



Australian Government

International Air Services Commission

DECISION

Decision: [2018] IASC 244
Variation of: [2014] IASC 112
The Route: Tonga
The Applicant: Virgin Australia Airlines (SE Asia) Pty Ltd
(ABN 79 097 892 389)
Public Register File: IASC/APP/201874

The Commission varies Determination [2014] IASC 112 to transfer the capacity allocated in the determination to Virgin Australia International Airlines Pty Ltd (VAIA) and permit the capacity to be used by either VAIA or its wholly-owned subsidiary, Tiger International Number1 Pty Ltd. The permission is valid for the duration of the determination commencing from 1 December 2018.

1 The application

1.1 On 10 August 2018, Virgin Australia Airlines (SE Asia) Pty Ltd (VAASEA) applied to the International Air Services Commission (the Commission) to transfer to Virgin Australia International Airlines Pty Ltd (VAIA) the capacity entitlements originally allocated to VAASEA in the following determinations on the Tonga route:

- [2014] IASC 112 which allocates 360 seats per week in each direction; and
- [2017] IASC 127 which allocates 180 seats per week in each direction.

1.2 In a subsequent communication to the Commission, VAASEA requested that the transfer of the capacity allocation be made effective from 1 December 2018.

1.3 VAASEA also requested that each determination is varied to authorise the utilisation of the capacity by another Australian carrier which is the wholly-owned of VAIA, namely Tiger International Number1 Pty Ltd (Tiger International).

1.4 In accordance with section 22 of the *International Air Services Commission Act 1992* (the Act), the Commission published a notice, on 10 August 2018, inviting submissions about the applications 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.

1.5 On 21 September 2018, the Commission issued Decision [2018] IASC 227 varying [2014] IASC 112 to transfer the capacity entitlements allocated in the Determination from VAASEA to VAIA. The decision is scheduled to come into force and effect on 1 December 2018.

1.6 On 27 November 2018, VAASEA requested that the Commission amend Decision [2018] IASC 227 to retain all relevant conditions set out in Determination [2014] IASC 112, in particular the condition which permits code sharing with Singapore Airlines.

1.7 The Commission published on its website VAASEA's letter of 27 November 2018 and notified stakeholders by email. Comments were invited and no comments were received.

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 The Australia-Tonga air services arrangements allow for multiple designation of Australian airlines and for a designated airline of Australia to enter into co-operative marketing arrangements such as blocked space, code sharing or aircraft leasing, whether as the operating or marketing airline, with an Australian airline(s), a Tongan airline(s) or an airline(s) of a third country.

3 Commission's assessment

3.1 VAASEA's original applications sought to vary the various determinations in a way that allocates, or has the effect of allocating, the capacity to another Australian carrier and as such the applications are transfer applications as so defined in subsection 4(1) of the Act¹. The Commission has assessed the applications 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 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. The Policy Statement sets out the range of criteria which the Commission is required to apply in assessing the benefit to the public of

¹ Subsection 4(1) defines 'transfer application' to mean 'an application, by an Australian carrier to whom a determination allocates capacity, for one or both of the following:

- (a) a variation of the determination in a way that allocates, or has the effect of allocating, that capacity to another Australian carrier;
- (b) a variation of the determination that varies, or has the effect of varying, one or more conditions of a kind referred to in paragraph 15(2)(d), (e) or (f).

allocations of capacity.

3.5 Section 7 of the Policy Statement explains that in deciding whether to vary a determination, the Commission is to have regard to the ‘reasonable capability criterion’ set out in section 8 of the Policy Statement and any of the additional criteria set out in section 9 that the Commission thinks to be relevant.

3.6 Section 18 of the Policy Statement which specifically deals with ‘transfer applications’, such as these ones, provides that in assessing whether the variation requested would not be of benefit to the public for purposes of subsection 25(2) of the Act, the Commission is:

- (a) to have regard to the ‘reasonable capability criterion’ in section 8 of the Policy Statement;
- (b) to have regard to the following matters: (i) the undesirability of approving a transfer where doing so will, or is reasonably likely to, permit or encourage any form of speculative activity, including trading in capacity allocations for commercial benefit; (ii) the undesirability, other than in exceptional cases, of approving a transfer application made by a carrier that has never exercised an allocation, or has only exercised an allocation for a period of less than six months; and
- (c) may have regard to any of the additional criteria set out in section 9 of the Policy Statement that it considers to be relevant.

