benefits.

The Draft Determination's concern that the Charter Alliance will "materially enhance the ability and incentive of the Applicants to unilaterally raise prices or reduce services" is predicated on a conclusion that the Charter Alliance will result in the Applicants acquiring market power and, with it, the ability and incentive to profitably exercise that market power to raise prices, restrict output or otherwise reduce service levels, despite any expected response from other competitors.<sup>6</sup> Such market power would imply a lack of competitive constraint from alternative suppliers and through the tender process.

There is no basis in fact for this position. The Charter Alliance has been in place since 2017 and has not resulted in these detriments. The likelihood of these preliminary concerns eventuating during the authorisation period does not reflect the nature of competition in the relevant markets, customer or supplier experience, interested party feedback or market reality. It is also at odds with the rationale for the Charter Alliance and some of the other views expressed in the Draft Determination.

The removal of competition between VARA and Alliance Airlines in WA under the Charter Alliance in exchange for a more competitive and compelling service offering for customers nationally does not mean there will be a material lessening of competition overall. To the contrary, the Charter Alliance has allowed the Applicants to deliver a superior level of service more competitively than could be achieved on a standalone basis. If reauthorised, the Applicants will continue to vigorously compete with Qantas and other FIFO operators and deliver significant and valuable benefits to FIFO customers as

<sup>5</sup> ACCC, Draft Determination, 4.112.

<sup>6</sup> ACCC, Draft Determination, 4.91.

the limited overlap between the Applicants in WA continues to decrease with VARA's fleet transition.

The changed conditions since the previous authorisation do not change this and in fact favour reauthorisation.

## **1.2 The pro-competitive service enhancing rationale for the Charter Alliance is fundamentally inconsistent with the posed public detriment**

The fundamental rationale for the Charter Alliance is to provide a superior, more competitive product to corporate charter customers, and in doing so, enhance the competitive position of the Applicants – particularly Virgin Australia – as against Qantas Group.

The Charter Alliance is a response by the Applicants to address the gaps in their offers to corporate customers. Through the Charter Alliance, each Applicant will benefit from the other Applicant's strengths.

For Alliance Airlines, it is able to offer its charter customers a superior product and a more complete range of services. It will be able to offer connections from its charter flights on to Virgin's RPT network around Australia, services on VARA/Virgin Australia's larger 100+ seat capacity aircraft, and other value-adds such as the Velocity Frequent Flyer program.

For VARA, it enables the use of Alliance Airlines' substantial F100 fleet, allowing a more competitive fleet scale, composition and capacity to deliver value to customers and provide a valuable charter product outside of WA where VARA lacks a material presence. This rationale is fundamentally inconsistent with a reduction in service levels or anti-competitive price increases and could not have that effect.

## **1.3 The posed public detriment is inconsistent with the limited and decreasing competitive overlap between the Applicants' businesses and is at odds with other views expressed in the Draft Determination**

As noted in the Draft Determination, outside WA there is no significant overlap in FIFO services supplied by the Applicants.<sup>7</sup>

The Applicants have complementary operational footprints, FIFO networks and fleet composition with VARA concentrated in WA (and unlikely to expand alone onto the East Coast) and Alliance Airlines which has a significant presence on the East Coast with a smaller presence in WA.

The ACCC recognises the scope for synergies and complementarities that may result from the Charter Alliance Agreement and notes that these may enable the Applicants to reduce costs and make better, not worse, offers to customers. The Draft Determination states that such synergies and complementarities may, at least to some degree, offset the effect of the increase in concentration on incentives to compete aggressively.<sup>8</sup>

### **(a) Retirement of VARA's F100 fleet means the Applicants have complementary fleet-types**

The only potential public detriment identified in the Draft Determination is the removal of competition between VARA and Alliance Airlines in WA. However, the ACCC notes that the competitive overlap, and therefore the extent of competition between VARA and

<sup>7</sup> ACCC, Draft Determination, 4.93.

<sup>8</sup> ACCC, Draft Determination, 4.100.



Alliance Airlines removed by the Charter Alliance, will likely reduce as VARA's remaining 10 F100 aircraft move closer to the end of their life spans in the next 5 years (i.e., during the authorisation period).<sup>9</sup> VARA has already reduced its F100 fleet from 14 in 2017 and plans to begin retiring its 8 F100s from service from first quarter 2023, replacing them with Boeing 737 (B737) aircraft (128 to 176 seats) over the next two years. As a result, Virgin will have a single fleet of B737 aircraft, with VARA retaining its 7 A320 (168 to 180 seats) aircraft, thereby transitioning to a fleet comprised of 128+ seat aircraft. In contrast, Alliance Airlines' fleet is made up of 80-100 seat capacity F70, F100 and E190 aircraft.

**[RESTRICTION OF PUBLICATION CLAIMED]**

Cross-hire arrangements under the Charter Alliance are more advantageous compared to wet-lease arrangements as they are less costly, more efficient, allow for greater flexibility, and allow the addition of capacity at short-notice and on an ad-hoc basis.

**[RESTRICTION OF PUBLICATION CLAIMED]**. In the absence of the Charter Alliance, **[RESTRICTION OF PUBLICATION CLAIMED]**, and Alliance Airlines has the potential to significantly mark up its wet-leasing rates, impacting the price ultimately paid by customers. In addition, customers typically prefer cross-hire arrangements under the Charter Alliance to wet-lease arrangements because this maintains a single line of accountability with VARA under the contract.

**(b) VARA is reliant on access to Alliance Airlines' F100 capacity to meet customer needs**

Examples of contracts where VARA relies on access to Alliance Airlines' F100 capacity **[RESTRICTION OF PUBLICATION CLAIMED]** include:

- **[RESTRICTION OF PUBLICATION CLAIMED]**: Contract with **[RESTRICTION OF PUBLICATION CLAIMED]** for underwritten charter and RPT services from **[RESTRICTION OF PUBLICATION CLAIMED]** (supported by Alliance Airlines under the Charter Alliance). **[RESTRICTION OF PUBLICATION CLAIMED]**. VARA currently relies on accessing Alliance Airlines' F100 capacity to support ad-hoc services for **[RESTRICTION OF PUBLICATION CLAIMED]** under the Charter Alliance. VARA has cross-hired Alliance Airlines' F100 aircraft to operate **[RESTRICTION OF PUBLICATION CLAIMED]** services between **[RESTRICTION OF PUBLICATION CLAIMED]** during FY22 due to VARA aircraft capacity limitations. **[RESTRICTION OF PUBLICATION CLAIMED]** These arrangements also maintain a single line of accountability with VARA under its contract with the customer. **[RESTRICTION OF PUBLICATION CLAIMED]**
- **[RESTRICTION OF PUBLICATION CLAIMED]**: Contract with **[RESTRICTION OF PUBLICATION CLAIMED]** for charter services from **[RESTRICTION OF PUBLICATION CLAIMED]**
- **[RESTRICTION OF PUBLICATION CLAIMED]**: Contract with **[RESTRICTION OF PUBLICATION CLAIMED]** for charter services from **[RESTRICTION OF PUBLICATION CLAIMED]**
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<sup>9</sup> ACCC, Draft Determination, 4.93.



**[RESTRICTION OF PUBLICATION CLAIMED]**

From a customer perspective, having access to a flexible aircraft fleet through a single contracting point creates efficiencies, flexibility as operations scale up and down and increases reliability of services. This is highlighted by recent customer feedback from **[RESTRICTION OF PUBLICATION CLAIMED]**, Rio Tinto, which has submitted that some of the main factors it considers when awarding contracts are “the airline’s ability to meet the schedule, the size of the aircraft offered, [and] the limitations of the relevant airports”.<sup>10</sup>

**(c) Alliance Airlines benefits from access to VARA’s A320 capacity, enabling it to meet customer needs**

Similarly, under the Charter Alliance, Alliance Airlines has been able to service customers that require access to larger aircraft by accessing VARA’s fleet of A320 and B737 aircraft, filling a gap in its own fleet. Without the Charter Alliance, Alliance Airlines would have been limited in its ability to meet customers’ needs and those customers would have missed out on the benefit of having a single contractor with the flexibility to add capacity to meet their changing needs over the life of their contract. **[RESTRICTION OF PUBLICATION CLAIMED]**.

Additional examples of customers for which the Charter Alliance enabled a solution comprising both VARA A320 and Alliance Airlines F70/F100 aircraft include:

- **[RESTRICTION OF PUBLICATION CLAIMED]**. The Charter Alliance entered a successful bid to provide charter and RPT services on a mix of Alliance Airlines (F70/F100) and VARA (A320) aircraft.
- **[RESTRICTION OF PUBLICATION CLAIMED]**. The Charter Alliance submitted a bid to provide charter services on Alliance Airlines and VARA aircraft (F70/F100), and domestic and international RPT services on Virgin Australia/VARA’s F100/A320/B737/A330 aircraft. Virgin Australia provided RPT pricing and tender deliverables to Alliance Airlines for inclusion in the Alliance Airlines-led submission.
- **[RESTRICTION OF PUBLICATION CLAIMED]**. The Charter Alliance entered a bid to provide charter services on Alliance Airlines (F70/F100) and VARA (F100/A320/B737) aircraft. The Charter Alliance offered the customer a range of aircraft which neither VARA nor Alliance Airlines would have been able to offer on a standalone basis.
- **[RESTRICTION OF PUBLICATION CLAIMED]**. Under the Charter Alliance, Alliance Airlines, VARA and Virgin Australia entered a bid to provide both charter and RPT services on F70, F100, A320 and B737 aircraft. While the RPT portion of the tender was submitted in a separate document, it was submitted under the Charter Alliance Agreement. The Charter Alliance offered the customer services on a mix of fleet types ranging from 80 seat to 168 seat aircraft and capacity support for Alliance Airlines’ charter services on VARA’s A320/B737 aircraft. The customer required services on both F100 and A320 aircraft (which Alliance Airlines does not have in its fleet). VARA would not have sufficient F100 capacity to satisfy the full scope of work for the customer on a standalone basis.
- **[RESTRICTION OF PUBLICATION CLAIMED]**. The Charter Alliance submitted a bid for charter services on F100 and A320 aircraft. Under the Charter Alliance, the Applicants were able to offer the customer a mix of both 100-seat and 168-seat capacity aircraft.

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<sup>10</sup> ACCC, File note of meeting with Rio Tinto dated 28 November 2022, 2.

#### 1.4 No increase in market share or material change to market structure

If the Charter Alliance *had* resulted in the Applicants acquiring sufficient market power to profitably raise prices and reduce service levels, one would expect to see a significant increase in the Applicants' market shares, with the Applicants winning all or at least more FIFO tenders. This has not occurred.

Virgin Australia estimates that the Applicants' combined market share (by weighted aircraft capacity) in Western Australia has remained constant at 37% since 2015 and has only slightly increased on the East Coast and Central Australia (using North Queensland (QLD) shares as a proxy for 2015) from 39% to 43%, with Virgin Australia increasing its share from less than 1% in 2015 to 2% in April 2022. Qantas has remained the largest operator in WA with an estimated market share of 42%, and a 36% share nationally compared to Alliance Airlines' 21% share and Virgin Australia and VARA's combined 17% share of national FIFO capacity. While a number of customers have switched to the Charter Alliance, the Applicants have faced strong competition across FIFO tenders, losing bids to [REstriction of Publication Claimed], among others.

