



**Australian Government**  
**International Air Services Commission**

**RENEWAL DETERMINATION**

<b>Determination:</b>	<b>[2017] IASC 127</b>
<b>Renewal of:</b>	<b>[2013] IASC 113</b>
<b>The Route:</b>	<b>Tonga</b>
<b>The Applicant:</b>	<b>Virgin Australia Airlines (SE Asia) Pty Ltd (Virgin Australia) ABN 79 097 892 389</b>
<b>Public Register</b>	<b>IASC/APP/201754</b>

**The Commission makes a determination allocating to Virgin Australia 180 seats of capacity per week in each direction on the Tonga route and permitting the use of the capacity for code share services with Singapore Airlines. The determination is valid for five years from 17 September 2018.**

## **1 The application for renewal**

1.1 On 8 March 2013, the Commission's delegate issued Determination [2013] IASC 113 (the Determination) allocating, in favour of Virgin Australia, 180 seats of capacity in each direction on the Tonga route. This determination was subsequently varied by Decision [2014] IASC 228 permitting Virgin Australia to provide code share services with Singapore Airlines.

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 16 September 2018. In view of this, the Commission sent, on 7 September 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 21 September 2017 for a renewal of the Determination for a further five-year period from 17 September 2018. Additionally, Virgin Australia requested the retention of the existing conditions permitting the use of the capacity for code sharing with Singapore Airlines.

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](http://www.iasc.gov.au)).

## **2 Relevant provisions of the air services arrangements**

2.1 In accordance with the Australia – Tonga air services arrangements, there are a total of 600 seats per week in each direction to and from Sydney, Melbourne, Brisbane and Perth which may be allocated to designated airlines of Australia. Of these capacity entitlements, 540 seats have been allocated to Virgin Australia leaving 60 weekly seats of capacity still available for immediate allocation to designated airlines of Australia. Of the 540 seats allocated to Virgin Australia, the airline is now seeking to renew 180 seats of capacity.

2.2 Under the Australia – Tonga air services arrangements, designated airline(s) of Australia may enter into other cooperative marketing arrangements, such as blocked space, code sharing or aircraft leasing, whether as the operating or as the marketing airline, with any Australian airline(s), a Tongan airline(s) or an airline(s) of a third country.

## **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 Pursuant to section 11 of the Act, then Minister for Transport and Regional Services, the Hon. John Anderson MP issued Policy Statement No. 5 (hereinafter referred to as the Policy Statement) dated 19 May 2004. 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.

3.3 Under paragraph 8 of the Policy Statement, 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 Policy Statement.

3.4 The Commission does not have information to indicate that Virgin Australia has failed to service the route effectively. Virgin Australia operates two weekly services between Australia and Tonga<sup>1</sup>. Additionally, there is no other carrier applying for the capacity.

3.5 Under paragraph 6.2 of 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

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<sup>1</sup> Northern Summer 2017 International Airlines Timetable Summary (26 March 2017-28 October 2017)

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.

3.6 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.

3.7 In these circumstances, the Commission is satisfied that allocating 180 seats of capacity on the Tonga route to Virgin Australia is of benefit to the public.

3.8 Further, Virgin Australia sought authority to continue utilising the capacity to offer code share services operated by Singapore Airlines.

3.9 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.

3.10 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).

3.11 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.

3.12 The Commission does not have serious concerns about the continued use of the capacity for code sharing with Singapore Airlines. For this reason, it did not consider it necessary to assess the application against the additional criteria in paragraph 5 of the Policy Statement and did not specifically consult the ACCC.

3.13 In view of the above, the Commission has decided to include the existing conditions to permit the use of the capacity for the provision of code share services between Virgin Australia and Singapore 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 [2013] IASC 113 allocating capacity on the Tonga route to Virgin Australia Airlines (SE Asia) Pty Ltd ([2017] IASC 127)**

4.1 The Commission allocates to Virgin Australia, pursuant to section 8 of the Act, 180 seats of capacity in each direction on the Tonga route in accordance with the terms of the Australia – Tonga air services arrangements.

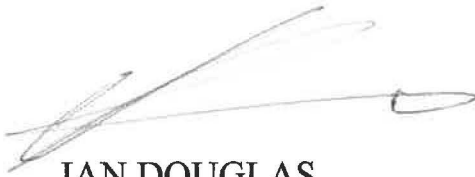
4.2 The determination is valid for five years from 17 September 2018.

4.3 The determination is subject to the following conditions:

- Virgin Australia is required to fully utilise the capacity from 30 September 2018 or such other date approved by the Commission;
- only Virgin Australia is permitted to utilise 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;
- subject to the preceding condition, the capacity may be used by Virgin Australia for the provision of code share services with Singapore Airlines in accordance with the code share agreement between Virgin Australia and Singapore Airlines which came into effect on 2 February 2012, 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 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 – Tonga 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: 17 October 2017



IAN DOUGLAS  
Chairperson



JAN HARRIS  
Commissioner