



# Draft Determination

Application for authorisation AA1000478

lodged by

Regional Express Pty Ltd

in respect of

coordination with Qantas and Virgin Australia on ten regional routes

Authorisation number: AA1000478

30 July 2020

Commissioners:

Sims

Keogh

Rickard

Court

Ridgeway

## Summary

The ACCC proposes to grant conditional authorisation to enable Regional Express Pty Ltd (Rex) to:

- coordinate flight schedules with Qantas and Virgin Australia to efficiently manage capacity on 10 regional routes, and
- enter into agreements to share revenue on those routes

as needed in response to the collapse in demand due to the COVID-19 pandemic.

Rex, Qantas and Virgin Australia currently benefit from various government funding arrangements which together support a minimum domestic network, including to regional and remote locations, until 31 December 2020. Based on the information available, the ACCC considers that the airlines are unlikely to coordinate or share revenue while these funding arrangements are in place.

Once the funding arrangements are removed, the ACCC considers that the ability for the airlines to coordinate and share revenue is likely to result in public benefits by supporting the continuity of air services to certain regions during the COVID-19 pandemic and enabling better schedule spread, which provides greater choice for passengers flying to and from those regional destinations.

In order to address the risk that the authorised conduct creates an ability and incentive for the airlines to raise airfares (by reducing capacity) and/or allows them to engage in anti-competitive information sharing, the ACCC proposes to impose conditions of authorisation requiring the airlines to:

- not set a fare on the 10 routes that is higher than the equivalent fare specified in their respective fare schedules in place as at 1 February 2020, and
- provide monthly updates to the ACCC, to notify the ACCC of developments in relation to the proposed conduct, and to provide information relating to the proposed conduct to the ACCC upon request. The reports will be published on the public register.

The ACCC proposes to grant conditional authorisation until 30 June 2021.

The ACCC invites submissions in relation to this draft determination, including on the Participating Airlines' cost savings as a result of the Proposed Conduct, the proposed conditions of authorisation and the proposed length of authorisation, by 20 August 2020 before it makes its final decision.

### 1. The application for authorisation

- 1.1. On 23 March 2020, Rex lodged application for authorisation AA1000478 with the Australian Competition and Consumer Commission (the **ACCC**). Rex is seeking authorisation for itself, Qantas Airways Limited (**Qantas**) and Virgin Australia Holdings Limited (**Virgin Australia**) (together, the **Participating Airlines**).
- 1.2. Rex seeks authorisation to enable Rex, Qantas (specifically its regional brand QantasLink) and Virgin Australia to coordinate flight schedules (**Coordinated Flights**) to reduce capacity, and enter into agreements to share revenue, on the 10 regional routes (the **Relevant Routes**) referred to in paragraph 1.11 (the **Proposed Conduct**).
- 1.3. Rex seeks authorisation until 30 June 2021.

- 1.4. The application was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.5. The ACCC may grant authorisation, which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.6. Rex also requested interim authorisation to enable it to engage in the Proposed Conduct while the ACCC is considering the substantive application. On 26 March 2020, the ACCC granted conditional interim authorisation.<sup>1</sup> Interim authorisation was granted subject to the condition that the Participating Airlines must not set a fare for a Coordinated Flight that is higher than the equivalent fare specified in their respective fare schedules in place as at 1 February 2020.
- 1.7. The interim authorisation remains in place until the ACCC final determination comes into force or it is revoked.

## The Applicant

- 1.8. Rex is an Australian airline based in Mascot, New South Wales, which operates scheduled regional services across Australia. Prior to the COVID-19 pandemic, Rex operated a fleet of 60 Saab 340 aircraft on approximately 1,500 weekly flights to 60 destinations. The Rex group also comprises wholly owned subsidiaries: Pel-Air Aviation (an air freight, aeromedical and charter operator) and two pilot academies in Wagga Wagga and Ballarat.