#### 1.5 The Charter Alliance has not increased prices or reduced service levels

Since authorisation of the Charter Alliance in 2017, the Applicants have not anticompetitively raised prices or reduced service levels to customers. In fact, to the contrary, the Applicants have been able to provide customers better services more efficiently.

[REstriction of Publication Claimed]. Gold Fields has submitted to the ACCC that, despite VARA and Alliance Airlines submitting a joint bid under the Charter Alliance rather than separate competing bids, it was able to secure a price that compared favourably to its previous contracts with incumbent suppliers for each route.<sup>11</sup>

#### 1.6 Contractual terms and tender processes mean that the Charter Alliance has no power to increase prices or reduce service levels

Importantly, 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. The Applicants' existing customers will typically have the benefit of existing contractual provisions which provide pricing and product commitments from VARA and Alliance Airlines 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. For example, in [REstriction of Publication Claimed] made an informal price testing request to Virgin Australia. [REstriction of Publication Claimed]. [REstriction of Publication Claimed] have now provided VARA a Letter of Award with the intention of entering into a formal charter services contract.

Since 2017, the Applicants have not reduced service levels to customers, consistent with the ACCC's finding in the Draft Determination that the Charter Alliance is likely to result in benefits to customers such as enhanced products and services and increased flexibility and optimisation of aircraft utilisation.<sup>12</sup> These service improvements are discussed in more detail in Section 2 below.

<sup>11</sup> ACCC, File note of meeting with Gold Fields dated 27 September 2022, 1.

<sup>12</sup> ACCC, Draft Determination, 4.112.



The lack of any customer concern about pricing and service levels under the Charter Alliance can be seen in customers' decisions to re-appoint the Charter Alliance as their supplier, despite alternative options being available.

For example, [REstriction of Publication Claimed] has [REstriction of Publication Claimed] its charter contract with VARA, with support from Alliance Airlines via the Charter Alliance for a term of [REstriction of Publication Claimed]. The Charter Alliance offered [REstriction of Publication Claimed] services in [REstriction of Publication Claimed] on F70, F100, A320 and B737 aircraft. Neither airline could provide this mix of fleet types absent the Charter Alliance as VARA does not have F70s in its fleet and Alliance Airlines does not have A320 and B737 aircraft in its fleet. [REstriction of Publication Claimed] passengers have also benefitted from access to Virgin Australia's Velocity Frequent Flyer program [REstriction of Publication Claimed]. Importantly, the Charter Alliance has allowed the Applicants to collaborate on capacity and access each other's additional fleet capacity to support the customer's requirements.<sup>13</sup> VARA has used Alliance Airlines' F100 aircraft since [REstriction of Publication Claimed] to service its [REstriction of Publication Claimed] to support [REstriction of Publication Claimed] schedule requirements.<sup>14</sup> In total, between the commencement of the Charter Alliance in [REstriction of Publication Claimed], VARA accessed Alliance Airlines' F100 capacity on more than [REstriction of Publication Claimed] sectors to support [REstriction of Publication Claimed] schedule.

Other examples include a new agreement between VARA and [REstriction of Publication Claimed] for charter and RPT services to [REstriction of Publication Claimed] and an agreement between VARA and [REstriction of Publication Claimed] which expires on [REstriction of Publication Claimed]. In each case, VARA's bid referenced VARA's partnership with Alliance Airlines. For example, VARA's bid in response to the [REstriction of Publication Claimed] tender referenced additional capacity support from Alliance Airlines on F100 aircraft to support the client's schedule requirements, additional services as activity ramps up or for ad-hoc purposes (capacity that VARA is unlikely to be able to provide on a standalone basis due to [REstriction of Publication Claimed] likely requiring services on peak operating days of Tuesday to Thursday).<sup>15</sup> In addition to this, VARA offered [REstriction of Publication Claimed] mixed charter/RPT services on a mix of F100, A320, B737 aircraft, with access to the Velocity Frequent Flyer Program.

## 1.7 The nature of competition for FIFO services is not conducive to unilateral or coordinated effects

Competition for FIFO services takes place in a bidding market where;

- customers include sophisticated mining and resource companies with significant procurement experience;
- customers control the tender requirements, participants, parameters and processes;
- tenders are diverse and tailored to the specific requirements of the customer at the time;
- FIFO operators have a largely fixed cost base and rely on a number of key contracts with charter customers to cover both the fixed and variable costs of their

<sup>13</sup> Refer to documents QAA.0003.0003.2365 and QAA.5000.0007.2848.

<sup>14</sup> See further Virgin Australia's Response of 30 September 2022 to the ACCC's Request for Information, 4 and 14.

<sup>15</sup> Refer to document QAA.5000.0007.2968.

operations. Consequently the loss of, or opportunity to win, a charter contract can have a significant impact on a FIFO operator's profitability;

- competition is lumpy with tenders being winner takes all and long term in nature – such that each contest is likely to be large relative to a supplier's total sales in a period;
- there is no lock-in by which the outcome of one tender contest necessarily determines another;
- 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);
- there are a range of FIFO providers each with different capabilities, aircraft and cost structures; and
- 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.

These characteristics are not conducive to either material unilateral or coordinated effects.

The Draft Determination accepts that these competitive dynamics mitigate against the risk of coordinated conduct noting any increase in the likelihood of coordinated conduct is uncertain, and in any event unlikely to be significant, but it does not appear to have given adequate consideration to these factors in reaching its conclusion about the potential for the Charter Alliance to result in unilateral effects.<sup>16</sup>

## **1.8 Customer bargaining power and continued strong competition from other FIFO operators preclude the exercise of market power by the Charter Alliance**

As demonstrated by the experience over the last 5 years, reauthorisation of the Charter Alliance will not give the Applicants the ability or incentive to unilaterally raise prices or reduce service levels. The Applicants will continue to be competitively constrained by customers' bargaining power, and by competition from Qantas and other FIFO operators, including the threat of expansion by existing operators. This is particularly the case given the importance and nature of FIFO contracts and the dynamics of the FIFO bidding market.

### **(a) Importance of FIFO contracts, customer power and control over the tender process**

Corporate customers are essential in supporting a sustainable full-service airline as they give access to:

- high yielding repeat passengers which are key to developing a broad and deep domestic and international network;
- a passenger mix which protects against shocks such as COVID-19; and

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<sup>16</sup> ACCC, Draft Determination, 23-24.



- a loyalty base through passengers redeeming points earned while travelling for work on leisure flights.

Half of the top 20 corporate contract customers by volume in Australia in FY22 were resources companies which require a comprehensive FIFO solution that incorporates intrastate (RPT and charter), interstate and international RPT services. These customers are therefore likely to value bids from operators who are capable of providing a 'one stop shop' solution. Without the Charter Alliance, Qantas will remain the only operator with this capability.

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.

Further as noted above, 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. **[RESTRICTION OF PUBLICATION CLAIMED]**

A number of customers have acknowledged that they possess bargaining power in the course of the ACCC's market inquiries. For instance, Regis Resources considers that it has some leverage when conducting its tender process, but not as much as Rio Tinto or other customers with 'tier one' requirements.<sup>17</sup> VARA's contractual agreement with **[RESTRICTION OF PUBLICATION CLAIMED]** is a good example of the power that customers can exert during the contractual term. **[RESTRICTION OF PUBLICATION CLAIMED]**

FIFO contracts typically also contain provisions that prevent operators from unilaterally increasing prices or reducing service levels during the term of the contract. FIFO contract terms are on average 3 to 5 years, with options to extend. The contract will typically, but not always, specify a fixed price for the services over the life of the contract, with a 'rise and fall' provision for CPI and other cost pass throughs. 'Rise and fall' clauses tend to be favourable to the customer and prevent airlines from increasing trip rates in line with increases in their operating costs, which can lead to margin squeeze for the operator. For example, **[RESTRICTION OF PUBLICATION CLAIMED]**.

Other contracts include provisions that safeguard service levels to ensure they are not reduced during the term of the contract. For example, **[RESTRICTION OF PUBLICATION CLAIMED]**.

#### **(b) Strong and increasing competition from other FIFO operators**

Market conditions have changed since the initial authorisation of the Charter Alliance in 2017. As noted in the Draft Determination, in 2017 there was a mining downturn in Australia, resulting in excess FIFO capacity. In contrast, the market is currently experiencing a current sustained period of growth in WA mining activity. These market conditions have not changed the fact that operators continue to be incentivised to aggressively compete for customers in order to secure work and cover costs both now and over a 3-5 year horizon. The ongoing level of vigorous competition in the market is evidenced by new entrants entering the market, existing operators expanding their operations and both smaller and medium operators winning contracts from larger players.

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<sup>17</sup> File note of meeting with Regis Resources dated 29 November 2022, 2.

**(c) Qantas is the largest carrier and its presence precludes the exercise of market power by the Charter Alliance**

The ACCC has recognised that the Applicants will continue to face competition from Qantas which has a broad network and a wide range of aircraft of varying seat capacities.<sup>18</sup> Qantas is the dominant supplier of FIFO services in Australia and the number one supplier in WA. As noted by the ACCC in its Statement of Issues in relation to Qantas' proposed acquisition of Alliance Airlines,<sup>19</sup> Qantas has the largest fleet of aircraft in Australia, featuring a range of aircraft suitable for air transport services to and from regional and remote resource locations. Qantas can quickly respond to any potential attempt by the Applicants to increase prices above competitive levels or reduce service levels with bases nationally and a large, diversified fleet which can be deployed quickly to scale up as needed in any particular region. Qantas has a capacity like no other player to tailor a solution to meet specific customer requirements and also offer other non-price factors of importance in choosing a charter service provider such as fleet mix, scheduling flexibility, reliability and back up support. It also has the ability to further constrain other players by utilising the value-added benefits which it can offer and which become substantially more valuable with an integrated service and broader domestic and international network. To suggest that the Applicants could and would anti-competitively increase prices or reduce service levels without fear of a strong competitive reaction from Qantas misunderstands the competitive dynamics of the provision of FIFO services and is inconsistent with the facts. The suggestion in the Draft Determination that the Charter Alliance would give the Applicants a degree of market power such that they could unilaterally raise prices or reduce service quality is negated by a recognition of the role that Qantas plays in the market.

Importantly, in the absence of the Charter Alliance, Qantas does not face the same competitive pressure. Qantas is the only operator that can meet the needs of all FIFO customers. As a consequence, any customer can wholly switch away from a FIFO provider to Qantas, whereas customers cannot switch wholly away from Qantas in response to price rises or service reductions. The Charter Alliance provides the best opportunity for them to do so.

