



Determination

Application for authorisation AA1000608

lodged by

Virgin Australia Airlines Pty Ltd

in respect of

proposed codeshare pricing arrangements with participating international airlines

Authorisation number: AA1000608

Date: 8 September 2022

Commissioners: Keogh
Rickard
Brakey

Summary

The ACCC has decided to grant authorisation to enable Virgin Australia to make and give effect to codeshare agreements with carriers operating long-haul international air passenger services to/from Australia (Partner Carriers). Partner Carriers will specify the prices at which Virgin Australia may market and resupply their operated services to consumers (the Proposed Conduct). Such conduct may constitute resale price maintenance.

The Proposed Conduct is limited to services on long-haul international routes where Virgin Australia does not operate or market services under a codeshare agreement that allows it to set airfares independently.

The ACCC considers the Proposed Conduct is likely to result in the following public benefits: streamlined booking process for customers; Velocity frequent flyer program benefits; and facilitating increased inter-brand airline competition.

The ACCC considers that the Proposed Conduct is likely to result in a public detriment by removing the potential for ('intra-brand') price competition between Virgin Australia and each Partner Carrier for the marketing of codeshare services operated by the Partner Carriers. However, the ACCC considers the extent of this public detriment is limited by:

- the likely small number of traditional arms-length codeshare arrangements that the Proposed Conduct is likely to displace, and
- inter-brand price competition from other operating carriers, including Qantas, on the relevant routes to/from Australia.

The ACCC is satisfied the Proposed Conduct would be likely to result in a public benefit that would outweigh the likely public detriment.

The ACCC has decided to grant authorisation until 30 September 2027.

1. The application for authorisation

- 1.1. On 14 April 2022, Virgin Australia Airlines Pty Ltd lodged an application for authorisation AA1000608 with the Australian Competition and Consumer Commission (the **ACCC**) on behalf of itself and its related bodies corporate, Virgin Australia International Airlines Pty Ltd and its related bodies corporate (collectively, **Virgin Australia**), and a class of international operating carriers (**Partner Carriers**, as defined in paragraph 1.11 below). This application was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. Virgin Australia seeks authorisation for 5 years on behalf of itself and Partner Carriers to engage in the conduct described in paragraphs 1.6 and 1.7 below and defined as the Proposed Conduct.
- 1.3. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.

- 1.4. On 12 May 2022, the ACCC granted interim authorisation¹ to enable Virgin Australia to engage in the Proposed Conduct with United Airlines. On 8 July 2022, the ACCC revoked this interim authorisation and granted a new interim authorisation to enable Virgin Australia to engage in the Proposed Conduct with Qatar Airways and Singapore Airlines in addition to United Airlines. The interim authorisation granted on 8 July 2022 will remain in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until it is revoked.
- 1.5. On 8 July 2022, the ACCC issued a draft determination² proposing to grant authorisation for 5 years for Virgin Australia to engage in the Proposed Conduct with Partner Carriers.

The Proposed Conduct

- 1.6. Virgin Australia is seeking authorisation to make and give effect to codeshare agreements³ with Partner Carriers (as defined in paragraph 1.11 below) that operate international flight services. These agreements will specify the fares at which Virgin Australia may market and resupply the flight services to consumers in Australia:
 - under Virgin Australia's own, independently set fare families and fare conditions
 - under Virgin Australia's code (VA)
 - whether these are sold as a standalone itinerary or part of an itinerary that includes segments operated by Virgin Australia(the **Proposed Conduct**).
- 1.7. The Proposed Conduct relates to all fare types including public and private fares (such as those made available under corporate contracts).⁴
- 1.8. Virgin Australia states that the Proposed Conduct will not involve any joint pricing of flight services with the Partner Carriers.
- 1.9. Virgin Australia submits that, if authorised, the effect of the Proposed Conduct will be that, for any relevant codeshare agreements with Partner Carriers, Virgin Australia would not independently set the price for any flight segments operated by the relevant Partner Carrier. Instead, Virgin Australia would accept the fare level specified by the Partner Carrier. It submits that all other aspects of the relevant codeshare arrangements would be conducted on an 'arms-length' basis.
- 1.10. Further, Virgin Australia submits that it will cease to engage in the Proposed Conduct if it commences operating on routes, or commences marketing services on routes where it has pricing control, that overlap with those operated by its Partner Carriers.

