



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Application for revocation of A91247 – A91248 and  
the substitution of authorisations A91510 – A91511

lodged by

Virgin Australia and Etihad Airways

in respect of

their alliance in relation to  
air transport services between  
Australia and the Middle East

Date: 30 October 2015

Authorisation numbers: A91510 – A91511

Commissioners: Rickard  
Cifuentes  
Court  
Featherston

## Summary

**The ACCC proposes to re-authorise Virgin Australia and Etihad Airways to continue their existing international alliance in relation to air transport services between Australia and the Middle East.**

**The ACCC proposes to re-authorise the alliance for a further five years.**

**The ACCC will seek submissions in relation to this draft determination before making its final decision.**

Virgin and Etihad (the Applicants) have sought re-authorisation of their existing international alliance in relation to air transport services between Australia and the Middle East (the Alliance). The Alliance was initially authorised by the ACCC in February 2011.

As part of the implementation of the Alliance, Virgin introduced Sydney-Abu Dhabi services but it submits that it would not operate them absent the Alliance. The ACCC has previously accepted this view and the ACCC continues to accept that Virgin would be unlikely to operate its services to Abu Dhabi in the absence of the Alliance. With only a small percentage of traffic between the UAE and Australia being point to point traffic, the ACCC considers it would be unlikely that Virgin could offer a viable service on the route without offering the beyond connections available on Etihad's network within the Alliance. Therefore there are unlikely to be any areas of direct overlap between Virgin and Etihad absent the Alliance.

The ACCC considers that in the circumstances, there is unlikely to be any significant public detriments as a result of the Alliance.

The ACCC considers that there is evidence to support the submission that the Alliance has resulted in public benefits consistent with the ACCC's 2011 assessment and that it is likely to continue to do so into the future. In particular, the ACCC considers that the Alliance is likely to result in the following public benefits:

- a greater likelihood of new routes and frequencies and capacity as a result of the passenger feeds coming from the Applicants' complementary networks
- enhanced products and services, including increased online connections and improved connectivity, optimised scheduling to minimise travel times
- a competitive response from rivals as a result of the enhanced product and service offering
- potential for efficiencies and cost savings such as through joint procurement and utilising each other's sales, marketing and customer service capabilities
- potential for stimulation of tourism in Australia.

While the Applicants are seeking re-authorisation for ten years the ACCC considers that the considerable growth in traffic to and through the Middle East underscores the dynamic nature of the aviation industry and therefore the ACCC is proposing to re-authorise the Alliance for a further five years.

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# The application for re-authorisation

1. On 6 August 2015 Virgin Australia<sup>1</sup> (**Virgin**) and Etihad Airways P.J.S.C. (**Etihad**) (together, the **Applicants**) lodged with the ACCC an application for the revocation of authorisations<sup>2</sup> (A91247 – A91248) and their substitution with authorisations (A91510 - 91511) (re-authorisation). The Applicants are seeking re-authorisation for their existing international alliance between Australia and the Middle East (the **Alliance**) for a further ten years.

## The proposed conduct

2. The Applicants seek re-authorisation to:
  - continue to give effect to the Commercial Cooperation Agreement and associated codeshare agreements and reciprocal lounge and frequent flyer agreements (the Alliance Agreements) as amended and restated
  - make and give effect to related agreements contemplated in the Alliance Agreements, including to renew the Alliance Agreements upon the expiration of their current term.

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

3. The Alliance involves coordination and agreement between the Applicants for passenger services on routes between Australia and Abu Dhabi and behind and beyond connections in relation to:
  - the planning and management of operations including schedules, capacity, aircraft deployment and routes flown
  - pricing and revenue management
  - sales, distribution and marketing activities
  - frequent flyer and lounge program offerings
  - purchasing and procurement.
4. The ACCC notes that the coordination that is proposed to continue under the Alliance has not changed since the ACCC's February 2011 decision to grant authorisation for the Alliance.

## The Applicants

5. Virgin commenced operations in Australia in August 2000. Virgin is listed on the Australian Stock Exchange. Virgin and its subsidiaries currently operate a fleet of

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<sup>1</sup> Virgin Australia includes Virgin Australia Airlines Pty Ltd; Virgin Australia International Airlines Pty Ltd; Virgin Australia Regional Airlines Pty Ltd; and Virgin Australia Airlines (SE Asia) Pty Ltd.

<sup>2</sup> Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at [www.accc.gov.au/publications/authorisation-guidelines-2013](http://www.accc.gov.au/publications/authorisation-guidelines-2013)

159 aircraft on approximately 3000 flights per week to over 450 Australian and international destinations through its brands, Virgin Australia, Virgin Samoa, Tiger Air, and through its codeshare partners.