3.7 Under the ‘reasonable capability criterion’ in section 8 of the Policy Statement, the Commission is to assess the extent to which an Australian carrier is reasonably capable of obtaining any licences, permits or other approvals required to operate on and service the route and of using the capacity allocated under the determination.

3.8 The Commission notes that VAIA is an established international carrier and finds that it is reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated on the route.

3.9 It was further requested that VAIA’s wholly-owned subsidiary, Tiger International, be permitted to utilise the capacity. The Commission sought advice from the Department of Infrastructure, Regional Development and Cities (the Department) to assess whether Tiger International is reasonably capable of: (a) obtaining any licenses, permits or other approvals required to operate on and service the route; and (b) using the capacity allocated under the determination. On 29 August 2018, the Department advised the Commission that it considers Tiger International as reasonably capable of obtaining the designation, licensing and other operational approvals to operate scheduled services on the Tonga route.

3.10 The Commission does not have information to suggest that VAIA or Tiger International would engage in speculative activity including trading in capacity allocations for commercial benefit. VAIA is an established international carrier which currently holds multiple determinations and other regulatory approvals enabling the carrier to operate scheduled international air services to various routes. Subparagraph 18(2)(b)(ii) of the Policy Statement does not apply in this case.

3.11 The Commission has come to the view that Tiger International is reasonably capable of obtaining any licences, permits or other approvals required to operate on and service the route; and of using the capacity allocated under the determination. There is public benefit

arising from the proposed use of the capacity by Tiger International on the Tonga route. The Commission did not find it necessary to apply any of the additional criteria in section 9 of the Policy Statement.

3.12 In light of the above, the Commission has decided to vary the determination, as requested by VAASEA, to transfer the capacity allocation to VAIA, authorise the use of the capacity by Tiger International and retain all relevant conditions such as the permission to utilise the capacity for code sharing with Singapore Airlines. In accordance with section 15 of the Act, the Commission may include such terms and conditions it thinks fit.

4 Decisions varying multiple determinations on the Tonga route ([2018] IASC 244)

4.1 In accordance with section 25 of the Act, the Commission varies Determination [2014] IASC 112 to transfer the capacity entitlements allocated in the Determination to Virgin Australia International Airlines Pty Ltd (VAIA) in accordance with the Australia-Tonga air services arrangements, with effect from 1 December 2018. All references to VAASEA in the Determination are changed to VAIA.

4.2 Furthermore, the Commission varies Determination [2014] IASC 112 by:

(i) *deleting* the condition “Virgin Australia is required to fully utilise the capacity from the date of this instrument” and *replacing* it with the following condition:

- “VAIA is required to fully utilise the capacity from 30 December 2018 or such other date approved by the Commission;”

(ii) *deleting* the condition “only Virgin Australia is permitted to use the capacity” and *replacing* it with the following condition

- “the capacity may be utilised by:
 - VAIA; or
 - Tiger International Number1 Pty Ltd, as long as it remains a wholly-owned subsidiary of VAIA; or
 - such other wholly-owned subsidiary of VAIA that the Commission approves in writing, as long as it remains a wholly-owned subsidiary of VAIA;”

(iii) *deleting* the condition “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”


and *replacing* it with the following condition:

- “changes in relation to the ownership and control of the airlines authorised to utilise 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-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 the airline(s) or be in a position to exercise effective control of the airline(s), without the prior consent of the Commission.”

4.3 This Decision comes into effect from 1 December 2018 and is valid for the duration of Determination [2014] IASC 112.

4.4 This Decision amends Decision [2018] IASC 227 issued on 21 September 2018 and where there is inconsistency between the two decisions, Decision [2018] IASC 244 prevails.

Dated: 30 November 2018



IAN DOUGLAS
Chairperson



IAN HARRIS
Commissioner



KAREN GOSLING
Commissioner