



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination: [2021] IASC 116
Renewal of: [2017] IASC 119
The Route: Italy
The Applicant: Virgin Australia International Airlines Pty Ltd
(Virgin Australia) ABN 63 125 580 823
Public Register File: IASC/APP/202126

The Commission makes a fresh determination allocating to Virgin Australia 300 third country code share seats per week on the Italy route for code share services with Singapore Airlines and Etihad Airways. The determination is valid for five years from 10 August 2022.

1 The application for renewal

1.1 On 10 August 2017, the International Air Services Commission (the Commission) issued Determination [2017] IASC 119 (the Determination) allocating, in favour of Virgin Australia, 300 third country code share seats per week on the Italy route. The Determination permits the use of the capacity for code share services with Singapore Airlines and Etihad Airways. On 6 September 2017, following changes to the Australia-Italy air services arrangements, the Commission issued Resolution [2017] IASC R07 recognising that the averaging-out methodology which was inserted in the bilateral arrangement applies to the capacity allocated in the Determination. (The averaging-out methodology for the use of the capacity allocation is further discussed in paragraph 2.4 below).

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 09 August 2022. In view of this, the Commission sent, on 10 August 2021, a letter to Virgin Australia inviting it to apply for renewal if it wished to renew the Determination.

1.3 On 06 September 2021, Virgin Australia applied to the Commission for a renewal of the determination for a further five-year period from 10 August 2022, and also requested the retention of all relevant conditions. On 11 October 2021, Virgin Australia confirmed by written correspondence that the airline has no plans at this stage to run third country code share services on this route by its wholly-owned subsidiary Tiger International Number1 Pty Ltd.

1.4 As required by sections 12 and 17 of the Act, the Commission published, on 06 September 2021, a notice on its website and subsequently sent a notification by email to stakeholders inviting other applications. No other applications or submissions 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 Under the Australia - Italy air services arrangements, designated airlines of Australia (Australian airlines) may operate seven frequencies per week with any aircraft type. None of this capacity is currently allocated. Australian airlines are entitled to perform their services with wet lease, code sharing, blocked space and/or other cooperative service arrangements with any airline.

2.2 Australian airlines may enter into arrangements with an airline or airlines of a third country to carry out services through code share arrangements. These code share arrangements may constitute up to 1,700 seats per week in total in each direction. Qantas currently holds a total capacity of 1,000 third country code share seats while 600 third country code share seats have been allocated to Virgin Australia.

2.3 According to the Register of Available Capacity, there are currently 100 seats per week in each direction available for immediate allocation to Australian airlines for code share with third country airlines.

2.4 In June 2017, the Australia – Italy air services arrangements were updated to include an explicit reference that the weekly capacity entitlements allocated for code share services are to be averaged over 12 months. Under the averaging methodology, a carrier may exceed its weekly capacity allocation for code share services from time to time so long as the total amount of capacity utilised during the year does not exceed the total annual capacity allocation (weekly capacity allocated multiplied by 52 weeks).

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.

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 section 14(2) of the Policy Statement.

3.6 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 coronavirus (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 Organisation declared the outbreak of COVID-19 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.

3.8 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.” At this time, the ban on overseas travel remains in place in Australia.

3.9 With the Government-imposed travel restrictions, the Virgin Australia Group announced on 18 March 2020 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 subsequently entered into a binding sale agreement with Bain Capital to restructure the company. Currently, Virgin Australia has suspended its third country code share services between Australia and Italy until further notice.

3.10 In assessing the current Virgin Australia application for the renewal of its capacity allocation on the Italy 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, the Virgin Australia Group offered code share seats on services operated by Singapore Airlines and Etihad Airways to certain points in Italy.

3.11 Prior to March 2020, there was no information to suggest that Virgin Australia has failed to utilise the capacity and service the Australia-Italy route effectively.

3.12 The Commission considers that the current temporary suspension of Virgin Australia’s use of code share capacity between Australia and Italy 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, it is likely that Virgin Australia will be able to resume offering code share seats to Australian passengers to certain points in Italy. For these reasons, the Commission finds that the temporary suspension of Virgin Australia’s services in these circumstances does not mean that it has failed to service the route effectively.

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 which, under normal circumstances, operates scheduled international services on various routes and

finds that the carrier is reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated on the Australia-Italy 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 the Virgin Australia Group on this route.

3.17 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" (s 19(3)). Consistent with Virgin Australia's advice that there are no plans at this stage for Tiger International to provide code share services on the route, the Commission has decided to delete references to Tiger International in the conditions.

3.18 Pursuant to section 19 of the Act, the Commission has decided to include certain conditions as set out in item 4 below.

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 Italy route to Virgin Australia ([2021] IASC 116)

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Virgin Australia, allocating 300 third country code share seats per week in each direction on the Italy route to be averaged over 12 months in accordance with the terms of the Australia – Italy air services arrangements.

4.2 The determination is valid for five years from 10 August 2022.

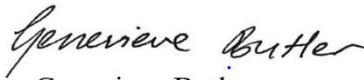
4.3 The determination is subject to the following conditions:

- (a) Virgin Australia is required to fully utilise the capacity from no later than 31 December 2022 or such other date approved by the Commission;
- (b) The capacity may be used by Virgin Australia for the provision of code share services with Singapore Airlines in accordance with the code share agreement

between Virgin Australia and Singapore Airlines which came into effect on 2 February 2012, as amended.

- (c) The capacity may be used by Virgin Australia for the provision of code share on services with Etihad Airways in accordance with the code share agreement between Virgin Australia and Etihad Airways which came into effect on 26 August 2010, as amended.
- (d) Virgin Australia must apply to the Commission for approval of any proposed variations to the code share arrangements with Singapore Airlines and Etihad Airways, which would change the relevant commercial aspects of the arrangements (from a free sale to block space, or vice versa), or if Virgin Australia proposes to add third country routes on which the airlines will code share which would require the use of Australian capacity entitlements;
- (e) where the capacity is used to provide code share services on the route, nothing in this determination exempts the airlines from complying with the Australian Consumer Law. The airlines are required to take all reasonable steps to ensure that passengers are informed, at the time of booking, of the carrier actually operating the flight;
- (f) 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 — Italy 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: 18 October 2021



Genevieve Butler
Chairperson



Karen Gosling
Commissioner



Jane McKeon
Commissioner