



## Australian Government

### International Air Services Commission

#### RENEWAL DETERMINATION

<b>Determination:</b>	<b>[2018] IASC 110</b>
<b>Renewal of:</b>	<b>[2013] IASC 130</b>
<b>The Route:</b>	<b>Indonesia</b>
<b>The Applicant:</b>	<b>Virgin Australia International Airlines Pty Ltd (Virgin Australia) (ABN 63 125 580 823)</b>
<b>Public Register:</b>	<b>IASC/APP/201822</b>

**The Commission makes a fresh determination allocating to Virgin Australia 1,080 seats per week on the Indonesia route. The capacity may be used by Virgin Australia for code share services with Delta Air Lines and also by Virgin Australia's wholly owned subsidiary. The determination is valid for five years from 11 May 2019.**

#### 1 The application for renewal

1.1 On 8 July 2013, the Commission's delegate issued Determination [2013] IASC 130 (the Determination) allocating, in favour of Virgin Australia, 1,080 seats of capacity on the Indonesia route. The determination was varied by Decisions [2013] IASC 225 to authorise the use of the capacity for code share services with Delta Air Lines and by [2015] IASC 210 to permit the use of the capacity by Virgin Australia or another Australian carrier which is a wholly-owned subsidiary of Virgin Australia.

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 10 May 2019. In view of this, the Commission sent, on 9 May 2018, 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 15 May 2018 for a renewal of the Determination for a further five-year period from 11 May 2019. Additionally, Virgin Australia requested the retention of the existing conditions, permitting the use of the capacity for the provision of code share services with Delta air Lines, and by a wholly-owned subsidiary of Virgin Australia, which for the purposes of this determination is Tiger International Number 1 Pty Ltd (Tigerair).

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 Paragraph 7(2)(aa) of the Act provides that the Commission must not allocate available capacity contrary to any restrictions on capacity contained in a bilateral arrangement(s). Any variation made to an existing allocation of capacity should also not be contrary to any restrictions on capacity contained in a bilateral arrangement(s).

2.2 The Australia – Indonesia air services arrangements allow multiple designation of Australian airlines to operate on the Indonesia route. The Register of Available Capacity indicates there are 3,120 seats of capacity available for immediate allocation to and from Sydney, Melbourne (including Avalon), Brisbane and Perth on this route. Additional 2,500 seats per week in each direction to Sydney, Melbourne (including Avalon), Brisbane and Perth, may be allocated provided such services operate via or beyond to a point in Australia other than Sydney, Melbourne (including Avalon), Brisbane and Perth.

2.3 A designated airline of Australia may enter into code-share, blocked space or other cooperative marketing arrangements, as the marketing and/or operating carrier with another Australian airline(s), with an Indonesian airline(s), or with 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 On 20 March 2018, the Hon. Michael McCormack MP, Deputy Prime Minister and Minister for Infrastructure and Transport, issued, in accordance with section 11 of the Act, the International Air Services Commission Policy Statement 2018 (the Policy Statement), which came into effect on 28 March 2018.

3.3 Section 7 of the Policy Statement explains that, in assessing the benefit to the public of an allocation of capacity when deciding to renew a determination, the Commission is to have regard to the 'reasonable capability criterion' in section 8 and

the additional criteria in section 9, when circumstances so warrant under Division 3 of Part 3 of the Policy Statement.

3.4 Under section 14 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 there are other applications for some or all of the capacity; and the Commission is satisfied that a different allocation of capacity would be of greater benefit to the public, having regard to the criteria set out in sections 8 and 9 of the Policy Statement.

3.5 The Commission does not have information that Virgin Australia has failed to service the route effectively. In its application, Virgin Australia states that the airline continues to operate services to Indonesia utilising capacity allocated under the Determination. Additionally, there is no other carrier applying for the capacity. For this reason, the Commission has decided to apply section 8 of the Policy Statement and did not find it necessary to apply the additional criteria in section 9.