6. At June 30, 2015, Virgin Australia had more than 9,400 employees throughout Australia, New Zealand and the United States, the majority are located in Brisbane and Sydney.
7. Etihad was established by Royal (Amiri) Decree in July 2003 and commenced operations in November 2003. Etihad currently operates a fleet of 110 aircraft to over 100 destinations in 66 countries.

## Background

### Previous authorisation

8. In February 2011 the ACCC granted authorisation to Virgin and Etihad for the Alliance for a period of five years. The ACCC considered that the Alliance was likely to promote competition and result in benefits for Australian consumers through new international services, increased online connections, enhanced value added services and stimulation of tourism.
9. The ACCC noted that Virgin and Etihad did not compete on any routes and considered that they were not likely to compete on any routes in the future. On this basis the ACCC considered that the Alliance was unlikely to result in any public detriment.

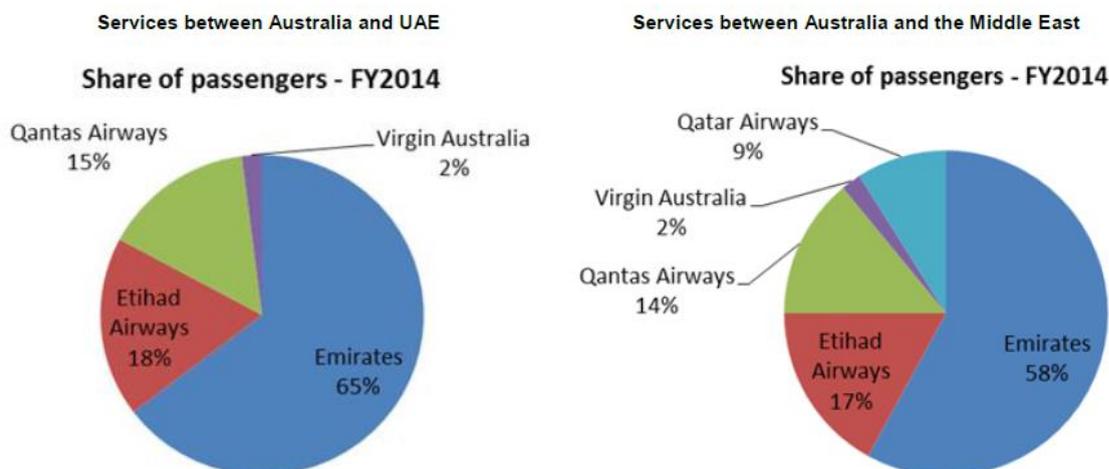
### Air Services Agreement

10. The UAE and Australia have an Air Services Agreement (**ASA**), which is designed to encourage nonstop air services between the two countries. The available capacity for services between Australia and the UAE has steadily increased since the ASA began.
11. The Applicants submit that Middle Eastern carriers have requested additional capacity and made the most of existing capacity by operating large aircraft, and increasing overall seat capacity and passenger numbers. The Applicants further submit that there has been a high degree of responsiveness of carriers to adding capacity to the market, in line with the significant passenger growth that has occurred on the route.

### Routes between Australia and the Middle East

12. The only nonstop services operated between Australia and the Middle East are to and from the UAE and Qatar. The relative share of passenger numbers on these services are set out in Figure 1 below. The data includes passengers travelling beyond the Middle East.

**Figure 1 – Share of passengers on services between Australia and the Middle East (Source: Applicant submission p.14)**



13. Etihad uses Abu Dhabi as its hub while Emirates operates out of its Dubai hub. Qantas also uses Dubai as a hub for its European services.
14. Qatar Airways is the national carrier of Qatar, operating daily services from its hub in Doha to Melbourne and Perth.<sup>3</sup>
15. Passenger and capacity growth on nonstop Australia - Middle East services over the last five years is set out in Figure 2 below:

**Figure 2- Passenger and capacity growth on nonstop Australia-Middle East services (Source: Applicant submission p.13)**

	Year Ending				
	Dec-10	Dec-11	Dec-12	Dec-13	Dec-14
Flights	6,920	6,704	7,633	10,499	11,078
Passengers	1,501,211	1,623,974	1,975,830	3,118,301	3,561,429
Seats	2,042,427	2,143,649	2,367,321	3,873,553	4,321,026
Seat utilisation	74%	76%	83%	81%	82%
% of nonstop seats to/from AU	5.7%	5.6%	6.1%	9.2%	9.8%

## Alliance routes

16. The Alliance offers the following routes between Australia and the Middle East:
  - Brisbane - Abu Dhabi - daily
  - Melbourne - Abu Dhabi - twice daily
  - Perth - Abu Dhabi - daily

<sup>3</sup> Qatar recently announced its intentions to introduce services between Doha and Sydney from 1 March 2016 and Adelaide from 2 May 2016. For further information see: <http://www.ausbt.com.au/qatar-to-fly-airbus-a350-to-adelaide-from-may-2016>

- Sydney - Abu Dhabi - twice daily

17. Prior to the commencement of the Alliance, Etihad offered 11 services per week between Sydney and Abu Dhabi. Virgin introduced the additional three services per week in January 2011. Virgin does not operate any other services between Australia and the Middle East.