**(d) Significant and growing competition from other FIFO providers**

The Draft Determination frames the Charter Alliance as removing competition between “2 of the 3 leading FIFO operators”.<sup>20</sup> The characterisation that the Charter Alliance leaves 2 suppliers supplying the majority of FIFO services in WA does not accurately reflect the true intensity of competition in the supply of FIFO services and the extent of the constraint provided by other FIFO operators such as Skippers, Cobham, Air North and Hevilift, a new entrant in WA. These operators have the capacity to, and do in fact compete vigorously against the Charter Alliance where the requirements of the FIFO contract set by the customer suit their operations.<sup>21</sup> VARA estimates that providers such as Air North, Cobham, Hevilift and Skippers have all significantly grown their market shares since 2015.<sup>22</sup> This demonstrates that FIFO operators with smaller scale operations are not prevented from winning contracts or restricted to providing ad-hoc charter services due to their more limited scale, fleet composition and/or service offering.

As recognised by the ACCC, smaller operators can submit non-compliant bids to a tender and customers can split up components of a tender and award them to different

<sup>18</sup> ACCC, Draft Determination, 4.97.

<sup>19</sup> ACCC, Statement of Issues on Qantas Airways Limited's proposed acquisition of Alliance Aviation Services Ltd, [15].

<sup>20</sup> ACCC, Draft Determination, 4.115.

<sup>21</sup> See further Applicants' Joint Submission in Support of Application for Authorisation dated 27 May 2022, 26.

<sup>22</sup> For example [REstriction of Publication Claimed]. See further Virgin Australia Supplementary Submission in Support of Application for Authorisation dated 3 June 2022, 12.



operators. The Draft Determination appears to selectively use this fact to downplay the constraint that the Charter Alliance places on Qantas,<sup>23</sup> while simultaneously discounting the constraint other operators place on the Charter Alliance. It does not hold to say, as the Draft Determination does, that because customers can and often choose to split their contractual needs between providers, the benefits of the Charter Alliance in terms of a single integrated offer and increased competitive tension with Qantas are negated, while also saying that other charter operators do not constrain the Charter Alliance because they are not capable of providing the same breadth of services.

While the Draft Determination found that smaller providers of FIFO services did not appear to impose a strong competitive constraint on the Applicants, if this was the case one would expect to see the Applicants winning more than their “fair share” of the existing FIFO tenders, which has not occurred. The constraint provided by existing FIFO operators is meaningful, particularly when combined with the constraint posed by Qantas and the other dynamics of FIFO service supply. Customers drive the tender requirements, parameters and processes and the outcomes of these tenders and lack of complaints from customers do not point to a lack of constraint on the Applicants. Customer feedback is consistent with this position. For example, Rio Tinto considers that any airline capable of providing charter services can compete with the Charter Alliance.<sup>24</sup>  
**[RESTRICTION OF PUBLICATION CLAIMED]**

VARA is aware that:

**[RESTRICTION OF PUBLICATION CLAIMED]**

**(e) Competition from wide range of FIFO operators supported by tender data**

VARA's tender data, attached as **Appendix A** to this submission, shows that  
**[RESTRICTION OF PUBLICATION CLAIMED]**

Since 2017, there have been numerous instances of operators such as Cobham and Skippers winning or retaining contracts where larger operators were also bidding.<sup>25</sup>

Examples of tenders where operators other than Qantas successfully competed against the Applicants since 2017 are summarised in Table 1 below.

**Table 1: Examples of tenders where operators other than Qantas successfully competed against the Charter Alliance since 2017**

**[RESTRICTION OF PUBLICATION CLAIMED]**

**(f) Strong history of entry and expansion in response to commercial opportunities**

The Draft Determination posits that new entry into the provision of FIFO services in WA on the scale necessary to compete with the major operators does not appear likely, even in the event the Applicants raise prices (while also concluding that the tendency for customers to split their work reduces the Charter Alliance's service benefits). As set out above, the characteristics of FIFO service supply and the constraint provided by existing FIFO operators (including Qantas) is such that new entry is simply not necessary to

<sup>23</sup> ACCC, Draft Determination, 4.79-4.80.

<sup>24</sup> ACCC, File note of meeting with Rio Tinto dated 28 November 2022, 2.

<sup>25</sup> See further Appendix A to this Submission and the Applicants' Joint Submission in Support of Application for Authorisation dated 27 May 2022, 27.

constrain the Applicants from anti-competitively increasing prices or reducing service levels.

However, there is a clear history of charter operators entering and expanding their operations in response to commercial opportunities in Western Australia and there is no reason to conclude that any attempt to raise prices above a competitive level would not prompt a similar response in the future.

Since the Charter Alliance was first authorised, there have been several examples of successful new entry and expansion of existing FIFO operators. Even if further new entry does not occur in the authorisation period, the threat of expansion in response to commercial opportunities is a real constraint on the Applicants especially since that is exactly what has occurred in practice.<sup>26</sup>

For example, since 2017:

- **Qantas:** The Qantas Group (which includes QantasLink and Jetstar) announced its plans to purchase the “*largest aircraft order in Australian aviation history*” in December 2021.<sup>27</sup> Qantas has made a commitment to purchase 40 new planes (20 A321 (extra long-range) aircraft seating ~180 passengers and 20 A220 aircraft seating ~ 150 passengers) by end of FY2022.<sup>28</sup> In addition, Qantas has a total of 18 options to wet lease E190 planes from Alliance Airlines. As of 8 March 2022, Qantas had exercised 14 of these 18 options.<sup>29</sup> QantasLink has grown its F100 fleet from 14 to 18 aircraft and its A320 fleet has increased from 0 to 11 aircraft. QantasLink has also transferred 5 Q300s from Jetstar NZ to Australia and plans to further grow its A320 fleet to 15 by mid-2023.<sup>30</sup>

On 1 February 2019 Qantas announced its intention to purchase a 19.9% shareholding in Alliance Airlines. Further to its significant fleet expansion since 2017,<sup>31</sup> on 5 May 2022 Qantas announced its intention to acquire the remaining shares in Alliance Airlines which it did not already own. Qantas has said that its acquisition of the remaining shares in Alliance Airlines would mean that it can “better compete in the highly competitive charter segment, particularly given the shared fleet type of Fokker aircraft [that Qantas and Alliance Airlines each have]” and that access to Alliance Airlines’ Fokker fleet and spare parts would enable Qantas to efficiently serve resource customers in WA and QLD and to “significantly extend the practical life of a combined fleet of around almost 70 Fokkers”.<sup>32</sup> The acquisition by Qantas of Alliance Airlines would give the already dominant carrier a scale and scope of services that cannot be matched by any rival, would seriously impede Virgin’s ability to compete for charter services, foreclose access to wetlease and spare part capacity, raising barriers to entry and expansion, and remove customer choice.

<sup>26</sup> See further Applicants’ Joint Submission in Support of Application for Authorisation dated 27 May 2022, 14.

<sup>27</sup> ‘Qantas selects Airbus as preferred aircraft for domestic fleet renewal’ *Qantas* (Web Page, 16 December 2021) <<https://www.qantasnewsroom.com.au/media-releases/qantas-selects-airbus-as-preferred-aircraft-for-domestic-fleet-renewal/>>

<sup>28</sup> Ibid.

<sup>29</sup> Alliance Aviation Services Limited, ‘Additional Wet Lease Agreement Options with Qantas’ (ASX Release, 8 March 2022) <[https://www.allianceairlines.com.au/docs/default-source/default-document-library/2022-03-08---wet-lease-agreement-options-with-qantas-airways-limited.pdf?Status=Master&sfvrsn=149b199e\\_7%202022-03-08---Wet-lease-agreement-options-with-Qantas-Airways-Limited%20.pdf](https://www.allianceairlines.com.au/docs/default-source/default-document-library/2022-03-08---wet-lease-agreement-options-with-qantas-airways-limited.pdf?Status=Master&sfvrsn=149b199e_7%202022-03-08---Wet-lease-agreement-options-with-Qantas-Airways-Limited%20.pdf)>

<sup>30</sup> Geoffrey Thomas, ‘Qantaslink adds four more A320s to meet resources demand’, *The West Australian* (online, 26 May 2022) < <https://thewest.com.au/business/aviation/qantaslink-adds-four-more-a320s-to-meet-resources-demand-c-6210159> >.

<sup>31</sup> See further Applicants’ Joint Submission in Support of Application for Authorisation dated 27 May 2022, 13; Virgin Australia Supplementary Submission in Support of Application for Authorisation dated 3 June 2022, 13.

<sup>32</sup> ‘Qantas to acquire Alliance Aviation to better support resources segment’ *Qantas* (Web Page, 5 May 2022), <<https://www.qantasnewsroom.com.au/media-releases/qantas-to-acquire-alliance-aviation-to-better-support-resources-segment/>>.



- **Cobham/ Pel Air:** In February 2022, Cobham's 6th Q400 turboprop was delivered (Cobham's fleet now comprises of 17 planes including Q400 turboprops and E190 aircraft). In 2022, Rex, which operates Pel-Air, acquired a 50% interest in Cobham, increasing the geographic footprint and scale of the business.
- **Aviair:** In November 2022, Aviair announced its intention to lease an unspecified number of DHC-8-Q400s to bolster its RPT operations in WA. Aviair also secured \$4 million via the Inter-Regional Flight Network subsidy scheme in the May 2022 WA Government budget to bolster its RPT flying, which will likely include services on FIFO-dominated routes.
- **Hevilift:** Hevilift is a new supplier of FIFO charter services in WA which commenced charter operations in Brisbane in 2012, before expanding into WA with an operating base at Perth Airport in August 2021.<sup>33</sup> This expansion shows that while there are significant sunk costs involved in establishing a base, operators will respond to commercial opportunities where they arise and compete aggressively where they can satisfy the customer's requirements.

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>34</sup> In addition, the Charter Alliance will not prevent other airline services providers (such as Bonza, a recent new entrant into the Australian domestic RPT market) from accessing ad-hoc charter services or Rex from accessing E190 simulators or parts.<sup>35</sup> **[RESTRICTION OF PUBLICATION CLAIMED]**<sup>36</sup>

## 1.9 Changes in the aviation industry since the previous authorisation favour continuation of the authorisation

The Draft Determination points to changes in the market since 2017 as weighing against reauthorisation, namely the movement from a period of downturn characterised by excess capacity to a new mining boom (at least in WA). However, in selecting only this change to the market, the Draft Determination overlooks important dynamics which favour reauthorisation and need to be considered when assessing the public benefits and detriments to date, and likely in the future.

### 1.10 Excess capacity is not required to incentivise the Applicants to aggressively compete

The Draft Determination notes that during its previous consideration of the Charter Alliance, the mining industry in WA was in the midst of a downturn resulting in excess capacity in the FIFO sector and the incentive to aggressively compete for corporate customers. The Draft Determination further notes that more recently the mining industry in WA has been experiencing a sustained period of growth in activity and this has been taken into account in the assessment of future public benefits and detriments.

Due to the nature of FIFO service supply and competition with valuable, lumpy, long-term contracts, FIFO operators will be incentivised to aggressively compete for corporate customers even if there is no longer excess capacity in the FIFO sector. Excess capacity in the FIFO sector may be a *sufficient* condition to incentivise the Applicants to

<sup>33</sup> 'Hevilift Expands Into Western Australia', *Smart Aviation* (Web Page, 27 August 2021) <<http://www.smartaviation-apac.com/2021/08/hevilift-expands-into-western-australia/>>.