Partner Carriers

- 1.11. Virgin Australia defines Partner Carriers as a class of international operating airlines operating long-haul international air passenger services to/from Australia, comprising any other international operating carrier with which Virgin Australia proposes to

¹ This decision was made under subsection 91(2) of the Act. See the ACCC's interim authorisation decision of 12 May 2022 on the ACCC's [public register](#).

² The draft determination is available on the ACCC's [public register](#).

³ A codeshare agreement allows an airline (the marketing carrier) to put its designator code on a flight operated by another airline (the operating carrier). This is usually done to extend the marketing carrier's 'virtual network' of destinations, and to provide a clearer schedule of connecting flights for customers.

⁴ Virgin Australia's letter, 25 August 2022 (see the ACCC's [public register](#)).

codeshare as marketing carrier so long as the Proposed Conduct does not occur on an international route, or a flight segment of an international route, involving an origin airport and a destination airport (a city pair) which is subject to an existing arms-length codeshare agreement⁵ with Virgin Australia or which Virgin Australia services as operating carrier.⁶

- 1.12. In addition to its announced Partner Carriers, United Airlines and Qatar Airways⁷, Virgin Australia submits it is also considering engaging in the Proposed Conduct with other international carriers including: Singapore Airlines⁸, All Nippon Airways⁹, Air Canada¹⁰ and Hawaiian Airlines.¹¹
- 1.13. For the reasons outlined in paragraph 4.24 below, Virgin Australia submits that it is likely that it will only have a small set of Partner Carriers at a time. It submits that Partner Carriers may include future codeshare partners as well as its historical codeshare partners (see paragraph 2.1 below).

Rationale for the Proposed Conduct

1.14. Virgin Australia submits that the Proposed Conduct is intended to:

- address the shortcomings of traditional arms-length codeshare pricing arrangements, which in its experience were often loss-making and complicated to administer
- enable it to more quickly and efficiently rebuild its virtual international network to offer codeshare international services to Australian consumers, in circumstances where it does not currently have suitable aircraft to begin operating its own long-haul international services, and
- be a stepping-stone in its strategy to return to operating its own long-haul international services.

2. Background

2.1. Prior to the outbreak of the COVID-19 pandemic, Virgin Australia operated domestic, short-haul and long-haul international flight services including, long-haul services from Sydney, Brisbane and Melbourne to Los Angeles, and long-haul services from Sydney and Melbourne to Hong Kong. Virgin Australia also sold international flight services as a marketing carrier under codeshare agreements with numerous international partner airlines. These agreements were entered into as part of authorised joint ventures (which permitted joint pricing), or on an arms-length basis where Virgin Australia independently set the prices for all itineraries.

⁵ An 'arms-length' codeshare agreement is one where the marketing carrier and the operating carrier independently determine the fares for the services operated by the operating carrier.

⁶ The application for authorisation, p.2; Virgin Australia's response to ACCC request for information, 15 June 2022, p.3.

⁷ Virgin Australia [media release](#), 10 May 2022.

⁸ Singapore Airlines and Virgin Australia previously had a joint venture, which was authorised by the ACCC on 1 December 2011 and re-authorised for five years on 23 September 2016.

⁹ All Nippon Airways entered into an arms-length codeshare agreement with Virgin Australia in January 2020. However, the agreement was never implemented for Virgin Australia sales due to the onset of the COVID-19 pandemic.

¹⁰ Air Canada entered into an arms-length codeshare arrangement with Virgin Australia in June 2017, which ended in March 2020.

¹¹ Hawaiian Airlines entered into an arms-length codeshare agreement with Virgin Australia in November 2011 however these arrangements are currently dormant.