## Participating Airlines

- 1.9. Qantas is Australia's largest domestic and international airline. Domestically, Qantas offers an integrated national network of regular public transport (**RPT**) services, and charter services under a number of brands including Qantas, QantasLink and Jetstar. QantasLink is Qantas's primary brand for regional RPT and charter services.
- 1.10. Virgin Australia is an Australian airline, founded in 2000 as Virgin Blue, which operates a network of domestic and international services from its main hub at Brisbane Airport. The Virgin Australia Group comprises Virgin Australia, Virgin Australia Regional Airlines and Tigerair Australia. Virgin Australia entered voluntary administration in April 2020. In June 2020, the administrators reached a sale agreement with Bain Capital, but the process remains ongoing.

## The Proposed Conduct

- 1.11. Rex seeks authorisation to coordinate flight schedules and enter into agreements to share revenue on the Relevant Routes with Qantas (as QantasLink) and Virgin Australia.
- 1.12. The **Relevant Routes** (and the current operators on these routes) are:

### New South Wales

- Sydney – Wagga (Rex and Qantas)
- Sydney – Dubbo (Rex and Qantas)

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<sup>1</sup> See ACCC decision of 26 March 2020 available [here](#).

- Sydney – Albury (Rex, Qantas and Virgin Australia, noting Virgin Australia has suspended services on this route)<sup>2</sup>
- Sydney – Armidale (Rex and Qantas, noting Rex has suspended services on this route)

#### Victoria

- Melbourne – Mildura (Rex, Qantas and Virgin Australia, noting Virgin Australia has suspended services on this route)<sup>3</sup>

#### South Australia

- Adelaide – Port Lincoln (Rex and Qantas)
- Adelaide – Whyalla (Rex and Qantas)
- Adelaide – Kangaroo Island (Rex and Qantas, Rex had announced an exit from this route in July 2020, but is currently still servicing it)

#### Queensland

- Cairns –Townsville (Rex and Qantas)
- Townsville – Mount Isa (Rex and Qantas).<sup>4</sup>

1.13. Rex submits that schedule coordination may involve, for example:

- each carrier on a Relevant Route flying one service per day, with the total revenue generated on that route shared between carriers
- a carrier suspending operations on a Relevant Route, leaving the remaining carrier with sustainable load factors (percentage of seats occupied on a flight).

1.14. Rex proposes that any cooperation between carriers be based on the fare schedule that was in place on 1 February 2020 and submits that any agreement on revenue sharing would therefore not involve any negotiation as to each carrier's pricing.

## 2. Background

2.1. The ACCC recognises the significant challenges occurring as a result of the COVID-19 pandemic. The pandemic has caused a major disruption to society and the economy, with social distancing measures and travel bans affecting various sectors across the economy. In that context, the ACCC has received a large number of applications for authorisation aimed at providing financial relief to businesses and individuals, facilitating the supply of goods and services (including medical products and services), and managing the financial impact of a significant economic shock.

2.2. There has been a significant drop in demand for airline passenger services as a result of the COVID-19 pandemic and there is also significant uncertainty about demand for these services in the short to medium term. While some domestic travel restrictions have recently been relaxed, the COVID-19 pandemic is expected to continue to disrupt airlines and flights in the short to medium term.

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<sup>2</sup> <https://newsroom.virginaustralia.com/release/virgin-australia-group-revised-domestic-schedule-0;>  
<https://travel.virginaustralia.com/au/domestic-schedule>.

<sup>3</sup> <https://newsroom.virginaustralia.com/release/virgin-australia-group-revised-domestic-schedule-0;>  
<https://travel.virginaustralia.com/au/domestic-schedule>.

<sup>4</sup> Rex originally sought authorisation to coordinate flight schedules on nine routes. On 24 March 2020, Rex amended the application to include the Townsville – Mount Isa route.