3.6 Under the 'reasonable capability criterion' in section 8 of the Policy Statement, in assessing the public benefit of an application, the Commission is to have regard to the extent to which all Australian carriers that are, or would be, permitted to use the capacity allocated under a determination are reasonably capable of: (a) obtaining any licences, permits or other approvals required to operate on and service the route to which the determination relates; and (b) using the capacity allocated under the determination.

3.7 Virgin Australia is an established carrier operating scheduled international air services and the Commission finds it is reasonably capable of obtaining any licences, permits or other approvals required to operate on and service the Indonesia route and of using the capacity allocated under the determination.

3.8 In relation to Tigerair, Virgin Australia stated, in a subsequent communication to the Commission, that Tigerair continues to comply with the relevant ownership and control requirements of the Air Navigation Act 1920, as well as the requirements for designation as an Australian international airline. Virgin Australia also stated that if and when Tigerair wishes to recommence services to Indonesia, they would secure the relevant regulatory approvals from the Indonesian aeronautical authorities and timetable approval from the Department of Infrastructure, Regional Development and Cities (as would be the case for new services to any international destination).

3.9 From information available to the Commission, it considers that Tigerair is also reasonably capable of obtaining any licences, permits or other approvals required to operate on and service the Indonesia route and of using the capacity allocated under the determination. In light of this, the Commission has decided to include a condition permitting the capacity to be used by Tigerair, in addition to Virgin Australia.

3.10 In light of the above circumstances, the Commission is satisfied that allocating 1,080 seats per week in each direction on the Indonesia route in favour of Virgin Australia, for its use and its wholly-owned subsidiary, would be of benefit to the public

3.11 Further, Virgin Australia sought authority to continue utilising the capacity for code sharing with Delta Air Lines. The Commission has approved utilisation of the capacity allocation by Virgin Australia for code sharing with Delta Air Lines in 2015 and has no reason to believe that there has been a material change in circumstances that would warrant making a different allocation of capacity by changing the existing condition which permits the use of the capacity for code sharing with Delta Air Lines. In view of this, the Commission considers it is not necessary to apply section 15 of the Policy Statement to the current application.<sup>1</sup>

3.12 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.

3.13 The Commission has decided to include the existing condition to permit the use of the capacity for the provision of code share services between Virgin Australia and Delta Airlines, as requested. 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 130 allocating capacity on the Indonesia route to Virgin Australia ([2018] IASC 110)**

4.1 The Commission allocates to Virgin Australia, pursuant to section 8 of the Act, 1,080 seats per week in each direction on the Indonesia route in accordance with the terms of the Australia – Indonesia air services arrangements.

4.2 The determination is valid for five years from 11 May 2019.

4.3 The determination is subject to the following conditions:

- Virgin Australia is required to fully utilise the capacity by no later than 30 June 2019, or from such other date approved by the Commission;
- only Virgin Australia or another Australian carrier which is a wholly owned subsidiary of 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;

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<sup>1</sup> Section 15 of the Policy Statement is to be applied if the Commission is considering making a different allocation as the original determination. Under section 15, the Commission is to have regard to the reasonable capable criterion in section 8 and any of the additional criteria in section 9 which the Commission considers to be relevant.

- subject to the preceding condition, the capacity may be used by Virgin Australia to code share with Delta Air Lines in accordance with the code share agreement between Virgin Australia and Delta Air Lines which came into effect on 8 July 2009, as amended;
- 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 the airlines authorised to use the capacity are permitted except to the extent that any change:
  - results in the designation of the airline(s) as an Australian carrier under the Australia – Indonesia 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 the airline(s) authorised to use the capacity or be in a position to exercise effective control of the airline(s) authorised to use the capacity, without the prior consent of the Commission.

Dated: 15 June 2018



IAN DOUGLAS  
Chairperson



JAN HARRIS  
Commissioner



KAREN GOSLING  
Commissioner