

AAA's Submission in Response to Virgin Australia's application for urgent interim authorisation

16 April 2020

1 Executive summary

- 1.1 The Australian Airports Association (**AAA**) makes this submission in response to Virgin Australia's application for urgent interim authorisation to engage in a range of coordinated conduct with Qantas, Rex, Alliance and other airlines (**VA Application**).
- 1.2 The proposed conduct sought to be authorised and the AAA's summary position is provided in the table below.

Type of conduct	Proposed coordinated conduct between Virgin, Qantas and other airlines	AAA position
Capacity allocation	Agreeing the routes, scheduling and/or capacity of RPT services	✓ Endorse and support
Capacity allocation	Jointly determining which carrier is best placed to operate a particular route or service	✓ Endorse and support
Revenue allocation	Discussing and agreeing the split or share of revenue generated by services but not extending to agreements relating to the price of fares	✓ Endorse and support
Capacity allocation	Discussing and agreeing the allocation of cargo space with air freight providers and operators	✓ Endorse and support
Collective bargaining conduct	Joint negotiations (including collective bargaining) with airports in relation to (but not limited to) infrastructure use and fee relief	✗ Strongly oppose

The AAA endorses and supports the Capacity and Revenue Allocation conduct authorisation

- 1.3 The AAA endorses and supports the VA Application for airlines to allocate capacity and revenue for both freight and RPT services (**Capacity and Revenue Allocation Conduct**) to ensure that essential passenger and freight aviation services are able to be supplied efficiently to mitigate the adverse effects of the COVID-19 disruption. However, the AAA notes that there are detriments to slot constrained airports subject to slot management regulation from the Capacity and Revenue Allocation Conduct. To this end, Sydney Airport will make separate submissions on this conduct.
- 1.4 The AAA has not reached this position lightly. The AAA considers that authorising such *extraordinary* collusive conduct between Qantas, Virgin and the smaller airlines is justifiable and proportionate in response to what is an unprecedented crisis to the aviation sector comprising the greatest shock to passenger demand since the collapse of Ansett, the 9/11 terror attacks, the SARS outbreak and the Bali bombings. A crisis, we may add, that affects airports and all other aviation businesses dependent upon demand derived from air travel and air freight.
- 1.5 In coming to this view, the AAA has considered the public benefits and detriments likely to result with and without the Capacity and Revenue Allocation Conduct.
 - 1.5.1 **Public benefits:** The Capacity and Revenue Allocation Conduct is likely to efficiently match supply with significantly reduced demand to maximise seat factors (subject to appropriate distancing within aircraft and terminal buildings) enabling airlines to defray operating costs across passengers to minimise average cost. In concert with much-mooted financial support by the Commonwealth Government to support a limited service network, this co-ordination is likely to deliver the nation its necessary aviation services until domestic travel restrictions are removed.
 - 1.5.2 **Public detriments:** The prospect of large airlines, in an exceptionally concentrated sector with high entry barriers, exchanging commercially sensitive information and in fact agreeing to restrict capacity and share revenue undoubtedly results in potentially very large and enduring competitive detriment reflecting archetypical anti-competitive practice that

the Competition and Consumer Act is designed to prohibit.¹ That said, at least in the short term, the fact that these services will be operating with significant government assistance should mitigate the risk of this behaviour although long term information sharing remains a significant issue. We would expect any interim authorisation should set out an information sharing protocol.

- 1.6 Accordingly, weighing the potentially large competitive detriment which would crystallise from the day that the *interim* authorisation is granted, against the benefits of promoting efficient capacity allocation in the face of unprecedented disruption, on balance, the AAA endorses and supports the Capacity and Revenue Allocation Conduct.
- 1.7 The AAA's support of the conduct is conditional upon the following issues being addressed:
 - 1.7.1 **the time period for the authorisation;**
 - 1.7.2 **imposition of an effective price ceiling; and**
 - 1.7.3 **greater certainty and clarity of the scope of the Capacity and Revenue Allocation Conduct in relation to freight services.**
- 1.8 With respect to the time period, the AAA emphasises that irrespective of the *final* authorisation decision, the anti-competitive harm associated with the Collective Bargaining Conduct would immediately crystallise from the day of the *interim* decision, requiring a careful and considered approach to any *interim* decision. The AAA also sets out more detail on the time period below at paragraph 2.10-2.12.
- 1.9 With respect to the price ceiling, the AAA encourages the ACCC to impose a price ceiling similar to the Rex Interim Authorisation decision to mitigate against the risk of anticompetitive restrictions resulting in higher prices. The AAA notes that given the serious risk of quantity restrictions effectively resulting in a price fixing arrangement, any such price ceiling, to be effective, must relate to a reasonable charge per passenger and charge per fare type. Due to the wide range of fares levied by airlines