<sup>34</sup> ACCC, File note of meeting with Rio Tinto dated 28 November 2022, 2; ACCC, File note of meeting with Bonza dated 25 November 2022, 1; ACCC, File note of meeting with Regis Resources dated 29 November 2022, 2; ACCC, File note of meeting with Sandfire Resources dated 25 November 2022, 2; ACCC, File note of meeting with Roy Hill dated 15 December 2022, 3.

<sup>35</sup> ACCC, File note of meeting with Bonza dated 25 November 2022, 1; Submission by Rex dated 18 November 2022.

<sup>36</sup> See further Virgin Australia Response of 17 August 2022 to ACCC Request for Information in relation to Qantas' proposed acquisition of Alliance Airlines, 19.

aggressively compete, but it is not a necessary one. In any event, other changes that have occurred in the industry since the previous consideration of the Charter Alliance further support the incentive for the Applicants to continue to aggressively compete for corporate customers and support the re-authorisation of the Charter Alliance.

These include the impact of COVID-19, Virgin Australia's journey through voluntary administration, its fleet transition and the expansions and increased constraint from other FIFO operators. As noted in the Draft Determination, Virgin Australia/VARA suffered significantly from the decrease in demand for RPT services, crash in customer confidence and related border closures during the pandemic. There has also been a shift away from RPT to charter services for some customers; for example, **[RESTRICTION OF PUBLICATION CLAIMED]**.

Virgin, like other FIFO operators, is heavily incentivised to compete aggressively for contracted long term FIFO revenue to cover fixed costs, provide stability, offer some buffer against external fluctuations impacting other components of its network and to compete against Qantas more broadly. This is particularly the case following the financial focus and scrutiny of decisions after coming out of administration. Corporate customers are essential to support a sustainable full-service airline and a substantial majority of Australia's largest corporate customers are resource companies who require a comprehensive FIFO solution. The ability to offer resource and mining companies competitive and compelling solutions through the Charter Alliance is crucial to being able to compete against Qantas for corporate travellers. With or without the Charter Alliance, Qantas is able to leverage its leading position across all Australian airline markets, including international travel, to continue to win the overwhelming share of corporate contracts. Its FIFO operations benefit from the loyalty base and competitive advantage this provides to its broader network.

#### **1.11 Mining downturn in QLD means the Charter Alliance has not yet fully realised the likely service and pro-competitive benefits in that region**

Since the Charter Alliance was initially authorised, QLD has been going through a mining downturn which has resulted in reduced demand for FIFO services (as discussed further in Section 3.5(a) below). The resulting lack of tender opportunities and Virgin's focus as it went through administration (post the initial authorisation), has meant that there has not been the opportunity to realise the full level of competitive benefit and constraint on Qantas on the East Coast and Central Australia. However, as acknowledged in the Draft Determination, previous determinations and customer feedback, if opportunities arise, the combination of the Applicants' strengths under the Charter Alliance will bring significant benefits to customers by promoting competition on the East Coast, "creating a viable competitor to Qantas" and forcing it to respond in a way or to a degree that would not be achieved without the Charter Alliance.

In considering the likelihood of detriments resulting from the Charter Alliance, the ACCC states that it has taken into account changes in market conditions since the previous authorisation to inform its current assessment of the likelihood of future public benefits and detriments. However, Virgin considers that it is important to consider whether market factors may have impeded the delivery of some benefits, which are likely to occur in the future as the demand cycle changes.

#### **1.12 All changes to competitive landscape should be taken into account in assessment**

As noted in the Draft Determination and above, since the ACCC authorised the Charter Alliance in 2017 the FIFO services market has experienced new entry, expansions and acquisitions. These dynamics highlight the unlikelihood that the Charter Alliance would



have the incentive or ability to anti-competitively raise prices or reduce service over the life of the proposed authorisation.

As noted in the Draft Determination, since consideration of the initial authorisation, Rex has acquired National Jet Express, the regional services arm of Cobham Aviation. This acquisition increases the potential constraint in WA from Cobham, an already significant player. Subject to Rex's plans for the business, the acquisition can be seen to also create the potential for synergies with Pel-Air, fleet access and scale, and the ability to better service customers that require a differentiated solution with more national coverage, given the presence on the East Coast/Central Australia. This undermines the criticism posed in the Draft Determination that the constraint from Cobham (**[RESTRICTION OF PUBLICATION CLAIMED]**) is somehow not significant because it is confined to certain regions only.

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## 2 The lack of strong opposition to the Charter Alliance is not consistent with material overall detriment

The Charter Alliance has been in place since 2017. If the Charter Alliance had resulted in material detriment, or there was a material risk of a substantial lessening of competition that outweighs public benefits, it would be expected that strong and consistent customer opposition to the reauthorisation would be received. This has not occurred.

The ACCC received no submissions from interested parties in relation to the application for interim authorisation or prior to the Draft Determination and the submissions received in response to the Draft Determination do not in any way reflect opposition to the reauthorisation.

To the contrary, they reflect the view that the Charter Alliance provides real benefits in terms of convenience, flexibility, enhanced services and the ability to access these benefits through a single contracting party where that is preferred. While one customer has noted that the Applicants no longer provide competing bids, it also states that it has access to better services from them working together.<sup>37</sup> It is this trade-off that is at the heart of the authorisation test. The Applicants acknowledge that the Charter Alliance removes competition between Virgin Australia and Alliance Airlines. But in doing so, it enhances competition as against Qantas, provides customers who want an integrated offer with more choice, and enables the Applicants to provide valuable service improvements to customers.

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## 3 Denial of authorisation would prevent the delivery of significant public benefits to FIFO customers

### 3.1 Overview

The Charter Alliance has resulted in, and will continue to result in, the delivery of significant public benefits to FIFO customers, including:

- enhanced product and service offers;
- operational efficiencies which are passed on to customers; and

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<sup>37</sup> ACCC, File note of meeting with Gold Fields dated 27 September 2022, 1 and 2.

- the promotion of competition between FIFO operators, especially by providing a real alternative to Qantas' integrated offer.

Any reduction in competition in the WA FIFO market as a result of the Charter Alliance is outweighed by these benefits such that FIFO customers would be left worse off if reauthorisation is denied.

The Draft Determination accepts that the Charter Alliance is likely to result in public benefits (including increased service levels and efficiencies and cost savings). However, these benefits have been given less weight due to the unsupported concern that somehow the Charter Alliance will allow the Applicants to acquire the market power to anti-competitively increase prices and reduce service levels in the WA FIFO bidding market, where:

- the Applicants are incentivised to hotly contest each contract given the importance of FIFO contracts (including the importance of winning FIFO contracts from Qantas in terms of Virgin Australia's broader proposition as an Australian domestic airline of choice for corporate and leisure travellers);
- there is little transparency in supply terms (including the price) negotiated by the customers controlling the tenders;
- tenders are diverse and tailored to the specific requirements of the customer at that point in time; and
- competition is lumpy with tenders being winner-takes all and long term in nature, often with provisions protecting the price-service commitments made for the length of the contract.

As set out above, the likelihood of this concern eventuating during the authorisation period does not reflect customer experience or market reality.

It is hard to see how the Charter Alliance could anti-competitively increase prices or reduce service quality without fear of a reaction from Qantas and equally how the Charter Alliance does not result in additional constraint on Qantas. As customers can switch away from the Charter Alliance, either in whole to Qantas, or by splitting their needs to other FIFO operators,<sup>38</sup> the Charter Alliance cannot credibly be said to have this effect. Further, as customer contracts are locked in for 3-5 years, the Charter Alliance would have no ability to unilaterally raise prices or reduce service quality for the life of the authorisation.

### 3.2 The Draft Determination's preliminary weighing of public benefits and detriments is inconsistent and contradictory

The Draft Determination:

- acknowledges that under the Charter Alliance the broader mix of aircraft available to the Applicants may enhance their competitiveness in WA by allowing them to offer aircraft with capacities similar to those offered by Qantas;<sup>39</sup>
- recognises the scope for synergies and complementarities under the Charter Alliance may enable the Applicants to reduce costs and make better, not worse

<sup>38</sup> Examples of customers that have contracted with multiple operators following an RFP include [RESTRICTION OF PUBLICATION CLAIMED]

<sup>39</sup> ACCC, Draft Determination, 4.83.



offers to customers noting that the Charter Alliance is likely to result in enhanced products and services and operational efficiencies;<sup>40</sup>

- recognises that the Applicants will continue to face competition from Qantas;<sup>41</sup>
- recognises that Qantas is the leading supplier of FIFO services in WA and that the Charter Alliance has not been able to win every tender even with the more compelling offering available under the Charter Alliance;<sup>42</sup>
- recognises that submitting an unsuccessful joint bid may in and of itself provide additional competitive constraint on Qantas (over and above if, absent the Charter Alliance, the Applicants bid independently) and this may require Qantas, as the incumbent or competitive bidder, to improve its offer to customers;<sup>43</sup>
- recognises that competitive bids by the Applicants for services on the East Coast and Central Australia may be incrementally improved by the Charter Alliance and that this may impose additional competitive constraint on Qantas<sup>44</sup> and that without the Charter Alliance, Virgin Australia would be unlikely to be able to independently constrain Qantas in the foreseeable future;<sup>45</sup>
- acknowledges that for the segment of customers that seek or value a national integrated charter and RPT option, the Charter Alliance provides a public benefit in allowing a competitive alternative to Qantas;<sup>46</sup>
- notes that the Applicants have provided examples of how combining fleet capacity and operating bases has allowed the Applicants to address capacity issues, make more confirming bids or provide a national solution;<sup>47</sup> and
- recognises that while wet leasing arrangements provide each airline with a degree of operational flexibility, the ACCC considers that the Charter Alliance is likely to provide a greater degree of flexibility at a lower cost allowing either party to respond more quickly and flexibly than would otherwise be the case.<sup>48</sup>

The Draft Determination also characterises the Charter Alliance as:

- bringing together what the ACCC characterises as the second and third leading suppliers of FIFO services such that it would have the market power to anti-competitively increase prices and reduce service levels; and
- resulting in two suppliers (Qantas and the Applicants) supplying the majority of FIFO services.

At the same time, the Draft Determination also suggests that even the enhanced offering utilising the synergies and complementarities of what it characterises as the second and third leading suppliers of FIFO services does not add a relevant competitive constraint on Qantas. If the enhanced and more compelling offers achievable under the Charter Alliance do not constrain Qantas, it is difficult to see how a conclusion that a world without the Charter Alliance would be more competitive than one with it. Further, it does not

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<sup>40</sup> ACCC, Draft Determination, 4.100.

<sup>41</sup> ACCC, Draft Determination, 4.97.

<sup>42</sup> ACCC, Draft Determination, 4.96 and 4.85.

<sup>43</sup> ACCC, Draft Determination, 4.85.

<sup>44</sup> ACCC, Draft Determination, 4.80.

<sup>45</sup> ACCC, Draft Determination, 4.85.