- 2.2. With the onset of the COVID-10 pandemic and as a result of going into administration, Virgin Australia lost access to its fleet of wide-body aircraft (the lease contracts for the aircraft expired or were cancelled).¹² Virgin Australia also paused its codeshare sales of all international partner airlines-operated services, with codeshare agreements either terminated/lapsed, or remaining in effect but dormant.
- 2.3. Virgin Australia currently operates domestic flight services and short-haul international flight services, using a fleet of narrow-body aircraft.¹³
- 2.4. United Airlines is the first airline to become a Partner Carrier. It currently operates daily flight services on the following routes between Australia and the USA: Sydney-Los Angeles, Sydney-San Francisco and Melbourne-San Francisco. United Airlines has an extensive network of routes within the USA and beyond. Prior to the ACCC's interim authorisation¹⁴, Virgin Australia had never sold United Airlines-operated services under a codeshare agreement.
- 2.5. Qatar Airways will be the second airline to become a Partner Carrier. It currently operates daily flight services between Doha and Melbourne, Sydney, Brisbane and Perth; and operates 3 weekly services between Doha and Adelaide (and continuing to Auckland, New Zealand). Qatar Airways' route network beyond Doha extends to over 140 destinations, including the Middle East, Europe and Africa. Qatar Airways and Virgin Australia have not previously been codeshare partners.
- 2.6. Singapore Airlines (with whom Virgin Australia is currently negotiating a codeshare agreement) operates flight services between several Australian cities and Singapore, with onward connections to various destinations in Asia, United Kingdom, Europe and the USA.

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 on the application for authorisation from a range of potentially interested parties including competitors, industry associations and regulatory bodies.¹⁵ The ACCC received 4 public submissions and one confidential submission.
- 3.3. Queensland Airports, the Northern Territory Department of Industry, Tourism and Trade and North Queensland Airports each provided a submission in support of the application on the basis of tourism benefits.
- 3.4. Qantas considers that the ACCC should limit the scope of authorisation by imposing a number of conditions including that the Proposed Conduct:
 - only occurs where there is no actual or imminent operational overlap with the codeshare partner (as Virgin Australia's submission states)

¹² Virgin Australia's submission in support of application for authorisation, 13 April 2022, page 9.

¹³ Virgin Australia currently operates services to Nadi, Fiji and to Bali, Indonesia. It also intends to re-commence short-haul services to Queenstown, New Zealand from November 2022, and to Vanuatu and Samoa in March 2023 as travel demand increases (see Virgin Australia's [media release](#), 14 June 2022).

¹⁴ See the ACCC's interim authorisation decision of 12 May 2022 on the ACCC's [public register](#).

¹⁵ The public submissions received are available on the ACCC's [public register](#).

- would cease to apply when Virgin Australia decides to operate services on a route that overlaps with those of its Partner Carriers, rather than at the point of Virgin Australia commencing operating such services (which may be some time later), and
- would apply only when Virgin Australia and its Partner Carriers continue to comply with all applicable regulatory requirements.

3.5. In response, Virgin Australia submits that:

- it has already proposed that the Proposed Conduct will only apply where it does not operate or price overlapping services with a Partner Carrier
- it anticipates that it would cease the Proposed Conduct on the date it has made a final, binding decision to commence operating or pricing services on an overlapping route with a Partner Carrier, and
- Virgin Australia will continue to comply with all its regulatory obligations.

3.6. The ACCC considers authorisation of the Proposed Conduct should be limited in the way suggested by Virgin Australia (and referred to by Qantas), but does not consider it is necessary to impose a specific condition. Similarly, the ACCC notes the responses provided by Virgin Australia in relation to its proposed timing for ceasing the Proposed Conduct and ongoing compliance with its regulatory obligations are an appropriate way to address those issues and it is not necessary to impose a specific condition.

3.7. Qantas also considers that the ACCC should impose a condition (including placing ring-fencing obligations on overlapping route/s Virgin Australia may commence to operate), so that the Proposed Conduct would not “contaminate” future competition between Virgin Australia and Partner Carriers. Virgin Australia submits that the Proposed Conduct will not “contaminate” future competition, because it will only enable Virgin Australia to replicate Partner Carriers’ prices rather than allow for any joint pricing or sharing of confidential pricing information between them.¹⁶ The ACCC considers the Proposed Conduct is unlikely to give rise to a risk of contamination of future competition between Virgin Australia and the Partner Carriers.

3.8. An anonymous party provided an oral submission in support of the application for authorisation, but identified three areas of concern.