¹ Tribunal, *Re Queensland Timber Board (1975)*, ATPR 40-005 at 17,122-17,123; ACCC, *Authorisation Guidelines*, March 2019, paragraph 12.25.

from extensive price discrimination, a 'ceiling' which allows the airlines to charge the highest fully flexible fare price point in an supply controlled market could result in extremely large average price increases (allowing an airline to charge the business class fare for all seats on a plane for an essential service). Due to the complexities of the issues involved the AAA would welcome an opportunity to discuss an appropriate price ceiling mechanism further.

- 1.10 With respect to the Capacity and Revenue Allocation Conduct concerning freight services, the AAA requires greater clarity on the exact scope of the conduct given that the demand for freight services, unlike passenger services, continues to be strong. Therefore, there is a material and substantive difference between freight and passenger services and a net benefit is required to be demonstrated.

The AAA strongly opposes the Collective Bargaining Conduct interim authorisation

- 1.11 The AAA *strongly opposes* the VA Application to the extent it seeks authorisation for airlines to engage in collective bargaining in negotiations with Australian airports (**Collective Bargaining Conduct**).

- 1.12 ***No public benefits flowing from the Collective Bargaining Conduct:*** With regard to, among other things, (i) the uncertain scope (ii) an assessment of the demand risk borne by both airports and airlines confronted by COVID-19; and (iii) practical considerations rendering any benefit from collective bargaining illusory; it is evident that there are no discernible public benefits arising from the Collective Bargaining Conduct interim authorisation.

- 1.13 ***Substantial public detriments associated with the Collective Bargaining Conduct:*** With regard to the concentrated nature of the Australian aviation market, the height of barriers to entry, and the significance of independent rivalry between Virgin and Qantas for the Australian travelling public and aviation sector more broadly, the Collective Bargaining Conduct imposes a material competitive detriment arising from the risk of anti-competitive information exchange and incumbent airlines in collective negotiations acting on an ability and incentive to deter new entry. Such competitive detriment is likely to endure for the medium to long term.

2 Preliminary comments on timing

- 2.1 By way of preliminary observation, the AAA and all of its members are disappointed that they have been given less than 48 hours to respond to the VA Application.
- 2.2 With regard to the adverse commercial impact upon AAA members of any grant of any urgent interim authorisation with respect to the Collective Bargaining Conduct, the AAA requires significantly more time to address matters raised. In the event that the ACCC proceeds to grant urgent interim authorisation each member of the AAA will have been denied procedural fairness and natural justice.
- 2.3 In respect of timing for the grant of the urgent interim authorisation, the AAA notes that the legal test for interim authorisation requires the ACCC to have regard to the following factors including (i) the extent to which interim authorisation will **change the market**, (ii) the **urgency** of the need for interim authorisation, and (iii) the possible **harm** to the applicant and other affected parties.²
- 2.4 The AAA accepts that there is a degree of urgency in the ACCC's interim authorisation relating to the Capacity and Revenue Allocation Conduct, as arguably each week or month with independent rivalry results in under-utilised operations resulting in larger losses and cessation of services.
- 2.5 The AAA however does not accept that there is any material urgency in airlines and airports negotiating the terms and conditions of access to aeronautical services or the payment terms of lease liabilities in the current environment.
- 2.6 In the first instance, there is no question that VA and all of its potential collective bargaining enjoy access to the full range of aeronautical services set out in Part 7 of the *Airports Regulation 1997* (Cth) under long term agreements with most, if not all, relevant airports. Where such arrangements do not exist at airports leased from the Commonwealth or Queensland Government, relevant provisions in airport leases ensure access although the terms and conditions of access are less clear.

² ACCC, *Authorisation Guidelines*, March 2019, paragraph 12.25.

- 2.7 VA in part seeks authorisation so it can collectively bargain about the use of airport infrastructure. Airline use of airport infrastructure is governed by a range of operational documents based not only on access agreements but also relevant safety, security and environmental law. Whilst arrangements need to be adjusted in the face of significant reductions in demand, frameworks are already in place to deal with these issues. If anything, in the face of temporary surplus airport infrastructure capacity, operational issues are likely to be more readily resolved.
- 2.8 More immediately, airlines are already in extensive discussions with airports on operational issues and payment issues and this process will not be meaningfully enhanced by authorisation. For example, despite major airports offering assistance to airlines in material respects including providing aeronautical services for free, Qantas has already informed major airports, on a unilateral take-it-or-leave-it basis, that they will only pay a certain portion of fixed lease liabilities for their VIP lounges and other operations at airports for a fixed period of time. Further, and contrary to VA's unsupported claim, the bulk of revenue airlines provide to airports is based on passenger throughput and are not fixed or semi-fixed, which as the ACCC is well aware is currently close to zero and is likely to remain so until domestic travel restrictions are removed.
- 2.9 Thus, there is no reason to expedite or hasten the consideration of the Collective Bargaining Conduct, and the AAA respectfully requests an extension of at least two weeks for the ACCC to properly consider these complex issues.