- 2.3. This significant short-term reduction in demand could potentially threaten the viability of operating on the Relevant Routes for some airlines notwithstanding that, in the longer term, demand for these services may be sufficient to otherwise sustain their operations.
- 2.4. Rex submits that the domestic aviation sector in Australia is experiencing an unprecedented downturn as a result of the COVID-19 pandemic. Rex further submits that, since mid-March, it has experienced a significant and sharp decline in passenger numbers on the Relevant Routes.
- 2.5. Rex, Qantas and Virgin Australia currently benefit from various government arrangements which together support a minimum domestic network, including to regional and remote locations (the **Funding Arrangements**).
- 2.6. In particular, Rex benefits from the Regional Airline Network Support (**RANS**) program. The objective of the program is to support critical air services to regional Australia. Rex was initially provided with a grant to provide two or three return services a week on a shortfall subsidy basis. In June 2020, the Department of Infrastructure extended Rex's grant until 31 December 2020, to ensure regional communities would continue to receive essential air services.
- 2.7. Qantas and Virgin Australia are eligible for the RANS program, but are currently benefiting from the Domestic Aviation Network Support (**DANS**) program, which underwrites a minimum domestic and regional network comprising the 50 domestic routes with the most traffic. This includes all Relevant Routes besides Townsville - Mount Isa. The DANS program has been extended until 30 September 2020 to maintain connectivity on major domestic air routes.
- 2.8. In June 2020, Qantas expanded its schedule on eight of the 10 Relevant Routes, in response to the relaxation of travel restrictions within Australia, an increase in demand for domestic air travel, and in preparation for the June and July school holidays. Rex also increased flights on seven of the Relevant Routes.<sup>5</sup>

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties, including government departments, airlines, relevant industry associations and peak bodies.
- 3.3. The ACCC received submissions from the Australian Airports Association, Armidale Regional Council, Dubbo Regional Council and Kangaroo Island Council, all of which provided general support for the authorisation. However, the Australian Airports Association, Armidale Regional Council and Dubbo Regional Council submit that the length of authorisation should be limited to prevent any detrimental impact on competition. Public submissions are considered in further detail below and are available on the public register.

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<sup>5</sup> [http://www.rex.com.au/MediaAndPressClippings/MediaReleaseList.aspx?site=MC&y=19\\_20](http://www.rex.com.au/MediaAndPressClippings/MediaReleaseList.aspx?site=MC&y=19_20);  
<https://www.qantasnewsroom.com.au/media-releases/qantas-and-jetstar-increase-domestic-flying-as-restrictions-ease/>

## Update on interim authorisation

- 3.4. On 5 May 2020, the ACCC requested an update from Rex, Qantas and Virgin Australia regarding their experience with the Proposed Conduct under the Interim Authorisation.
- 3.5. Rex advised that the Proposed Conduct is not currently occurring because the Government is subsidising some services to regional routes and, as a result of this, it is financially viable for airlines to fly those routes under the Funding Arrangements even if there are almost no passengers on the flights. According to Rex, these arrangements make coordination unnecessary. However, as submitted by Rex the need to coordinate to optimise operations may well arise once these arrangements end.
- 3.6. Qantas indicated that its focus had been on implementing its own operations pursuant to its agreement with the Federal Government to operate a minimum domestic network and that, as such, it did not have any comments on the impact, benefits or detriments of interim authorisation.
- 3.7. On 26 June 2020, Rex advised that there had not been any developments in relation to the Proposed Conduct, and submitted that the ability to cooperate within the conditions stipulated in the interim authorisation would nevertheless still be of great public benefit.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. Rex has sought authorisation for 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.
- 4.3. 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 (**authorisation test**).

## Relevant areas of competition

- 4.4. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be affected.
- 4.5. Rex did not specifically describe the relevant areas of competition.
- 4.6. The ACCC considers that the area of competition likely to be affected by the authorisation is the supply of domestic air passenger transport services on the Relevant Routes.
- 4.7. The ACCC considers that domestic freight services to and from regional Australia are unlikely to be affected by the authorisation, as Rex advised that it has very limited freight capacity on its Saab 340 aircraft and that it currently sells that space.