3.9. The first area of concern is that the requested authorisation period is too long and may act as a disincentive for Virgin Australia to re-commence its own long-haul international services (this second point was also raised by Qantas). The length of authorisation is discussed in paragraphs 4.31-4.33 below. In relation to its incentives, Virgin Australia submits that the Proposed Conduct is a genuine stepping-stone to resuming its own long-haul international services. It submits that it aims to resume services where they are commercially sustainable (taking into account the risks and rewards of doing so)¹⁷ and when it has access to wide-body aircraft. The ACCC requested further information from Virgin Australia to substantiate its claim that the Proposed Conduct will not lessen its incentive to re-commence its own long-haul international services. After comparing the (confidential) margins that Virgin Australia stands to earn under the Proposed Conduct versus by operating on specific routes, the ACCC considers the Proposed Conduct would not be likely to materially deter Virgin

¹⁶ Virgin Australia states that as part of the Proposed Conduct, Virgin Australia would not receive any pricing information regarding the Partner Carrier’s fares that would not also be available to other market participants, including Qantas (see Virgin Australia’s response to interested party submissions, 9 May 2022, p.2).

¹⁷ See Virgin Australia’s response to ACCC request for information, 16 June 2022, p.3.

Australia from re-commencing its own long-haul international services when it would be profitable to do so.

- 3.10. The second area of concern is the potential for inappropriate sharing of confidential airport-related pricing information between Virgin Australia and Partner Carriers that are not members of the Board of Airline Representatives of Australia (**BARA**).¹⁸ Virgin Australia's response is that the scope of the Proposed Conduct will not involve Virgin Australia sharing any information or engaging in any joint conduct with Partner Carriers (whether or not they are BARA members). The ACCC considers that authorisation would not extend to allowing Virgin Australia to share airport fees and charges with non-BARA member airlines. Moreover, if Virgin Australia were to disclose such information to non-BARA member airlines, it would be doing so in breach of its confidentiality obligations and there would likely be remedies available to the parties whose interests were affected by any such breach. Authorisation by the ACCC would not affect those remedies.
- 3.11. The third area of concern is the potential for Virgin Australia to transfer its airport slots to Partner Carriers. The anonymous party submits that any unused slots that Virgin Australia is currently holding but not operating should be released back to the slots pool. Virgin Australia submits the Proposed Conduct does not relate to slots in any way and notes that Virgin Australia may transfer, trade or swap slots with any other airline, or choose to return slots to the slots pool, in compliance with regulatory requirements.¹⁹ The ACCC does not consider this is an issue relevant to the consideration of whether authorisation should be granted. Accordingly, the ACCC will not further consider the issue in this determination.
- 3.12. On 8 July 2022 the ACCC issued a draft determination proposing to grant authorisation for 5 years. A pre-decision conference was not requested, and no submissions were received following the draft determination.
- 3.13. Public submissions, and a summary of the confidential submission, are available on the ACCC's [public register](#).

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. Subsections 90(7) and 90(8) of the Act provide that the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would 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 from the Proposed Conduct (**authorisation test**).
- 4.2. Virgin Australia has sought authorisation for the Proposed Conduct with respect to sections 48 and 96 of the Act as the Proposed Conduct may involve resale price maintenance.

Relevant areas of competition

- 4.3. Based on information provided by Virgin Australia regarding its potential Partner Carriers (see paragraph 1.12 above), the ACCC considers the areas of competition relevant to the assessment of the Proposed Conduct are the supply of international air

¹⁸ The Board of Airline Representatives of Australia is a body that represents airlines in their negotiations with airports on airport fees and charges, among other things.

¹⁹ Virgin Australia's response to anonymous party submission, 29 June 2022.

passenger transport services on long-haul routes between Australia and the USA, Europe, various parts of Asia, the Middle East and Africa.²⁰

Future with and without the Proposed Conduct

- 4.4. Virgin Australia submits that, absent the Proposed Conduct, it will generally not enter into the same kind of arms-length codeshare agreements with international carriers as it did pre-COVID-19 and pre-administration, although it may consider a traditional arms-length codeshare arrangement if a potential Partner Carrier preferred it. It submits that this is because, having emerged from administration and in view of its previous experience with arms-length codeshare arrangements, Virgin Australia has low appetite for entering into commercial arrangements that are likely to be loss-making.
- 4.5. The ACCC notes that Virgin Australia has provided confidential case study information to substantiate its claim that past arms-length codeshare arrangements were not commercially sustainable. It appears that the risk of an arms-length codeshare arrangement becoming uncommercial for the marketing carrier may be greater where the marketing carrier does not itself operate an international service that the partner airline may codeshare on.
- 4.6. Given the circumstances surrounding Virgin Australia's administration and its commitment to ensure services are not loss-making, the ACCC accepts that absent the Proposed Conduct, Virgin Australia would be likely to enter into few, if any arms-length codeshare arrangements with long-haul international operating carriers until it is in a position to negotiate a reciprocal codeshare arrangement involving its own operated international services.
- 4.7. In the future with the Proposed Conduct, the ACCC considers that Virgin Australia is likely to enter into more codeshare arrangements with international carriers. For potential Partner Carriers, the appeal of entering into such an arrangement with Virgin Australia is enhanced by the Proposed Conduct's removal of intra-brand price competition by the marketing carrier.

