



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination: [2021] IASC 117
Renewal of: [2017] IASC 120
The Route: Samoa
The Applicant: Virgin Australia International Airlines Pty Limited
(Virgin Australia) ABN 63 125 580 823
Public Register File: IASC/APP/202127

The Commission's makes a fresh determination allocating to Virgin Australia 880 seats per week in each direction on the Samoa route, subject to certain conditions. 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 120 (the Determination) allocating 880 seats per week in each direction on the Samoa route in favour of Virgin Australia. The Determination was valid for five years and permitted the capacity to be utilised by Virgin Australia or another Australian carrier which is a wholly-owned subsidiary of Virgin Australia and for the provision of joint services by the Virgin Australia Group and any of its wholly-owned subsidiary.

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 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 for the capacity to be used 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 submissions about the application. No 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-Samoa air services arrangements, Australian designated airlines may operate up to 1000 seats per week of passenger capacity in each direction between Australia and Samoa. Virgin Australia has been allocated a total of 880 seats of capacity. There remains 120 seats of passenger capacity available for allocation. Additionally, the designated airlines of Australia may determine the number of frequencies, capacity and aircraft type to be operated for freight services.

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 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 (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.

3.8 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 services between Australia and Samoa until further notice.

3.10 In assessing the current Virgin Australia application for the renewal of its capacity allocation of 880 seats per week in each direction of passenger capacity on the Samoa 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 was operating up to five services per week in each direction between Australia and Samoa.

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

3.12 The Commission considers that the current temporary suspension of Virgin Australia flights between Australia and Samoa 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 operating regular flights between Australia and Samoa. 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.

3.13 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-Samoa 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' 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)).

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 Samoa route to Virgin Australia ([2021] IASC 117)

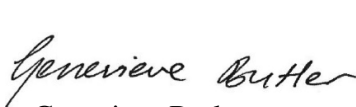
4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Virgin Australia, allocating 880 seats per week in each direction on the Samoa route in accordance with the Australia - Samoa air services arrangements.

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) Virgin Australia is not permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person unless approved by the Commission;
- (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 — Samoa 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