## Future with and without the Proposed Conduct

- 4.8. 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.
- 4.9. As noted earlier, there is significant uncertainty about the state of Australia's domestic aviation sector in the short to medium term and, as a result, State and Federal Governments have put in place a number of Funding Arrangements.
- 4.10. On 7 June 2020, the Federal Government announced it would extend a range of measures to support the aviation sector, including the RANS program, until 31 December 2020.
- 4.11. As previously noted, Rex states that the Funding Arrangements make consideration of optimisation irrelevant as the Federal Government funds some limited services to the regional routes and it is therefore to the advantage of all carriers to fly the maximum possible under the funding, even if there are almost no passengers on the flights. However, Rex notes that there could be a need for coordination once the Funding Arrangements are removed. This suggests that the Funding Arrangements have enabled the airlines to manage the short-term reduction in passenger demand on the Relevant Routes without the need to coordinate and/or share revenue. Taking this into account, the ACCC considers it unlikely that Rex will engage in the Proposed Conduct before the extended Funding Arrangements conclude on 31 December 2020. This means there is no difference between the likely future with and without the Proposed Conduct during this time.
- 4.12. The ACCC recognises that, once the Funding Arrangements are removed, demand for domestic air passenger transport services on the Relevant Routes is likely to remain below usual levels in the short to medium term.
- 4.13. During this time, without the Proposed Conduct, it is likely that Rex and other airlines will need to individually consider the viability of their services on the Relevant Routes and take steps to address the continued operation of those services. In this regard, the ACCC notes the impact of the COVID-19 pandemic in March 2020 when both Rex and Qantas reduced their schedules and Virgin Australia reduced its capacity by 50%.

## Public benefits

- 4.14. 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.*<sup>6</sup>
- 4.15. As discussed above, the ACCC considers it unlikely that Rex will coordinate and/or share revenue with the other airlines while the Funding Arrangements remain in place and therefore there is little difference between the likely future with and without the Proposed Conduct during this period. It follows that the Proposed Conduct is unlikely to result in any public benefits during this time.

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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.

4.16. However, the ACCC has considered the potential for the Proposed Conduct to result in the following public benefits once the Funding Arrangements are removed:

- supporting the continuity of regional air services for regions on the Relevant Routes during the COVID-19 pandemic
- better schedule spread
- cost savings.

### **Supporting the continuity of regional air services**

4.17. Rex submits that:

- it is in the interests of the Australian community to safeguard the long term viability of domestic airlines, particularly in relation to Australia, where reliable, sustainable and affordable air services are critical to the socio-economic wellbeing of regional communities; and
- coordinating flight schedules will enable carriers to reduce capacity in a way that seeks to achieve sustainable load factors on regional routes, without compromising schedule offerings to passengers.

4.18. The Australian Airports Association and Dubbo Regional Council submit that the Proposed Conduct provides support to regional air travel through the COVID-19 pandemic and while domestic travel restrictions are in place.

4.19. The ACCC considers that once the Funding Arrangements are removed the Proposed Conduct is likely to result in a public benefit by allowing Participating Airlines to pursue more efficient allocation of capacity and service continuity on the Relevant Routes in order to address low demand due to the COVID-19 pandemic.

### **Better schedule spread**

4.20. Where airlines act independently during periods of unusually low demand, the effect that each airline has on the demand of the other airline's services is not taken into account by either party in planning schedules. Airlines are likely to prefer to schedule their flights at the most popular departure time, which can result in duplication of services.

4.21. The Proposed Conduct has the potential to address this issue by giving the Participating Airlines the ability and incentive to coordinate their schedules. Allowing the Participating Airlines to share revenue is likely to result in them being indifferent to individual load factors and route profitability and create the incentive for them to offer a better schedule spread.

4.22. As such, the ACCC considers that once the Funding Arrangements are removed, the Proposed Conduct is likely to result in a public benefit by enabling greater schedule flexibility and choice for passengers flying to and from certain regional destinations during periods of unusually low demand.

### **Cost savings**

4.23. Rex submits that it expects to achieve cost savings through the Proposed Conduct by increasing load factors to surpass what is typically possible under open competition to allow Participating Airlines to increase their marginal revenue per flight.



