



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2020] IASC 105
Renewal of:	[2015] IASC 110
The Route:	Indonesia
The Applicant:	Virgin Australia International Airlines Pty Ltd (ABN 63 125 580 823) (Virgin Australia)
Public Register File:	IASC/APP/202023

The Commission makes a fresh determination allocating to Virgin Australia 120 seats per week in each direction of passenger capacity on the Indonesia route. The determination is valid for five years from 30 August 2021.

1 The application for renewal

1.1 On 21 August 2020, Virgin Australia applied to the International Air Services Commission (the Commission) for renewal of Determination [2015] IASC 110 (the original determination), as varied, which allocates, in favour of Virgin Australia, 120 seats of passenger capacity per week in each direction on the Indonesia route. The original determination allocated 2,800 seats per week in each direction but was varied twice to reduce the capacity allocation leaving 120 seats per week in each direction.¹

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 original determination is due to expire on 29 August 2021. In view of this, the Commission sent, on 06 August 2020, a letter to Virgin Australia inviting it to apply for renewal if it wished to renew the determination.

1.3 On 21 August 2020, Virgin Australia applied to the Commission for a renewal of the determination for a further five-year period from 30 August 2021. Virgin Australia submitted a supplementary application on 7 September 2020 informing that the condition which allows another Virgin Australia Group subsidiary to utilise the capacity is no longer required.

¹Determination [2015] IASC 110 was varied by Decisions [2017] IASC 205 and [2018] IASC 219.

1.4 In accordance with sections 12 and 17 of the Act, the Commission published Virgin Australia' application on the Commission's website inviting other applications for capacity on the Indonesia 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).

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(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-Indonesia air services agreement and the Register of Available Capacity, there are 172 seats per week in each direction available for allocation to and from Sydney, Melbourne (including Avalon), Brisbane and Perth on the Indonesia route.

2.3 Additionally, under the Australia-Indonesia air services arrangements, designated airlines of Australia may enter into code share, blocked space or other cooperative marketing arrangements, as either the operating or marketing airline, with another Australian airline(s), with an Indonesian airline(s) or with an airline(s) of a third party.

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 section 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. 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 section 14(2) of the Policy Statement.

3.5 However, section 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.

3.6 On 11 March 2020, the World Health Organisation declared the outbreak of COVID-19 (coronavirus) a pandemic. In response the Australian Government introduced a range of health, financial and other measures to minimise the number of people becoming infected or sick with COVID-19.

3.7 In this context, on 24 March 2020 the Prime Minister announced that the Government was introducing a ‘do not travel’ ban on Australians travelling overseas under the *Biosecurity Act 2015*. This ban is intended to limit travellers returning to Australia with coronavirus and to reduce the risks of spreading the coronavirus to other countries. The Prime Minister’s media statement indicated that the prohibition was aligned with the Government’s decision to raise the Smartraveller Travel Advice to Level 4 – “Do not go overseas. A travel ban is in place.” The ban on overseas travel has been extended until 17 December 2020.

3.8 In a statement to the Australian Securities Exchange (ASX) on 18 March 2020, Virgin Australia announced its suspension of scheduled international flights from 30 March to 14 June 2020. On 20 April 2020, the Board of Virgin Australia put the company into voluntary administration. The Commission notes that the company entered into a binding sale agreement with Bain Capital to restructure the company. Currently, Virgin Australia has suspended its operations between Australia and Indonesia in light of the Government’s travel ban.

3.9 In assessing the current Virgin Australia application for the renewal of its capacity allocation of 120 weekly seats on the Indonesia route, the Commission considered whether Virgin Australia has failed to service the route effectively. Until travel restrictions linked to the COVID-19 pandemic were imposed by the Australian Government in March 2020, Virgin Australia operated up to 21 services a week using a B737-800 aircraft between Denpasar and the following points in Australia: Brisbane,

Port Hedland and Sydney. There was no information to suggest that Virgin Australia failed to service the route effectively prior to March 2020.

3.10 The Commission considers that the current temporary suspension of Virgin Australia flights between Australia and Indonesia is in response to the Australian Government COVID-19 restrictions. Moreover, the Commission considers that it is highly likely that there will be an ongoing impact on international air services for some time, but that once the Government-imposed travel restrictions are lifted, the Commission has no information before it to indicate that Virgin Australia would be unable or unwilling to resume operating regular flights between Australia and Indonesia. For these reasons, the Commission finds that the temporary suspension of Virgin Australia' services in these circumstances does not mean that it has failed to service the route effectively.

3.11 The Commission has also considered the 'reasonable capability criterion' in section 8 of the Policy Statement, ie 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.

3.12 The Commission notes that from Virgin Australia's public statements to the ASX, the airline will continue to operate B737 fleet for domestic and short-haul international services. Considering that Virgin Australia is an established carrier that has serviced the Australia-Indonesia route for many years which, under normal circumstances, would operate scheduled international services on various routes, the Commission finds that Virgin Australia is reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated on the Australia-Indonesia route.

3.13 There is no other information before the Commission that it considers to be relevant or material to its assessment of Virgin Australia' 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).

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

3.15 Under section 19 of the Act, the Commission "must include the same terms and conditions as the original determination to which it relates" [subsec 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"[subsec 19(3)].

3.16 Virgin Australia in its supplementary application of 7 September 2020 indicated that it no longer requires the condition permitting a wholly-owned subsidiary to utilise

the capacity. The Commission has therefore decided not to include this condition in this renewal determination.

3.17 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 for renewal of Determination [2015] IASC 110 allocating capacity on the Indonesia route to Virgin Australia ([2020] IASC 105)

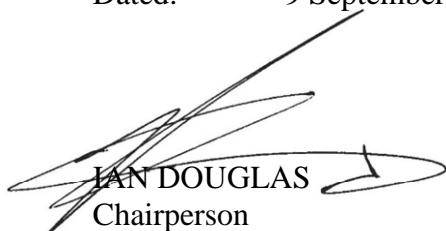
4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Virgin Australia International Airlines Pty Ltd, allocating 120 seats of capacity per week in each direction on the Indonesia route in accordance with the Australia – Indonesia air services arrangements.

4.2 The determination is valid for five years from 30 August 2021.

4.3 The determination is subject to the following conditions:

- (a) Virgin Australia is required to fully utilise the capacity from no later than 31 December 2021 or from such other date approved by the Commission;
- (b) Virgin Australia is not permitted to use the capacity to provide code share or joint services with any other carrier or person unless approved by the Commission; and
- (c) 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 – 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 Virgin Australia or be in a position to exercise effective control of Virgin Australia, without the prior consent of the Commission.

Dated: 9 September 2020


IAN DOUGLAS
Chairperson


KAREN GOSLING
Commissioner