



Draft Determination

Application for authorisation AA1000443

lodged by

Virgin Australia Airlines Pty Ltd, Virgin Australia Airlines (SE Asia) Pty Ltd, Virgin Australia Cargo Pty Ltd, Virgin Australia International Airlines Pty Ltd, Virgin Australia Regional Airlines Pty Ltd, Virgin Atlantic Airways Ltd, and Virgin Atlantic International Limited

in respect of cooperation on services between Australia and the UK/Ireland

Authorisation number: AA1000443

Date 13 September 2019

Commissioners:

Rickard

Court

Ridgeway

Summary

The ACCC proposes to grant authorisation for five years to enable Virgin Australia and Virgin Atlantic to more closely cooperate on services between Australia and the UK/Ireland via mutual mid-points in Hong Kong, Los Angeles and any other future mutual connection point.

Virgin Australia and Virgin Atlantic are separate businesses that do not operate overlapping services on any routes and are unlikely to do so in the future. In light of this, the ACCC considers it unlikely that their proposed conduct would result in any significant detriment to competition on existing or future routes between Australia and the UK/Ireland.

The ACCC considers that allowing the two carriers to more closely cooperate is likely to result in public benefits – in particular, an enhanced product and service offering including better scheduling and greater loyalty program benefits.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for authorisation

- 1.1. On 3 June 2019, Virgin Australia¹ and Virgin Atlantic² (the **Applicants**) lodged application for authorisation AA1000443 with the Australian Competition and Consumer Commission (the **ACCC**). This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).³
- 1.2. On 4 July 2019 the ACCC granted interim authorisation under subsection 91 of the Act to enable the Applicants to engage in the Proposed Conduct while the ACCC is considering the substantive application.

The Proposed Conduct

- 1.3. The Applicants are seeking authorisation for five years to negotiate, enter into and give effect to, a long-term cooperation agreement in relation to services between Australia and the UK/Ireland, via Hong Kong, Los Angeles and any future connecting points that may be operated by the Applicants. The Applicants' coordination agreement would address and facilitate:
 - a. joint pricing and inventory management on services between Australia and the UK/Ireland;
 - b. joint scheduling on services that include each airline operating one sector each between Australia and the UK/Ireland;
 - c. joint network planning including in relation to capacity and aircraft changes;
 - d. frequencies and potential new services through mutual connecting points to drive traffic between UK-Australia;

¹ 'Virgin Australia' means, collectively: Virgin Australia Airlines Pty Ltd, Virgin Australia International Airlines Pty Ltd, Virgin Australia Regional Airlines Pty Ltd, Virgin Australia Airlines (SE Asia) Pty Ltd and Virgin Australia Cargo Pty Ltd.

² 'Virgin Atlantic' means, collectively: Virgin Atlantic Airways Limited, and Virgin Atlantic International Limited.

³ Authorisation provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

- e. joint marketing, distribution, sales representation and cooperation, including joint bidding for corporate and industry contracts and small to medium enterprise customers;
- f. joint discussions and agreement between the Applicants' brand and product teams to enhance the 'Virgin to Virgin' customer experience, including scope for product innovation, and an enhanced Premium Customer Handling Agreement;
- g. enhanced frequent flyer and lounge cooperation;
- h. alignment of compatible customer service policies, for example in relation to disrupt management;
- i. joint procurement opportunities;
- j. enhanced cooperation in relation to cargo operations;
- k. joint operational synergies at airports in Hong Kong, Los Angeles and any further connecting points that may be contemplated in the future (e.g. consistency between Virgin Australia and Virgin Atlantic in baggage entitlements, meal inclusions, seat selection and other service elements and co-located members lounges, where possible), and
- l. metal neutral⁴ policies for routes operated by the Applicants, including the exploration of revenue sharing opportunities to achieve this.

(together, the **Proposed Conduct**).

- 1.4. Virgin Australia and Virgin Atlantic currently cooperate on flights between Australia and the UK/Ireland via mid-points in Hong Kong and Los Angeles through a code share agreement. They have applied for authorisation to enable closer cooperation and submit that this will enable them to provide a more competitive service offering.