## Rationale for the alliance

18. The Applicants' networks are complementary. The Applicants have never been in direct competition with each other in any market. Virgin introduced Sydney-Abu Dhabi services as part of the implementation of the Alliance and submits that it would not operate on these routes absent the Alliance. On this basis, the Applicants submit that there is no relevant overlap between the Applicants' operations and, as a result, the Alliance cannot have an adverse impact on competition in any market.

19. The Applicants note that there is significant and growing capacity between Australia and the UAE, but that there is relatively little demand for point to point travel between the two countries. In 2014, only 14% of passengers travelling between Australia and the UAE were Australia-UAE origin-destination passengers. The vast majority of passengers connected from and to an international destination beyond the UAE, in particular throughout Europe.

20. The Applicants submit that it is demand for travel to and from a wide network of international destinations that drives demand and capacity growth on routes to and from the UAE.

21. Virgin submits that access to Etihad's international network is vital and that no matter how good Virgin's domestic offering, it will always face challenges in attracting corporate accounts and high frequency travellers away from its rivals if it cannot offer a competitive international network.

22. The Applicants submit that the Alliance has enabled the following objectives to be met:

- attracting additional customers to their services by offering a wide joint network of destinations and accessing passenger feed from each other's networks
- cooperating to enhance their sales and marketing presence
- in doing so, enhancing their competitive position, especially in relation to rival carriers Qantas and Emirates.

## Consultation

23. The ACCC invited submissions from a range of potentially interested parties including airlines, airports, regulators, government departments, and industry groups.<sup>4</sup>

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<sup>4</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

24. The ACCC received four submissions, each in support of the application for re-authorisation.
25. Northern Territory Airports supports the Alliance, submitting that the Alliance has worked well and has resulted in public benefits with no discernible competitive detriment in the relevant market.
26. Perth Airport submits that the Alliance is likely to result in better connections and shorter travel times for regional WA passengers. It supports the Alliance.
27. Tourism WA supports the Alliance submitting that:

Tourism WA sees the continued partnership of Etihad Airways and Virgin Australia as beneficial for future aviation growth in WA and Australia. The partnership provides improved product and connections as well as additional benefits in growing business, trade and tourism to Australia overall. Tourism WA therefore supports the continued alliance between Etihad Airways and Virgin Australia...
28. The Department of Infrastructure and Regional Development submits that in its view, the proposed re-authorisation is consistent with the overarching objectives of the Australian Government's aviation policy. It considers that the Alliance has benefited Australian consumers by enabling Virgin to offer its customers better access to its integrated virtual network which is underpinned by commercial relationships such as the alliance with Etihad.
29. The submissions by the Applicants and interested parties are considered as part of the ACCC's assessment of the application for re-authorisation.

## ACCC assessment

30. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant net public benefit tests<sup>5</sup> contained in the *Competition and Consumer Act 2010* (Cth) (the **CCA**). In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the Proposed Conduct would outweigh the likely detriment to the public, including from any lessening of competition.

## Relevant areas of competition

31. In its previous consideration of the Alliance, the ACCC considered that the relevant areas of competition were:
  - International air transport services for passengers travelling between Australia and the Middle East, and between Australia and the UK/Europe
  - Domestic air transport services for passengers travelling within Australia.
32. Similarly, the Applicants submit that the following areas of competition are likely to be relevant:
  - air travel between Australia and the UK/Europe;
  - air travel between Australia and the Middle East and Africa; and

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<sup>5</sup> Subsections 91C(4), 91C(7), 90(5A), 90(5B), 90(6), 90(7), 90(8).

- domestic air travel within Australia.
33. The ACCC accepts that these areas of competition are likely to be relevant and notes that the Alliance does not concern freight services.
34. On the basis that there is no direct overlap between the operations of Virgin and Etihad, the Applicants submit that whether the product markets are defined narrowly (business passengers separate from leisure passengers) or more broadly (both types of passengers together) does not alter the competitive assessment of the Alliance.
35. The distance between Australia and Europe precludes commercial aircraft from offering non-stop services. As such, the routes between Australia and Europe are serviced by end-point carriers and mid-point carriers.
- End-point carriers are designated carriers that operate out of either Australia (i.e. Qantas) or Europe (i.e. British Airways).
  - Mid-point carriers offer services from centrally located hubs, primarily in Asia or the Middle East.
36. The Applicants submit that mid-point carriers based out of Asia compete with mid-point carriers based out of the Middle East for passengers flying between Australia and the UK / Europe. The Applicants provided the following list of mid-point carriers operating in the Australia-UK/Europe market:

**Figure 3 – Mid-point carriers operating in the Australia-UK/Europe market (source: Applicant submission p.12)**

South East Asian Carriers	North East Asian Carriers	Middle Eastern Carriers
Garuda Indonesia (via Jakarta)	Air China (via Beijing)	Emirates (via Dubai)
Malaysian Airlines (via Kuala Lumpur)	Air India (via Delhi)	Etihad Airways (via Abu Dhabi)
Singapore Airlines (via Singapore)	Cathay Pacific (via Hong Kong)	Qatar Airways (via Doha)
Thai Airways International (via Bangkok)	China Airlines (via Taipei)	
	China Southern Airlines (via Guangzhou)	
	China Eastern (via Shanghai)	
	Japan Airlines (via Tokyo)	
	Korean Air (via Seoul)	

37. The Applicants further submit that each relevant international market is characterised by a high level of competition as evidenced by the significant increase in capacity and passengers and a material decrease in average fares since the implementation of the Alliance.

## Future with and without

38. To assist in its assessment of the Proposed Conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.
39. In its 2011 Determination (prior to the commencement of the Alliance), the ACCC considered that Virgin would be unlikely to launch its Abu Dhabi services in the

absence of the Alliance. The ACCC stated that 'with only five to ten percent of traffic between the UAE and Australia being point to point traffic, the ACCC accepts that Virgin [Blue] could not offer a viable service on the route without offering the beyond connections available on Etihad's network within the Alliance'.

40. The Applicants submit that without the Alliance:

- they would not be able to offer the same level of service or range of codeshare destinations and frequencies at favourable prorate.
- they would not have access to traffic feed to and from each other's networks and the ability to jointly price and market the Alliance. The Applicants would attract fewer passengers to their services, making new and existing routes less sustainable.
- it would not be viable for Virgin Australia to operate services between Sydney and Abu Dhabi absent the Alliance.
- the Applicants would be impeded in their ability to provide a viable and attractive alternative to other competing airlines and alliances, particularly Qantas and Emirates.

41. As noted previously, the Applicants have never been in direct competition with each other in any market. Virgin introduced Sydney-Abu Dhabi services as part of the implementation of the Alliance and maintains that it would not operate them absent the Alliance.

42. The ACCC considers that the future without the Alliance would be similar to the scenario accepted by the ACCC in 2011 and outlined by the Applicants in their latest submission.

## Public benefit

43. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with 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.<sup>6</sup>

44. In its 2011 Determination, the ACCC considered that the Alliance was likely to result in significant public benefits in the form of:

- increased competition between Virgin Australia and the Qantas Group resulting from the benefits of network expansion
- new international services
- enhanced products and services, namely increased online connections and enhanced value added services
- stimulation of tourism.

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<sup>6</sup> *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

45. The Applicants submit that each of these benefits has been achieved and that the Alliance will continue to deliver public benefits in the form of:

- new routes, and additional frequency and capacity, with a greater capacity for further expansion
- superior products and services such as new international destinations, improved connectivity, optimised scheduling, and an expanded behind and beyond network
- greater loyalty program benefits through reciprocal accrual and redemption benefits, status recognition, lounge access and other service offerings
- increased capacity for efficiencies and cost savings through the ability to leverage sales and distribution strengths in respective home markets
- promotion of a competitive response from rivals
- stimulation of tourism to Australia.

### **Operation of the Alliance during existing period of authorisation**

46. The Applicants submit that since the Alliance commenced in October 2010, it has:

- more than doubled Alliance-operated capacity between Australia and the UAE
- introduced new daily non-stop services between Perth and Abu Dhabi and between Brisbane and Abu Dhabi
- increased to double-daily its services between Sydney and Abu Dhabi and Melbourne and Abu Dhabi
- offered a wide network of 39 international codeshare destinations throughout Europe, the Middle East, Pakistan, and Africa, connecting onto 50 destinations in Australasia
- upgraded aircraft to provide the highest quality in-flight experiences, such as Etihad's flagship A380 on Sydney-Abu Dhabi services, featuring its latest and most luxurious inflight products including the Residence
- provided full reciprocal frequent flyer and status benefits
- heavily invested in the promotion of international tourism to Australia, including through Tourism Australia.

47. The total number of passengers flying between Australia and Europe grew from 5,157,757 in FY2010 to 6,170,460 in FY2014 (approximately 5% per annum). The proportion of these passengers travelling via a hub in the Middle East increased from 17% in FY2011 to 31% in FY2014.

48. In the year ending December 2014, nonstop services between Australia and the Middle East comprised 9.8% of all scheduled international passenger air services capacity to and from Australia, compared with 5.7% in 2010. During this period

seats on non-stop flights between Australia and the Middle East have grown from 2,042,427 to 4,342,026 and passengers carried have grown from 1,501,211 to 3,561,429 (including those disembarking at destinations beyond the UAE/Qatar).