The time period for the authorisation

- 2.10 The authorisation sought is until 30 June 2021, which is inappropriately long given that the purpose of the authorisation is to assist with short-term issues caused by COVID-19.
- 2.11 The duration of time that the COVID-19 pandemic will affect travel is an evolving assessment associated with considerable uncertainty. Therefore, any interim authorisation of any aspect of the authorised conduct requires a short period of interim authorisation following which requests for extensions can be considered against the best available evidence.

- 2.12 Accordingly, a time period to 30 June 2020 is appropriate, proportionate and justified in striking the right balance between minimising sanctioned cartel conduct and tailoring a proportionate response to a significant decline in demand.

3 Uncertain scope

- 3.1 The AAA has serious concerns with the scope of the Collective Bargaining Conduct authorisation application.
- 3.2 The striking vagueness of its application is evident from the face of the VA Application, which seeks authorisation to engage in: “*Joint negotiations (including collective bargaining) with airports in relation to (but not limited to) infrastructure use and fee relief*”.³
- 3.3 In particular, unlike most other applications of this type, there is no explicit ruling out of boycott behaviour.
- 3.4 Nowhere in the VA Application does VA seek to explain or impose any limits upon the meaning of ‘airports’, ‘infrastructure use’ and ‘fee relief’ upon which the interim authorisation would apply. On its face, it is difficult to conclude whether the authorisation would apply only to aeronautical fees (a variable cost to the airline) or leasing fees (a fixed cost to the airline).
- 3.5 The scope of the Collective Bargaining Conduct authorisation is unclear and uncertain to such a degree that the interim authorisation, if allowed, would be incapable of being authorised by the ACCC. An authorisation that is so unclear that it is incapable of being workable or effectively authorised by the ACCC is self-evidently a material public detriment.
- 3.6 Whilst the public detriments of such a vague, uncertain, unenforceable and unworkable Collective Bargaining Conduct authorisation are self-evident, the AAA briefly sets out below the perverse and problematic implications of this broad reaching Collective Bargaining Conduct authorisation application.

Unclear term 1: Airports

- 3.7 This authorisation would allow Virgin, Qantas and other airlines to collectively negotiate with over 150 airports in Australia with RPT services which are represented by the AAA.
- 3.8 The vast majority of those airports do not wield *any* market power and in fact many do not operate on a commercial basis with or without the COVID-19 disruptions. It is the long standing view of successive Australian Governments that only Sydney, Melbourne, Brisbane and Perth have sufficient market power to warrant ACCC monitoring. These second and third tier airports do not have market power in the *absence* of COVID-19, and will clearly be confronting near fatal reductions in revenue with the current upheaval in the aviation sector.
- 3.9 With the Collective Bargaining Conduct authorisation, these regional or non-capital city airports will be under even greater pressure to oblige any requests by airlines (which comprise either their sole, or one of two customers) be it for rent relief or other matters.
- 3.10 With such a problematically broad scope of application, the AAA considers that airlines will use Collective Bargaining as a stand-over tactic against tier two and tier three airports, resulting in suppression of aeronautical charges and long-term underinvestment in critical infrastructure assets giving rise to material public detriment, including diversion of council resources from other essential services such as public health. The likelihood of such behaviour is borne out by various submissions made by regional airports to the recent Productivity Commission inquiry.

Unclear term 2: Infrastructure use

- 3.11 The first ill-defined subject matter for which airlines could lawfully negotiate terms and conditions with airports relates to 'infrastructure use'.
- 3.12 This term is so broad as to be devoid of meaning. 'Infrastructure use', on its face, applies to all services provided by an airport to an airline with no limitation whatsoever or basis for such a broad, carte blanche right to collectively bargain with airports. It would plainly incorporate:

³ *Virgin Australia*, Application for Authorisation – COVID19 airline industry impact, April 2020, page 4.