2. Consultation

- 2.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 2.2. The ACCC invited submissions from a range of potentially interested parties including major competitors, related service providers, relevant industry associations, airports, state and federal government agencies and relevant regulatory bodies.⁵
- 2.3. Three interested parties provided public submissions supporting, or not objecting to, the application for authorisation:
 - a) **Tourism Australia** considers the Proposed Conduct should increase capacity, add new flight and route options, enhance codeshare connectivity, lower airfares and improve schedule coordination. Tourism Australia also notes the importance of the US, UK and Ireland to Australian tourism.
 - b) **Qantas** agrees that codeshares and alliances between airlines are generally procompetitive and deliver customer benefits by enabling airlines to offer extended networks and services that would not otherwise be possible. Qantas also supports claims by Virgin Australia and Virgin Atlantic that the relevant markets to the

⁴ 'Metal neutrality' refers to a situation where the carriers are indifferent as to who operates or owns the aircraft used for a particular flight because of revenue sharing agreements.

⁵ A list of the parties consulted and the public submissions received is available from the ACCC's public register: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/virgin-australia-virgin-atlantic>.

UK/Ireland are characterised by strong competition including by end-point and mid-point carriers. Qantas rejects the assertion that, simply by virtue of its relative share or load factors, Qantas is 'dominant' or that the market is not intensely competitive.

c) **Air Mauritius** has no objection to the Proposed Conduct.

2.4. Each of the public submissions is available in full on the Public Register for this matter. The ACCC also received confidential submissions supporting the application.

3. ACCC assessment

3.1. The ACCC has conducted its assessment of the Proposed Conduct in accordance with the relevant authorisation test contained in the Act.

3.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (the **authorisation test**).

Areas of competition

3.3. The ACCC considers that the primary area of competition relevant to the assessment of the Proposed Conduct is international air passenger transport services between Australia and the UK/Ireland, including flights between Australia and mid-point 'hub' destinations.

3.4. Virgin Australia operates international airline services between Melbourne/Sydney-Hong Kong, and Brisbane/Melbourne/Sydney-Los Angeles⁶ and services within domestic Australia.⁷ Virgin Atlantic operates international airline services between the UK and Hong Kong and between the UK and Los Angeles.⁸

3.5. The Applicants submit that while Virgin Atlantic has aircraft technically equipped to undertake a non-stop route from Perth to London, demand and yields are such that this service would not be commercially viable.⁹ Neither of the Applicants, nor any Australian airline, operate flights to Ireland. Virgin Australia markets flights from Australia– Abu Dhabi – Dublin through a code share with Etihad Airways. Virgin Atlantic does not market flights between Australia and Ireland.¹⁰

3.6. The Proposed Conduct extends to services between Australia and the UK/Ireland which may pass through a future mutual mid-point and does not restrict where that mid-point may be. The ACCC has considered the possible application of the Proposed Conduct to future mid-point hubs (as part of an Australia – UK/Ireland route) in its assessment of possible public benefits and detriments below.

⁶ Department of Infrastructure, Transport, Cities and Regional Development 'Northern Summer 2019: 31 March 2019 - 26 October 2019' https://www.infrastructure.gov.au/aviation/international/files/NS_2019_TT_Summary.pdf

⁷ Application for Authorisation AA1000443, Section 6.

⁸ Ibid.

⁹ Applicants' supporting submission dated 3/6/2019, p 14.

¹⁰ Department of Infrastructure, Transport, Cities and Regional Development 'Northern Summer 2019: 31 March 2019 - 26 October 2019' p 14 https://www.infrastructure.gov.au/aviation/international/files/NS_2019_TT_Summary.pdf

Future with and without the Proposed Conduct

- 3.7. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation, to the likely future in which the Proposed Conduct does not occur.
- 3.8. The Applicants submit that, absent the Proposed Conduct, Virgin Australia will offer a smaller international network and public benefits would not be realised. Each of Virgin Australia and Virgin Atlantic would continue to offer their services through their current, more limited forms of cooperation, which include code shares. And, they would not have the incentive to offer more favourable prorates, investment in policy alignment, or deepening their cooperation in relation to frequent flyer, status and lounge benefits.
- 3.9. The Applicants submit that with or without the Proposed Conduct, Virgin Atlantic does not intend to re-commence services between Hong Kong and Australia¹¹, and Virgin Australia would not commence its own services to the UK via any mid-point.¹²
- 3.10. The Applicants submit the Proposed Conduct will facilitate operational changes that will attract additional passengers on each leg of Australia – UK routes, increasing the likelihood of new services via mutual mid-points (especially in Asia), new frequencies and increased capacity by up-gauging aircraft on existing services.
- 3.11. The ACCC considers that without the Proposed Conduct, the status quo will continue:
- a) The ACCC considers it unlikely that Virgin Atlantic will re-commence flights between Hong Kong and Australia or commence flights between Los Angeles and Australia, and Virgin Australia is unlikely to commence flights to the UK via any mid-point with its own aircraft.
 - b) It is likely that the Applicants would continue to coordinate through arms-length agreements (such as code shares).