49. Since the implementation of the Alliance, Etihad has almost doubled its operated frequency on routes between Australia and the UAE, adding an additional 17 services per week. Etihad's capacity on the Australia-Middle East services has also grown by 131% between January 2011 and January 2016, which is an additional 14,596 seats per week.
50. While there are likely to be many factors that determine movements in fares, the ACCC notes that industry fares appear to have declined during the period in which the Alliance has been operating. The Applicants provided the figures below that depict the trend in fares:

Figure 4 – Australia – UAE/Qatar industry average fare, nominal US dollars (Source: Paxis)

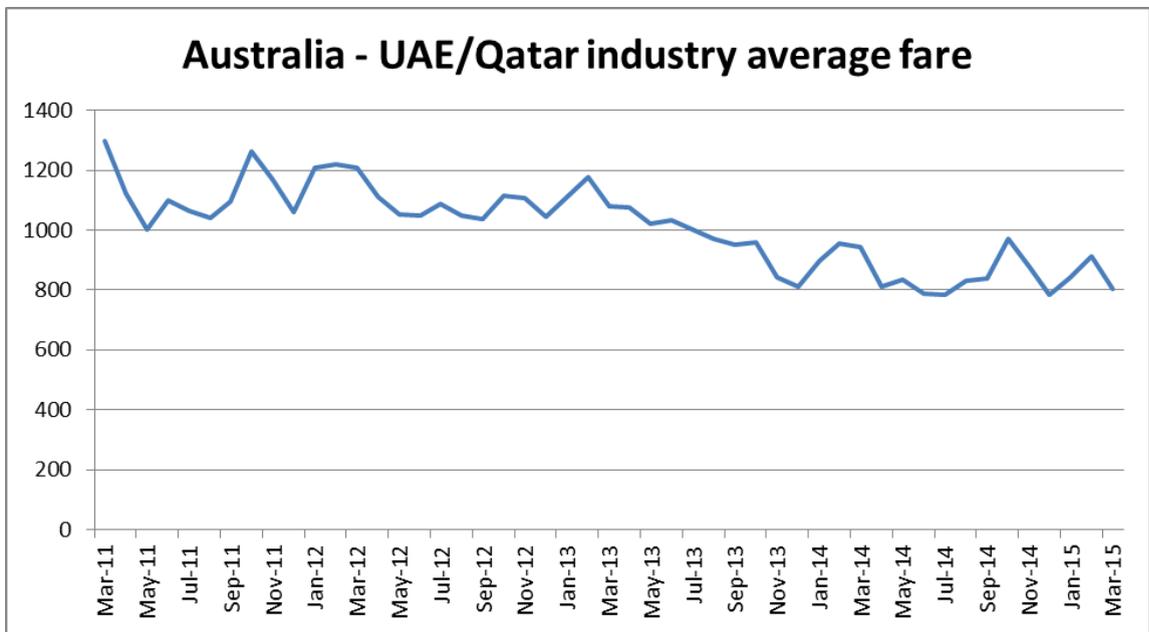
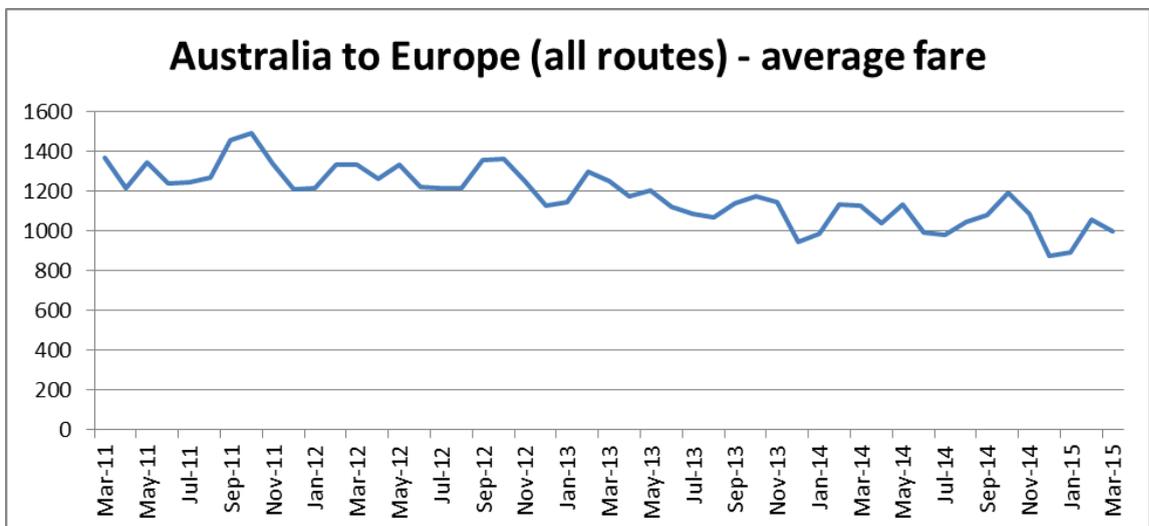