<sup>46</sup> ACCC, Draft Determination, 4.62.

<sup>47</sup> ACCC, Draft Determination, 4.31.

<sup>48</sup> ACCC, Draft Determination, 4.28.

follow that the Charter Alliance could attain market power enabling it to increase prices and reduce service levels without fear of Qantas' response, while also not meaningfully increasing competition as against Qantas.

The facts that customers may ultimately award components of tenders to separate operators and often accept non-compliant tenders does not negate the additional competitive constraint and optionality that can be achieved under the Charter Alliance rather than on a stand-alone basis, as the Draft Determination suggests. As noted in the Draft Determination, there are those customers who may be looking for the national integrated 'one-stop' offering that only Qantas (and the Charter Alliance) can provide. However, even for those that are not looking for that particular offer, the ability to challenge Qantas' ability to leverage its unique proposition (with broad and deep network and operational capabilities, fleet scale and composition with the widest range of seat capacity aircraft and value added services) increases the ability for customers to force Qantas to 'sharpen its pencil' and provide more competitive responses to the customer's particular requirements. As noted in the Draft Determination, other factors that customers may identify as being particularly important in choosing a charter service provider include fleet mix, scheduling flexibility, reliability and back up support. This is regardless of whether the customer is looking for an integrated national RPT/charter service provider. Under the Charter Alliance, the Applicants are better able to provide these features and a more comparable competitive alternative to Qantas is available for the benefit of customers than without it.

### 3.3 Significant public benefits have and will continue to be passed on to customers

While it questions the magnitude of these in the Draft Determination, the ACCC considers that the Charter Alliance is likely to result in public benefits including:

- operational efficiencies in the form of cost savings, increased flexibility and optimisation of aircraft utilisation; and
- enhanced products and services through the provision of a more extensive integrated charter and RPT service offering and improved flight scheduling and connectivity, allowing the Applicants to offer better flight times and reduce the risk of missed connections and enabling eligible Alliance Airlines passengers to be able to accrue Velocity Frequent Flyer program points and/or to access Virgin Australia lounges.<sup>49</sup>

Submissions of interested parties emphasise that customers consider and/or value the following factors when awarding FIFO contracts:

- access to frequent flyer points and airport lounges;<sup>50</sup>
- fleet availability and scale<sup>51</sup> and fleet mix;<sup>52</sup>
- the airline's ability to meet the customer's schedule, including ability to offer flights during peak charter flight times (Tuesdays-Thursdays);<sup>53</sup>

<sup>49</sup> ACCC, Draft Determination, 4.112, 4.64.

<sup>50</sup> ACCC, File note of meeting with Rio Tinto dated 28 November 2022, 2; ACCC, File note of meeting with Gold Fields dated 27 September 2022, 2.

<sup>51</sup> ACCC, File note of meeting with Sandfire Resources dated 25 November 2022, 2; File note of meeting with Roy Hill dated 15 December 2022, 3.

<sup>52</sup> File note of meeting with Regis Resources dated 29 November 2022, 1.

<sup>53</sup> ACCC, File note of meeting with Sandfire Resources dated 25 November 2022, 1; File note of meeting with Regis Resources dated 29 November 2022, 2.



- additional fleet capacity and availability of ad-hoc charter flights;<sup>54</sup>
- availability of a broader solution and economies of scale from a joint offering and discounts on repeat flights;<sup>55</sup>
- availability of suitably sized aircraft, with Regis Resources specifically mentioning the ability of the airline to ensure capacity to fly 100 passengers;<sup>56</sup>
- reliability and on time performance;
- overall cost of the service;
- limitations of relevant airports;<sup>57</sup>
- the airline's prior experience in providing charter services; and<sup>58</sup>
- safety.<sup>59</sup>

The Charter Alliance greatly enhances the Applicants' capability to efficiently address the factors listed above in a manner that could not be achieved on a standalone basis, as discussed in more detail below.

### 3.4 Enhanced products and services are a direct customer benefit

#### (a) Better scheduling and fewer flight delays

In its Draft Determination the ACCC accepted that the Charter Alliance has enabled VARA and Alliance Airlines to access each other's combined fleet and combined pool of pilots and crew (including to provide ad-hoc services) and to jointly schedule services, resulting in better scheduling (including at peak FIFO flying times) and reduced flight delays and disruptions for customers.<sup>60</sup> The ACCC's market feedback has confirmed this benefit is highly valued by customers such as Sandfire Resources, Regis Resources and Roy Hill.<sup>61</sup> Examples of other customers that have benefitted from better scheduling and fewer flight delays under the Charter Alliance include **[RESTRICTION OF PUBLICATION CLAIMED]**.

#### (b) Value-added benefits

In its Draft Determination, the ACCC accepted that the Charter Alliance allowed the Applicants to provide value-added services at a lower cost and on a potentially broader range of flights, and indicated that it would further explore the importance of value-added benefits such as access to the Velocity Frequent Flyer program and Virgin lounges with customers.<sup>62</sup> The ACCC indicated that, though it considered that access to frequent flyer programs does provide some public benefit, it was not satisfied that this feature would

<sup>54</sup> ACCC, File note of meeting with Sandfire Resources dated 25 November 2022, 1; File note of meeting with Roy Hill dated 15 December 2022, 2; File note of meeting with Regis Resources dated 29 November 2022, 2.

<sup>55</sup> File note of meeting with Regis Resources dated 29 November 2022, 2.

<sup>56</sup> File note of meeting with Rio Tinto dated 28 November 2022, 2; File note of meeting with Regis Resources dated 29 November 2022, 1.

<sup>57</sup> File note of meeting with Rio Tinto dated 28 November 2022, 2.

<sup>58</sup> ACCC, File note of meeting with Rio Tinto dated 28 November 2022, 2; ACCC, File note of meeting with Sandfire Resources dated 25 November 2022, 2.

<sup>59</sup> File note of meeting with Regis Resources dated 29 November 2022, 1.

<sup>60</sup> ACCC, Draft Determination, 4.52.

<sup>61</sup> ACCC, File note of meeting with Sandfire Resources dated 25 November 2022, 1-2. File note of meeting with Regis Resources dated 29 November 2022, 2.

<sup>62</sup> ACCC, Draft Determination, 4.57.

significantly impact the competitive outcomes of tender processes and considered that Alliance Airlines would still be able to compete for charter contracts without a frequent flyer program or other value-added services.<sup>63</sup>

Though not all customers consider that services such as frequent flyer programs and lounge access are important factors in conducting tenders, several very significant customers and their employees do value such benefits, including Rio Tinto, which considers access to frequent flyer points and lounges a relevant factor when awarding a contract, acknowledging that it is important for recruitment and for the overall experience of its FIFO workers.<sup>64</sup> Gold Fields indicated that lounge and Velocity Frequent Flyer program access at a competitive price played an important role in its decision to award its charter contracts to the Charter Alliance.<sup>65</sup>

Access to value-added benefits is a feature that has been offered under the Charter Alliance to many customers, including **[RESTRICTION OF PUBLICATION CLAIMED]**

Importantly, 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.

### (c) National and integrated charter / RPT solution

The Draft Determination acknowledged that the ability to provide a national, integrated charter and RPT solution with value-added services may result in some public benefit through increasing customers' choice of operators able to provide such a solution. However, the ACCC indicated that it would consult with market participants on the extent of the benefit, which depended on the value that customers and their employees placed on such a service.<sup>66</sup>

While some resource companies whose operations are restricted to a single state or territory may naturally not place much value on this benefit, larger customers whose operations span multiple states and territories such as **[RESTRICTION OF PUBLICATION CLAIMED]** (and their employees) clearly benefit from the Charter Alliance's ability to provide a national, integrated charter/RPT solution with value-added services. Virgin estimates that for **[RESTRICTION OF PUBLICATION CLAIMED]**, approximately **[RESTRICTION OF PUBLICATION CLAIMED]** of their workforce needs to travel from the East Coast to Perth before commencing work. This number is expected to increase as the WA workforce recedes.<sup>67</sup> Gold Fields has noted that a small but not insignificant number of its staff board RPT flights following a charter flight.<sup>68</sup> The Charter Alliance allows passengers to accrue Velocity Frequent Flyer Points when travelling on both Alliance Airlines and VARA charter services and Virgin Australia RPT services, and to access lounges when connecting to Virgin Australia-operated RPT services.<sup>69</sup>

Customers who have benefitted from the Charter Alliance's ability to provide an integrated charter/RPT offering include **[RESTRICTION OF PUBLICATION CLAIMED]**. The interested party submissions indicate that some customers clearly value an integrated charter/RPT offering. For example, Roy Hill requires both charter and RPT

<sup>63</sup> ACCC, Draft Determination, 4.60.

<sup>64</sup> ACCC, File note of meeting with Rio Tinto dated 28 November 2022, 2.

<sup>65</sup> ACCC, File note of meeting with Gold Fields dated 27 September 2022, 2.

<sup>66</sup> ACCC, Draft Determination, 4.63.

<sup>67</sup> See further Virgin Australia's Response of 30 September 2022 to the ACCC's Request for Information, 15-16.

<sup>68</sup> ACCC, File note of meeting with Gold Fields dated 27 September 2022, 2.

<sup>69</sup> See further Virgin Australia's Response of 30 September 2022 to the ACCC's Request for Information, 15-16.



services (including interstate or overseas services) on 168+ seat capacity aircraft (which Alliance Airlines does not have in its fleet).<sup>70</sup> Qantas currently provides all of Roy Hill's charter and RPT flights except for ad-hoc flights where Qantas is unable to provide the service.<sup>71</sup> Roy Hill prefers bidders to offer the overall package of services it requires and recognises that there are synergies that can be achieved by contracting with a single airline for both charter and RPT in terms of administrative costs, commonality of service and volume-based discounts/rebates (although it is willing to split out charter and RPT services between different airlines if this provides the best price).<sup>72</sup> Regis Resources similarly prefers contracting with a single aviation provider and recognises the benefit in having a broader solution, economies of scale from a joint offering and discounts on repeat flights.<sup>73</sup>

Gold Fields has stated that having a consistent partner across all projects allows for Frequent Flyer services to be provided consistently across the group.<sup>74</sup> This is a tangible benefit even if the customer would not switch suppliers solely for this benefit. The value of having a single operator providing an integrated service across different projects may also increase if the workforce requirements of the customer's projects change.

**[RESTRICTION OF PUBLICATION CLAIMED]**.

**[RESTRICTION OF PUBLICATION CLAIMED]** and are willing to split their tender processes between multiple service providers.<sup>75</sup>

However, the above feedback shows that customers clearly value this offering even when they are ultimately willing to split up the tender between different operators. The ability to offer this complete 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 in some limited circumstances (for example, if this results in a better price). The ability to offer an alternative integrated solution prevents Qantas from simply 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.

### 3.5 Promotion of competition in the supply of FIFO services in Western Australia and on the East Coast and Central Australia

Qantas is in a unique position to provide a full suite of corporate-related services which include charter, RPT, frequent flyer and lounge benefits nationally. As noted above, Qantas has the largest fleet of aircraft in Australia, featuring a range of aircraft suitable for air transport services to and from regional and remote resource locations, which can be deployed quickly to scale up as needed in any particular region.

