



**Virgin Australia – Application for authorisation AA1000608
Interim authorisation decision
12 May 2022**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted interim authorisation in respect of application for authorisation AA1000608, lodged by Virgin Australia Airlines Pty Ltd on behalf of itself and its related bodies corporate, Virgin Australia International Airlines Pty Ltd and its related bodies corporate (collectively, **Virgin Australia**, or the **Applicant**), and a class of international operating carriers (**Partner Carriers**, as defined in paragraph 8 below).
2. Interim authorisation is granted to Virgin Australia to enable it to engage in the conduct described in paragraph 7 below and defined as the Proposed Conduct with United Airlines, a Partner Carrier (as defined in paragraph 8 below) referred to in the application. In summary, this will enable Virgin Australia and United Airlines to make and give effect to a codeshare agreement which contains pricing provisions that may otherwise trigger the prohibition against resale price maintenance.
3. This Interim authorisation 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.
4. The ACCC has decided to grant interim authorisation in relation to section 48 of the *Competition and Consumer Act 2010* (the **Act**), as the Proposed Conduct may involve resale price maintenance within the meaning of sections 96/96A of the Act.
5. Interim authorisation commences immediately and remains in place until the date the ACCC's final determination comes into effect, the application for authorisation is revoked, or until it is revoked.

The application for authorisation

6. Virgin Australia currently operates a network of domestic passenger flight services and limited short-haul international passenger flight services.
7. Virgin Australia is seeking authorisation to make and give effect to codeshare agreements with Partner Carriers 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)
 - via Virgin Australia's own channels, and

- whether these are sold as a standalone itinerary or part of an itinerary that includes segments operated by Virgin Australia

(the **Proposed Conduct**).

8. Partner Carriers are described in the application as a class of international operating airlines, comprising any other international operating carrier with which Virgin Australia proposes to 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 codeshare agreement with Virgin Australia or which Virgin Australia services as operating carrier.
9. The Applicant states that, if authorised, the effect of the Proposed Conduct will be that, for any relevant codeshare agreements with Partner Carriers, the Applicant would not independently price any flight segments operated by the relevant Partner Carrier. Instead, the Applicant would accept the fare level specified by the Partner Carrier. All other aspects of the relevant codeshare arrangements would be conducted on an “arms’ length” basis.
10. United Airlines is the first airline to become a Partner Carrier. It currently operates daily flight services on the Sydney–Los Angeles route and the Sydney–San Francisco route, and plans to re-commence its service on the Melbourne–San Francisco route in June 2022. United Airlines has an extensive network of routes within the USA and beyond.
11. Virgin Australia is seeking authorisation for the Proposed Conduct for five years with respect to sections 48 and 96 of the Act.
12. Virgin Australia submits that:
 - it does not currently operate any long-haul international flight services and is unlikely to be able to do so in the short-medium term, as it does not have access to the widebody aircraft necessary to begin operating such services
 - it will cease the Proposed Conduct if it commences operating on routes (or marketing services on routes where it has pricing control) that overlap with those operated by its Partner Carriers
 - the Proposed Conduct will enable it and Partner Carriers to market a comprehensive network of international flight itineraries to Australian consumers and create strong incentives to price codeshare fares competitively, in circumstances where Virgin Australia’s ability to offer long-haul international travel has been significantly impaired by the COVID-19 pandemic and the circumstances surrounding its administration, and
 - absent the Proposed Conduct, it will not be profitable for Virgin Australia to continue to sell fares for all partners via a traditional arms’ length codeshare, and Virgin Australia may not restore codeshare sales with all partners, thus reducing consumer choice.

The authorisation process

13. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Act. Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

Interim authorisation

14. Section 91 of the Act allows the ACCC, where it considers it appropriate, to grant interim authorisation. This allows the parties to engage in the proposed conduct while the ACCC is considering the substantive application.
15. Virgin Australia requested interim authorisation by 13 May 2022, so that it can commence marketing United Airline-operated services under the Proposed Conduct. Virgin Australia considers this timeframe is commercially important given the easing of travel restrictions and the start of the northern hemisphere's summer travel season.

Consultation

16. The ACCC invited submissions from a range of potentially interested parties including competitors, industry associations and regulatory bodies. The ACCC received 4 public submissions and one confidential submission.
17. Queensland Airports, the Northern Territory Department of Industry, Tourism and Trade, North Queensland Airports and the party who lodged the confidential submission all support the application for authorisation.
18. Qantas has concerns which it says apply to both interim and final authorisation. Broadly, Qantas submits that the Proposed Conduct must only apply in certain circumstances and within the regulatory framework for capacity allocation, and the ACCC should carefully interrogate Virgin Australia's claim that arms-length codeshare agreements are not commercially sustainable. Qantas rejects any contention by Virgin Australia that it has a 'dominant' position with respect to international services, but agrees that international routes to and from Australia are highly competitive.
19. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, can be obtained from the ACCC's [public register](#).

Reasons for decision

20. The ACCC has decided to grant interim authorisation under section 91(2) of the Act. In granting interim authorisation, the ACCC considers that:
 - interim authorisation is time-limited (see paragraph 5 above), and is only granted to enable Virgin Australia to engage in the Proposed Conduct with United Airlines (not with a potentially large numbers of yet to be identified Partner Carriers)
 - interim authorisation is restricted to circumstances where Virgin Australia does not operate its own international flight services, or does not have pricing control as marketing carrier, on city pair routes that overlap with those operated by United Airlines (see paragraph 3 above)
 - there will continue to be competitive constraint from Qantas and other international carriers operating on the routes between Australia and the USA, and
 - the Proposed Conduct is likely to assist Virgin Australia to re-establish its international network, in circumstances where it appears it is unlikely to be able to operate its own long-haul international services in the short term.

Reconsideration of interim authorisation

21. The ACCC may review interim authorisation at any time, including in response to feedback received after the granting of this interim authorisation.
22. The ACCC's decision in relation to this interim authorisation should not be taken to be indicative of whether or not final authorisation will ultimately be granted.