



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination: [2017] IASC 113
Renewal 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: IASC/APP/201728

The Commission makes a determination allocating to Virgin Australia unlimited passenger and freight capacity in each direction on the New Zealand route and permitting the use of the capacity by Virgin Australia for the provision of code share services with Etihad Airways, Delta Air Lines, Air New Zealand, Singapore Airlines, Alitalia, Air Berlin, Air Canada and Hong Kong Airlines. The determination is valid for ten years from 10 July 2018.

1 The application for renewal

1.1 On 11 October 2007, the Commission's delegate issued Determination [2007] IASC 118 (the Determination) allocating, in favour of Pacific Blue Airlines (Aust) Pty Ltd, unlimited passenger and freight capacity on the New Zealand route. The Determination was amended under [2011] IASC R16 to recognise the name change of Pacific Blue Airlines (Aust) Pty Ltd to Virgin Australia Airlines (SE Asia) Pty Ltd. It was also amended several times to permit the capacity to be used for code sharing with the following airlines: Etihad Airways, Delta Air Lines, Air New Zealand, Singapore Airlines, Alitalia, Air Berlin, Air Canada and Hong Kong Airlines¹.

1.2 Section 17 of the *International Air Services Commission Act 1992* (the Act) requires the Commission to start its consideration of the renewal of a determination at least 12 months before the expiry of the Determination. The Determination is due to expire on 9 July 2018. In view of this, the Commission sent, on 21 June 2017, a letter to Virgin Australia inviting it to apply for renewal if it wished to renew the Determination.

1.3 Virgin Australia applied to the Commission on 11 July 2017 for a renewal of the Determination for a further ten-year period from 10 July 2018. Additionally, Virgin Australia requested the retention of the existing conditions permitting the use of the capacity for code sharing with Etihad Airways, Delta Air Lines, Air New Zealand,

¹ The Determination was amended by Decisions [2009] IASC 201, [2010] IASC 208, [2011] IASC 201, [2011] IASC 210, [2011] IASC R16, [2012] IASC 219, [2014] IASC R01, [2016] IASC 217, [2016] IASC 218, [2017] IASC 207 and [2017] IASC 211.

Singapore Airlines, Alitalia, Air Berlin, Air Canada and Hong Kong Airlines. In its original application, Virgin Australia also sought the inclusion of a condition permitting the use of the capacity by a wholly-owned subsidiary; however, this request was subsequently withdrawn on 4 August 2017.

1.4 As required by sections 12 and 17 of the Act, the Commission published a notice on its website inviting other applications for the capacity. No other applications were received.

1.5 All non-confidential material supplied by Virgin Australia is available on the Commission's website (www.iasc.gov.au).

2 Relevant provisions of the 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, via and beyond to third countries.

2.2 Designated airline(s) of Australia may enter into code share and other cooperative marketing arrangements, as the marketing and/or operating airline, with any airline including airlines of third countries.

3 Commission's consideration

3.1 Section 8 of the Act provides that the Commission may, at any time while a determination is in force, make a fresh determination allocating the capacity to which the original determination relates. The fresh determination 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.

3.2 Under paragraph 8 of the Minister's Policy Statement issued on 19 May 2004, there is a presumption in favour of the carrier seeking a renewal which may be rebutted only if the carrier has failed to service the route effectively and the use of the capacity, in whole or in part, by another carrier who applied for the capacity, would better serve the public having regard to the criteria set out in paragraphs 4 and 5 of the Minister's Policy Statement.

3.3 The Commission does not have information to indicate that Virgin Australia has failed to service the route effectively. Additionally, there is no other carrier applying for the capacity.

3.4 Under paragraph 6.2 of the Minister's 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.

3.5 The Commission notes that: (i) there are no other applicants seeking the capacity for which Virgin Australia has applied; and (ii) Virgin Australia is an established international carrier reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its application.

3.6 In these circumstances, the Commission is satisfied that allocating unlimited passenger and freight capacity on the New Zealand route to Virgin Australia is of benefit to the public.

3.7 Further, Virgin Australia sought authority to continue utilising the capacity to offer code share services operated by:

- Etihad Airways;
- Delta Air Lines;
- Air New Zealand;
- Singapore Airlines;
- Alitalia;
- Air Berlin;
- Air Canada; and
- Hong Kong Airlines

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 Minister's 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 considers that Virgin Australia's continued code sharing with Etihad Airways, Delta Air Lines, Air New Zealand, Singapore Airlines, Alitalia, Air Berlin, Air Canada and Hong Kong Airlines on the New Zealand route does not have competition impact on the route, mainly on the basis that the capacity entitlements of Australian carriers on the route are unlimited and unrestricted including the ability to offer code share services. The Commission also considers that the current code share arrangements provide benefit to the travelling public in the form of enhanced products including facilitation of new services and additional frequencies, increased and better online connections and, in some instances, provide greater loyalty program benefits and improved lounge access.