- 4.24. The Australian Airports Association submits that the Proposed Conduct will allow airlines to maximise load factors and allow airlines to save on costs.
- 4.25. The ACCC accepts that cost savings accruing to one or more firms arising from increases in productive efficiency can constitute public benefits and it is not necessary for the savings to be passed on to consumers in the form of lower prices. The community at large has an interest in resource savings because these resources are released for use elsewhere in the economy. However, the ACCC will give more weight to benefits which flow through to the broader community and are sustained over time.
- 4.26. When load factors on a flight are optimised, average costs per passenger are lower because the fixed costs to operate the flight (e.g. airport landing costs and pilot wages) are spread over a larger number of passengers.
- 4.27. The ACCC considers that the Proposed Conduct may result in cost savings for the Participating Airlines once the Funding Arrangements are removed. However, at this time, the ACCC is not satisfied that such cost savings are likely, as it does not currently have sufficient information in relation to:
- the Participating Airlines' variable costs and fixed costs, and
  - how their costs would be reduced as a result of the Proposed Conduct.
- 4.28. The ACCC therefore invites any further information or submissions that would inform its decision on the Participating Airlines' cost savings as a result of the Proposed Conduct.

### **ACCC conclusion on public benefit**

- 4.29. The ACCC considers that the Proposed Conduct is likely to result in the following public benefits once the current Funding Arrangements have been removed.
- Supporting the continuity of air services for regions on the Relevant Routes during the COVID-19 pandemic.
  - Enabling better schedule spread, which provides greater choice for passengers flying to and from regional destinations.

### **Public detriments**

- 4.30. 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.<sup>7</sup>*

- 4.31. Consistent with its approach to public benefits, the ACCC considers that the Proposed Conduct is unlikely to result in any public detriments while the Funding Arrangements are in place because it is unlikely that the airlines will engage in the Proposed Conduct.
- 4.32. The ACCC has also considered whether the Proposed Conduct is likely to result in the following detriments once the Funding Arrangements are removed.

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

- Removing competition between the Participating Airlines creates an increased ability and incentive to unilaterally reduce capacity on the Relevant Routes (or not to grow capacity as quickly as would otherwise be the case). To the extent this makes seats on the Relevant Routes scarcer, this could lead to an increase in airfares and reduced consumer choice.
  - Coordination of schedules by the Participating Airlines on the Relevant Routes, while managing the effects of the COVID-19 pandemic, could facilitate long term understandings between them about scheduling services on the Relevant Routes.
- 4.33. Rex submits that the Proposed Conduct is likely to result in minimal public detriment because:
- it does not involve carriers sharing confidential commercial information: the information required to coordinate capacity, such as passenger numbers, each airline's pre-COVID-19 pandemic schedules, and their intended reduced schedule in response to the COVID-19 pandemic, is available in the public domain
  - carriers will revert to their own schedules once the Proposed Conduct is no longer needed
  - it proposes that authorisation be granted subject to a condition that any cooperation between airlines is based on the fare schedule as at 1 February 2020 so as to offer reassurance that potential increases in air fares are prevented
  - the Proposed Conduct may not be required on all Relevant Routes. The Participating Airlines will engage in the Proposed Conduct on an 'as needed' basis.
- 4.34. Armidale Regional Council submits that flight schedule coordination may result in anti-competitive behaviour and that there should be oversight of the airlines' proposed price schedules.
- 4.35. Kangaroo Island Council submits that should domestic demand increase after travel restrictions are lifted, the Proposed Conduct may impede new entry on the Adelaide – Kangaroo Island route.
- 4.36. The ACCC considers coordination (including flight scheduling and revenue sharing) between airlines on particular routes has the potential to give rise to significant anti-competitive detriments. Where airlines share revenue and coordinate schedules on routes where they would otherwise be in competition with each other, coordinated arrangements between them are likely to have competitive effects similar to those that would flow from a merger between competing airlines on these routes. These detriments are likely to be less where airlines have minimal overlap with each other on particular routes (and provide services on routes that are more often complementary to each other); and where there are a number of other alternative providers of services on these routes that are not part of an alliance. Accordingly, in circumstances other than the current pandemic, this level of coordination would raise strong competition concerns.
- 4.37. In this instance, authorisation is sought for all airlines that directly compete with each other on the Relevant Routes to coordinate with each other, and therefore has the potential to remove all competition between airlines on this route. In normal circumstances, this would represent a significant anti-competitive detriment.
- 4.38. The ACCC accepts that the following factors could reduce the likely public detriment in the current circumstances.

