



## Australian Government

### International Air Services Commission

#### RENEWAL DETERMINATION

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| <b>Determination:</b>        | <b>[2023] IASC 119</b>   |
| <b>Renewal of:</b>           | <b>[2018] IASC 107</b>   |
| <b>The Route:</b>            | <b>Korea</b>   |
| <b>The Applicant:</b>        | <b>Virgin Australia International Airlines Pty Ltd<br/>ABN 63 125 580 823 (Virgin Australia)</b> |
| <b>Public Register File:</b> | <b>IASC/APP/202329</b>   |

**The Commission makes a fresh determination allocating to Virgin Australia International Airlines Pty Ltd 1,000 seats per week in each direction on the Korea route, subject to certain conditions. The capacity may be used by Virgin Australia International Airlines Pty Ltd to provide code share services with Singapore Airlines. The determination is valid for five years from 14 March 2024.**

#### 1 The application for renewal

1.1 On 10 April 2018, the International Air Services Commission (the Commission) issued Renewal Determination [2018] IASC 107 (the Determination) allocating, in favour of Virgin Australia International Airlines Pty Ltd (Virgin Australia), 1,000 seats per week in each direction of passenger capacity on the Korea route. The capacity allocation permits Virgin Australia to provide code share services, as marketing carrier, on Singapore Airlines operated services.

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 original determination. The Determination is due to expire on 13 March 2024. In view of this, the Commission sent, on 27 March 2023, a letter to Virgin Australia inviting it to apply for renewal if it wished to renew the Determination.

1.3 On 13 April 2023, Virgin Australia applied to the Commission for a renewal of the Determination for a further five-year period and requested the retention of all existing conditions, including conditions permitting the use of the capacity for the provision of code share services with Singapore Airlines.

1.4 In accordance with sections 12 and 17 of the Act, the Commission published, on 1 March 2023, a notice on its website and subsequently sent a notification by email to stakeholders inviting other applications for capacity on the route. No other applications were received.

1.5 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 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.

2.2 According to the Register of Available Capacity, there are 5,907 seats per week of capacity in each direction available for allocation to Australian carriers to operate services to and from Sydney, Melbourne, Brisbane and Perth.

2.3 Under the Australia - Korea air services arrangements, designated airlines of Australia may operate 8,500 seats per week between Korea and the following Australian gateways: Sydney, Melbourne, Brisbane and Perth.

2.4 Under the Australia-Korea air services arrangements, Australian designated airlines may, subject to certain conditions, enter into cooperative marketing arrangements such as blocked space, code sharing or leasing arrangements, whether as the operating airline(s) or the marketing airline(s), in respect of passenger, combination and/or cargo air services with airline(s) of Australia, (an) airline(s) of Korea and (an) airline(s) of any third country or countries.

2.5 The capacity offered by a designated Australian airline, as the marketing airline, on services operated by other airlines, including airlines of a third country or countries, shall be counted against any capacity entitlements of the contracting party designating the marketing airline. This means that the code share seats offered by an Australian designated airline, as the marketing carrier, are counted against Australian capacity entitlements.

## **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. Subsection 8(2) provides in part that 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 Pursuant to 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 14 of the Policy Statement applies where the Commission is proposing to make a fresh determination under section 8 of the Act, and is considering whether the allocation of capacity in the original determination is no longer of benefit to the public for the purpose of section 8(2)(a)(i) of the Act. Section 14(2) of the Policy Statement provides that, without limiting the matters to which the Commission may have regard, an allocation is generally no longer of benefit to the public if:

- the carrier has failed to service the route effectively (s 14(2)(a)); and
- there are other applications for some or all of the capacity (s 14(2)(b)); 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 (s 14(2)(c)).

3.4 The Commission notes that, under subsection 14(2) of the Policy Statement, an allocation will generally no longer be of benefit to the public where all of the above conditions are satisfied.

3.5 There are no other applications for some or all of the capacity to which the determination in question relates, and therefore the condition in section 14(2)(b) of the Policy Statement is not satisfied. The Commission therefore finds that the proposed allocation does not fall within the class of allocations that are generally no longer of benefit to the public contemplated by subsection 14(2) of the Policy Statement.

3.6 However, subsection 14(2) of the Policy Statement operates ‘without limiting the matters to which the Commission may have regard’. In view of the circumstances pertaining to the COVID-19 pandemic, the Commission has proceeded to consider whether the allocation is no longer of benefit to the public in all the circumstances.