Unlike any other independent FIFO service provider, Qantas has the scale, fleet composition, network and capacity to tailor solutions that can meet *all* the requirements specified by *any* customer. This includes value-added benefits across broad domestic and international networks, flight connectivity and scheduling flexibility and given Qantas' large scale and network presence, the promise of reliability of service when extra capacity is needed or disruption occurs.

Irrespective of the specific customer requirements, Qantas is able to leverage its unique market position. Any customer has the option to bypass the Charter Alliance, thwarting

<sup>70</sup> Virgin notes that **[RESTRICTION OF PUBLICATION CLAIMED]**.

<sup>71</sup> File note of meeting with Roy Hill dated 15 December 2022, 1.

<sup>72</sup> File note of meeting with Roy Hill dated 15 December 2022, 2.

<sup>73</sup> ACCC, File note of meeting with Regis Resources dated 29 November 2022, 2.

<sup>74</sup> ACCC, File note of meeting with Gold Fields dated 27 September 2022, 2.

<sup>75</sup> ACCC, Draft Determination, 4.62 and 4.72.

any potential attempt by the Applicants (and any incentive to attempt) to reduce service levels or increase prices above competitive levels. Qantas is not subject to the same constraint as it is much more difficult for customers to switch all their business away from Qantas.

Under the Charter Alliance, the synergies created from combining the complementary strengths and offerings of the Applicants including increased scale and fleet mix and the ability to offer an alternative integrated RPT/charter solution across the greater mix of fleet types and greater fleet capacity, with value-added benefits enables a greater competitive constraint to be exerted on Qantas than would otherwise be the case.

Authorisation of the Proposed Conduct will continue to result in the Applicants being able to exert a greater competitive constraint on Qantas in WA and on the East Coast and Central Australia.

The Draft Determination recognises the ability of the Charter Alliance to impose additional constraint on Qantas including where joint bids are unsuccessful.<sup>76</sup> However, it wishes to further explore and consult with market participants to understand the extent of that benefit which it considered unclear based on information provided prior to the release of the Draft Determination. As a result, it has not been taken into account in the balancing of public benefit against the uncertain and unfounded public detriment. It is also noted that the discounting of the extent of this public benefit in the Draft Determination relies heavily on Alliance Airlines' response to the ACCC's request for information in making a number of observations about the likely pro-competitive impacts of the Charter Alliance. However, Alliance Airlines' response should be viewed in light of Qantas' proposed acquisition of Alliance Airlines which is currently under review by the Commission, and the likely incentives for Alliance Airlines to downplay the dominant position of Qantas in the FIFO market, particularly in WA, and therefore the need for (and extent of) the competitive constraint exerted on Qantas by the Charter Alliance.<sup>77</sup>

**(a) East Coast and Central Australia**

The ACCC's Draft Determination indicated that the ACCC would further explore the potential for any pro-competitive outcomes arising from the Charter Alliance on the East Coast and Central Australia.<sup>78</sup>

**[RESTRICTION OF PUBLICATION CLAIMED]**

Since the Charter Alliance was authorised in 2017, Alliance Airlines has tended to be appointed as the operating airline for charter contracts in QLD. This is due to VARA/Virgin Australia's limited charter operations on the East Coast, and the provisions of the Charter Alliance Agreement, which provide for Alliance Airlines to be the Operating Airline for New Charter Opportunities requiring aircraft capacity of 100 seats or less in QLD.

However, the bid documents which the Applicants have provided to the ACCC with this submission contradict Alliance Airlines' assertion that it has only made independent bids on the East Coast and Central Australia. The bid documents show that the Charter Alliance has enhanced Alliance Airlines' charter value proposition in joint bids through the provision of RPT services by Virgin Australia, value-added services, and additional capacity support.

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<sup>76</sup> ACCC, Draft Determination, 4.85.

<sup>77</sup> See further Virgin Australia's Further Supplementary Submission in support of Application for Authorisation dated 10 October 2022, 6.

<sup>78</sup> ACCC, Draft Determination, 4.81.



Examples of the Charter Alliance exerting competitive pressure on Qantas through joint bids on the East Coast and Central Australia include:

- **[RESTRICTION OF PUBLICATION CLAIMED]**: Alliance Airlines and VARA were able to offer the customer both **[RESTRICTION OF PUBLICATION CLAIMED]**, described by the Applicants at the time as a “one stop shop united bid”.<sup>79</sup> **[RESTRICTION OF PUBLICATION CLAIMED]**. The Charter Alliance improved Alliance Airlines’ charter proposition through the provision of Velocity Frequent Flyer points, lounge access, access to Virgin Australia’s RPT and global partner network, and the ability to utilise VARA’s additional aircraft capacity as and when required. VARA would have been unable to submit a conforming charter response without the Charter Alliance as its charter operations are limited to WA and it does not have smaller F70 aircraft in its fleet.
- **[RESTRICTION OF PUBLICATION CLAIMED]**: VARA responded to **[RESTRICTION OF PUBLICATION CLAIMED]** (identifying Alliance Airlines as a partner in its tender response), while Alliance Airlines bid for **[RESTRICTION OF PUBLICATION CLAIMED]**. The Charter Alliance allowed Alliance Airlines to offer access to Virgin Australia’s Velocity Frequent Flyer program on the **[RESTRICTION OF PUBLICATION CLAIMED]**, making Alliance Airlines’ bid more competitive **[RESTRICTION OF PUBLICATION CLAIMED]** as access to value-added benefits was one of the customer’s specified requirements.<sup>80</sup>

The Charter Alliance has provided benefits to customers on the East Coast and Central Australia by offering a solution which neither Alliance Airlines or VARA would be able to provide on a standalone basis (as the ACCC recognises in stating that under the Charter Alliance, customers on the East Coast and Central Australia have been offered RPT services, additional capacity support and value-added services). In addition to the two tenders cited above, additional examples of the benefits for customers on the East Coast and Central Australia realised and enabled under the Charter Alliance include the following:

- **[RESTRICTION OF PUBLICATION CLAIMED]**, where the Charter Alliance offered charter services on a mix of Alliance Airlines F70 and F100 aircraft and VARA B737 aircraft. **[RESTRICTION OF PUBLICATION CLAIMED]**, and the Charter Alliance allowed the Applicants to offer access to Virgin’s Velocity Frequent Flyer program and additional aircraft capacity.<sup>81</sup>
- **[RESTRICTION OF PUBLICATION CLAIMED]**.<sup>82</sup>
- **[RESTRICTION OF PUBLICATION CLAIMED]**: Alliance Airlines (F70/F100) and VARA (F100/A320/B737) bid under Charter Alliance. The Charter Alliance offered the customer a range of aircraft and additional aircraft capacity (including resulting flexibility) which neither VARA nor Alliance Airlines would have been able to offer on a standalone basis, and access to Virgin Australia’s Velocity Frequent Flyer program.<sup>83</sup>
- **[RESTRICTION OF PUBLICATION CLAIMED]** VARA requested that Alliance Airlines provide pricing and capability to support services on **[RESTRICTION OF PUBLICATION CLAIMED]**. VARA and Alliance Airlines jointly developed a proposal to **[RESTRICTION OF PUBLICATION CLAIMED]** for weekly services on

<sup>79</sup> Refer to document QAA.0004.0001.0460.

<sup>80</sup> See further Virgin Australia’s Further Supplementary Submission in support of its Application for Authorisation dated 10 October 2022, 7.

<sup>81</sup> Refer to documents QAA.5000.0007.2654.

<sup>82</sup> Refer to documents QAA.5000.000.5236, QAA.5000.0007.5239 and QAA.5000.0008.2069.

<sup>83</sup> Refer to document QAA.5000.0007.5442.

F70 and F100 aircraft from [REstriction of Publication Claimed] respectively.

Furthermore, the de-identified market feedback provided by the ACCC states that customers consider 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 fleet. Therefore, the assertion that Qantas will be the only provider offering an integrated charter and RPT service on the East Coast with or without the Charter Alliance does not reflect market reality.

The Charter Alliance has also allowed Virgin Australia to become more competitive on the East Coast by incentivising Alliance Airlines to allow Virgin Australia access to its wet-lease capacity on more favourable terms. Access to wet-leased Alliance Airlines F100 aircraft on the East Coast has allowed Virgin Australia to contest RPT services more effectively against Qantas [REstriction of Publication Claimed]. For example, Virgin Australia is only able to service corporate customers such as [REstriction of Publication Claimed].<sup>84</sup>

VARA frequently receives requests from customers for block bookings on RPT services in QLD and relies on access to Alliance Airlines' wet-leased F100 aircraft to service these opportunities. Following the termination of Virgin Australia's QLD turboprop services in 2017, Virgin has provided block seat RPT services to charter customers using Alliance Airlines wet-leased aircraft and has provided Alliance Airlines with access to value added services for its own services. This has included:

- In 2019-2021, Virgin provided 3 weekly block seat RPT services to [REstriction of Publication Claimed].
- In [REstriction of Publication Claimed] requested a quote from Virgin for a block booking on Virgin RPT services between [REstriction of Publication Claimed], and [REstriction of Publication Claimed] requested a quote for block bookings on RPT services between [REstriction of Publication Claimed].
- [REstriction of Publication Claimed].

Therefore, the Charter Alliance and Virgin Australia's wet-lease agreements with Alliance Airlines are complementary and interdependent co-operation tools on the East Coast. VARA's wet-lease arrangements with Alliance Airlines would not be effective without the Charter Alliance because Alliance Airlines would have no incentive to offer these services to Virgin Australia on favourable terms.

To the extent that there have been fewer joint tenders and successful charter outcomes in Queensland, this can be attributed to:

- the smaller scale of the East Coast charter market compared to the WA charter market. Resource customers on the East Coast typically require smaller aircraft with a maximum capacity of 100 seats or less for their charter services. If the customer does not also require RPT services, then Alliance Airlines has historically been able to meet these needs independently; and
- the lack of charter opportunities as the industry recovered from a mining downturn in previous years. Queensland experienced a resources boom from 2005 as resource companies invested in coal and three major liquefied natural gas projects (with coal, copper and coal seam gas being the main commodities in Queensland).

<sup>84</sup> See further Virgin Australia's Further Supplementary Submission in support of its Application for Authorisation dated 10 October 2022, 9.



However, global prices for coal fell considerably between 2012-2015, leading to a downturn and forcing mining companies to cut production levels and employment. FIFO workforce movements also fell following completion of the major LNG construction projects as LNG production is less labour intensive than construction. Although commodity and coal prices stabilised around 2017, the impacts of the mining downturn have varied across commodities and regions, with Queensland Outback and North-West Minerals Province in particular seeing mine closures and a decline in mining activity.<sup>85</sup> More recently, low global prices for coal have led to a number of further mine closures.<sup>86</sup> The outlook is likely to remain similarly level in the future unless large scale renewables projects emerge.