- The Proposed Conduct is for a limited period of time. As noted, the Participating Airlines have not needed to give effect to the Proposed Conduct under the interim authorisation given the current Funding Arrangements and the authorisation is proposed to expire at most six months after those Funding Arrangements end (currently 31 December 2020).
- The Proposed Conduct will be implemented only as necessary and airlines are able to continue to make scheduling decisions independently.
- The Proposed Conduct applies to a limited number of routes where the airlines offer services, and coordination may only be required on a limited number of these routes.
- The value of any information on price and capacity shared under the Proposed Conduct during these unprecedented circumstances will predominantly be time-limited. That is, the information shared by the Participating Airlines will lose relevance as demand for air transport on the Relevant Routes recovers following the COVID-19 pandemic.
- Most or all of the information required to coordinate flight schedules and reduce capacity is already in the public domain, albeit accessed less efficiently.

4.39. Nevertheless, the ACCC considers that the following proposed conditions are necessary in order for the ACCC to be satisfied that the likely public benefits will outweigh the likely public detriments identified at paragraph 4.32, noting that the Proposed Conduct involves all of the airlines operating on the Relevant Routes.

### **Pricing condition**

4.40. In order to address the risk that the Proposed Conduct provides the Participating Airlines with the incentive and ability to raise airfares above competitive levels on the Relevant Routes, the ACCC proposes to maintain the pricing condition which was imposed when interim authorisation was granted:

If any of the Participating Airlines agree to coordinate flight schedules and/or share revenue on a Relevant Route while the authorisation is in effect, the Participating Airlines must not set a fare for a Coordinated Flight that is higher than the equivalent fare specified in their respective fare schedules in place as at 1 February 2020.

### **Reporting condition**

4.41. In order to address the risk relating to anti-competitive information sharing under the Proposed Conduct, the ACCC proposes to impose the following condition requiring the Participating Airlines to provide monthly updates to the ACCC, to notify the ACCC of any developments in relation to the Proposed Conduct, and to provide information relating to the Proposed Conduct to the ACCC upon request.

The Applicant will provide monthly updates to the ACCC regarding any developments in relation to the Proposed Conduct as the COVID-19 situation evolves. In addition, the Applicant will:

1. notify the ACCC of any measures formulated as part of the Proposed Conduct at least five business days before the measure is implemented or otherwise takes effect
2. notify the ACCC within three business days of any decisions or arrangements made by the Applicant to:

- a. coordinate schedules between the Participating Airlines; or
  - b. share revenue between the Participating Airlines, and
3. provide to the ACCC, within a reasonable timeframe, all information reasonably requested by the ACCC in relation to the Proposed Conduct.

The ACCC will publish reports made pursuant to this condition on its public register, subject to the ACCC deciding to exclude material from the register based on confidentiality or any other grounds.

### **ACCC conclusion on public detriment**

4.42. The ACCC considers that, given the exceptional circumstances related to the COVID-19 pandemic and subject to the proposed conditions of authorisation, the Proposed Conduct is unlikely to result in significant public detriments, including as a result of a lessening of competition.

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

4.43. For the reasons outlined in this draft determination, the ACCC is satisfied, subject to the proposed conditions of authorisation, 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**

4.44. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>8</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.

