



Australian Government
International Air Services Commission

DECISION

Decision:	[2013] IASC 201
Variation of:	[2009] IASC 133
The Route:	Thailand
The Applicant:	Virgin Australia Airlines (SE Asia) Pty Ltd formerly Pacific Blue Airlines (Aust) Pty Ltd ABN 79 097 892 389
Public Register:	IASC/APP/201221

The Commission's delegate varies Determination [2009] IASC 133 to add certain conditions including allowing the capacity to be used by Virgin Australia Airlines (SE Asia) Pty Ltd to provide services jointly with Etihad.

1 The application

1.1 On 15 November 2012, Virgin Australia Airlines (SE Asia) Pty Ltd applied for a variation to Determination [2009] IASC 133 (the Determination) which allocates 3.15 B747 equivalent services of capacity each week in each direction on the Thailand route, to permit such capacity to be used to offer joint services with Etihad Airways (Etihad). The Determination was varied to permit Virgin Australia (SE Asia) Pty Ltd to code share with Virgin Australia International Airlines Pty Ltd.

1.2 On 16 November 2012, the Commission published a notice, in accordance with section 22 of the Act, inviting submissions about the application. No submissions were received. All material supplied by the applicant is available on the Commission's website, www.iasc.gov.au.

1.3 The Determination was originally given in favour of Pacific Blue Airlines (Australia) Pty Ltd and varied by Decision [2011] IASC 205 permitting the capacity to be used to provide services jointly with V Australia (now known as Virgin Australia International Airlines Pty Ltd). The Commission subsequently issued Resolution [2011] IASC R16 recognising the name change of Pacific Blue Airlines (Australia) Pty Ltd to Virgin Australia Airlines (SE Asia) Pty Ltd. The Determination is valid until 10 November 2014.

1.4 On 21 January 2013, Virgin Australia Group confirmed that Virgin Australia Airlines (SE Asia) Pty Ltd and Virgin Australia International Airlines Pty Ltd will be selling and operating under the same 'VA' code from January 2013. In view of this, it will no longer be necessary to put in a condition permitting the two entities to code share on the route.

2 Delegate's assessment

2.1 In accordance with section 27AB of the *International Air Services Commission Act 1992* (the Act) and regulation 3A of the *International Air Services Commission Regulations 1992*, the delegate of the Commission may consider the application for variation. (For purposes of this decision, all references to the Commission include the delegate of the Commission).

2.2 Virgin Australia (SE Asia) Pty Ltd's application seeks to vary conditions in the Determination of a kind referred to in paragraph 15(2)(e) of the Act. In view of this, the application is a transfer application as so defined in subsection 4(1) of the Act and will have to be assessed in accordance with section 25.

2.3 Subsection 25(1) provides that the Commission must make a decision varying the determination in a way that gives effect to the variation requested, subject to subsection 25(2). Subsection 25(2) states that the Commission must not make a decision varying the determination in a way that varies, or has the effect of varying an allocation of capacity if the Commission is satisfied that the allocation, as so varied, would not be of benefit to the public.

2.4 Under section 26 of the Act, in assessing the benefit to the public of a variation of an allocation of capacity, the Commission is required to apply the criteria set out in any policy statement issued by the Minister under section 11.

2.5 Pursuant to section 11 of the Act, the Minister issued Policy Statement No. 5 dated 19 May 2004 (the Policy Statement). The Policy Statement sets out the range of criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity. It also provides other guidance to the Commission in performing its functions.

2.6 Paragraph 6.3 of the Policy Statement provides that, subject to paragraph 6.4, where a carrier requests a variation of a determination to allow it flexibility in operating its capacity, including to use the Australian capacity in a code share arrangement with a foreign carrier, and no submission is received about the application, only the criteria in paragraph 4 of the Policy Statement are applicable.

2.7 Under paragraph 4, the use of entitlements by Australian carriers under a bilateral arrangement is of benefit to the public unless such carrier is not reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its application.

2.8 The Commission notes that Virgin Australia (SE Asia) Pty Ltd is an established international carrier which is clearly capable of obtaining the necessary approvals and of implementing its proposal. This means that there is public benefit arising from the use of the entitlements.

2.9 Paragraph 6.4 of the Policy Statement, in part, provides that the Commission may apply the additional criteria set out in paragraph 5 in circumstances set out in

paragraph 3.6, including where no submissions are received. Paragraph 3.6 provides as follows:

Where capacity that can be used for code sharing 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.

2.10 The Commission notes that the Australia – Thailand air services arrangements allow the designated airlines of each country to enter into code sharing arrangements with any other airline or airlines which hold the appropriate route and traffic rights, subject to a number of provisions.

2.11 The Commission does not have serious concerns about Virgin Australia (SE Asia) Pty Ltd's use of the capacity on the Thailand route under code sharing arrangements with Etihad. In this regard, it did not consult the ACCC on the matter. The Commission has previously permitted code sharing between Virgin Australia and Etihad on a number of other routes including Thailand.

2.12 The Commission notes that the Australian Competition and Consumer Commission (ACCC), on 3 February 2011, has authorised the commercial cooperation and code share arrangements between the Virgin Australia Group and Etihad. The ACCC's authorisation includes the ability of the airlines to jointly price and schedule services across their respective networks, but does not include revenue sharing.

2.13 Subsection 15(1) of the Act empowers the Commission to include such terms and conditions as it thinks fit. Paragraph 15(2)(e), however, requires the inclusion of a condition in a determination stating the extent to which the carrier may use that capacity in joint services with another carrier.

2.14 In view of the above, the delegate, on behalf of the Commission, will authorise the use of the capacity in joint services with Etihad. The delegate will vary the determination as requested by Virgin Australia (SE Asia) Pty Ltd.

2.15 Nothing in this decision, however, should be taken as indicating either approval or disapproval by the ACCC. This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

3 Decision [2013] IASC 201


3.1 In accordance with section 25 of the Act, the delegate, on behalf of the Commission, varies Determination [2009] IASC 133, which allocates capacity on the Thailand route, by:

adding the following conditions to the Determination:

- “the capacity may be used by Virgin Australia (SE Asia) Pty Ltd to provide services jointly with Etihad in accordance with;
 - the code share agreement between Virgin Australia (SE Asia) Pty Ltd and Etihad dated 26 August 2010; or
 - any subsequent code share agreement between Virgin Australia (SE Asia) Pty Ltd and Etihad, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under any code share agreement with Etihad, Virgin Australia (SE Asia) Pty Ltd must not share or pool revenues on the route with Etihad;
- under the code share agreement with Etihad, Virgin Australia (SE Asia) Pty Ltd must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of booking; and
- under the arrangements with Etihad, Virgin Australia (SE Asia) Pty Ltd may only price and market its services on the route jointly with Etihad as long as such practices are authorised under the *Competition and Consumer Act 2012* or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal;

deleting the conditions added by Decision [2011] IASC 205 permitting code sharing between Virgin Australia (SE Asia) Pty Ltd and Virgin Australia International Airlines Pty Ltd.”

Dated: 23 January 2013



Marlene Tucker
Executive Director
Delegate of the IASC Commissioners