- 3.12.1 access to all aeronautical infrastructure used by airlines in RPT and freight aeronautical services including the airfield, terminal and related aeronautical assets, disturbing bilateral negotiations struck in accordance with the Federal Government's light-handed regulatory regime;
- 3.12.2 use of VIP lounges leased to airlines within terminals, and any other 'use' of any facility at an airport;
- 3.12.3 use of non-aeronautical land and assets by airlines including landside access services, retail premises and other non-aeronautical services such as hangers and freight and catering facilities.

- 3.13 The breadth of ‘infrastructure use’ is plainly so uncertain and unclear so as to be practically unworkable, and for this reason alone the ACCC must reject the VA Application.

Unclear term 3: Fee Relief

- 3.14 Another ill-defined term is the free-floating reference to ‘fee relief’. The VA Application appears to bundle a range of concepts under this term including any negotiation relating to the deferment, reduction or variation to an airline’s obligation to pay for their use and/or occupation of an Australian airport’s facilities.
- 3.15 Again this concept would on its face apply to all agreements between an airport and an airline involving the payment of any fees from an airline to an airport including the matters listed at paragraph 3.12.
- 3.16 This authorisation would conceivably allow airlines, in concert, to revisit pricing agreements, which extends far beyond the intended scope of collective bargaining to address COVID-19 costs. In the absence of any case for such an egregious interference with voluntary arrangements met between two commercially sophisticated parties, such a broad extension of cartel law immunity must be rejected.

4 No Public Benefits

Legal test to be applied by the ACCC

- 4.1 The ACCC must assess the options for achieving claimed benefits and appropriate weighting be given to future benefits not achievable in any other less anti-competitive way. In *Re Sea Swift*, the Tribunal stated that:⁴⁴

A public benefit arises from a proposed acquisition if the benefit would not exist without the acquisition or if the acquisition removes or mitigates a public detriment that would otherwise exist. If a claimed public benefit exists, in part, in a future without the proposal, the weight accorded to the benefit may be reduced appropriately.

⁴⁴ Application by Sea Swift Pty Limited [2016] ACompT 9 at [42].

- 4.2 In this case any collective negotiation ‘benefit’ will be realised in any event, in the future without the authorisation because:
- 4.2.1 Federal and State governments *have already* implemented specific regulatory obligations and guidance for commercial tenancy rent relief issues in response to COVID-19 obliging airports to proactively negotiate with all tenants on rent relief issues. This express regime should not be superseded or extended by a ‘backdoor’ authorisation application;
- 4.2.2 Airports *are already* addressing payment issues with customers, including by waiving fees for aeronautical services and actively engaging in rent relief discussions with airline and non-airline airport tenants.
- 4.2.3 Airlines *have already* engaged in such negotiations. Qantas, for instance, has *concluded* its final position on these issues, by unilaterally determining what fees and lease payments it will make.
- 4.3 For these reasons, the claimed benefits, if any, do not arise solely from authorisation.

Claimed benefits from collective negotiations must be likely

- 4.4 The ACCC, in assessing claimed public benefits, should determine that such benefits are a real chance, and not a mere possibility of eventuating. In this matter the claimed benefits are at best speculative and are practically theoretical.
- 4.5 The ACCC recognised in its decision to refuse a request for collective bargaining at Perth Airport in 2010 that given the *voluntary* nature of collective bargaining arrangements benefits will generally only arise if both sides are likely to benefit from collectively negotiating an outcome. Further the ACCC concluded that in the absence of a clear benefit to Perth Airport it would not likely engage in collective negotiations.⁵
- 4.6 In this matter VA has not put forward any material to substantiate why an airport would voluntarily enter into collective bargaining arrangements. Accordingly, there is no factual basis for the ACCC to determine that it is likely that an airport would do so and accordingly logically there are no benefits arising from the application.