3.7 On 11 March 2020, the World Health Organization declared the outbreak of COVID-19 a pandemic. In response, the Australian Government introduced a range of health, financial and other measures to prevent and minimise the transmission of COVID-19.

3.8 In this context, on 24 March 2020 the Prime Minister announced that the Australian Government was introducing a ‘do not travel’ ban on Australians travelling overseas under the *Biosecurity Act 2015*. On 27 October 2021, the Government announced it would lift the international travel ban for certain categories of travellers from 1 November 2021, subject to certain conditions. On 7 February 2022, the Prime Minister announced that Australian international borders would re-open from 21 February 2022.

3.9 With the imposition of travel restrictions in March 2020, Virgin Australia suspended its international services in 2020-21.

3.10 In assessing the current Virgin Australia application for the renewal of the Determination, the Commission considered whether Virgin Australia has failed to service the route effectively.

3.11 Until travel restrictions linked to the COVID-19 pandemic were imposed by the Australian Government in March 2020, Virgin Australia offered code share services, as marketing carrier, on flights operated by Singapore Airlines on the Korea route. Prior to March 2020, there was no information to suggest that Virgin Australia has failed to service the Australia-Korea route effectively.

3.12 The Commission considers that the temporary suspension in 2020-21 of Virgin Australia's code share services between Australia and Korea was directly in response to travel restrictions associated with the COVID-19 pandemic. The Commission therefore finds that the temporary suspension of Virgin Australia's services in these circumstances does not mean that Virgin Australia has failed to service the route effectively. Moreover, the Commission notes that since November 2022 Virgin Australia has resumed providing code share services on flights operated by Singapore Airlines between points in Australia and Korea.

3.13 The Commission has also considered the 'reasonable capability criterion' in section 8 of the Policy Statement, i.e. 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.

3.14 The Commission notes that Virgin Australia is an established carrier that currently operates international services. The Commission therefore finds that the carrier is reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated on the Australia-Korea route.

3.15 There is no other information before the Commission that it considers to be relevant or material to its assessment of Virgin Australia's application. Based on its findings above, the Commission is not satisfied that the allocation of capacity in the original determination is no longer of benefit to the public for the purposes of section 8(2)(a)(i) of the Act. Therefore, the Commission is required to make the same allocation of capacity as the original determination (see section 8(2)(a) of the Act).

3.16 The Commission will continue to monitor the utilisation of capacity by Virgin Australia on this route.

3.17 Virgin Australia also requested to retain all existing conditions. Under section 19 of the Act, the Commission "must include the same terms and conditions as the original determination to which it relates" (s 19(1)(c)), but "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" (subsection 19(3)).

3.18 The Commission has decided to continue permitting the use of the capacity for code sharing with the airlines listed in item 4 below subject to conditions as stated.

3.19 Nothing in this decision should be taken as indicating either approval or disapproval by the Australian Competition and Consumer Commission (ACCC). This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

## **4 Determination allocating capacity on the Korea route to Virgin Australia International Airlines Pty Ltd ([2023] IASC 119)**

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Virgin Australia International Airlines Pty Ltd, allocating 1,000 seats per week in each direction on the Korea route in accordance with the Australia - Korea air services arrangements.

4.2 The determination is valid for five years from 14 March 2024.

4.3 The determination is subject to the following conditions:

- a) Virgin Australia International Airlines Pty Ltd is required to fully utilise the capacity from no later than the date that the determination comes into effect or from such other date approved by the Commission.
- b) Only Virgin Australia International Airlines Pty Ltd is permitted to utilise the capacity.
- c) Virgin Australia International Airlines Pty Ltd is not permitted to utilise the capacity to provide code share or joint services with another Australian carrier or any other carrier unless approved by the Commission.
- d) Subject to the preceding condition, the capacity may be used by Virgin Australia International Airlines Pty Ltd to provide code share services, as marketing carrier, on services operated by Singapore Airlines in accordance with the code share agreement between the airlines which came into effect on 2 February 2012, as amended.
- e) Virgin Australia International Airlines Pty Ltd must apply to the Commission for approval of the use of the capacity if there are variations to the code share arrangement(s) which would change the relevant commercial aspects of the code share arrangement(s) 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 that route.
- f) 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 relevant airline as an Australian carrier under the Australia – Korea 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 International Airlines Pty Ltd or be in a position to exercise effective

control of Virgin Australia International Airlines Pty Ltd without the prior consent of the Commission.

Dated: 19 May 2023



Genevieve Butler  
Chairperson



Jane McKeon  
Commissioner