



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2019] IASC 126
Renewal of:	[2014] IASC 112
The Route:	Tonga
The Applicant:	Virgin Australia International Airlines Pty Ltd (Virgin Australia) (ABN 63 125 580 823)
Public Register:	IASC/APP/201933

The Commission makes a fresh determination allocating to Virgin Australia International Airlines Pty Ltd (VAIA) 360 seats per week of capacity in each direction on the Tonga route. The fresh determination permits the capacity to be used by either VAIA or its wholly-owned subsidiary, Tiger International Number1 Pty Ltd and is valid for five years from 8 September 2020.

1 The application for renewal

1.1 On 15 September 2014, the International Air Services Commission (the Commission) issued Determination [2014] IASC 112 (the Determination) allocating, in favour of Virgin Australia Airlines (SE Asia) Pty Ltd (VAASEA), 360 seats per week of capacity in each direction on the Australia-Tonga route. On 21 September 2018, the Commission varied the Determination, upon VAASEA's request, to transfer the capacity allocation 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 Ltd¹. The Determination permits Singapore Airlines to code share on flights operated by VAASEA and subsequently VAIA.

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 7 September 2020. In view of this, the Commission sent, on 11 October 2019, a letter to Virgin Australia inviting it to apply for renewal if it wished to renew the Determination.

1.3 VAIA applied to the Commission on 25 October 2019 for a renewal of the Determination for a further five-year period from 8 September 2020.

¹See Decision [2018] IASC 227

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 VAIA 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 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 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 360 seats of capacity.

2.3 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 In accordance with section 11 of the Act, the Minister issued 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 make, renew or vary 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 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.

3.6 The Commission notes that there are no other applicants seeking capacity on the route and there is no information to suggest that VAIA has failed to service the route effectively. For this reason, the Commission decided to only apply the reasonable capability criterion under section 8 of the Policy Statement and did not consider it necessary to assess the application against the additional criteria in section 9 of the Policy Statement.

3.7 The Commission considers that VAIA’s continued code share with Singapore Airlines does not have competition impact on the route. The Commission also notes that the ACCC has granted re-authorisation to the existing alliance between Virgin Australia and Singapore Airlines, on 23 September 2016 to coordinate their operations and codeshare on each other’s regular air passenger transport networks. In light of this, the Commission is satisfied that renewing the capacity allocation in favour of VAIA and permitting the capacity to be used for joint services with Singapore Airways would be of benefit to the public.

3.8 Subsection 15(1) of the Act allows a determination to include such terms and conditions as the Commission thinks fit. Subsection 19(3) of the Act provides that “[i]n including terms and conditions in the determination, the Commission may make such changes (if any) to the terms and conditions included in the original determination (including adding or deleting terms and conditions) as it is satisfied are warranted because of changes in circumstances since the original determination was made”. VAIA, in its application requested for the retention of all conditions in the Determination sought to be renewed. In light of this, the Commission has decided to issue this fresh determination with the conditions set out below.

4 Determination for renewal of [2014] IASC 112 allocating capacity on the Tonga route to Virgin Australia International Airlines ([2019] IASC 126)

4.1 The Commission allocates to Virgin Australia International Airlines Pty Ltd (VAIA), pursuant to section 8 of the Act, 360 seats per week of capacity in each

direction on the Australia-Tonga route in accordance with the terms of the Australia – Tonga air services arrangements.

4.2 The determination is valid for five years from 8 September 2020.

4.3 The determination is subject to the following conditions:

- (a) VAIA is required to fully utilise the capacity from no later than 31 December 2020 or such other date approved by the Commission.
- (b) 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.
- (c) VAIA is not permitted to utilise the capacity to provide code share or joint services with another carrier or any other person without the approval of the Commission;
- (d) The capacity may be used by VAIA to provide services jointly with Singapore Airways in accordance with the code share agreement between Virgin Australia and Singapore Airways dated 3 February 2012, as amended.
- (e) VAIA must obtain the Commission’s written approval before implementing any variation 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 VAIA proposes to add third country routes on which the airlines will code share where Australian capacity will be used for services on that route.
- (f) To the extent that the capacity is used to provide code share (or joint) 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.
- (g) 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-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.

Dated: 28 November 2019



IAN DOUGLAS
Chairperson



KAREN GOSLING
Commissioner