COVID-19 affecting airports, airlines and other aviation sector businesses

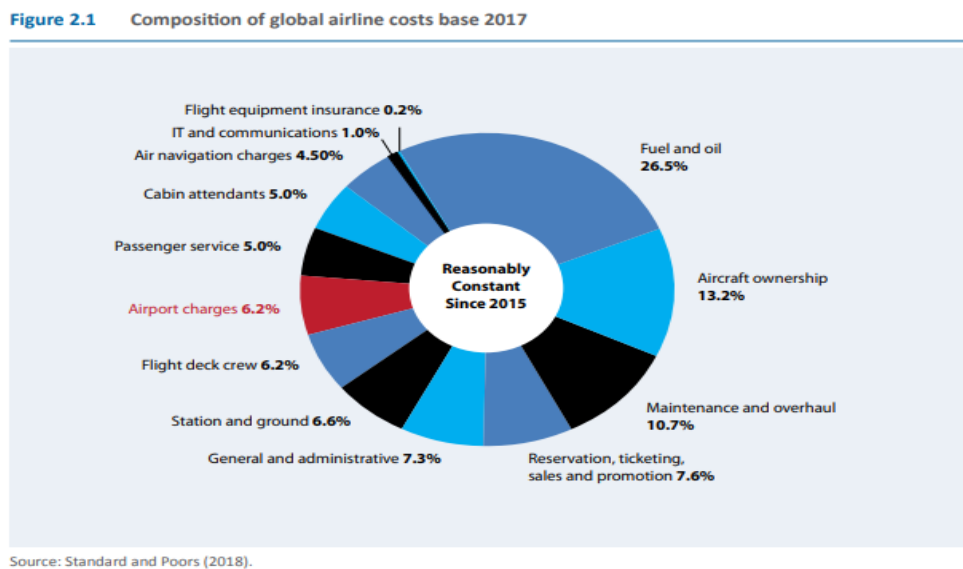
- 4.7 A central theme running through VA's Application is its appeal to the reduction in aeronautical traffic associated with the COVID-19 outbreak to justify *urgency* of and the *necessity* for its interim authorisation application for both the Capacity and Revenue Allocation Conduct and the Collective Bargaining Conduct.
- 4.8 Such submissions give the incorrect impression that airlines alone are facing disruption resulting from COVID-19.
- 4.9 The ACCC is deeply familiar with the supply chain for the provision of aviation services and understands that businesses in the aviation sector, including airlines, airports, fuel operators, ground handling service providers, airport security providers and others must necessarily minimise costs during this unprecedented slump in demand resulting from the COVID-19 pandemic.
- 4.10 Specifically in relation to airports, this is because the demand for airport services is a *derived demand*. That is, COVID-19 imposes deleterious commercial consequences for *airports*, as well as airlines. As the ACCC will be aware from its airport monitoring activities, airports derive around half of their revenue from aeronautical charges which largely depend on passenger throughput (small amounts are derived from freight and general aviation movements), as does retail and ground access revenues. Whilst the AAA has not had an opportunity to canvass its members on the revenue that has been lost from the effective shut down of the aviation industry, we would expect it to be about 75 per cent and up to 100 per cent for airports with substantial lease income as is the case for many regional airports.
- 4.11 Further, airports have no ability to redeploy underutilised capital which is sunk, immobile and stranded, and their capacity to reduce cost by laying off staff is far more limited than it is for airlines.
- 4.12 In this respect, the AAA encourages the ACCC to approach its assessment of the Collective Bargaining Conduct from the perspective of the travelling public, and the perspective of all aviation sector enterprises involved in the provision of aeronautical

⁵ ACCC, Application for collective bargaining by Hertz and others at Perth Airport CB0000143, 16 July 2010 <https://www.accc.gov.au/system/files/public-registers/documents/D10%2B3646162.pdf>

services. The aviation sector is more than airlines, and a strong *competitive* and *efficient* aviation sector is demonstrably in the public interest.

- 4.13 Airport costs are a small proportion of total airline costs. For example, Standard and Poor's, relying on IATA data for global airlines estimated that the share of airport charges in total airline costs was around 6.2%

Figure 1 – Composition of global airline costs base 2017, sourced from page 12 of the AAA's September 2018 submission to the Productivity Commission's Airports Inquiry



- 4.14 The VA Application asserts that airlines are exposed to substantial 'fixed' cost expenditures attributable to operations at airports such as leases for VIP lounges and other such cost items. VA contend that exposure to these 'fixed' costs, unaffected by passenger demand during a time of sharp declines in revenue, exposes airlines to grave commercial risks to justify its Collective Bargaining Conduct application.
- 4.15 Yet in the cost breakdown provided in Figure 1, such costs are not sufficiently material to justify independent identification with airline lease costs at airports not appearing as a standalone integer. It is inaccurate for airlines to contend that 'fixed cost' lease expenditures comprise a material component of their total cost base.

Lease payments are currently an airport's only main source of income

- 4.16 Saddled with substantial fixed costs, *the only remaining source of revenue* for an airport during COVID-19 includes the lease payments to be paid by airlines and other

commercial tenants. The AAA's airport members are in the process of negotiating variations to these payment terms and conditions.

- 4.17 Therefore, Collective Bargaining Conduct by airlines over these payments has the potential to substantially suppress the quantum and delay the timing for payment which will jeopardise one of the only sources of income for over 100 airports around Australia. This is likely to result in significant financial hardship compared with the immaterial benefit of reduced lease payments in the hands of airlines which are at the forefront of the Government's airline subsidisation policy.