Figure 5 – Australia to Europe (all routes) – average fare, nominal US dollars (Source: Paxis)



51. The Alliance partners submit that they have invested in a variety of joint marketing initiatives since commencement of the Alliance. For example, the Applicants submit that they engaged in joint sponsorship of Tourism Australia and the Australian Tourism Exchange (ATE), Australia's largest travel and tourism business-to-business event, sponsoring the event in Cairns in 2014 and the event in Melbourne in 2015. The Applicants describe ATE as Australia's premier tourism trade event and is the largest international distribution show of its kind in the southern hemisphere. In 2014, Virgin Australia replaced Qantas as the Official Airline Partner of ATE.
52. The ACCC notes the October 2014 agreement between Virgin and Tourism Australia. Under this agreement, Virgin and Tourism Australia will jointly spend \$50 million to promote Australia to travellers. The ACCC considers that Virgin's alliances with international partners, including with Etihad, are likely to have increased the incentive for Virgin to secure the agreement with Tourism Australia and may have enabled Tourism Australia to reach an agreement that represents better value for money.

### **ACCC considerations**

53. The ACCC has previously stated that airline alliances are likely to result in most benefits where there are network complementarities, the incentives of the alliance partners are aligned, and a procompetitive response is promoted. Each of these factors suggest that the Alliance is likely to continue to result in public benefits. The ACCC considers that the Alliance is likely to result in increased competition between Virgin and Qantas, resulting from the benefits of network expansion that the Alliance enables.
54. The ACCC considers that the Alliance is likely to result in:
- a greater likelihood of new routes and frequencies and capacity as a result of the passenger feeds coming from the Applicants' complementary networks. The ACCC notes that there has been significant growth in the relevant areas of competition and that capacity has grown along with passenger numbers and that there is some evidence of declining industry fares on relevant routes.
  - enhanced products and services, including increased online connections and improved connectivity, optimised scheduling to minimise travel times. The ACCC also considers that the Alliance is likely to enhance the loyalty program benefits including other service offerings such as lounge access.
  - a competitive response from rivals as a result of the enhanced product and service offering
  - potential for efficiencies and cost savings such as through joint procurement and utilising each other's sales, marketing and customer service capabilities.
55. The ACCC considers that the proposed conduct has the potential to result in tourism related public benefits by:

- facilitating increased and/or more effective investment in the promotion of Australia as a destination in countries where Virgin does not have a strong presence in the absence of the Alliance
- making it easier for foreign leisure travellers to visit non-gateway destinations in Australia.

56. Taken together, the ACCC considers that the Alliance is likely to result in significant public benefits.

57. The ACCC notes the significant growth in capacity, passenger numbers and importance of the Middle East as a hub for Australian passengers travelling through to Europe. In the context of this growth, the ACCC considers that the public benefits from the Alliance are likely to be significant.

## Public detriment

58. The CCA does not define what constitutes a public detriment and the ACCC considers its meaning as essentially the opposite of public benefit. In this regard the Tribunal 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 principle elements the achievement of the goal of economic efficiency.<sup>7</sup>

59. In its 2011 assessment, the ACCC concluded that the Alliance would be unlikely to result in any significant diminution of competition in any of the relevant markets. The ACCC noted that the Applicants did not directly compete on any routes, and considered that they were unlikely to directly compete in the future. In the light of this, the ACCC considered that the Alliance was unlikely to result in any public detriment.

60. The ACCC considered that absent the Alliance, the Applicants were unlikely to offer directly competing services in the future, as it would not be viable for Virgin to offer services between Australia and Abu Dhabi, where point to point traffic is lower than ten per cent, without providing onward connections to destinations such as Europe.

61. Further, the ACCC noted that the Applicants faced direct competition from Emirates and Qatar Airways in the Australia-Middle East market and that there is strong competition between a large number of competitors in the Australia-UK/Europe market.

62. The ACCC also considered that the Alliance was likely to promote competition in the relevant markets and result in benefits for Australian consumers through new international services, increased online connections, enhanced value added services and stimulation of tourism.

63. The Applicants submit that their networks are entirely complementary and there is no direct overlap between their operated services. In particular, the Applicants submit that:

- Virgin and Etihad have never competed against each other on any route.

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

- Virgin introduced its Sydney-Abu Dhabi service as part of Alliance implementation.
- Without the Alliance, Virgin would not operate services between Australia and Abu Dhabi, nor would it operate services to Europe via any mid-point. The ACCC has previously recognised that given the traffic feed and network connections necessary to make these international routes viable, Virgin would not independently operate these services.
- Virgin and Etihad are therefore neither direct competitors nor potential competitors absent the Alliance.