3.11 The Commission further notes that the ACCC has granted authorisation to Virgin Australia's alliances or joint venture agreements with some of its code share partners on the New Zealand routes. On 3 September 2013, the ACCC granted conditional authorisation until 31 October 2018 to Virgin Australia and Air New Zealand to continue to give effect to their airline alliance including a code share agreement. The authorisation is subject to conditions requiring the airlines to maintain at least an aggregate base level of capacity across specified city pair routes to ensure the airlines do not decrease their service offerings thus increasing airfares on these routes. On 14 August 2015, the ACCC re-authorised the existing alliance between Virgin Australia and Delta Air Lines allowing the airlines to jointly schedule and price their services and to share revenue under a metal neutral arrangement on passenger and freight services until 7 September 2020. On 4 December 2015, the ACCC re-granted authorisation for the existing alliance between Virgin Australia and Etihad Airways allowing the airlines to coordinate their services on routes between Australia and Abu Dhabi and behind and beyond connections, for a period of five years until 30 December 2020. On 23 September 2016, the ACCC granted re-authorisation to the existing alliance between Virgin Australia and Singapore Airlines to coordinate their operations and codeshare on each other's regular air passenger transport networks. On 20 March 2017, the ACCC gave interim authorisation for the Alliance Framework Agreement and associated agreements between Virgin Australia and HNA Group/ Hong Kong Airlines/ Hong Kong Express Airways. The Alliance Agreement Framework includes reciprocal code share agreements; special prorate agreements; reciprocal frequent flyer participation and lounge access agreement; and cooperation on joint pricing and scheduling of services between Australia and mainland China and Hong Kong.

3.12 In light of the above, the Commission did not consider it necessary to assess the application against the additional criteria in paragraph 5 of the Minister's Policy Statement and did not specifically consult the ACCC.

3.13 The Commission has further decided to include the existing conditions to permit the use of the capacity for the provision of code share services between Virgin Australia and Etihad Airways, Delta Air Lines, Air New Zealand, Singapore Airlines, Alitalia, Air Berlin, Air Canada and Hong Kong Airlines, as requested.

3.14 Nothing in this determination in relation to code sharing should be taken as indicating either approval or disapproval by the ACCC. This determination is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

4 Determination for renewal of [2007] IASC 118 allocating capacity on the New Zealand route to Virgin Australia ([2017] IASC 113)

4.1 The Commission allocates to Virgin Australia, pursuant to section 8 of the Act, unlimited passenger and freight capacity on the New Zealand route in accordance with the terms of the Australia – New Zealand air services arrangements.

4.2 The determination is valid for ten years from 10 July 2018.

4.3 The determination is subject to the following conditions:

- Virgin Australia is required to fully utilise the capacity;
- only Virgin Australia is permitted to use the capacity;
- Virgin Australia is not permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person without the approval of the Commission;
- the capacity may be used by Virgin Australia to provide code share services with Etihad Airways in accordance with the code share agreement between the airlines which came into effect on 26 August 2010, as amended;
- the capacity may be used by Virgin Australia to provide code share services with Delta Air Lines in accordance with the code share agreement between the airlines which came into effect on 8 July 2009, as amended;
- the capacity may be used by Virgin Australia to provide code share services with Air New Zealand in accordance with the code share agreement between the airlines which came into effect on 3 May 2010, as amended;
- the capacity may be used by Virgin Australia to provide code share services with Singapore Airlines in accordance with the code share agreement between the airlines which came into effect on 2 February 2012, as amended;
- the capacity may be used by Virgin Australia to provide code share services with Alitalia in accordance with the code share agreement between the airlines which came into effect on 26 March 2016, as amended;
- the capacity may be used by Virgin Australia to provide code share services with Air Berlin in accordance with the code share agreement between the airlines which came into effect on 28 June 2013, as amended;
- the capacity may be used by Virgin Australia to provide code share services with Air Canada in accordance with the code share agreement between the airlines which came into effect on 1 April 2017, as amended;
- the capacity may be used by Virgin Australia to provide code share services with Hong Kong Airlines in accordance with the code share agreement between the airlines which came into effect on 4 May 2017, 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(s) which

would change the relevant commercial aspects of the code share arrangement(s) 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 will be used for services on that route;

- to the extent that the capacity is used to provide code share or joint services, the airlines 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 the airlines from complying with the Australian Consumer Law;
- 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 – New Zealand 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: 10 August 2017



IAN DOUGLAS
Chairperson



JAN HARRIS
Commissioner