- Under the terms of the Charter Alliance Agreement, Alliance Airlines is most likely to be the Operating Airline for any New Charter Opportunity requiring aircraft capacity of 100 seats or less in Queensland given VARA's fleet and limited footprint on the East Coast. However, having the Charter Alliance in place enables those customers to access RPT and value-added services together with their charter needs.

In that context, the competitive influence and benefits that the Charter Alliance has provided has to date been greater in WA than on the East Coast and Central Australia. However, the Applicants have still offered integrated charter and RPT services to customers on the East Coast and Central Australia in two successful **[RESTRICTION OF PUBLICATION CLAIMED]**, and the Charter Alliance has continued to supplement Alliance Airlines' charter offering and Virgin Australia's RPT offering on the East Coast and Central Australia as described above.

#### **(b) Western Australia**

The ACCC noted that it would engage in further consultation with market participants to assess the extent to which the Charter Alliance has increased the competitive constraint on Qantas in Western Australia.<sup>87</sup> 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. As discussed in Section 3.4 above, Roy Hill and Regis Resources have given feedback that they prefer to contract with a single provider for a broader solution,<sup>88</sup> while Gold Fields has also recognised the benefits that result from dealing with a consistent partner across projects.<sup>89</sup>

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. Customer feedback shows that customers see their bargaining power as dependent on the contract, extent of services required,<sup>90</sup> number of weekly flights required, as well as the airline they are negotiating with,<sup>91</sup> which further underscores the importance of having a second operator with the ability to provide a

<sup>85</sup> Queensland Government, Submission to the Productivity Commission's Inquiry into Transitioning Regional Economies (24 February 2017) 4 <[https://www.pc.gov.au/\\_data/assets/pdf\\_file/0020/214571/sub026-transitioning-regions.pdf](https://www.pc.gov.au/_data/assets/pdf_file/0020/214571/sub026-transitioning-regions.pdf)>.

<sup>86</sup> See for example 'Glencore to close three Australian coal mines', *Argus Media*, (Web Page, 7 December 2021) <<https://www.argusmedia.com/en/news/2280726-glencore-to-close-three-australian-coal-mines>>.

<sup>87</sup> ACCC, Draft Determination, 21.

<sup>88</sup> ACCC, File note of meeting with Roy Hill dated 15 December 2022, 1.

<sup>89</sup> ACCC, File note of meeting with Gold Fields dated 27 September 2022, 2.

<sup>90</sup> ACCC, File note of meeting with Roy Hill dated 15 December 2022, 2.

<sup>91</sup> ACCC, File note of meeting with Rio Tinto dated 28 November 2022, 2.

comparable solution to Qantas. Other market participants have acknowledged that the Charter Alliance provides a competitive constraint on other larger FIFO operators.<sup>92</sup>

The ACCC has noted that charter customers are willing to conduct split tender processes for charter and RPT services or for services by region or route and to award contracts to multiple different service providers.<sup>93</sup> Customers may prefer to split up different components of a tender between operators (e.g., charter and RPT) for ease of contracting purposes, but will nevertheless assess and compare the full solution proposed by each operator in the tender process. For example, **[RESTRICTION OF PUBLICATION CLAIMED]**.<sup>94</sup> Larger operators such as Rio Tinto may also choose to contract with a variety of different providers across both charter and RPT in order to ensure security of supply.<sup>95</sup>

In WA, examples of the Charter Alliance competing against Qantas for contracts / bids include the following integrated charter and RPT proposals with value-added services across a range of fleet types:

- **[RESTRICTION OF PUBLICATION CLAIMED]**, where Alliance Airlines and VARA were able to provide the customer with both charter and RPT services on a mix of Alliance Airlines F70 and F100 aircraft and VARA A320 aircraft, thereby providing them with flexibility and improved flight scheduling that would not be possible absent the Charter Alliance (particularly in circumstances where VARA could not have provided the smaller aircraft, and Alliance Airlines could not have provided the larger aircraft required to service the customer). **[RESTRICTION OF PUBLICATION CLAIMED]**.
- **[RESTRICTION OF PUBLICATION CLAIMED]**, where Alliance Airlines and VARA were able to offer the customer both charter and RPT services on F70, F100 and A320/B737 aircraft under the Charter Alliance. The Charter Alliance therefore provided the customer with a mix of fleet types ranging from 80 to 168 seat aircraft in circumstances where the customer required both F100 and A320 aircraft but where neither Alliance Airlines nor VARA could independently satisfy the customer's scope of work. **[RESTRICTION OF PUBLICATION CLAIMED]**
- **[RESTRICTION OF PUBLICATION CLAIMED]** tender for charter and RPT services on **[RESTRICTION OF PUBLICATION CLAIMED]**, VARA identified Alliance Airlines as its partner in the submission to enable access to Alliance Airlines' F100 capacity where needed (capacity that VARA would be unlikely to be able to provide without the Charter Alliance). **[RESTRICTION OF PUBLICATION CLAIMED]** The Charter Alliance has been awarded the tender.
- **[RESTRICTION OF PUBLICATION CLAIMED]** tenders for charter and RPT services **[RESTRICTION OF PUBLICATION CLAIMED]** Without the Charter Alliance, Qantas **[RESTRICTION OF PUBLICATION CLAIMED]** would therefore be the only operator who could submit a response for the complete scope of work.
- **[RESTRICTION OF PUBLICATION CLAIMED]** for charter services on the **[RESTRICTION OF PUBLICATION CLAIMED]** The customer required a mix of F100 and A320 aircraft, with **[RESTRICTION OF PUBLICATION CLAIMED]**

<sup>92</sup> ACCC, File note of meeting with Bonza dated 25 November 2022, 2. Virgin disagrees that this has been to the detriment of smaller providers, as evidenced by those providers successfully winning contracts and competing with Qantas and the Charter Alliance.

<sup>93</sup> ACCC, Draft Determination, 4.72.

<sup>94</sup> Refer to document QAA.5000.0007.5435.

<sup>95</sup> ACCC, File note of meeting with Rio Tinto dated 28 November 2022, 2.



Without the Charter Alliance, Qantas would be the only operator able to provide such an offering.

**[RESTRICTION OF PUBLICATION CLAIMED]**

The Applicants' success in winning all or part of the **[RESTRICTION OF PUBLICATION CLAIMED]** tenders against Qantas shows that customers both demand and value this offering and that the Charter Alliance exerts a strong competitive constraint on Qantas. For example, the Charter Alliance prompted a competitive response from Qantas in the **[RESTRICTION OF PUBLICATION CLAIMED]** tender, **[RESTRICTION OF PUBLICATION CLAIMED]**

Virgin submits that caution should be had in citing Alliance Airlines' confidential information as evidence of limited benefits in circumstances where this has not been able to be properly tested and Alliance Airlines clearly sees commercial benefit in the Charter Alliance as it is seeking reauthorisation of the arrangements if Qantas' proposed acquisition does not proceed.

**3.6 Further information on operational efficiencies**

The Draft Determination recognises that the Charter Alliance results in operational efficiencies, and there is evidence of some cost savings and efficiencies associated with the Charter Alliance. However, it placed limited weight on these in the absence of further information on how these are passed through to customers.

Virgin submits that many of the operational efficiencies cited in the Application directly translate to improved reliability, flexibility and service quality for customers, while also delivering economic efficiencies for the Applicants. Further information is provided in relation to these benefits below.

**(a) Alignment of procedures and processes at Perth Airport**

The Draft Determination accepted that the Charter Alliance Agreement was likely to result in some operational efficiencies and cost savings through the alignment of procedures and processes at Perth Airport, however it was not satisfied that these cost savings would be passed through to customers, including because of the concern that the reduced competition between the Applicants in WA under the Charter Alliance would mean they would have the market power, ability and incentive to increase prices and reduce service levels which, as discussed above, does not reflect customer experience or market reality or even necessarily logically follow.<sup>96</sup> The fundamental rationale for the Charter Alliance is to combine each other's strengths to deliver superior and more competitively compelling services to customers to better compete with other FIFO operators including Qantas. That is what the Charter Alliance has done.

Specific examples of joint customers that have benefitted from the alignment of procedures and processes at Perth Airport and the resulting improved quality of FIFO services include **[RESTRICTION OF PUBLICATION CLAIMED]**. **[RESTRICTION OF PUBLICATION CLAIMED]** passengers benefitted from access to quick and flexible additional capacity support, improved connections and reduced connection transfer times between charter services delivered by Alliance Airlines at Terminal 2 and RPT services delivered by Virgin Australia at Terminal 1. VARA and Alliance Airlines' co-location at Terminal 2 further enhanced the Applicants' ability to offer mitigation options and lessen disruption delay time on the customer's services.<sup>97</sup>

<sup>96</sup> ACCC, Draft Determination, 4.22.

<sup>97</sup> Refer to document QAA.5000.0007.2866, 2, 8 and 10.

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>98</sup> While Gold Fields submitted that it did not experience any real benefit from improved connections between terminals at Perth airport, it also acknowledged that a not insignificant number of its staff boarded RPT flights following a charter flight.<sup>99</sup> These passengers benefit from streamlined passenger connections from charter flights onto domestic and international RPT flights due to Virgin Australia's domestic and international RPT operations being located at Terminal 1, adjacent to VARA and Alliance Airlines' charter operations at Terminal 2.<sup>100</sup> The de-identified market feedback provided by the ACCC also identified reduction of journey time for passengers transiting between a charter and RPT service (due to the proximate location of Virgin Australia and Alliance Airlines terminals compared to connections between other airlines) as a benefit of the Charter Alliance.

**(b) Access to complementary fleet sizes**

The combination of VARA 's and Alliance Airlines' complementary fleets has allowed the Applicants to offer integrated RPT and charter services across a range of fleet types (as well as access to both operators' combined fleet capacity) which each party would be unable to offer on a standalone basis. This has allowed the Applicants to better and more efficiently service customers' needs and requirements.

The Charter Alliance has reduced risk to customers by offering recovery services and the flexibility to scale up and down capacity at short notice if required. Access to both operators' combined fleet capacity has also allowed the Applicants to offer better scheduling and offer flights during peak charter flight times (Tuesdays-Thursdays). Gold Fields has noted that combined fleet capacity under Charter Alliance has worked well for it (particularly during the COVID-19 pandemic, when demand for ad-hoc charter services increased), and that without the Charter Alliance it would need to rely on an individual supplier to enter into a cross-hire arrangement to acquire additional aircraft to meet its increases in demand.<sup>101</sup> Roy Hill has also recognised that the Charter Alliance's additional fleet capacity and resulting flexibility is a valuable benefit.<sup>102</sup> Interested party feedback not only noted the benefits of additional fleet capacity but access to the complementary sizes of aircraft (e.g., Virgin Australia's larger aircraft and Alliance Airlines' smaller aircraft) to best suit customer demand and specific requirements.