Airlines are not an airport's sole tenants

- 4.18 Airports have many other tenancies on the airport including terminal, landside access, car rental and business park tenancies.
- 4.19 Accordingly, airports are addressing the implication of COVID-19 across all tenancies and in the context of airports needing to recover fixed costs, collective bargaining by airline tenants may result in non-airline tenants bearing a disproportionate share of relevant costs. Put another way, any collective bargaining authorisation will result in non-airline tenants not receiving the same level of rent relief as what the airlines will demand.

No basis to single-out airports

- 4.20 There is no probative reason why the Collective Bargaining Conduct by airlines should only relate to services provided by airports. On VA's logic, no matter how immaterial that cost is or the significance of the lease as a form of income, could justifiably become the target of a Collective Bargain Conduct interim authorisation application. For example, the fuel operator supply chain includes a range of well-resourced petroleum companies which provide a significant service to airlines at airports yet no authorisation to collectively bargain in relation to these services has been sought. Alternatively, why should airlines be able to negotiate collectively with airports for office accommodation but not other landlords from whom they source premises in similarly desirable locations, say just outside the airport boundary or in central business districts. It is not apparent why airports have been 'singled-out'.

- 4.21 In the absence of any reason to single-out airports or a principled case with demonstrable public benefits that outweigh clear competitive detriment, the Collective Bargaining Conduct interim authorisation application must be rejected.

Practical considerations rendering any benefit from Collective Bargaining illusory

- 4.22 The overarching rationale for collective bargaining is for a group of buyers to collectively negotiate access to the *same* facility or product on the *same* terms. Classic examples include agricultural co-operatives negotiating with a common supplier, or a group of miners accessing a common user railway or port, or indeed the authorisation the Commission has granted, with airport support, for international airlines to negotiate through the Board of Airline Representatives of Australia.
- 4.23 This rationale is irreconcilable with the VA Collective Bargaining Conduct application which appears to relate to negotiations about ‘fixed’ costs faced by an airline from operations at a particular airport.
- 4.24 Those ‘fixed’ costs appear to include the cost of any lease for an airline’s VIP lounge that is leased by an airport to an airline for a *particular airline’s exclusive possession*. Accordingly, it is futile and incongruous, for the negotiation of deferral or variation of payment for that lease in the context of COVID-19 for an *exclusive* asset to be undertaken by way of *collective* agreement. For example, there is no basis for Alliance to rationally enter into collective negotiations, in conjunction with Virgin, concerning the terms of deferred payment for Virgin’s exclusive VIP lounge lease at Melbourne Airport.
- 4.25 In the absence of a commercial incentive to devote resources to negotiating the terms of a lease governing a competitor’s *exclusive* VIP lounge on behalf of that competitor, there is no plausible benefit resulting from interfering with a bilateral contract, for what is a *single-user* facility.
- 4.26 Further, VA currently has bilateral agreements in place with all major airports and has in any event ceased all operations other than between Melbourne and Sydney on a limited basis, and Qantas has already unilaterally imposed its terms of its ongoing use of airport facilities during the COVID-19 period. Given that the VIP lounges and other ‘fixed’ costs faced by airlines at airports are not multi-user facilities, there is no basis to convert a bilateral agreement for exclusive rights to a collective agreement.

- 4.27 Further, collective bargaining does not compel an airport to engage in such bargaining with a group of airlines. Accordingly, in the absence of a clear incentive for an airport to engage in such conduct, it is unlikely that any such collective bargain will eventuate and there is therefore no 'real chance' that any public benefits can arise.

Converting bilateral negotiations to collective negotiations unnecessarily interferes with voluntary bargains

- 4.28 The authorisation, if allowed, will result in an enduring change in the competitive dynamics between airports and airlines. The Collective Bargaining Conduct authorisation applies until 30 June 2021 (a 14 month period), by which time many agreements may possibly be substantially renegotiated with airlines able to overtly collude on price and non-price terms, including those which might reduce the likelihood of new airline entry. Such outcomes would be especially damaging in circumstances where VA fails and Qantas has an effective domestic monopoly.
- 4.29 If allowed, this period of Collective Bargaining Conduct, will radically depart from the light handed framework devised and implemented by the Federal Government. The light-handed regime relies upon the benefits flowing from commercially sophisticated parties reaching mutually agreed, voluntary, negotiated outcomes in *bilateral* negotiations. The ACCC must see the disruption of well-established public policy upon which the investment of tens of billions of dollars of fixed capital is based as a significant detriment irrespective of its own views of that policy.
- 4.30 Such bilateral agreements expressly contemplate and endorse price differentiation reflective of differences in costs, benefits and flexibility associated with tailored contracts designed for each particular airline. The light handed framework, predicated on bilateral voluntary bargaining, in conjunction with sufficient regulatory oversight from ACCC monitoring and frequent Productivity Commission reviews has been heralded as a key virtue and success of consistent improvements in airport service quality and efficient investment accommodating large increases in demand and innovation over the last decade.
- 4.31 However, the Collective Bargaining Conduct, if authorised, would potentially irreparably change the course of these negotiations. Airlines, able to collude on price and non-price terms, would collectively wield monopoly power in negotiations with