Public benefits

- 4.8. 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 in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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.*²¹

- 4.9. Virgin Australia submits that the Proposed Conduct will result in the following public benefits:
 - enabling Virgin Australia to quickly rebuild its market presence, providing more international flight options to consumers

²⁰ However, the ACCC considers it is not necessary to precisely define the relevant markets for the purpose of considering the application for authorisation.

²¹ 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.

- promoting a competitive response from Qantas
- lower fares and greater efficiencies in pricing services
- more fare products available to more consumers via more channels
- reduction in consumer confusion through clearer and simpler pricing, and
- greater loyalty program benefits for Velocity members.

4.10. The ACCC considers that the Proposed Conduct is likely to result in the following public benefits:

- streamlined booking process
- Velocity frequent flyer program benefits, and
- facilitating increased inter-brand airline competition.

Streamlined booking process

4.11. Virgin Australia submits that the Proposed Conduct will enhance the experience of its customers by providing a single, streamlined booking process for international itineraries through Virgin Australia. It will also enable Virgin Australia to offer a wider range of fare types, including tactical and sale fares, than are typically offered by Partner Carriers under a traditional arms-length codeshare arrangement.

4.12. The ACCC considers that the Proposed Conduct will enable Virgin Australia to offer its customers a more convenient, streamlined booking process for international travel with a domestic connection, compared to the likely future without the Proposed Conduct. It will also allow Virgin Australia customers to access the full range of fare types offered by Partner Carriers. Absent the Proposed Conduct, customers would need to book directly with the Partner Carriers to access some fare types and separately book any connecting domestic services operated by Virgin Australia.

4.13. The ACCC accepts that the Proposed Conduct would be likely to result in some public benefit in the form of increased convenience for customers who book an international itinerary that includes connecting domestic flights operated by Virgin Australia.

Velocity frequent flyer program benefits

4.14. Virgin Australia submits that it has in place existing 'earn and redeem' agreements with a number of its historical codeshare partners as part of the Velocity program, and these would apply with or without the Proposed Conduct.²² However, it also states that the Proposed Conduct will in some cases provide Velocity members with a better earn rate and enable them to earn more status credits, when they choose to book with a VA code rather than on a Partner Carrier code on the same flight.²³

4.15. The ACCC accepts that the Proposed Conduct is likely to provide frequent flyer program benefits to Virgin Australia's Velocity members to the extent that it enables Virgin Australia to:

²² See Virgin Australia's response to ACCC request for information, 4 May 2022. See also Virgin Australia [Velocity Program Update – Airline Partners](#).

²³ See Virgin Australia's response to ACCC request for information, 4 May 2022.

- offer a better earn rate or more status credits on services operated by Partner Carriers compared to the likely future without the Proposed Conduct, and/or
- reach a codeshare agreement with more international partner airlines compared to the likely future without the Proposed Conduct.

4.16. The ACCC accepts this would be likely to result in some public benefit.

Facilitating increased inter-brand airline competition

4.17. Virgin Australia submits that absent the Proposed Conduct, it will be constrained in its ability to market international services in the short to medium term. It submits that the Proposed Conduct will enable it to more rapidly rebuild its market presence in international travel, allowing it to remain a viable option for both domestic and international flight services in consumers' minds (until it can re-establish its own long-haul international capacity). It argues that this is important for its ability to be a viable challenger to Qantas for long-haul international services in the longer term.

4.18. The ACCC understands that Virgin Australia faces challenges in securing aircraft suitable to re-commence its own long-haul international services in the short to medium term. The ACCC considers the Proposed Conduct would be likely to enhance Virgin Australia's ability to negotiate codeshare agreements with Partner Carriers and start offering long-haul international services to consumers on a codeshare basis sooner than would occur in the likely future without the Proposed Conduct. The ACCC accepts that this would likely assist Virgin Australia to rebuild and maintain its brand and marketing presence in relation to international services, which in turn is likely to support its return to operating long-haul international services.

