



## Australian Government

### International Air Services Commission

#### DECISION

**Decision:** [2004] IASC 201  
**The Routes:** France Route 3 (New Caledonia), Fiji, Vanuatu  
**The Applicant:** Virgin Blue Airlines Pty Ltd  
(ACN 090 670 965) (Virgin Blue)  
**Public Register File:** IASC/APP/200404

#### 1 The application

1.1 On 8 March 2004, Virgin Blue applied to transfer to Pacific Blue Airlines (Australia) Pty Ltd (ACN 097 892 389) (Pacific Blue Australia) capacity allocated to Virgin Blue on the France Route 3 (New Caledonia), Fiji and Vanuatu routes under determinations issued by the Commission. Determination [2003] IASC 110 allocated 1,260 seats per week on the Fiji route, [2003] IASC 111 allocated 720 seats per week on the Vanuatu route and [2003] IASC 129 allocated 0.75 units of capacity on France Route 3 (New Caledonia).

1.2 Virgin Blue stated that the transfer was sought because the Board of Virgin Blue Holdings had decided that it would be in the best interests of the business to conduct the international operations through a separate entity being Pacific Blue Australia. It was stated that this was a more appropriate arrangement for various reasons, including in terms of brand management and management of the separate set of contractual and regulatory relationships required for international operations. It was submitted that this was not a transfer which encourages speculative activity. Virgin Blue noted that a separate New Zealand-based company, Pacific Blue Airlines (New Zealand), had been established to operate trans-Tasman services. Pacific Blue Australia is a sister company proposed to conduct operations between Australia and destinations other than New Zealand. There were no significant changes to the business plan provided with Virgin Blue's original application to the Commission which was built around the operational airline expertise currently within what is now the Virgin Australia Holdings Limited Group. Some updated material was provided on a confidential basis.

1.3 The Commission published a notice on 11 March 2004 inviting submissions about the application. No submissions were received.

1.4 All public material supplied by the applicant is filed on the Register of Public Documents. Confidential material provided by the applicant is filed on the Commission's confidential register.

#### 2 Commission's assessment

2.1 Section 25 of the *International Air Services Commission Act 1992* (the Act), states that the Commission must, having conducted a review to decide a transfer application, make a decision varying the determination concerned in a way that gives effect to the variation requested. However, the Commission must not do so if it is satisfied that the allocation, as varied, would not be of benefit to the public.

2.2 Paragraph 4 and paragraph 10 of the Minister's policy statement contain the criteria relevant to this application. Under paragraph 4, the use of Australian entitlements by a carrier that is reasonably capable of obtaining the necessary approvals and of implementing its proposals is of benefit to the public. Paragraph 10 makes it clear that approvals which encourage speculative activity would not be of benefit to the public. Further, except in exceptional circumstances, approvals should not be given that would have the effect of allowing a carrier that has never exercised an allocation to transfer that allocation, or has only exercised it for less than a reasonable period. Six months would usually represent a reasonable period. The explanatory statement accompanying the policy statement reinforces that it is the Government's intention in this provision to guard against speculative activity which could result if carriers are allowed to transfer capacity without having used it for a reasonable period.

2.3 In relation to paragraph 4, the Commission wrote to the Department of Transport and Regional Services on 24 March seeking the Department's advice as to whether it considered Pacific Blue Australia to be reasonably capable of obtaining the approvals necessary to operate. The Department responded on 29 March advising that it believed the airline was capable of doing so.

2.4 The Commission considers that Pacific Blue Australia is capable of implementing its proposals. These proposals are identical to those advanced by Virgin Blue and there is no change to the fundamentals of the business plan as proposed originally.

2.5 Turning to the paragraph 10 provisions, the Commission notes the Minister's guidance concerning transfer applications. The Minister's policy statement provides that the Commission should take into account that approvals which encourage speculative activity would not be of benefit to the public.

2.6 The Commission notes that while Virgin Blue has not used the capacity, it considers that Virgin Blue has had every intention of doing so, and was and remains capable of doing so. The Commission also notes that Virgin Blue is not in breach of any conditions of its determinations, observing in particular that the airline still has considerable time remaining before it is required to fully utilise its capacity (November 2004 or later). Further, Virgin Blue had expressed in earlier correspondence that it did not intend to commence services until at least mid-2004. The Commission concludes that the non-use of the capacity thus far is entirely to be expected. It would, in the Commission's view, be unreasonable to conclude, simply from the fact that the capacity has not so far been used, that Virgin Blue had a speculative intention when seeking the original allocation of capacity. The Commission believes, nevertheless, that any approval of the proposed transfer should contain conditions to discourage speculative activity and thereby assure public benefit. To this end, the Commission proposes a condition that the allocation of the transferred capacity is conditional upon Pacific Blue Australia remaining

for a reasonable period, except with the prior approval of the Commission, a wholly owned subsidiary in the Virgin Blue Holdings Limited Group.

2.7 Additionally, the Ministers policy statement provides that where a carrier has never used capacity or has done so only for a short period (less than six months) transfers in such instances should be approved only in exceptional circumstances. As Virgin Blue has not exercised its allocations of capacity under any of the determinations which are the subject of this application the Commission has therefore to also consider whether there are exceptional circumstances.

2.8 Virgin Blue has provided an explanation of the application which is sound and reasonable in the experience of the Commission. Importantly, the proposed transfer is between two companies within the Virgin Blue Holdings Limited group of companies which have demonstrated their capability to successfully undertake airline operations. The Commission therefore finds that Virgin Blue's approach of establishing separate operating entities for international operations satisfies the exceptional circumstances provisions of the Minister's policy statement.

2.9 The Commission finds, in accordance with the requirements of Section 25 of the Act, that there would be no reduction in public benefit through allowing the transfer on the basis that Pacific Blue Australia remains a wholly owned subsidiary within the Virgin Blue Holdings Limited Group. The Commission will therefore approve the transfer on the basis that any structural change to the current ownership and control arrangements pertaining to Pacific Blue Australia prior to 31 March 2005 will not be permitted without the prior approval of the Commission. The Commission will also retain in the determinations the existing provisions concerning changes to ownership and control.

### **3 Decision [2004] IASC 201**

3.1 In accordance with section 25 of the Act, the Commission varies Determinations [2003] IASC 110, [2003] IASC 111 and [2003] IASC 129 as requested by Virgin Blue by transferring from Virgin Blue to Pacific Blue Australia the allocations of capacity made to Virgin Blue under those determinations but with each such determination being varied by adding the following condition " until 31 March 2005, the allocation of capacity hereunder is conditional upon Pacific Blue Australia remaining, except with the prior approval of the Commission, a wholly owned subsidiary in the Virgin Australia Holdings Limited Group".

Dated: 1 April 2004

John Martin  
Chairman

Michael Lawriwsky  
Member

Stephen Lonergan  
Member