



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination: [2013] IASC 140
Renewal of: [2009] IASC 133
The Route: Thailand
The Applicant: Virgin Australia Airlines (SE Asia) Pty Ltd (Virgin Australia), formerly Pacific Blue Airlines (Australia) Pty Ltd (ABN 79 097 892 389)
Public Register File: IASC/APP/201338

The Commission makes a fresh determination allocating Virgin Australia 3.15 B747 equivalent units of capacity per week and permitting joint services with Etihad and Air Berlin on the Thailand route.

1 The application for renewal

1.1 On 11 November 2009, the Commission issued Determination [2009] IASC 133 (the Determination), allocating to Virgin Australia the equivalent of 3.15 B747 equivalent units of capacity per week in each direction on the Thailand route.

1.2 The Determination was originally allocated to Pacific Blue Airlines (Australia) Pty Ltd and was varied by Decision [2011] IASC 205 to permit Pacific Blue Australia to provide services jointly with V Australia. Subsequently, Resolution [2011] IASC R16 recognised the name change of Pacific Blue Australia to Virgin Australia Airlines (SE Asia) Pty Ltd. The Determination was further varied by Determinations [2013] IASC 201 and [2013] IASC 221 to permit Virgin Australia to provide joint services with Etihad and Air Berlin.

1.3 Under section 17 of the *International Air Services Commission Act 1992* (the Act), the Commission must start its consideration of the renewal of a determination at least 12 months before the expiry of the determination. The Determination expires on 10 November 2014. In view of this, the Commission sent, on 4 November 2013, a letter to Virgin Australia inviting it to apply to the Commission if it wished to renew the Determination. On 5 November 2013, Virgin Australia applied for a renewal of the Determination.

1.3 The Commission published a notice on 5 November 2013, in accordance with sections 12 and 17 of the Act, inviting other applications about the application. No other applications were received.

1.4 All material supplied by the applicant is filed on the Commission's website (www.iasc.gov.au).

2 Relevant provisions of the air services arrangements

2.1 The Australia – Thailand air services arrangements allow the designated airlines of Australia to enter into code sharing arrangements as the non-operating airline with any airline(s) of third countries, which has appropriate authorisation from both Contracting Parties, with up to 40 weekly services in each direction. In addition, the designated airlines of Australia may use any unused own operated passenger frequency entitlements for third country code share services.

2.2 Currently, there are the equivalent of 6.25 B747 own operated weekly services available for allocation (which may be converted into additional third country code share services on the basis of one unused B747 equivalent service equals one third country code share frequency weekly).

3 Delegate's assessment

3.1 In accordance with section 27AB of the Act and regulation 3A of the International Air Services Commission Regulations 1992, the delegate of the Commission may consider Virgin Australia's application. (For purposes of this determination, all references to the Commission include the delegate of the Commission).

3.2 In considering an application for renewal of a determination under section 8 of the Act, the Commission must make the same allocation of capacity as the original determination unless the Commission is satisfied that the allocation is no longer of benefit to the public. In assessing the benefit to the public of an allocation of capacity, the Commission must apply the criteria set out for that purpose in the policy statement made by the Minister under section 11 of the Act.

3.3 Under paragraph 6.2 of the Minister's Policy Statement (No. 5) of 19 May 2004 (the Policy Statement), in circumstances where there is only one applicant for allocation of capacity on a route, only the criteria in paragraph 4 are applicable. Paragraph 4 provides that the use of entitlements by Australian carriers under a bilateral arrangement is of benefit to the public unless such carriers are not reasonably capable of obtaining the necessary approvals to operate on the route and are not reasonably capable of implementing their applications.

3.4 Under paragraph 8.1 of the Policy Statement, there is a presumption in favour of the carrier seeking the renewal which may be rebutted by applying the following criteria, where the start-up phase has concluded:

- whether the carrier seeking renewal has failed to service the route effectively; and
- whether the use of the capacity in whole or in part by another Australian carrier that has applied for the capacity would better serve the public having regard to the criteria set out in paragraphs 4 and 5.

3.5 The Commission notes that:

- there are no other applicants seeking capacity on the route;

- Virgin Australia is an established international carrier and is therefore reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its application; and
- there is no evidence that Virgin Australia has failed to service the route effectively.

3.6 In these circumstances, the Commission concludes that the renewal of Determination [2009] IASC 133 would be of benefit to the public.

3.7 Further, as part of the renewal, Virgin Australia has requested continued permission for the capacity to be used to provide services jointly with Etihad and Air Berlin.