Public benefits

- 3.12. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*¹³
- 3.13. In terms of network coverage and geography, the ACCC considers that, generally, the networks of Virgin Australia and Virgin Atlantic are highly complementary. Virgin Australia has an extensive domestic network in Australia, where Virgin Atlantic has no presence. Internationally, there is very limited overlap between their operations, and there is no service overlap between the carriers on any point-to-point route.
- 3.14. The Proposed Conduct aims to achieve metal neutrality and contemplates the Applicants engaging in joint pricing, inventory management, scheduling, network planning and marketing. The Applicants also submit that they intend to explore

¹¹ From 2004 to 2014, Virgin Atlantic operated its own one-stop services between London and Sydney via Hong Kong, ultimately withdrawing the services due to high operating costs and poor route performance

¹² Ibid.

¹³ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

revenue sharing to support their pursuit of metal neutrality.¹⁴ As such, the ACCC considers that the Applicants are likely to be strongly incentivised to act in a manner that will maximise their collective benefit.

- 3.15. The ACCC considers that the public benefits claimed by the Applicants fall into four broad categories: enhanced products and services; enhanced ability to compete, triggering a competitive response from rivals; operational and other efficiencies; and stimulation of tourism.

Enhanced products and services

- 3.16. The ACCC considers that the Proposed Conduct is likely to result in material public benefits through enhanced products and services. These benefits are likely to arise through: the facilitation of additional frequencies and seats; increased and better online connections; improved customer experience; schedule optimisation; greater loyalty program benefits; and improved lounge access.

Facilitation of new routes and additional frequencies and seats.

- 3.17. The Applicants submit that the Proposed Conduct is likely to result in increased network feed, load factors, operating profitability and will facilitate better optimisation of operational schedules and network connections. These enhancements will create opportunities for additional frequencies and up-gauging, and greater potential for the development of routes via new mutual mid-points.¹⁵

- 3.18. The ACCC considers that the Proposed Conduct is likely to result in increased capacity on existing routes between Australia and the UK. By increasing passenger numbers on current routes, the Proposed Conduct is likely to reduce any risk that they may otherwise be withdrawn or reduced in frequency and has a real chance of leading to increased capacity in the future.

Increased and better online connections.

- 3.19. The Applicants submit that extending the existing codeshare arrangements to all onwards connections in Australia and New Zealand and in the UK and Ireland will open up more online connection¹⁶ opportunities for customers.¹⁷
- 3.20. The ACCC considers that the Proposed Conduct will allow each of the Applicants to access the other's schedules and, hence, offer additional frequencies and destinations. The ACCC considers that the Proposed Conduct is likely to result in public benefits by increasing the number of online connections available.

Improved customer experience.

- 3.21. The Applicants submit that under the Proposed Conduct they intend to align their customer facing policies so that baggage entitlements, meal inclusions and requests, seat selection and other service elements are consistent across the airlines; and, where possible, check-in, baggage collection and lounge services will be co-located. These improvements will convenience consumers and reduce the confusion that may

¹⁴ Applicants' supporting submission dated 3/6/2019, p 6.

¹⁵ Ibid p 30.

¹⁶ 'Online connections' are passenger itineraries of two or more flight segments where connections are made between flights of the same airline, or its code share partners.

¹⁷ The ACCC recognises that customers value online connections more than interline connection options. In particular, online connections may provide benefits including increased convenience in not having to collect and bear baggage mid journey; time savings associated with through check; and removal of the risk of forfeiting non-refundable fares if the first flight in their journey is delayed.

otherwise arise when the two Virgin branded airlines both operate in the same airport.¹⁸

- 3.22. The ACCC accepts the presence of two 'Virgin' branded airlines in airports can lead to confusion for consumers who find themselves unable to access services and facilities of 'the other Virgin' carrier. Co-location of facilities and alignment of services by the Applicants is likely to be valued by consumers. However it is not clear to the ACCC why such streamlining would not, or could not, occur in the absence of the Proposed Conduct.