airports. The collective bargaining outcomes would conflict with the objective of cost based pricing, efficient price discrimination, and the Australian Government's express direction to remove anticompetitive 'no less favourable' clauses designed to protect an airline's incumbency.⁶ The net result would be a substantial transfer of rents from airports to airlines (who have no incentive to pass on cost reductions to customers due to extensive price discrimination).

5 Public Detriments

Irreparable harm to competition in a duopoly

- 5.1 The ACCC is well versed on the perils of allowing competitors in highly concentrated sectors, sheltered from high barriers to entry, to exchange confidential information, or tacitly or overtly collude on price or non-price terms. Indeed, Adam Smith famously stated that such agreements inevitably 'ends in a conspiracy against the public, or in some contrivance to raise prices.'⁷
- 5.2 As noted in the Authorisation guidelines, it is for this reason that the applicant, in bearing the onus to persuade the ACCC that public benefits outweigh established competitive harm from collusive conduct that is usually prohibited on a per se basis, presents a compelling case.⁸ Accordingly, consistent with these principles, there must be a compelling case presented by Virgin to justify the urgent interim authorisation of the Collective Bargaining Conduct.
- 5.3 Importantly, this case must be *independent* of the case justifying Capacity and Revenue Allocation Conduct to efficiently allocate capacity to ensure essential RPT and freight aviation services are delivered efficiently during the period of the COVID-19 emergency.
- 5.4 In the absence of any stand-alone arguments put forward to support the Collective Bargaining Conduct authorisation to justify the interim authorisation, it is clear that

⁶ Australian Government, *Australian Government response to the Productivity Commission Inquiry into the Economic Regulation of Airport*, December 2019, p7.

⁷ A Smith, *The Wealth of Nations*, Book IV Chapter VIII, v.11, p. 660, paragraph 49.

the Collective Bargaining Conduct authorisation application is uncertain, broad, unjustified, opportunistic and deleterious to competition with no countervailing material public benefit.

Long term view of competition

- 5.5 Competitive detriment arising from the Collective Bargaining Conduct must be assessed from the perspective of the *competitive process*. This process is iterative. It unfolds over time. Market participants are constantly evaluating and re-evaluating competitors. In this assessment, uncertainty about the future plans, capabilities or strategies of a competitor is the very essence of *independent rivalry* or vigorous ‘jockeying’ for sales.⁹
- 5.6 Accordingly, the AAA considers the assessment on competition must be upon the medium-to-long run, which, in aviation, given lead times and other barriers to commencing a domestic Australian aviation enterprise, is at least a seven to ten year window. A short term effect readily corrected by market processes, accordingly, must be dismissed.