4.19. The ACCC considers that this would be likely to confer public benefit by triggering a pro-competitive response from other airlines operating on the international routes that Virgin Australia enters.

Public detriments

4.20. 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.²⁴

4.21. Virgin Australia submits that the Proposed Conduct will not result in any material competitive detriment, because:

- while the Proposed Conduct will remove the potential for 'intra-brand' competition between it and the Partner Carriers (which is not commercially sustainable), it will promote 'inter-brand' competition with third-party airlines
- there is no competitive overlap between it and the Partner Carriers, and it will cease to engage in the Proposed Conduct if it commences operating or pricing overlapping services with the relevant Partner Carrier (so as to avoid hindering any future competition between them), and

²⁴ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- it and the Partner Carriers will have no ability or incentive to raise fares because they will be competitively constrained by a large number of competitors, including Qantas, across the markets for international air travel to/from Australia.

4.22. In its submission, Qantas raised concerns about the potentially broad range of Partner Carriers that could participate in the Proposed Conduct. It considers that the ACCC should impose a condition to ensure that only future codeshare partners (but not current codeshare partners) of Virgin Australia could participate in the Proposed Conduct. In response, Virgin Australia submits that it is not currently placing its code on any international services, but it has historical relationships with a number of airlines it hopes to renew (which will include the Proposed Conduct). It submits that the Proposed Conduct should not be restricted in the way suggested by Qantas; rather, it should extend to all relevant codeshare partners so that consumers will be provided with the broadest possible range of destinations and fares.²⁵

4.23. A submission from an anonymous party has raised concerns about the lack of specificity of the Partner Carriers.

4.24. In response to the ACCC's request for further information about the identity of potential Partner Carriers, Virgin Australia submits that the class of Partner Carriers will be limited by the following considerations:²⁶

- the number of carriers that currently operate long-haul international services to and from Australia on their own fleet and who are not already in a codeshare relationship with Qantas²⁷
- commercial considerations, such as potential Partner Carriers having different interests or limited services to Australia, or where Virgin Australia already has a codeshare agreement with another international airline from the same region, and
- keeping the number of Partner Carriers small and focussed, and not engaging with multiple partners serving the same geographies, will allow Virgin Australia to avoid the costs and complexity of maintaining multiple codeshare partners and potential confusion for customers.

4.25. Virgin Australia submits that due to these considerations, it will likely only have 7 or 8 Partner Carriers (and certainly no more than 10) at a time, though the identity of Partner Carriers may change over time. Virgin Australia also provided a list of potential Partner Carriers (see paragraph 1.12).

4.26. The ACCC generally considers that arms-length codeshare arrangements make an important contribution to price competition for the supply of international air passenger services. In an arms-length (freesale) codeshare arrangement, the operating and marketing carrier each independently set the fares for services operated by the operating carrier. This differs from the Proposed Conduct, where Partner Carriers will set the fares and Virgin Australia will match those fares in offers to consumers.

4.27. The ACCC considers that the Proposed Conduct would be likely to result in a public detriment by removing the potential for (intra-brand) price competition between Virgin

²⁵ Virgin Australia's response to interested party submissions, 9 May 2022, p.2.

²⁶ Virgin Australia's response to ACCC information request, 15 June 2022, pp. 3-4.

²⁷ Virgin Australia submits that Qantas has partnered with 24 international carriers, 10 of which fly long-haul services to and from Australia. It submits that these airlines are unlikely to also pursue a codeshare relationship with Virgin Australia in parallel (see Virgin Australia's response to ACCC information request, 15 June 2022, p.3).

Australia and each Partner Carrier. However, the ACCC considers that the extent of this public detriment would likely be limited by:

- the likely small number of traditional arms-length codeshare arrangements that the Proposed Conduct is likely to displace (see paragraph 4.6 above), and
- inter-brand price competition from other operating carriers, including Qantas, on the relevant routes to/from Australia.

4.28. The ACCC's view, based on the information available, is that there would likely be sufficient inter-brand competition on routes operated by potential Partner Carriers identified by Virgin Australia (whether they are historical or future codeshare partners) to limit the extent of public detriment likely to arise due to the Proposed Conduct's removal of intra-brand price competition. The ACCC considers that it is not necessary to impose a condition to exclude any potential Partner Carriers as requested by Qantas.