Schedule optimisation

- 3.23. The Applicants submit that through joint scheduling and co-location of airport facilities, the Proposed Conduct will facilitate improved connection times at each of Hong Kong and Los Angeles airports, benefiting customers.¹⁹
- 3.24. The ACCC accepts that airline alliances can enable transit times to be reduced through schedule optimisation and considers this is more likely to be achieved in circumstances where the incentives of the airlines are aligned through revenue sharing arrangements.
- 3.25. The ACCC considers that, to the extent it involves revenue sharing between the Applicants, the Proposed Conduct is likely to result in public benefits from schedule optimisation for current and possible future routes, resulting in reduced or more convenient travel and transit times.

Greater loyalty program benefits

- 3.26. The Applicants already offer reciprocal earning and redemption of loyalty points on each other's services and recognition of status and high value guests. However, the Applicants submit that with the Proposed Conduct the Applicants will invest in improvements to these loyalty programs which will benefit members of the 'Velocity' or 'Flying Club' programs.²⁰ In particular, the Proposed Conduct would enable further opportunities to earn points (from new connections), reciprocal 'bonus points' and upgrade arrangements, automation of rewards and tier status recognition, and the introduction of online points redemption facilities.²¹
- 3.27. The ACCC understands that the attractiveness of loyalty programs is related to the ability to earn and redeem points on a wide range of network options (frequencies and destinations). . The ACCC considers that the attractiveness of the Applicants' loyalty programs is likely to be enhanced under the Proposed Conduct and is likely to result in some public benefit.

Improved lounge access

- 3.28. The Applicants submit that Virgin Australia and Virgin Atlantic passengers have lounge facilities located in separate terminals in Hong Kong airport, which poses a challenge to the overall customer experience as passengers assume one 'Virgin' operation in Hong Kong.²² The Applicants submit that:

¹⁸ Applicants' supporting submission dated 3/6/2019, p 28.

¹⁹ Ibid.

²⁰ Ibid p 29.

²¹ Ibid pp 29, 30.

²² Ibid pp 28, 29.

- a) Virgin Australia and Virgin Atlantic would take the opportunity as part of the Proposed Conduct to explore possibilities for co-location in Hong Kong airport by utilising the same lounge, providing a seamless “Virgin to Virgin” experience.
- b) The Los Angeles airport is currently undergoing significant upgrade works. As part of the Proposed Conduct, the Applicants will explore co-location of their lounges and other airport facilities as the development progresses.²³

3.29. The ACCC considers that the co-location of lounges would be likely to reduce confusion and assist passengers in locating appropriate lounge facilities. However, it is not clear that the co-location of lounge facilities is likely to occur (requiring consent from each airport), or that the incentive to make this change is a result of the Proposed Conduct (noting that the Applicants already code share). At this stage, the ACCC does not consider that improved lounge access is likely to occur as a result of the Proposed Conduct.

Conclusion on enhanced products and services

3.30. The ACCC considers the Proposed Conduct is likely to result in public benefits through enhanced products and services in the form of additional frequencies and seats being offered than would be the case without the Proposed Conduct, increased and better online connections, schedule optimisation and greater loyalty program benefits.

Enhanced ability to compete, triggering a competitive response from rivals

3.31. The Applicants submit that their current arm’s length code share limits information sharing and can result in unsold seats on services.²⁴ In contrast, the Proposed Conduct is likely to lead to lower prices and increased traffic feed. Through joint management of inventory, the Applicants will openly discuss demand for their services and opportunities for discount connecting fares to stimulate demand. By jointly bidding, the Applicants expect to win more valuable corporate accounts, supporting their operations. And, coordination of inventory strategies, together with more favourable pro-rates, will result in more competitively priced codeshare seats for customers and increased load factors for the Applicants, improving the sustainability of their services and inviting a pro-competitive response from competitors.

3.32. The Applicants also submit that the Proposed Conduct will facilitate the promotion of Virgin Australia as a second full service Australian airline offering a comprehensive network of international and domestic services, in competition with Qantas and its partners to the benefit of Australian consumers.

3.33. The ACCC considers that the Proposed Conduct is likely to enhance the Applicants’ product and service offering, and thereby their ability to compete with rival airlines. However, the ACCC does not consider that there is currently sufficient evidence to conclude that a public benefit in the form of triggering a competitive response from rivals is likely to arise. Rather, the ACCC considers that rival airlines will continue to strongly compete for passengers between Australia and the UK/Ireland and the Proposed Conduct is unlikely to be an integral driver of this competition.

Operational and other efficiencies

3.34. The Applicants submit that the Proposed Conduct avoids duplication of effort and achieves cost savings through the ability to utilise a home carrier delegation pricing

²³ Ibid p 29.

