



Australian Government
International Air Services Commission

RENEWAL DETERMINATION

Determination: [2017] IASC 114
Renewal of: [2008] IASC 110
The Route: United States of America (USA)
The Applicant: Virgin Australia International Airlines Pty Ltd
(Virgin Australia) ABN 63 125 580 823
Public Register: IASC/APP/201729

The Commission makes a determination allocating to Virgin Australia unlimited passenger and freight capacity in each direction on the USA route with permission to use the capacity for code share services with Delta Air Lines. The determination is valid for ten years from 1 August 2018.

1 The application for renewal

1.1 On 1 August 2008, the Commission's delegate issued Determination [2008] IASC 110 (the Determination) allocating, in favour of Virgin Blue International Airlines Pty Ltd, unlimited passenger and freight capacity on the USA route. The Determination was subsequently amended as follows: (i) [2008] IASC R02 extended the date of commencement of the use of the capacity from 31 December 2008 to 31 March 2009; (ii) [2011] IASC 212 added a condition permitting the use of the capacity for code share services with Delta Air Lines; and [2011] IASC R10 recognising the name change of Virgin Blue International Airlines Pty Ltd to Virgin Australia International Airlines Pty Ltd.

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 Determination. The Determination is due to expire on 31 July 2018. In view of this, the Commission sent, on 21 June 2017, a letter to Virgin Australia inviting it to apply for renewal if it wished to renew the Determination.

1.3 Virgin Australia applied to the Commission on 11 July 2017 for a renewal of the Determination for a further ten-year period from 1 August 2018. Additionally, Virgin Australia requested the retention of the existing conditions permitting the use of the capacity for code sharing with Delta Air Lines and the inclusion of a condition permitting the use of the capacity by a wholly-owned subsidiary. On 4 August 2017, Virgin Australia nominated Tiger International Number1 Pty Ltd (Tiger International) as the wholly-owned subsidiary.

3.6 In these circumstances, the Commission is satisfied that allocating unlimited passenger and freight capacity on the Unites States route to Virgin Australia is of benefit to the public.

3.7 Virgin Australia also sought the inclusion of an additional condition to permit the capacity to be used by another Australian carrier which is a wholly-owned subsidiary, which in this case is Tiger International. As Virgin Australia effectively seeks a variation to the existing Determination to allow it flexibility in operating capacity by permitting a wholly-owned subsidiary to utilise the capacity, the Commission is required to apply the paragraph 4 criteria on Tiger International.

3.8 From information available to the Commission, it has reached the view that Tiger International is reasonably capable of obtaining the necessary approvals to operate on the USA route and of implementing the service in accordance with the Australia-USA air services arrangements.

3.9 Section 19(3) of the Act allows the Commission to make changes to the terms and conditions included in the determination (which is subject to renewal), including adding or deleting terms and conditions in the determination as may be warranted. In light of this, the Commission has decided to add another condition permitting the use of the capacity by another Australian carrier which is a wholly-owned subsidiary of Virgin Australia.

3.10 Further, Virgin Australia sought authority to continue utilising the capacity to offer code share services operated by Delta Air Lines.

3.11 Subsection 15(1) of the Act allows a determination to include such terms and conditions as the Commission thinks fit. Subsection 15(2) provides, in part, that the determination must include a condition stating the extent (if any) to which any such carrier may use that capacity by providing joint international air services with another Australian carrier or any other person.

3.12 Under paragraph 3.6 of the Minister's Policy Statement, 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).

3.13 The Commission notes that the ACCC granted re-authorisation to Virgin Australia and Delta Air Lines to continue to coordinate under a metal-neutral alliance their passenger and frequency services on direct routes between Australia and the USA. The alliance involves joint scheduling and pricing and revenue-sharing.

3.14 The Commission further notes that in making its decision, the ACCC considered

- 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;
- subject to the preceding condition, the capacity may be used by Virgin Australia to provide services jointly with Delta Air Lines in accordance with the code share agreement between Virgin Australia and Delta Air Lines which came into effect on 8 July 2009, as amended;
- Virgin Australia must apply to the Commission for approval of the use of the capacity if there are variations to the code share arrangement(s) which would change the relevant commercial aspects of the code share arrangement(s) from a free sale code share arrangement to a block space, or vice versa, or if Virgin Australia proposes 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 joint services, 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;
- 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 – USA 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: 10 August 2017



IAN DOUGLAS
Chairperson



JAN HARRIS
Commissioner