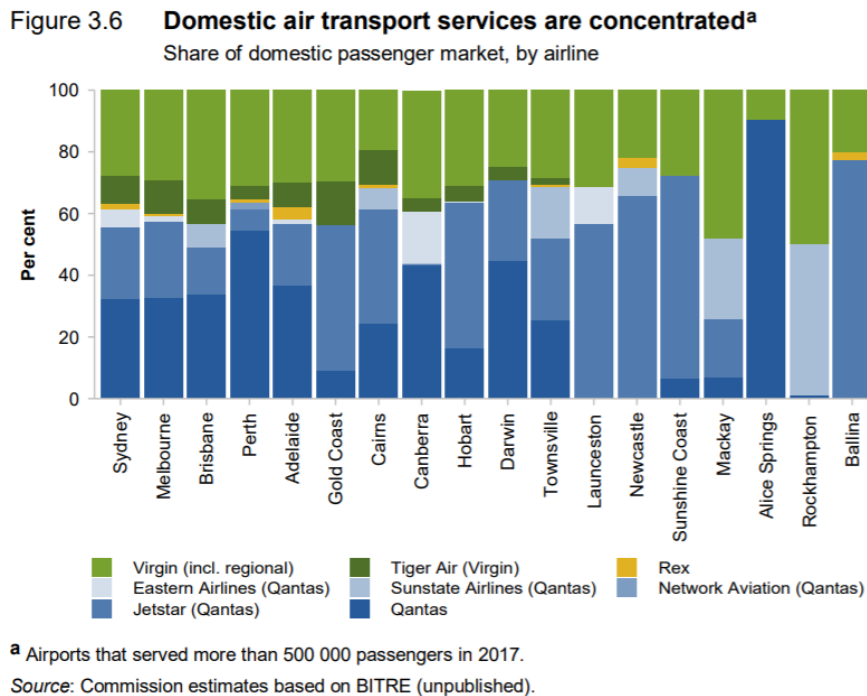
Market structure

- 5.7 A duopoly market has largely prevailed in Australian aviation since the collapse of Ansett in 2001, and for most of the period before then. In such a highly concentrated sector, the significance of independent rivalry between Qantas and Virgin is critical for enduring domestic aviation competition both in the immediate, and more importantly into the long term.
- 5.8 The extremely high levels of market concentration in the Australian domestic aviation, with Qantas and Virgin commanding approximately 60/40 share of the market respectively is provided in the graphic below.

⁸ ACCC, *Authorisation Guidelines*, March 2019, paragraph 12.25.

⁹ *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1989] HCA 6; 167 CLR 177 at [24].

Figure 2: Productivity Commission Inquiry Report into the Economic Regulation of Airports
June 2019 at page 107- <https://www.pc.gov.au/inquiries/completed/airports-2019/report/airports-2019.pdf>



5.9 In highly concentrated duopolies with high barriers to entry, there is a strong incentive and ability for incumbents to engage in parallel or collusive conduct if given any encouragement or opportunity. This is because the benefits of the cartel are large, and the risk of a third party or entrant ‘cheating’ on the cartel are minimal due to the limited number of players required to coordinate. Accordingly, the ACCC must be highly critical of the commercially sensitive information able to be conveyed between Qantas and Virgin in Collective Bargaining with airports, and must recognise that there is a considerable risk of anti-competitive information sharing and parallel conduct directed at frustrating entry.

Anti-competitive information sharing

5.10 Given the risk of anticompetitive information exchange and/or tacit sharing of negotiation strategies in joint negotiations with airports, it is telling that the VA Application does not refer to *any* information protocols and/or ring-fencing processes to mitigate this appreciable risk.

- 5.11 Any information shared between the airlines would be known well beyond the expiration of *any* urgent interim collective bargaining approval. This is the case whether the approval is ‘interim’ or ‘final’. Information sharing is the first step in any collective bargaining that might be undertaken. Without an effective information sharing protocol, and the VA Application does not have one, airlines could participate in the early stages of a collective bargain, obtain commercially sensitive information about their competitors irrespective of whether the collective bargain completes.
- 5.12 Accordingly, to the extent that the ACCC is considering approving the collective bargaining interim authorisation, contrary to the AAA’s strong opposition, the risk of anti-competitive information sharing facilitating cartel conduct outside the scope of the interim authorisation is a significant anti-competitive detriment that must be managed *before* any interim authorisation is granted. This is not a matter that can be deferred for the ‘final’ authorisation decision as the anti-competitive harm will have crystallised the moment Qantas and Virgin are permitted to collusively negotiate with airports. On this point, the AAA would welcome the opportunity to have further input into any information sharing protocol considered necessary by the ACCC to inform ring-fencing principles and other parameters concerning the restrictions applying to competitively sensitive information.

Incumbent airlines acting in concert to deter new entry

- 5.13 An additional anticompetitive detriment associated with the Collective Bargaining Conduct relates to the heightening of barriers to entry for new entrant airlines that are excluded from collective negotiations with *incumbents*. In this sense, the airline incumbents, in joint negotiations, have a strong incentive and ability to act in concert to ‘shut-out’ a new entrant.
- 5.14 For example, at Sydney Airport, the Federal Government, prompted by issues related to the COVID-19 crisis, has imposed a temporary restriction on the allocation of peak period slots to favour *incumbent* airlines in accordance with a ‘historical precedence’ measure. This restriction favours incumbent airlines vis-à-vis new entrants, and erects a barrier to entry for new entrant international airlines in entering the Australian market as a peak-slot at Sydney airport is often a necessary precondition for a viable international service to Australia. The Collective Bargaining Conduct, if authorised, would enhance the ability of incumbent airlines to lobby for an extension

to the slot management restrictions at Sydney Airport, heightening entry barriers and lessening competition in the Australian aviation sector.

- 5.15 In conclusion, the enduring risk to competition in the Australian duopoly aviation sector reinforces the haphazard nature of the Collective Bargaining Conduct sought to be authorised in the VA Application and the egregious unintended anti-competitive consequences of the ACCC addressing the matter with unwarranted urgency.