²⁴ Because an operating carrier earn more revenue selling seats themselves, they may offer too few seats to the marketing carrier resulting in fewer seats being sold on flights.

model²⁵ and leverage the home marketing strength of each Applicant. The Applicants will be able to realise efficiencies from the optimisation of operational synergies in Hong Kong in particular, as well as other cost savings through opportunities for joint procurement, sharing of sales and marketing resources, and staff exchange programs.²⁶

- 3.35. In principle, the ACCC accepts that the Proposed Conduct is likely to facilitate public benefits through cost savings and other efficiencies arising from integration of the Applicants' operations. However, at this stage, the Applicants have provided limited substantiation of cost savings and efficiencies, which are largely focused on flights through Hong Kong.

Stimulation of tourism

- 3.36. The Applicants submit that the new and improved services enabled by the Proposed Conduct will result in market stimulation and a likely increase in passengers travelling to Australia, benefitting tourism and imparting a public benefit.²⁷ The Applicants also submit that the extension of code share network may also stimulate tourism beyond the main Australian gateways, increasing Virgin Atlantic feed onto Australia's domestic, Tasman and Pacific networks.²⁸
- 3.37. Tourism Australia's submission notes that the United States, UK and Hong Kong are, respectively, the 2nd, 3rd and 8th largest tourism markets for Australia and collectively bring 1.8 million visitors each year who spend \$8.6 billion.²⁹
- 3.38. The ACCC considers that the level of tourism-related public benefits attributable to the Proposed Conduct depends on the likely impact of the Proposed Conduct on demand for tourism in Australia and on expenditure by tourists on Australian goods and services once they arrive. In this respect, there are a wide range of factors that influence tourism demand and expenditure, including general purchasing power in source countries, the relative cost of other destinations, the total cost of visiting Australia and the perceived quality of Australia as a destination.
- 3.39. The ACCC also considers that it is likely that competition between airlines for inbound tourists from the UK, Europe, the United States and Hong Kong would be strong with or without the Proposed Conduct.
- 3.40. However, the increased connectivity and convenience of the Applicants' services under the Proposed Conduct (including combining Virgin Australia's extensive domestic network with Virgin Atlantic's international network) is likely to promote greater inbound tourism, at least to some degree, particularly to regional Australia and for international tourists who wish to travel between cities in Australia. Accordingly, the ACCC considers that the Proposed Conduct is likely to result in some public benefit through the stimulation of tourism.

ACCC conclusion on public benefits

- 3.41. The ACCC considers that the Proposed Conduct is likely to result in public benefits through enhanced products and services in the form of increased and better online connections, schedule optimisation and greater loyalty program benefits.

²⁵ Under a 'home carrier delegation pricing model' Virgin Atlantic will assume responsibility for marketing services originating in the UK/Ireland and Virgin Australia will assume responsibility for marketing services originating in Australia.

²⁶ Applicants' supporting submission dated 3/6/2019, p 31.

²⁷ Applicants' supporting submission dated 3/6/2019, p 31.

²⁸ Ibid p 32.

²⁹ Tourism Australia's submission dated 20 June 2019.

- 3.42. The ACCC also considers that the Proposed Conduct is likely to result in some public benefit through operational and other efficiencies and stimulation of tourism.

Public detriments

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

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.³⁰

- 3.44. The Applicants submit that the Proposed Conduct will not result in any anti-competitive detriment and cannot result in a substantial lessening of competition in the relevant markets, which they describe as highly competitive and characterised by other, larger carriers.³¹ The Applicants submit that they are not close competitors and would not have the ability or incentive to exercise any market power on Australia – UK/Ireland routes because of strong competition from other carriers.³²

Unilateral effects

- 3.45. An alliance between carriers can have unilateral effects if it removes or weakens competitive constraints in such a way that the alliance partners find it profitable to raise prices, reduce services or otherwise exercise any market power they may acquire as a result of the alliance, despite any expected response from other competitors.
- 3.46. The ACCC considers that absent the Proposed Conduct, it is unlikely that Virgin Atlantic or Virgin Australia would operate services on a complete route between Australia and the UK/Europe with their own aircraft. Further, Virgin Atlantic would not compete in the Australian domestic air passenger services market and Virgin Australia would not compete with the beyond service to the UK/Europe offered by other carriers, or provide non-stop services between Australia and the UK and Europe. Accordingly, the ACCC does not consider it likely that the Proposed Conduct will have any effect on the competitive dynamic between the Applicants in the operation of their services.
- 3.47. On the basis of confidential information provided by the Applicants, the ACCC considers it unlikely that Virgin Atlantic and Virgin Australia will operate competing flights on any leg of a journey to/from UK/Europe. As such, the ACCC considers that the competitive dynamic between the Applicants is likely to be substantively similar with or without authorisation on all relevant routes.
- 3.48. The ACCC considers that the Proposed Conduct is not likely to materially enhance the ability and incentive of the Applicants to unilaterally raise prices, reduce services or otherwise exercise any market power they may acquire as a result of the Proposed Conduct.

