



Australian Government

International Air Services Commission

DECISIONS

Decisions:	[2018] IASC 208 and [2018] IASC 209
Variation of:	[2007] IASC 118 and [2017] IASC 113
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/201808 and 201812

The Commission's delegate varies Determinations [2007] IASC 118 and [2017] IASC 113 to permit the use of the capacity on the New Zealand route for code sharing between Virgin Australia and Hainan Airlines. The permission is valid for the duration of the determinations commencing from the date of issue of this decision.

1 The application

1.1 On 16 January 2018, the International Air Services Commission (the Commission) received an application from Virgin Australia Airlines (SE Asia) Pty Ltd (Virgin Australia) seeking to vary Determinations [2007] IASC 118, as amended, and [2017] IASC 113 (the Determinations) to enable Hainan Airlines to code share on flights operated by Virgin Australia on the New Zealand route.

1.2 The Determinations allocate to Virgin Australia unlimited passenger and cargo capacity on the New Zealand route and permit the capacity to be used for code share services with Delta Air Lines, Etihad Airways, Air New Zealand, Singapore Airlines, Alitalia, Air Berlin, Air Canada and Hong Kong Airlines.

1.3 On 16 January 2018, 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 to enable Hainan Airlines to code share on flights operated by Virgin Australia. No submissions were received. All non-confidential material supplied by the applicant is available on the Commission's website, www.iasc.gov.au.

2 Relevant provisions of the air services arrangements

2.1 Paragraph 7(2)(aa) of the Act requires the Commission not to allocate available capacity contrary to any restrictions on capacity contained in a bilateral arrangement(s). This also means that any variations made to an existing allocation of capacity must not be contrary to any restrictions on capacity contained in a bilateral arrangement(s).

2.2 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 third countries.

2.3 Additionally, a designated airline of Australia may enter into code-share and other cooperative marketing arrangements, whether as the operating or marketing airline, with any airline including airlines of third countries.

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 purposes of this decision, references to the Commission include the delegate of the Commission.)

3.2 Virgin Australia's application seeks to vary the Determinations 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 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.

3.6 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.

3.7 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 delegate notes that Virgin Australia is an established international carrier which is capable of obtaining the necessary regulatory approvals and of implementing their proposed services.

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. Under

paragraph 3.6, where capacity that can be used for code share operations is available under the relevant 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).

3.9 The Commission does not have concerns that the proposed code share services may not be of benefit to the public. For this reason, the delegate did not apply the additional criteria set out in paragraph 5 of the Policy Statement.

3.10 The delegate notes that Hainan Airlines, which is proposed to market the services operated by Virgin Australia across the Tasman from 1 March 2018, is part of the HNA Aviation Group. Virgin Australia and the HNA Aviation Group obtained authorisation from the ACCC to coordinate their international passenger transport services pursuant to an Alliance Framework Agreement which includes codeshare, lounge access, reciprocal frequent flyer participation, route planning etc. The ACCC granted the authorisation until 31 August 2022.¹

3.11 The delegate considers that allowing Hainan Airlines to code share on Virgin Australia-operated services between Australia and New Zealand will add to the number of carriers that market services on the route and is unlikely to have a detrimental impact on competition.

3.12 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.

3.13 The Commission's delegate has decided to add conditions permitting the use of the capacity for the provision of code share services between Virgin Australia and Hainan Airlines on the New Zealand route in accordance with the Australia-New Zealand air services arrangements. As required by the Policy Statement, the delegate has included a condition requiring the airlines 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.

¹ ACCC Determination dated 10 August 2017 (Authorisation numbers A91575 and A91576)

4 Decisions varying Determinations [2007] IASC 118 and [2017] IASC 113 allocating capacity to Virgin Australia on the New Zealand route ([2018] IASC 208 and [2018] IASC 209)

4.1 In accordance with section 25 of the Act, the Commission's delegate varies Determinations [2007] IASC 118 and [2017] IASC 113 which allocate to Virgin Australia unlimited passenger and cargo capacity on the New Zealand route, by:

adding the following conditions to the Determinations:

- The capacity may be used by Virgin Australia to provide code share services with Hainan Airlines in accordance with the code share agreement between Virgin Australia and Hainan Airlines made on 30 October 2017 and the air services arrangements between Australia and the New Zealand.
- Virgin Australia must apply to the Commission for approval of any proposed variations to the code share agreement between Virgin Australia and Hainan Airlines which would change the relevant commercial aspects of the agreement from a free sale code share arrangement to a block space, or vice versa, or if the airlines propose to add third country routes on which the airlines will code share where Australian capacity entitlements will be used for services on that 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 These decisions come into effect from the date of issue and are valid for the duration of Determinations [2007] IASC 118 and [2017] IASC 113.

Dated: 2 February 2018



MARLENE TUCKER
Executive Director