



Australian Government

International Air Services Commission

DECISION

Decision: [2022] IASC 219
Variation Of: [2017] IASC 113
The Route: New Zealand
The Applicant: Virgin Australia International Airlines Pty Ltd
(Virgin Australia) ABN 63 125 580 823
Public Register File: IASC/APP/202248

The Commission varies Determination [2017] IASC 113 to permit the use of the capacity on the New Zealand route for code sharing between Virgin Australia and Qatar Airways. The permission is valid for the duration of the Determination commencing from the date of issue of this decision.

1 The application

1.1 On 25 November 2022, Virgin Australia applied to the International Air Services Commission (the Commission) seeking to vary Determination [2017] IASC 113, as varied (the Determination), to permit the utilisation of the capacity for code share services between Virgin Australia and Qatar Airways on the New Zealand route. Specifically, it is proposed that Qatar Airways will offer code share services, as marketing carrier, on flights operated by Virgin Australia on the New Zealand route, under a free-sale arrangement.

1.2 The determination allocates to Virgin Australia unlimited passenger and freight capacity in each direction on the New Zealand route and permits the use of capacity by Virgin Australia for the provision of code share services with Etihad Airways, Delta Air Lines, Air New Zealand, Singapore Airlines, Alitalia (now ITA Airways), Hainan Airlines, Air Berlin, Air Canada, Hong Kong Airlines and Hawaiian Airlines.

1.3 In its application, Virgin Australia sought to retain the conditions that permit the provision of code share services with Etihad Airways, Singapore Airlines, Air Canada, and Hawaiian Airlines. It also sought to remove conditions permitting the provision of code share services with Air New Zealand, Delta Air Lines, Air Berlin, Hong Kong Airlines, Alitalia (now ITA Airways) and Hainan Airlines.

1.4 In accordance with section 22 of the *International Air Services Commission Act 1992* (the Act), on 28 November 2022, the Commission published Virgin Australia's application on the Commission's website 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 paragraph 7(2)(aa) of the Act, 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 Under the Australia – New Zealand air services arrangements, Australian designated carriers may enter into code-share, blocked space or other cooperative marketing arrangements, whether as the operating or marketing airline, with any airline including airlines of third countries, provided only that the airline holds the appropriate authority to conduct air transport on the routes or segments concerned.

3 The Commission's consideration

3.1 Virgin Australia's application seeks to vary the Determination to include a condition of a kind referred to in paragraph 15(2)(e) of the Act. In view of this, the application is a transfer application as so defined in subsection 4(1) of the Act. The Commission has assessed the application in accordance with section 25 of the Act.

3.2 Subsection 25(1) provides that the Commission must make a decision varying the determination in a way that gives effect to the variation requested, subject to subsection 25(2). Subsection 25(2) states that the Commission must not make a decision varying the determination in a way that varies, or has the effect of varying an allocation of capacity if the Commission is satisfied that the allocation, as so varied, would not be of benefit to the public.

3.3 Under section 26 of the Act, in assessing the benefit to the public of a variation of an allocation of capacity, the Commission is required to apply the criteria set out in any policy statement issued by the Minister under section 11 of the Act.

3.4 Under section 11 of the Act, the Minister made *the International Air Services Commission Policy Statement 2018* (the Policy Statement) which came into effect on 28 March 2018. The Policy Statement sets out the criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity.

3.5 Section 18 of the Policy Statement specifically deals with 'transfer applications' such as this one. It provides that, in assessing whether the variation requested would not be of benefit to the public for the purpose of subsection 25(2) of the Act, the Commission is to have regard to the 'reasonable capability criterion' set out in section 8 of the Policy Statement and may have regard to any of the additional criteria set out in section 9 that the Commission considers to be relevant. The Commission is also to have regard to the matters specified in paragraph 18(2)(b) of the Policy Statement to the extent that they are relevant to the variation under consideration.

3.6 'Reasonable capability criterion' is defined in section 8 of the Policy Statement to mean the extent to which Australian carriers are reasonably capable of a) obtaining the necessary approvals to operate on and service the route, and b) of using the capacity allocated under the Determination. The 'additional criteria' to which the Commission may have regard are set out in section 9 of the Policy Statement.