64. The Applicants submit that the Alliance has enhanced competition in international aviation to and from Australia by facilitating Virgin's entry onto new routes that it would not have been able to enter absent the Alliance. And that the Alliance has and will continue to allow Virgin and Etihad to compete more vigorously with the Qantas / Emirates alliance, stimulating more competition in the market.

65. In its 2011 assessment, the ACCC noted that the Applicants face direct competition from Emirates and Qatar Airways in the Australia-Middle East market, and noted that:

- Emirates and Etihad continue to aggressively add capacity to Australia following recent changes in the ASA between the two countries
- Emirates is the largest airline in the region with approximately 70% of capacity between Australia and the UAE and over half of all UAE/Saudi Arabian tourists entering Australia on this airline
- there are currently no constraints on the number of nonstop flights from the Middle East to Australia increasing with sufficient capacity available under the ASA.

66. The Applicants submit that the ACCC's observations in 2011 remain valid. Emirates continues to be the largest carrier on Australia-Middle East services, and with its alliance with Qantas, has entrenched that position, holding around 80% passenger share, on average. In comparison, the Alliance together holds a very small share, of around 15%, on Australia-Middle East routes.

67. The Applicants submit that the only potential overlap between their existing services is in respect of the broader Australia-UK/Europe market, via different intermediate points. Virgin Australia, through its alliance with Singapore Airlines, offers services between Australia and Europe via Singapore Airlines' hub in Singapore, while Etihad operates services between Australia and Europe via its hub in Abu Dhabi.

68. Virgin Australia offers, as the marketing carrier, one-stop services operated by Etihad and by Singapore Airlines between Sydney/Melbourne/Brisbane and Perth and the following European destinations:

- Paris, France
- Rome, Italy
- Milan, Italy

- Frankfurt, Germany
- Munich, Germany
- Moscow, Russia
- Athens, Greece
- Zurich, Switzerland
- Amsterdam, The Netherlands
- London Heathrow, United Kingdom
- Manchester, United Kingdom

69. Services operated by Singapore Airlines are via Singapore, while services operated by Etihad are via Abu Dhabi, with resulting differences in travel time, distance and customer experiences.<sup>8</sup>

70. Virgin submits that it is effectively a reseller of Singapore Airlines' and Etihad's capacity in relation to these routes and that it has limited ability to influence the price of these services, particularly in relation to those operated by Singapore Airlines.

71. Virgin also submits that in relation to each of these routes, there are a significant number of competitors providing comparable one-stop services to and from Australia.

72. On this basis, Virgin submits that the potential overlap could therefore not result in any lessening of competition on these city pairs and that the Alliance cannot have an adverse impact on competition in any market. Rather, it has had, and will continue to have, a significant pro-competitive effect in all relevant markets.

### **ACCC considerations**

73. In relation to the Australia-UK/Europe market, the ACCC notes that there is strong competition between a large number of airlines. For example, the ACCC found in its consideration of the Qantas Emirates Alliance that:

- There is competition on routes to UK/Europe via multiple hubs including Dubai, Bangkok, Singapore, Hong Kong and Abu Dhabi.
- There are large number of established carriers with the ability and incentive to expand their operations, including a number of Chinese airlines which have recently expanded services to Australia, such as China Southern Airlines, China Eastern Airlines and Air China, and a number of other carriers, such as Malaysia Airlines, Thai Airways and Qatar Airways, who all have the ability to expand capacity between Australia and Europe.

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<sup>8</sup> Since the 2011 authorisations of Virgin's Alliances with each of Singapore Airlines and Etihad, Etihad has commenced direct services to Brisbane and ceased to offer indirect services via Singapore. As such, there is no longer any additional direct overlap between Etihad's operations and the Singapore Airlines services marketed by Virgin Australia in the Australia-Asia market.

- There is available capacity in the short to medium term for an Australian designated airline to enter an Australia-UK/Europe route or enter via codeshare, and there is available capacity for a number of foreign designated carriers to likewise expand services (with the exception of via Hong Kong).

74. As noted, the ACCC considers that in the absence of the Alliance, Virgin would not be able to sustain its Sydney-Abu Dhabi service of just 3 flights per week given the low percentage of travellers utilising the service as a point-to-point route (less than 10%). As a result, it is not likely that Virgin and Etihad would be direct competitors in the absence of the Alliance.

75. Consistent with previous observations, the ACCC considers that the Applicants face direct competition from Emirates and Qatar Airways in the provision of air travel between Australia and the Middle East and that the Alliance has a relatively small share of passengers on these routes.

76. In relation to domestic air travel within Australia, the Alliance is likely to enhance Virgin's competitive position in light of the public benefits identified.

