



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2021] IASC 121
Renewal of:	[2016] IASC 112
The Route:	Fiji
The Applicant:	Virgin Australia (SE Asia) Pty Limited ABN 79 097 892 389 (Virgin Australia)
Public Register File:	IASC/APP/202138

The Commission makes a fresh determination allocating to Virgin Australia 907 seats per week in each direction on the Fiji route, subject to certain conditions. The determination is valid for five years from 5 November 2022.

1 The application for renewal

1.1 On 19 December 2016, the International Air Services Commission (the Commission) issued Renewal Determination [2016] IASC 112 (the Determination) renewing the allocation of 907 seats of capacity per week in each direction on the Fiji route in favour of Virgin Australia. The Determination was valid for five years from 5 November 2017.

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 4 November 2022. In view of this, the Commission sent, on 4 November 2021, a letter to Virgin Australia inviting it to apply for renewal if it wished to renew the Determination.

1.3 On 11 November 2021, Virgin Australia applied to the Commission for a renewal of the determination for a further five-year period from 5 November 2022, and also requested the retention of all relevant conditions.

1.4 As required by sections 12 and 17 of the Act, the Commission published, on 11 November 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-Fiji air services arrangements, Australian designated airlines may operate up to 6,900 seats per week of passenger capacity in each direction between Fiji and the following points in Australia: Sydney, Melbourne, Brisbane and/or Perth. Virgin Australia has been allocated a total of 4,389 seats of capacity. Qantas has a total allocation of 2,334 seats. There remains 177 seats of passenger capacity available for allocation.

2.2 Additionally, the designated airlines of Australia may determine the number of frequencies, capacity and aircraft type to be operated for freight services to and from points other than Sydney, Melbourne, Brisbane and/or Perth.

2.3 When operating or holding out agreed services on the specified routes, any Australian designated carrier may enter into cooperative marketing arrangements such as blocked space, code sharing or leasing, whether as the operating or marketing airline, with an Australian designated airline(s) or a Fijian designated airline(s). On the specified Joint Services Route, Australian designated airline(s) may enter into code sharing, blocked space and/or any other cooperative services arrangement with an airline or airlines of Fiji or with an airline of the Association of South Pacific Airlines as at 9 March 1998.

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 Organization 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 was 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.” On 27 October 2021, the Government announced it would lift the international travel ban from 01 November 2021, subject to certain conditions.¹

3.9 Virgin Australia announced on 12 October 2021 that it will return to operate international flights in December 2021. It was further announced that Virgin Australia will restart flights to Fiji on 16 December 2021.²

3.10 In assessing the current Virgin Australia application for the renewal of its capacity allocation of 907 seats per week in each direction of passenger capacity on the Fiji route, 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, the Virgin Australia group was operating

¹ <https://www.pm.gov.au/media/interview-david-koch-and-natalie-barr-sunrise-0>

² <https://www.virgin.com/about-virgin/latest/virgin-australia-to-return-to-international-flights>

between 15 to 21 services per week in each direction between points in Australia and Fiji. Prior to March 2020, there was no information to suggest that Virgin Australia has failed to service the Australia-Fiji route effectively.

3.12 The Commission considers that the temporary suspension of Virgin Australia flights in 2020 and 2021 was in response to the Australian Government COVID-19 restrictions. The Commission therefore 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. Moreover, the Commission notes Virgin Australia's announcement that it would recommence its services to Fiji from mid-December 2021.

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-Fiji 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)).

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 Fiji route to Virgin Australia (SE Asia) Pty Ltd ([2021] IASC 121)

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Virgin Australia (SE Asia) Pty Ltd, allocating 907 seats per week in each direction on the Fiji route in accordance with the Australia - Fiji air services arrangements.

4.2 The determination is valid for five years from 05 November 2022.

4.3 The determination is subject to the following conditions:

- (a) Virgin Australia (SE Asia) Pty Ltd is required to fully utilise the capacity from the date this determination comes into effect or such other date as may be approved by the Commission;
- (b) only Virgin Australia (SE Asia) Pty Ltd is permitted to utilise the capacity
- (c) 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;
- (d) changes in relation to the ownership and control of Virgin Australia (SE Asia) Pty Ltd are permitted except to the extent that any change:
 - results in the designation of the airline as an Australian carrier under the Australia — Fiji 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 (SE Asia) Pty Ltd or be in a position to exercise effective control of Virgin Australia (SE Asia) Pty Ltd without the prior consent of the Commission.

Dated: 29 November 2021


GENEVIEVE BUTLER
Chairperson


JANE MCKEON
Commissioner