3.8 Subsection 15(1) of the Act allows a determination to include such terms and conditions as the Commission thinks fit. Subsection 15(2) provides, in part, that the determination must include a condition stating the extent (if any) to which any such carrier may use that capacity by providing joint international air services with another Australian carrier or any other person.

3.9 Under paragraph 3.6 of the Policy Statement, where capacity that can be used for code share operations is available under air services arrangements, including where foreign airlines have rights to code share on services operated by Australian carriers, the Commission would generally be expected to authorise applications for use of capacity to code share. However, if the Commission has serious concerns that a code share application (or other joint service proposal) may not be of benefit to the public, it may subject the application to more detailed assessment using the additional criteria set out in paragraph 5 (whether the application is contested or not). Before doing so, the Commission will consult with the Australian Competition and Consumer Commission (the ACCC).

3.10 The Commission does not have serious concerns that the continued use of the capacity on the Thailand route in joint services with Etihad and Air Berlin may not be of benefit to the public. The Commission considers it is unlikely that Etihad and Air Berlin would compete with Virgin Australia on the route absent the code sharing arrangement. In this regard, it did not consult the ACCC on the matter and does not propose to subject the application to more detailed assessment under paragraph 5 of the Policy Statement.

3.11 The Commission notes that it has previously allocated capacity to Virgin Australia to be used in joint services with other airlines on the route in the interests of providing commercial and operational flexibility, consistent with the Act. The Commission considers that including this condition is consistent with the object of the Act and the Policy Statement, both of which make it clear that the Commission should have regard to the need for Australian airlines to be able to compete effectively with one another and with foreign airlines.

3.12 In the interests of providing commercial and operational flexibility, consistent with requirements of the Act, the Commission authorises the use of the capacity in joint services with Etihad and Air Berlin.

3.13 Consistent with paragraph 3.7 of the Policy Statement, in relation to joint services, the Commission includes a condition requiring Virgin Australia to take all reasonable steps to ensure that passengers are informed, at the time of booking, of the carrier that is actually operating the flight.

3.14 Virgin Australia advised the Commission that from mid-January 2013 all Virgin Australia flights would be operated under the VA designator and that once this occurred code share operations between Virgin Australia entities would no longer be required. Accordingly, in this determination the Commission has removed conditions contained in Determination [2009] IASC 133, as varied by Decision [2011] IASC 205, allowing for joint services and code sharing between Virgin Australia entities.

4 Determination for renewal of Determination [2009] IASC 133 allocating capacity on the Thailand route to Virgin Australia ([2013] IASC 140)

4.1 The Commission's delegate makes, in accordance with section 8 of the Act, a determination in favour of Virgin Australia Airlines (SE Asia) Pty Ltd (Virgin Australia), allocating 3.15 B747 equivalent services per week in each direction between Australia and Thailand under the Australia – Thailand air services arrangements.

4.2 The determination is for five years from 11 November 2014.

4.3 The determination is subject to the following conditions:

- Virgin Australia is required to fully utilise the capacity;
- the capacity may be used by Virgin Australia to provide services jointly with Etihad in accordance with;
 - the code share agreement between Virgin Australia and Etihad dated 26 August 2010; or
 - any subsequent code share agreement between Virgin Australia and Etihad, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- the capacity may be used by Virgin Australia to provide services jointly with Air Berlin in accordance with;
 - the code share agreement between Virgin Australia and Air Berlin dated 28 June 2013; or
 - any subsequent code share agreement between Virgin Australia and Air Berlin, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under the code share agreements with Etihad and Air Berlin, Virgin Australia must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of booking. Nothing in this determination exempts Virgin Australia from complying with the Australian Consumer Law;
- under the arrangements with Etihad and Air Berlin, Virgin Australia may not price and market its services jointly, or share or pool revenues/profits on the route with Etihad or Air Berlin unless such practices are authorised by the ACCC under the

Competition and Consumer Act 2012 or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal; and

- changes in relation to the ownership and control of Virgin Australia are permitted except to the extent that any change:
 - results in the designation of the airline as an Australian carrier under the Australia - Thailand air services arrangements being withdrawn; or
 - has the effect that another Australian carrier, or a person (or group of persons) having substantial ownership or effective control of another Australian carrier, would take substantial ownership of Virgin Australia or be in a position to exercise effective control of Virgin Australia, without the prior consent of the Commission.

Dated: 27 November 2013



Marlene Tucker
Executive Director
Delegate of the IASC Commissioners