77. Accordingly, the ACCC considers that the Alliance is unlikely to result in any significant public detriment in any of the three relevant areas of competition identified.

## **Balance of public benefit and detriment**

78. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the Proposed Conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

79. On the basis of the information provided by the Applicants and interested parties and the ACCC's consideration of previous relevant matters, the ACCC considers that the Alliance has resulted, and the Proposed Conduct is likely to continue to result, in public benefits including:

- a greater likelihood of new routes and frequencies and capacity as a result of the passenger feeds coming from the Applicants' complementary networks
- enhanced products and services, including increased online connections and improved connectivity, optimised scheduling to minimise travel times
- a competitive response from rivals as a result of the enhanced product and service offering
- potential for efficiencies and cost savings such as through joint procurement and utilising each other's sales, marketing and customer service capabilities
- potential for stimulation of tourism in Australia.

80. The ACCC considers that the likely public benefits are significant.

81. The ACCC considers that the Proposed Conduct is unlikely to result in any significant public detriment.
82. For the reasons outlined in this draft determination the ACCC is satisfied that the Proposed Conduct is likely result in a public benefit that would outweigh any likely public detriment, including the detriment constituted by any lessening of competition that would be likely to result.
83. Accordingly, the ACCC proposes to re-authorise the Proposed Conduct.

## **Length of authorisation**

84. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>9</sup> 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.
85. In this instance, the Applicants seek authorisation for ten years.
86. The ACCC has generally granted authorisation for aviation alliances for a limited timeframe of up to five years. This has typically been for the following reasons:
- the likely public detriments identified in its assessment
  - the ongoing evolution of aviation services in the relevant areas of competition
  - the dynamic nature of the aviation industry.
87. In relation to the Alliance, the Applicants submit that:
- ...as there can be no competitive detriment associated with the Alliance, and the Alliance has and will continue to deliver clear public benefits, there is no regulatory risk to a ten year authorisation period. The Applicants propose to further extend the commercial and consumer benefits of the Alliance in the reauthorisation period.
88. The ACCC considers that while the Proposed Conduct is not expected to result in any significant public detriments, it also considers that the considerable growth in traffic to and through the Middle East underscores the dynamic nature of the aviation industry. For this reason, the ACCC proposes to re-authorise the Proposed Conduct for a period of five years.

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<sup>9</sup> Subsection 91(1).

# Draft determination

## The applications

89. The Applicants lodged an application, under subsection 91C of the CCA, for the revocation of authorisations A91247 – A91248 and the substitution with new authorisations A91510 – A91511 for the ones revoked. The application was made using a Form FC, under subsection 91C(1) of the CCA. Authorisation is sought to:

- give effect to the Commercial Cooperation Agreement and associated codeshare agreements and reciprocal lounge and frequent flyer agreements (the Alliance Agreements)
- make and give effect to related agreements contemplated in the Alliance Agreements, including to renew the Alliance Agreements upon the expiration of their current term.

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

90. Authorisation is sought as the Proposed Conduct concerns agreements that may contain a cartel provision or may have the purpose or effect of substantially lessening competition or contain an exclusionary provision within the meaning of section 45 of the CCA.

91. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.<sup>10</sup>

## The net public benefit test

92. For the reasons outlined in this draft determination the ACCC is satisfied, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the Proposed Conduct for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the Proposed Conduct.

93. For the reasons outlined in this draft determination the ACCC is satisfied, pursuant to section 90(8) that the Proposed Conduct for which authorisation is sought is likely to result in such a benefit to the public that the Proposed Conduct should be allowed to take place.

## Conduct which the ACCC proposes to authorise

94. The ACCC proposes to revoke authorisations A91247 – A91248 and grant authorisations A91510 – A91511 in substitution for the ones revoked. The proposed re-authorisation is to the Applicants to:

- give effect to the Commercial Cooperation Agreement and associated codeshare agreements and reciprocal lounge and frequent flyer agreements (the Alliance Agreements)

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<sup>10</sup> s91C(5) requires the ACCC to comply with the requirements of s90A prior to making a determination.

- make and give effect to related agreements contemplated in the Alliance Agreements, including to renew the Alliance Agreements upon the expiration of their current term.

95. The ACCC proposes to grant re-authorisation for five years.

96. This draft determination is made on 30 October 2015.

## **Next steps**

97. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the Applicants or an interested party may request that the ACCC hold a conference to discuss this draft determination.

## Attachment A - Public benefit tests in CCA

**Subsections 90(5A) and 90(5B)** provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

**Subsections 90(6) and 90(7)** state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

**Subsection 90(8)** states that the ACCC shall not:

- make a determination granting:
  - i. an authorisation under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
  - ii. an authorisation under subsection 88(7) or (7A) in respect of proposed conduct; or
  - iii. an authorisation under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
  - iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

- make a determination granting an authorisation under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.