



## Australian Government

### International Air Services Commission

#### DECISION

**Decision:** [2014] IASC 228  
**Variation of:** [2009] IASC 130 and [2013] IASC 113  
**The Route:** Tonga  
**The Applicant:** Virgin Australia Airlines (SE Asia) Pty Ltd  
(Virgin Australia) ACN 79 097 892 389  
**Public Register File:** IASC/APP/201458

The Commission's delegate varies Determinations [2009] IASC 130 and [2013] IASC 113 to permit Singapore Airlines to code share on Virgin Australia services on the Tonga route.

#### 1 The application

1.1 On 15 May 2014, Virgin Australia applied for a variation to Determinations [2009] IASC 130 (as varied) and [2013] IASC 113 (together, the Determinations) to enable Singapore Airlines to code share on flights operated by Virgin Australia on the Tonga route. The Determinations allocate 540 seats per week of passenger capacity on the route.

1.2 On 16 May 2014, the Commission published a notice, in accordance with section 22 of the Act, inviting submissions about the application for variation. No submissions were received. All material supplied by the applicant is available on the Commission's website, [www.iasc.gov.au](http://www.iasc.gov.au).

#### 2 Delegate's assessment

2.1 In accordance with section 27AB of the *International Air Services Commission Act 1992* (the Act) and regulation 3A of the *International Air Services Commission Regulations 1992*, the delegate of the Commission may consider the application for variation. (For purposes of this decision, all references to the Commission include the delegate of the Commission).

2.2 Virgin Australia's application seeks to vary the Determinations 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 and has been assessed in accordance with section 25.

2.3 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.

2.4 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.

2.5 Paragraph 6.3 of the Minister's Policy Statement (No. 5) of 19 May 2004 (the Policy Statement) provides that, subject to paragraph 6.4, where a carrier requests a variation of a determination to allow it flexibility in operating its capacity, including to use the Australian capacity in a code share arrangement with a foreign carrier, and no submission is received about the application, only the criteria in paragraph 4 of the Policy Statement are applicable.

2.6 Paragraph 6.4 provides, in part, that the Commission may apply the criteria in paragraph 5 in the circumstances set out in paragraph 3.6 of the Policy Statement.

2.7 Under paragraph 3.6, where capacity that can be used for code share operations is available under air services arrangements, including where foreign airlines have rights to code share on services operated by Australian carriers, the Commission would generally be expected to authorise applications for use of capacity to code share. However, if the Commission has serious concerns that a code share application (or other joint service proposal) may not be of benefit to the public, it may subject the application to more detailed assessment using the additional criteria set out in paragraph 5 (whether the application is contested or not). Before doing so, the Commission will consult with the Australian Competition and Consumer Commission (the ACCC).

2.8 Tonga is one of the smallest markets to which Australian carriers operate passenger services. Virgin Australia currently operates two services per week between Sydney and Nuku'alofa. Passenger movements have remained steady over the past five years with average annual growth of 1.3 per cent over this time, suggesting there is limited potential for significant growth in the market.

2.9 According to the Register of Available Capacity, there are 60 seats per week available for Australian airlines for services between Australia and Tonga. While the lack of capacity precludes the opportunity for a second Australian international airline to commence services to Tonga and compete against Virgin Australia, Australian airlines are not seeking additional capacity. One-stop services between Australia and Tonga operated by Fiji Airways and Air New Zealand via their respective home countries provide some competition for Virgin Australia's direct services.

2.10 Singapore Airlines' presence in the South West Pacific is limited to Australia and two points in New Zealand. It also does not operate any aircraft capable of landing at Tonga's international airport, Fua'amotu Airport. In view of this, and the small size of the market, the Commission considers it most unlikely that Singapore Airlines would commence own aircraft operations to Tonga absent the code share.

2.11 Australia's air services arrangements with Singapore authorise the exercise of transit rights by Singaporean carriers beyond Australia, but do not provide for Singaporean carriers to exercise traffic rights between Australia and Tonga. Consequently, all passengers travelling between Australia and Tonga on a Singapore Airlines code will need to originate in, or be destined for, a point other than Australia.

2.12 Upon the request of the Commission, Virgin Australia confirmed on 27 May 2014 that Singapore Airlines intends to exercise transit rights only in Australia en route to Tonga

and that no fifth freedom or own-stopover traffic rights will be exercised.

2.13 In the Commission's view, allowing Singapore Airlines to code share on Virgin Australia services between Australia and Tonga could assist in making Virgin Australia's service more sustainable. Overall, as Singapore Airlines are not carrying local traffic on the route, the code share will have little or no impact on competition.

2.14 In light of the above, the Commission does not have concerns that the code share application may not be of benefit to the public.

2.15 Under paragraph 4 of the Policy Statement, the use of entitlements by Australian carriers under a bilateral arrangement is of benefit to the public unless such carriers are not reasonably capable of obtaining the necessary approvals to operate on the route and of implementing their proposals. The Commission notes that Virgin Australia is an established international carrier which is clearly capable of obtaining the necessary approvals and of implementing its proposals.

2.16 Subsection 15(1) of the Act empowers the Commission to include such terms and conditions as it thinks fit. Paragraph 15(2)(e) requires the inclusion of a condition stating the extent to which the carrier may use that capacity in joint services with another carrier. As is its normal practice, the Commission will also include a condition which requires Virgin Australia to comply with the Australian Consumer Law and to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

2.17 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.

### **3 Decision varying Determinations [2009] IASC 130 and [2013] IASC 113 allocating capacity to Virgin Australia on the Singapore route ([2014] IASC 228)**

3.1 In accordance with section 25 of the Act, the delegate, on behalf of the Commission, varies Determinations [2009] IASC 130 (as varied) and [2013] IASC 113 which allocate capacity to Virgin Australia on the Tonga route, by:

*adding* the following conditions to the Determination:

- the capacity may be used by Virgin Australia to provide services jointly with Singapore Airlines in accordance with the code share agreement between Virgin Australia and Singapore Airlines dated 3 February 2012, as amended;
- Virgin Australia must advise the Commission of any proposed amendment to the code share agreement, or any proposed new code share agreement with Singapore Airlines, that would result in a substantive change in the nature of the code share agreement (including any route changes);
- under any code share agreement with Singapore Airlines, Virgin Australia must price and sell its services on the route independently of Singapore Airlines and must not share or pool revenues on the route with Singapore Airlines; and

- under the code share arrangements with Singapore Airlines, the airlines must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of booking. Nothing in this determination exempts the airlines from complying with the Australian Consumer Law.

Dated: 30 May 2014

A handwritten signature in cursive script that reads "Marlene Tucker". The signature is written in dark ink and is positioned above the printed name and title.

Marlene Tucker  
Executive Director  
Delegate of the IASC Commissioner