4.45. In this instance, Rex seeks authorisation until 30 June 2021.

4.46. The Australian Airports Association, Armidale Regional Council and Dubbo Regional Council submit that consideration should be given to a shorter time period. Kangaroo Island Council states that the risk of competitive distortion will be mitigated by the ACCC's ability to review, and if necessary revoke, the authorisation if it is granted.

4.47. In response to these submissions, Rex states that:

- a barebones twice-weekly schedule during the month of May represented an 85% reduction in flights and a 95% reduction in passenger numbers, and
- as of 1 July 2020, its passenger numbers were still approximately 15% of their level prior to the COVID-19 pandemic.

4.48. Rex also states that it is unable to make any meaningful demand forecasts at this time.

4.49. The ACCC recognises there is significant uncertainty around the COVID-19 pandemic which makes it extremely difficult to predict the extent of its impact on the aviation sector and a timeframe for any sort of recovery.

4.50. Nevertheless, the ACCC notes that travel restrictions remain in place and continue to evolve around Australia, and the Federal Government has considered it appropriate to

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<sup>8</sup> Subsection 91(1).

extend the Funding Arrangements until 31 December 2020. These factors tend to suggest that demand for the Participating Airlines' regional services is likely to remain low through the remainder of 2020 and into 2021.

- 4.51. In these circumstances, the ACCC proposes to grant authorisation until 30 June 2021 as requested by Rex.
- 4.52. However, given the evolving situation, the ACCC invites any further information or submissions that would inform its decision on the appropriate length of authorisation.

## 5. Draft determination

### The application

- 5.1. On 23 March 2020, Rex lodged application AA1000478 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. Rex seeks authorisation for the Proposed Conduct.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.4. 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.
- 5.5. For the reasons outlined in this draft determination, and subject to the proposed conditions, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant conditional authorisation.

### Conduct which the ACCC proposes to authorise

- 5.7. Subject to the proposed conditions outlined at paragraphs 5.13 and 5.14, the ACCC proposes to grant authorisation AA1000478 to enable Rex to engage in the Proposed Conduct, as described in paragraph 1.11.
- 5.8. Consistent with the reasons stated by Rex for seeking to engage in the Proposed Conduct, the ACCC proposes to grant conditional authorisation for the Proposed Conduct only insofar as it is solely directed to maintaining the quality and viability of regional services that are or are likely to be impacted by the COVID-19 pandemic.
- 5.9. 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.
- 5.10. The ACCC proposes to grant authorisation until 30 June 2021.
- 5.11. This draft determination is made on 30 July 2020.

## Proposed conditions of authorisation

5.12. The ACCC proposes to include the following conditions.

### Pricing condition

5.13. If any of the Participating Airlines agree to coordinate flight schedules and/or share revenue on a Relevant Route while the authorisation is in effect, the Participating Airlines must not set a fare for a Coordinated Flight that is higher than the equivalent fare specified in their respective fare schedules in place as at 1 February 2020.

### Reporting condition

5.14. The ACCC proposes to grant authorisation subject to the following conditions:

The Applicant will provide monthly updates to the ACCC to be published on the ACCC's public register (subject to the ACCC deciding to exclude material from the public register) regarding any developments in relation to the Proposed Conduct.

In addition, the Applicant will:

1. notify the ACCC:
  - a. of any measures formulated as part of the Proposed Conduct at least five business days before the measure is implemented or otherwise takes effect;
  - b. within three business days of any decisions or arrangements made by the Applicant to:
    - i. coordinate schedules between the Participating Airlines; or
    - ii. share revenue between the Participating Airlines,and state how the notified measure, decision or arrangement is directed to maintaining the quality or viability of regional services that are or are likely to be impacted by the COVID-19 pandemic;
2. provide to the ACCC, within a reasonable timeframe, all information requested by the ACCC in relation to the Proposed Conduct.

5.15. The ACCC invites submissions relating to the proposed conditions.

## 6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination by 20 August 2020.

6.2. In addition, consistent with section 90A of the Act, Rex or an interested party may request that the ACCC hold a conference to discuss the draft determination.