Coordinated effects

- 3.49. Coordinated effects refer to the risk of competitive harm from the Proposed Conduct by increasing the risk of coordinated conduct among airlines on international routes. Coordinated conduct in this sense involves competing airlines recognising and accommodating their mutual interdependence (explicitly or tacitly) by not competing as aggressively as they otherwise would. In considering this risk, the key issue is whether

³⁰ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

³¹ Applicants' supporting submission dated 3/6/2019, pp 22, 23.

³² Ibid p 24.

the Proposed Conduct increases the likelihood of coordinated conduct between airlines more broadly (beyond the coordination that is inherent in the Proposed Conduct).

- 3.50. Because the Applicants do not operate overlapping services on any route, it is unlikely that either carrier currently plays a strong role in preventing the other from coordinating with their competitors. As such, the ACCC considers that the Proposed Conduct is unlikely to materially reduce an impediment to coordination on affected routes as compared to the likely future without the Proposed Conduct.
- 3.51. The ACCC also notes that passengers booking flights between Australia-UK/Ireland can substitute mid-points (or choose non-stop services) in response to a reduction of service or increase in price.
- 3.52. Because Virgin Australia and Virgin Atlantic do not code share on flights between Australia and the UK/Ireland passing through any other mid-point, the future application of the Proposed Conduct to future mid-points would not have the effect of lessening competition along such routes or increase the risk of coordination effects.
- 3.53. Accordingly, the ACCC considers that the Proposed Conduct is unlikely to materially enhance the ability and incentive of the Applicants to coordinate with other carriers to raise price or reduce service.

ACCC conclusion on public detriment

- 3.54. The ACCC considers that the Proposed Conduct is unlikely to result in any significant public detriments because Virgin Australia and Virgin Atlantic do not operate overlapping services on the relevant routes and are not likely to commence overlapping services. Further, the ACCC considers that the routes affected by the Proposed Conduct are likely to remain competitive.

Balance of public benefit and detriment

- 3.55. The ACCC considers that the Proposed Conduct is likely to result in public benefits through enhanced products and services in the form of additional frequencies and seats, increased and better online connections, schedule optimisation and greater loyalty program benefits.
- 3.56. The ACCC also considers that the Proposed Conduct is likely to result in some public benefit through operational and other efficiencies and stimulation of tourism, although the extent of this benefit is likely to be small.
- 3.57. The ACCC considers that the Proposed Conduct is unlikely to result in any significant public detriments because Virgin Australia and Virgin Atlantic do not operate overlapping services on the relevant routes and are not likely to commence overlapping services during the period of authorisation.
- 3.58. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

- 3.59. The Act allows the ACCC to grant authorisation for a limited period of time.³³ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 3.60. In this instance, the Applicants seek authorisation for five years.
- 3.61. In light of the ongoing evolution of services and the dynamic nature of the aviation industry, the ACCC considers five years is an appropriate period for authorisation.
- 3.62. The ACCC proposes to grant authorisation for five years.

4. Draft determination

The application

- 4.1. On 3 June 2019, the Applicants lodged application AA1000443 with the ACCC, seeking authorisation under subsection 88(1) of the Act. The Applicants seek authorisation for the Proposed Conduct as described at paragraph 1.3.
- 4.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 4.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct (the authorisation test).
- 4.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the authorisation test is met.
- 4.5. Accordingly, the ACCC proposes to grant authorisation for the Proposed Conduct.

Conduct which the ACCC proposes to authorise

- 4.6. The ACCC proposes to grant authorisation AA1000443 to enable the Applicants to cooperate on flights between Australia and the UK/Ireland via mid-points in Hong Kong, Los Angeles and any other future mutual connection point, as described in paragraph 1.3 and defined as the Proposed Conduct.
- 4.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 4.8. The ACCC proposes to grant authorisation AA1000443 for five years.
- 4.9. This draft determination is made on 13 September 2019.

³³ Subsection 91(1)

5. Next steps

- 5.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.
- 5.2. Submissions commenting on this draft determination should be provided to the ACCC by 4 October 2019.