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Mr David Hatfield
Director
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Australian Competition and Consumer Commission
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Dear Mr Hatfield

Application for Authorisation - AA1000615-1 - Virgin Australia & Alliance Airlines

We refer to:

- the joint application for authorisation of the Charter Alliance between Virgin Australia Airlines Pty Ltd, Virgin Australia Regional Airlines Pty Ltd (**VARA**) (together, **Virgin Australia**), Alliance Airlines Pty Limited and Alliance Aviation Services Ltd (together, **Alliance**) (the **Applicants**) lodged with the Australian Competition and Consumer Commission (**Commission**) on 27 May 2022 and the submissions in support of that application (**Authorisation Application**);
- the Draft Determination of the application for authorisation AA1000615 issued by the Commission on 21 October 2022, which stated that the Commission would consider the implications of a final determination not granting authorisation for affected parties, including existing contracts in place under the Charter Alliance Agreement; and
- the telephone call between the Commission and Gilbert + Tobin on 30 January 2023 in which the Commission requested that the Applicants provide submissions on how the arrangements under the Charter Alliance Agreement would be unwound in the event of the Commission not granting the application for authorisation.

This letter encloses a brief submission on behalf of the Applicants which:

- sets out the detriments that would result for customers with existing contracts with the Applicants if the Commission decided not to grant the application for authorisation; and
- requests that the Commission, if it was not satisfied that the test for authorisation had been met following receipt of additional information, grant authorisation subject to appropriate conditions that will reduce the detriment to customers for charter services.

1 Denial of authorisation would result in significant detriment

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

For the reasons outlined in previous submissions, 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 in WA, unconditional authorisation of the Charter Alliance should be granted for five years. Changed market 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 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.

1.4 Denying authorisation will have negative implications for customers under existing contracts

Existing contracts established under the Charter Alliance were procured by customers following competitive tender processes and 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.

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

(b) 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 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;
- 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, while 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 flags 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.¹

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.

(c) Authorisation subject to conditions

It is in the interests of continuity of service for customers who are already acquiring services from the Applicants pursuant to the Charter Alliance Agreement that, rather than deny authorisation, the ACCC should grant authorisation on the condition that:

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

This condition is simple in its construction and essentially takes the form of limiting authorisation to a subset of the Proposed Conduct relating to existing customer contracts for the commercial life of those contracts. The Applicants note that they have previously agreed to the extension of the relevant period for consideration of the Applicants' application until 24 May 2023 and that this will allow sufficient time for consideration and any necessary consultation on the Proposed Condition.

We note that all existing contracts under the Charter Alliance will expire within 5 years from the date of the final determination (including options to extend).

¹ *Re Medicines Australia Inc [2007] ACompT 4* at [129]

(d) The Proposed Condition will result in better outcomes for customers than the denial of authorisation

While the Applicants strongly believe this limitation on the authorisation:

- 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.

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 would be significantly greater under an unconditional authorisation given the significant competitive constraint and more competitively compelling 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.

The Applicants consent to the Commission sharing the Proposed Condition with interested parties and on the public register.

The Applicants would be happy to discuss further the information in this supplementary submission.

Yours faithfully
Gilbert + Tobin


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