3.7 The Commission considered the application of the reasonable capability criterion to the circumstances of this application. The Commission notes that Virgin Australia is an established international carrier, and therefore finds that it is reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated under the Determination.

3.8 The Commission did not have regard to the additional criteria in section 9 of the Policy Statement. The Commission does not have serious concerns about the proposed code sharing by Virgin Australia and Qatar Airways on the New Zealand route. The Commission notes that there is unlimited capacity on the route and that it has received no adverse submissions opposing the variation sought in Virgin Australia's transfer application.

3.9 Furthermore, the Commission notes that the Australian Competition and Consumer Commission (the ACCC) has, on 8 September 2022, authorised the alliance between Virgin Australia and Qatar Airways, subject to certain conditions (ACCC authorisation number AA1000608).

3.10 In these circumstances, there is nothing before the Commission to indicate that its assessment of benefit to the public for the purpose of subsection 25(2) of the Act would be assisted by having regard to the additional criteria in section 9 of the Policy Statement. The Commission considers that there is unlikely to be any lessening of public benefit through authorising the code sharing arrangement in relation to the New Zealand route.

3.11 The Commission finds that the matters specified in paragraph 18(2)(b) of the Policy Statement are not relevant to the variation under consideration. The Commission does not have information to suggest that Virgin Australia's transfer application involves speculative activity. Virgin Australia is an established international carrier which currently holds multiple determinations and other regulatory approvals enabling the carrier to operate scheduled international air services on various routes.

3.12 Having considered the criteria set out in section 18 of the Policy Statement, the Commission is satisfied that the allocation, as proposed to be varied permitting Qatar Airways to code share, as marketing carrier, on flights operated by Virgin Australia on the Australia-New Zealand route, would be of benefit to the public. Therefore, in accordance with section 25 of the Act, the Commission must make a decision varying the Determination in a way that gives effect to the variation requested in the transfer application.

3.13 Subsection 15(1) of the Act empowers the Commission to include such terms and conditions in a determination as it thinks fit. Paragraph 15(2)(e) requires the inclusion of a condition stating the extent to which the carrier may use capacity allocated under a determination in joint services with another carrier.

3.14 The Commission has decided to add conditions permitting the use of the capacity for the provision of code share services between Virgin Australia and Qatar Airways on the New Zealand route. As required by section 23 of the Policy Statement, the Commission has decided to include a condition requiring the airlines to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

3.15 Nothing in this decision should be taken as indicating either approval or disapproval by the ACCC. This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

4 Decision varying Determination [2017] IASC 113 allocating capacity to Virgin Australia International Airlines Pty Ltd on the New Zealand route ([2022] IASC 219)

4.1 In accordance with section 25 of the Act, the Commission varies Determination [2017] IASC 113 which allocates capacity to Virgin Australia International Airlines Pty Ltd on the New Zealand route, by:

adding the following conditions to the Determination:

- The capacity may be used by Virgin Australia International Airlines Pty Ltd to provide code share services with Qatar Airways in accordance with the code share agreement between Virgin Australia International Airlines Pty Ltd and Qatar Airways, made effective on 21 June 2022, and the air services arrangements between Australia and New Zealand.
- Virgin Australia must apply to the Commission for approval of any proposed variations to the code share agreement between Virgin Australia International Airlines Pty Ltd and Qatar Airways which would change the relevant commercial aspects of the agreement from a free sale code share arrangement to a block space, or if the airlines propose to add third country routes on which the airlines will code share where Australian capacity will be used for services on that route.
- To the extent that the capacity is used to provide code share services on the route, the airlines must take all reasonable steps to ensure that passengers are informed, at the time of booking, of the carrier actually operating the flight. Nothing in this Determination exempts the airlines from complying with the Australian Consumer Law.

removing the following conditions to the Determination:

- The capacity may be used by Virgin Australia International Airlines Pty Ltd to provide code share services with Air New Zealand, Delta Air Lines, Air Berlin, Hong Kong Airlines, Alitalia (now ITA Airways) and Hainan Airlines.

4.2 This decision comes into effect from the date of issue and is valid for the duration of Determination [2017] IASC 113.

Dated: 16 December 2022



GENEVIEVE BUTLER
Chairperson



JANE MCKEON
Commissioner