



**Australian Government**  

---

**International Air Services Commission**

**DECISION**

**Decision:** [2016] IASC 218  
**Variation of:** [2007] IASC 118  
**The Route:** New Zealand  
**The Applicant:** Virgin Australia Airlines (SE Asia) Pty Ltd  
(Virgin Australia) ABN 79 097 892 389  
**Public Register File:** IASC/APP/201636

**The Commission's delegate varies Determination [2007] IASC 118 to permit Air Berlin to code share on Virgin Australia services on the New Zealand route.**

## **1 The application**

1.1 On 6 September 2016, Virgin Australia applied for a variation to Determination [2007] IASC 118 (as varied by Decisions [2009] IASC 201, [2010] IASC 208, [2011] IASC 201, [2011] IASC 210, [2012] IASC 219 and [2016] IASC 217) to enable Air Berlin to code share on flights operated by Virgin Australia on the New Zealand route.

1.2 On 6 September 2016, the Commission published a notice, in accordance with section 22 of the *International Air Services Commission Act 1992* (the Act), inviting submissions about the application for variation. No submissions were received. All non-confidential material supplied by the applicant is available on the Commission's website, [www.iasc.gov.au](http://www.iasc.gov.au).

## **2 Air services arrangements**

2.1 Under the Australia – New Zealand air services arrangements, there is unlimited capacity for Australian carriers to operate scheduled passenger and freight services between Australia and New Zealand and between New Zealand and third countries. Australian carriers may enter into code share and other cooperative marketing arrangements with any airline, including airlines of third countries, as the marketing and/or operating airline.

## **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 the application for variation. (For purposes of this decision, all references to the Commission include the delegate of the Commission).

3.2 Virgin Australia's application seeks to vary the Determination to include a condition 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 has been assessed in accordance with section 25.

3.3 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.

3.4 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.

3.5 Paragraph 6.3 of the Minister's Policy Statement (No. 5) of 19 May 2004 (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.

3.6 Under paragraph 4 of the Policy Statement, 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 of implementing their proposals.

3.7 The Commission notes that Virgin Australia is an established international carrier capable of obtaining the necessary approvals to operate on the route and of implementing its proposals.

3.8 Paragraph 6.4 provides, in part, that the Commission may apply the criteria in paragraph 5 in the circumstances set out in paragraph 3.6 of the Policy Statement.

3.9 Under paragraph 3.6, 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 notes that Air Berlin does not operate its own services between Australia and New Zealand. The Commission considers it is unlikely for Virgin Australia and Air Berlin to be competitors on this route. The Commission further notes that several carriers offer services between Australia and New Zealand either operating directly or under code share arrangements.

3.11 In light of this, the Commission has no serious concerns that the proposed code share between Virgin Australia and Air Berlin would impact on competition on the Australia-New Zealand route. For this reason, the Commission did not specifically consult the ACCC and did not consider it necessary to apply the additional criteria in paragraph 5.

3.12 In light of the above, the Commission has decided to permit the use of the capacity for code share services between Virgin Australia and Air Berlin to be conducted in accordance with the Australia-New Zealand air services arrangements.

3.13 Subsection 15(1) of the Act empowers the Commission to include such terms and conditions as it thinks fit. Paragraph 15(2)(e) requires the inclusion of a condition stating the extent to which the carrier may use that capacity in joint services with another carrier. As is its normal practice, the Commission will also include a condition which requires Virgin Australia to comply with the Australian Consumer Law and to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

3.14 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.

#### **4 Decision varying Determination [2007] IASC 118 allocating capacity to Virgin Australia on the New Zealand route ([2016] IASC 218)**

4.1 In accordance with section 25 of the Act, the delegate of the Commission, varies Determination [2007] IASC 118 which allocates unlimited passenger and freight capacity per week in each direction to Virgin Australia Airlines (SE Asia) Pty Ltd on the New Zealand route, by:

*adding* the following conditions to the Determination:

- the capacity may be used by Virgin Australia for code share services with Air Berlin in accordance with the code share agreement between Virgin Australia and Air Berlin dated 28 June 2013, as amended;
- Virgin Australia must apply to the Commission for approval of the use of the capacity if there are variations to the code share arrangement which would change the relevant commercial aspects of the code share arrangement from a free sale code share arrangement to a block space, or vice versa, or if Virgin Australia proposes to add third country routes on which the airlines will code share where Australian capacity entitlements will be used for services on the route;
- under any code share agreement with Air Berlin, Virgin Australia must price and sell its services on the route independently of Air Berlin and must not share or pool revenues on the route with Air Berlin unless such practices are authorised under the *Competition and Consumer Act 2010*;
- to the extent that the capacity is used to provide code share services on the route, the airlines must take all reasonable steps to ensure that passengers are informed, at the time of booking, of the carrier actually operating the flight. Nothing in this determination exempts the airlines from complying with the Australian Consumer Law.

4.2 The variation takes effect from the date of this instrument.

Dated: 21 September 2016



Marlene Tucker  
Executive Director  
Delegate of the IASC Commissioners