4.29. The ACCC considers Virgin Australia has provided sufficient clarity about the identity of potential Partner Carriers and the number of potential Partner Carriers it is likely to have at any time (which is not unreasonably large). The ACCC notes that all airlines engaging in the Proposed Conduct with Virgin Australia must meet the definition of Partner Carriers (as set out in paragraph 1.11 above²⁸) in order to be covered by authorisation. At this stage, the ACCC does not consider that any foreseeable changes to the composition of Virgin Australia's Partner Carriers are likely to affect the ACCC's net public benefit assessment. The ACCC also notes that, if there is a material change in circumstances in the future, the ACCC may consider a revocation of the authorisation or a revocation and substitution.

Balance of public benefit and detriment

4.30. For the reasons outlined in this determination, the ACCC is satisfied that the Proposed Conduct would be likely to result in a public benefit and this public benefit would outweigh any detriment to the public from the Proposed Conduct.

Length of authorisation

4.31. The Act allows the ACCC to grant authorisation for a limited period of time.²⁹ 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.

4.32. An anonymous party submits that the requested 5-year authorisation period is too long, particularly given the dynamic nature of the airline industry and the lack of specificity about the identity of potential Partner Carriers. Virgin Australia submits that an authorisation period of 5 years is reasonable, given the significant resources required to establish codeshare arrangements, the time required for it to realise the benefits associated with the Proposed Conduct (noting that international travel is still recovering), and the lack of material anti-competitive detriment arising from the Proposed Conduct.

²⁸ This requires Partner Carriers to be operators of long-haul international flights to/from Australia, and who do not have overlap with Virgin Australia on any route that Virgin Australia operates or markets services under another codeshare agreement that allows it to set airfares independently.

²⁹ Subsection 91(1) of the Act.

- 4.33. As mentioned in paragraph 4.29, the ACCC considers that Virgin Australia has provided sufficient clarity about the identity and number of potential Partner Carriers. Given the Proposed Conduct is likely to result in a net public benefit (and the risk of public detriment is low, based on current information), the ACCC's view is that a 5-year authorisation period is appropriate. Should there be a material change in circumstances (for instance, a significant change in market conditions) during the authorisation period, the ACCC may consider a revocation of the authorisation or a revocation and substitution. Accordingly, the ACCC considers it is appropriate for it to grant authorisation until 30 September 2027.

5. Determination

The application

- 5.1. On 14 April 2022, Virgin Australia lodged an application for authorisation AA1000608 to enable it to engage in the Proposed Conduct as described in paragraphs 1.6 and 1.7 with Partner Carriers as defined in paragraph 1.11. This application for authorisation was made under subsection 88(1) of the Act.
- 5.2. Virgin Australia seeks authorisation for 5 years for the Proposed Conduct with respect to sections 48 and 96 of the Act.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct would be likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this determination, the ACCC is satisfied that the Proposed Conduct would be likely to result in a benefit to the public, and that benefit would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.
- 5.5. Accordingly, the ACCC has decided to grant authorisation.

Conduct which the ACCC has decided to authorise

- 5.6. The ACCC has decided to grant authorisation AA1000608 to enable Virgin Australia to make and give effect to codeshare agreements with Partner Carriers (as defined in paragraph 1.11) which contain pricing provisions that may otherwise trigger the prohibition against resale price maintenance, such conduct being described as the Proposed Conduct in paragraphs 1.6 and 1.7 above.
- 5.7. The authorisation which the ACCC has decided to grant is restricted to circumstances where the Proposed Conduct does not occur on an international route, or a flight segment of an international route, involving an origin airport and a destination airport (a city pair) on which Virgin Australia operates or markets services under a codeshare arrangement that allows Virgin Australia to set airfares independently.
- 5.8. The conduct authorised by the ACCC does not include any joint pricing of flight services operated by the Partner Carriers (as stated in paragraph 1.8).

5.9. The ACCC grants authorisation AA1000608 until 30 September 2027 with respect to section 48 of the Act, as the Proposed Conduct may involve resale price maintenance.³⁰

6. Date authorisation comes into effect

6.1. This determination is made on 8 September 2022. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into effect on 30 September 2022.

³⁰ For resale price maintenance see s48, and ss96/96A in Part VIII of the Act.