The Draft Determination accepted that the Charter Alliance is likely to provide a greater degree of flexibility at a lower cost than wet-leasing arrangements, while allowing the Applicants to respond more quickly and flexibly to customer needs.<sup>103</sup> Through the Charter Alliance the Applicants have been able to avoid the inefficiencies associated with obtaining complementary fleet capacity through alternative arrangements. As discussed above, without the Charter Alliance the Applicants would likely need to rely on wet-lease arrangements, assuming that wet-lease capacity is available. As alluded to in the Draft Determination, such arrangements would be costly as they would introduce complexity and cost to business operations due to these fleets being subscale. Alliance Airlines would not have the same incentive to offer VARA a favourable price, access or the degree of access requested in the time frames required without the existence of the Charter Alliance partnership. **[RESTRICTION OF PUBLICATION CLAIMED]** Without the Charter Alliance, Alliance Airlines may be incentivised to offer any available wet-lease capacity at a higher price, which would lead to unfavourable outcomes for customers. In addition, it may be unable to commit to a similar level of certainty of supply, which may

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<sup>98</sup> ACCC, File note of meeting with Gold Fields dated 27 September 2022, 2.

<sup>99</sup> As above.

<sup>100</sup> Refer to document QAA.5000.0007.4993.

<sup>101</sup> ACCC, File note of meeting with Gold Fields dated 27 September 2022, 2.

<sup>102</sup> ACCC, File note of meeting with Roy Hill dated 15 December 2022, 1.

<sup>103</sup> ACCC, Draft Determination, 4.28.



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disrupt VARA's ability to service its customer contracts or lead to poor operational performance.

In addition, the Applicants will lose the ability to discuss and agree on efficient allocation of aircraft across both parties' fleet to best meet customers' needs, and to provide incremental and ad-hoc additions of capacity.<sup>104</sup> The rationale for the Charter Alliance beyond the wet-leasing arrangements in place prior to the Charter Alliance was that it enabled so much more to be achieved more efficiently and effectively to enable the Applicants to offer and deliver better outcomes for customers. Customers who have benefitted from VARA and Alliance Airlines utilising each other's additional fleet capacity to provide continuity of service include **[RESTRICTION OF PUBLICATION CLAIMED]**.

Access to both parties' complementary and combined fleets has allowed the Charter Alliance to offer customers the best possible price by matching capacity to customer demand, and by enabling:

- an additional competitive constraint on Qantas (which has the broader fleet scale and composition to tailor its solutions in a way that could not as effectively be delivered by the Applicants individually); and
- the provision of the non-price factors which customers value such as fleet mix, flexibility, reliability and back up support.

### (c) Avoiding costs of expanding operating fleet and bases

The ACCC considered that the Applicants' fleet expansion and operating base plans in the future without the Proposed Conduct, and as a result the extent of any cost savings (and how these were passed through to customers), were unclear.<sup>105</sup> The Charter Alliance has allowed VARA to continue to provide services on 100-seat capacity aircraft when required by customers, while avoiding the costs of investing in an ageing and subscale F100 fleet. **[RESTRICTION OF PUBLICATION CLAIMED]**

**[RESTRICTION OF PUBLICATION CLAIMED]**.

These cost savings which the Charter Alliance has facilitated have allowed VARA to avoid passing on increased costs to its customers in the form of increased charter prices. Similarly, Alliance Airlines has been able to offer customers services on 128-180 seat A320 and B737 aircraft without being required to introduce a subscale fleet type to its fleet.

### (d) Reduced ACMI costs, including avoiding costs of replacing F100 engines

In its Draft Determination the ACCC accepted that the Charter Alliance Agreement has allowed VARA to achieve cost savings from avoiding the costs of replacing its F100 engines by utilising Alliance Airlines' spare parts, inventory and F100 fleet capacity, but considered that this benefit was likely to be reduced compared to 2017 and would exist with or without the Charter Alliance following VARA's fleet transition.<sup>106</sup> **[RESTRICTION OF PUBLICATION CLAIMED]**

The ACCC considered that it was unclear how the Charter Alliance allowed VARA to introduce a level of pricing tension with its supplier of heavy maintenance services (through entering into an arrangement with Alliance Airlines' supplier of heavy maintenance services) which it could not achieve via a competitive procurement process

<sup>104</sup> Virgin Australia's Response of 30 September 2022 to the ACCC's Request for Information, 11-12.

<sup>105</sup> ACCC, Draft Determination, 4.31.

<sup>106</sup> ACCC, Draft Determination, 4.38.

in the absence of the Charter Alliance.<sup>107</sup> Under the Charter Alliance, VARA was able to rely on information shared by Alliance Airlines in conducting due diligence on viable alternative heavy maintenance suppliers, enabling it to approach and secure a reduced rate with Alliance Airlines' heavy maintenance supplier, prompting VARA's former supplier to match this pricing. VARA would have been unlikely to secure the same timely outcome via a competitive procurement process carried out individually.

**(e) Reduced variable costs**

The Draft Determination accepted that VARA was able to negotiate reductions of per passenger taxes at Perth Airport and pass these savings on to customers, but considered it was unclear how these savings resulted from the Charter Alliance or would result in the future.<sup>108</sup> While 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).

As discussed above, 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. 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.

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## 4 Denial of authorisation would result in significant detriment

### 4.1 The Proposed Conduct results in net public benefit and should be authorised

For the reasons outlined above, authorisation of the Charter Alliance should be granted for five years. The Charter Alliance will result in significant public benefits for consumers that outweigh any public detriment caused by the removal of some competition between VARA and Alliance Airlines in WA. Changed conditions since the previous authorisation do not change the fact that:

- the authorisation will not materially enhance the ability and incentives of the Applicants to anti-competitively raise prices or reduce service levels;
- the authorisation will deliver significant benefits to all FIFO customers, not only those who seek and value a national integrated RPT/charter offering; and
- the state of competition for the supply of FIFO services is intense with the Charter Alliance in place and will remain so for the foreseeable future if it is reauthorised.

The nature of FIFO services supply and the constraint on the Applicants from Qantas, smaller and medium sized FIFO operators and customers' bargaining power is such that the Applicants will continue to aggressively compete for contracts and deliver public benefits in the process. This is the case, despite the fact that there is no longer excess capacity in the FIFO sector (as there was during the consideration of the previous

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<sup>107</sup> ACCC, Draft Determination, 4.36.

<sup>108</sup> ACCC, Draft Determination, 4.40-4.41



authorisation). In fact, as discussed above, changed conditions in the aviation industry since consideration of the previous authorisation favour reauthorisation and actually operate to further support the Charter Alliance resulting in a net public benefit for FIFO customers in the authorisation period.

#### **4.2 Denying authorisation will have negative implications for customers under existing contracts and tender processes that have already commenced**

Existing contracts established under the Charter Alliance were procured by customers following competitive tender processes, under which the customer chose the offer provided by, or with the support of, the Charter Alliance. As a result, customers would have made business plans and decisions on the assumption that those contracts are in place and will continue to be serviced with the flexibility and support of the Charter Alliance for the duration of, and as per, the agreement made. Without authorisation, the same degree of flexibility and ability to best use the complementary strengths of each Applicant to optimally respond to customer needs and circumstances will simply not be available – altering the competitive bargain struck and potentially leaving the customer to bear increased risk to the efficiency its operations or fill gaps at short notice it did not expect to have to fill when the Charter Alliance was chosen.

Not granting authorisation will also leave customers worse off where tender opportunities and processes have already commenced under the Charter Alliance but the outcome has not yet been determined. Not granting authorisation will disrupt the processes designed by customers to achieve competitive outcomes (including the participants, parameters, non-negotiable components and timelines) on the assumption that the Charter Alliance is in place and able to service requirements with the benefit of the authorisation. This will result in delays and costs and potentially leave customers with fewer options and suboptimal outcomes.

#### **4.3 Authorisation should not be denied when authorisation subject to conditions is open to the ACCC and avoids customer detriment**

##### **(a) The ACCC can specify conditions in an authorisation**

The Applicants applied for authorisation to make and give effect to an extension of the Charter Alliance Agreement that enables Virgin Australia/VARA and Alliance Airlines to cooperate, coordinate and jointly bid for, and provide, FIFO and value-added services to corporate customers including by:

- deciding whether to jointly bid;
- jointly bidding for, and contracting with, corporate customers, including joint pricing and scheduling of services for those customers;
- sharing information about relevant routes (including in relation to costs, willingness to operate a route, capacity, utilisation, demand and pricing);
- agreeing capacity, flight schedules and aircraft type and whether an Applicant will suspend a relevant route;
- cooperating 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;

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- agreeing which Applicant will operate relevant routes and under what commercial arrangements and discussing and agreeing ways of providing services on the relevant routes; and
- jointly optimising operations, including procurement and deployment of aircraft engines and spare parts, and maintenance and ground-handling services, to achieve cost savings and efficiencies.

In the Draft Determination, whilst noting that the Charter Alliance is likely to result in public benefit, the ACCC proposed to deny authorisation because it was not satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public that would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct. The public detriment and reduced weight placed on the public benefits stems from the concern that the removal of the rivalry between the Applicants in the provision of FIFO services in WA will materially enhance the Applicants' ability to anticompetitively raise prices and reduce service levels. This concern is noted to be uncertain and the ACCC indicated that further consultation on the Proposed Conduct in its totality is required to understand and assess the potential impact on the competitive dynamics

Under section 88(3) of the *Competition and Consumer Act 2010 (Cth)* (the **Act**), the ACCC may specify conditions in an authorisation. The ACCC determines the nature, form and scope of any conditions imposed. There is no express limit on the types of conditions which may be imposed on the grant of an authorisation. However, the power to impose conditions is constrained by the subject matter, scope and purposes of the Act.<sup>109</sup>

In most cases the types of conditions imposed by the ACCC are to ensure that the authorisation test is met, or continues to be met, over the term of the authorisation.

### **(b) Authorisation subject to conditions**

It is in the interests of continuity of service for customers and to minimise detriment and disruption to customers in terms of the competitive bargains struck and tender processes commenced and designed to maximise competitive tension for the specific requirements of the relevant customer, for the ACCC to, rather than deny authorisation, grant authorisation subject to conditions.

The Applicants will shortly submit a further supplementary submission that outlines their proposed condition.

### **(c) Authorisation subject to conditions will result in better outcomes for customers than the denial of authorisation**

While it is submitted that authorisation subject to conditions:

- is not necessary because authorisation will not lead to material detriment; and
- would preclude the delivery of the significant and valuable benefits that can be achieved under an unconditional Charter Alliance authorisation,

it will avoid some of the detriment and disruption to customers that would follow not granting authorisation at all.

<sup>109</sup> *Re Medicines Australia Inc [2007] ACompT 4* at [129]



Authorisation subject to the proposed condition would:

- remove the ACCC's key (yet unfounded) concern with the Charter Alliance - the loss of rivalry between the Applicants' largely and increasingly complementary offerings in the competition for future WA FIFO contracts materially enhancing the ability and incentives of the Applicants to anticompetitively raise prices and reduce service levels; and
- allow the Applicants to continue to cooperate and coordinate to service existing contracts effectively and efficiently for the benefit of existing customers.

Therefore, while the net public benefit is significantly greater under an unconditional authorisation given the significant competitive constraint and more competitively compelling price-service offerings that the combination of the Applicants' strengths can provide for all FIFO customers, 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; and
- is in all circumstances better than denial of authorisation altogether.