



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

**DECISION**

**Decision:** [2017] IASC 211  
**Variation of:** [2007] IASC 118  
**The Route:** New Zealand  
**The Applicant:** Virgin Australia Airlines (SE Asia) Pty Ltd  
(Virgin Australia) ACN 097 892 389  
**Public Register File:** IASC/APP/201723

**The Commission varies Determination [2007] IASC 118 to permit the capacity allocation on the New Zealand route to be used for code share services between Virgin Australia and Hong Kong Airlines.**

## **1 The application**

1.1 On 18 May 2017, Virgin Australia applied to the International Air Services Commission (the Commission) for a variation of Determination [2007] IASC 118 (as varied by [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 and [2017] IASC 207) to enable Hong Kong Airlines to offer code share services on flights operated by Virgin Australia on the New Zealand route. Virgin Australia provided a copy of the confidential code share agreement to the Commission. It is planned that code share tickets would be made available on sale from 19 June 2017 for travel from 5 July 2017, to coincide with Virgin Australia's commencement of own-operated services to Hong Kong.

1.2 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, 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 assessment**

3.1 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.

3.2 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.

3.3 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.

3.4 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.

3.5 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.

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

3.7 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).

3.8 The Commission notes that there are a number of international carriers offering either own-operated or code share services between Australia and New Zealand, including Australian carriers Virgin Australia, Qantas and Jetstar. In terms of passenger share, in the year ended December 2016, Air New Zealand captured 36.2% of passenger traffic; followed by Qantas at 17.6%; Virgin Australia at 16.2%; Jetstar at 13.0%; and Emirates at 11.8%. Other international carriers which operate services connecting their home cities to Australia and New Zealand are China Airlines, LAN Airlines, Air Asia X, Philippine Airlines and

Singapore Airlines.<sup>1</sup>

3.9 Virgin Australia operates over 80 weekly services between Australia and New Zealand, increasing to over 90 weekly services during peak season. Air Berlin, Air New Zealand, Alitalia, Delta, Etihad and Singapore Airlines code share on services operated by Virgin Australia on the route.<sup>2</sup>

3.10 Hong Kong Airlines operates direct services between Hong Kong and the Gold Coast and on the northbound route, from the Gold Coast to Hong Kong via Cairns. Currently, Hong Kong Airlines does not offer services between Australia and New Zealand. From the Commission's view, it is unlikely that Hong Kong Airlines would operate its own services on the Australia-New Zealand route. In light of this, the Commission has no serious concerns that the proposed code share between Virgin Australia and Hong Kong Airlines would impact on competition on the trans-Tasman 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 of the Policy Statement.

3.11 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. The Commission notes that Virgin Australia is an established international carrier which is clearly capable of obtaining the necessary approvals and of implementing its proposals.

3.12 The Commission notes further that on 20 March 2017, the ACCC has given 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.<sup>3</sup>

3.13 In granting the interim authorisation, the ACCC stated that the proposed conduct (of giving effect to the Alliance Agreement) appears likely to result in some public benefit and limited public detriment. The ACCC further considered that the Alliance Agreement would assist in facilitating the commencement of new services between Australia and Hong Kong by Virgin Australia and support existing services by Virgin Australia and the HNA Group/Hong Kong Airlines/ Hong Kong Express by allowing each airline to market and sell the services operated by the other Alliance partner.<sup>4</sup>

3.14 In light of the above, the Commission has decided to permit the use of the capacity on the New Zealand route for code share services between Virgin Australia and Hong Kong Airlines to be conducted in accordance with the Australia-New Zealand air services arrangements.

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<sup>1</sup> Source: Bureau of Infrastructure, Transport and Regional Economics

<sup>2</sup> International Airlines Timetable Summary, Northern Summer 2017, <[www.infrastructure.gov.au](http://www.infrastructure.gov.au)>

<sup>3</sup> <http://registers.accc.gov.au/content/index.phtml/itemId/1201183/fromItemId/278039>

<sup>4</sup> <http://registers.accc.gov.au/content/index.phtml/itemId/1201183/fromItemId/278039/display/acccDecision>

3.15 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 requiring the airlines 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.

3.16 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 ([2017] IASC 211)**

4.1 In accordance with section 25 of the Act, the Commission varies Determination [2007] IASC 118 which allocates unlimited capacity per week in each direction to Virgin Australia 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 Hong Kong Airlines to be conducted in accordance with Australia's air services arrangements with New Zealand and the code share agreement between Virgin Australia and Hong Kong Airlines dated 4 May 2017;
- 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 the route;
- 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 and is valid for the duration of the Determination.

Dated: 7 June 2017

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IAN DOUGLAS  
Chairperson

A handwritten signature in black ink, featuring a stylized 'J' and 'H' followed by a wavy line.

JAN HARRIS  
Commissioner