



## Australian Government

### International Air Services Commission

#### DECISION

<b>Decision:</b>	<b>[2013] IASC 202</b>
<b>Variation of:</b>	<b>[2008] IASC 120</b>
<b>The Route:</b>	<b>Indonesia</b>
<b>The Applicant:</b>	<b>Virgin Australia International Airlines Pty Ltd formerly Virgin Blue International Airlines Pty Ltd ABN 63 125 580 823</b>
<b>Public Register:</b>	<b>IASC/APP/201224</b>

**The Commission's delegate varies Determination [2008] IASC 120 to add certain conditions including allowing the capacity to be used by Virgin Australia International to provide services jointly with Delta.**

#### 1 The application

1.1 On 11 December 2012, Virgin Australia International Airlines Pty Ltd (Virgin Australia International) applied for a variation to Determination [2008] IASC 120 (the Determination) which allocates 1,980 seats of capacity each week in each direction on the Indonesia route, to permit such capacity to be used to provide joint services with Delta Air Lines (Delta).

1.2 The Determination was originally issued to Pacific Blue Australia and subsequently varied as follows:

- [2010] IASC 206 transferring the capacity to Virgin Blue Airlines (ACN 090 670 965);
- [2011] IASC 214 permitting Virgin Blue Airlines to use the capacity to provide services jointly with V Australia; and
- [2012] IASC 204 transferring the capacity to Virgin Australia International (ABN 63 125 580 823), revoking all conditions previously given and replacing them with new conditions.

1.3 On 12 December 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](http://www.iasc.gov.au).

## 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 International'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 International 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 (ACCC).

2.10 The Commission notes that the Australia – Indonesia air services arrangements allow a designated airline of Australia to enter into code share, blocked space or other cooperative marketing arrangements, as the marketing and/or operating airline with another Australian airline (or airlines), with an Indonesia airline (or airlines), or with an airline (or airlines) of a third country, subject to a number of conditions.

2.11 The Commission does not have serious concerns about Virgin Australia International's use of the capacity on the Indonesia route under code sharing arrangements with Delta. In this regard, it did not consult the ACCC on the matter.

2.12 The Commission notes further that on 10 December 2009, the ACCC granted authorisation for a joint venture between the Virgin Blue Group and Delta in relation to air passenger and freight services. The joint venture includes coordination and agreement between the parties on trans-Pacific routes between Australia and mainland United States relating to schedules, capacity and routes flown, passengers sales and marketing activities, pricing and revenue management, enhancement of frequent flyer and lounge program offerings, purchasing and procurement. In its determination, the ACCC considered that the joint venture, including the code share arrangements, would likely result in public benefits in the form of:

- more efficient and effective integration of the parties' Trans-Pacific services with their Australian and United States domestic networks leading to route connectivity benefits for consumers and more sustainable competition on the routes;
- enhanced route coverage and schedules; and
- potential cost savings which are likely to be passed on to consumers as a result of competition on the trans-Pacific routes.

2.13 Subsection 15(1) of the Act empowers the Commission to include such terms and conditions 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 by Virgin Australia International in joint services with Delta.

2.15 Nothing in this decision 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 202

3.1 In accordance with section 25 of the Act, the delegate, on behalf of the Commission, varies Determination [2008] IASC 120, which allocates capacity on the Indonesia route, by:

*adding* the following conditions to the Determination:

- “the capacity may be used by Virgin Australia International to provide services jointly with Delta in accordance with;
  - the code share agreement between Virgin Australia International and Delta dated 8 July 2009, as amended on 10 December 2012; or
  - any subsequent code share agreement between Virgin Australia International and Delta, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under the code share agreement with Delta, Virgin Australia International 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 Delta, Virgin Australia International may only price and market its services on the route jointly with Delta 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.”

Dated: 23 January 2013



Marlene Tucker  
Executive Director  
Delegate of the IASC Commissioners