



**Australian Government**  

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**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.

1.4 As required by sections 12 and 17 of the Act, the Commission published a notice on its website inviting other applications for the capacity. No other applications were received.

1.5 All non-confidential material supplied by Virgin Australia is available on the Commission's website ([www.iasc.gov.au](http://www.iasc.gov.au)).

## **2 Relevant provisions of the air services arrangements**

2.1 Under the Australia-USA air services arrangements, there is unlimited capacity for Australian carriers to operate scheduled passenger and freight services between Australia and the USA.

2.2 Additionally, designated airline(s) of Australia may enter into code share and other cooperative marketing arrangements, as the marketing and/or operating airline, with any airline including airlines of third countries.

## **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. 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 Under paragraph 8 of the Minister's Policy Statement issued on 19 May 2004, there is a presumption in favour of the carrier seeking a renewal which may be rebutted only if the carrier has failed to service the route effectively and the use of the capacity, in whole or in part, by another carrier who applied for the capacity, would better serve the public having regard to the criteria set out in paragraphs 4 and 5 of the Minister's Policy Statement.

3.3 The Commission does not have information to indicate that Virgin Australia has failed to service the route effectively. Additionally, the Commission notes that there are no other applicants seeking the capacity for which Virgin Australia has applied.

3.4 Under paragraph 6.2 of the Minister's Policy Statement, in circumstances where there is only one applicant for allocation of capacity on a route, as in this case, only the criteria in paragraph 4 are applicable. Paragraph 4 provides that 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 are not reasonably capable of implementing their applications.

3.5 Virgin Australia is an established international carrier and in the Commission's view is reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its proposed service.

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

that the alliance is likely to continue to result in material public benefits in the form of enhanced products and services including increased and better online connections, access to each other's frequencies, better schedule spread, loyalty program benefits and improved lounge access. Further, the ACCC recognised that the alliance would lessen competition on the route as it reduces the number of competitors on direct routes between Australia and the USA and brings together two airlines which would otherwise be close competitors on these routes. However, after weighing the public benefits and detriments, the ACCC has reached the view that the alliance would likely result in material public benefit that would outweigh the detriment to the public constituted by the lessening of competition.<sup>1</sup>

3.15 The Commission considers that Virgin Australia's continued code sharing with Delta Air Lines on the USA route does not have competition impact on the route. For this reason, it did not consider it necessary to assess the application against the additional criteria in paragraph 5 of the Minister's Policy Statement and did not specifically consult the ACCC.

3.16 In view of the above, the Commission has decided to include the existing conditions to permit the use of the capacity for the provision of code share services between Virgin Australia and Delta Air Lines as requested.

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

#### **4 Determination for renewal of [2008] IASC 110 allocating capacity on the USA route to Virgin Australia ([2017] IASC 114)**

4.1 The Commission allocates to Virgin Australia, pursuant to section 8 of the Act, unlimited passenger and freight capacity on the United States route in accordance with the terms of the Australia – USA air services arrangements.

4.2 The determination is valid for ten years from 1 August 2018.

4.3 The determination is subject to the following conditions:


- Virgin Australia is required to fully utilise the capacity from 1 August 2018 or such other date as may be approved by the Commission;
- only Virgin Australia or another Australian carrier which is a wholly-owned subsidiary of Virgin Australia is permitted to use the capacity;

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<sup>1</sup> ACCC Determination Authorisation Nos. A91475, A91476, A91477 and A91478 dated 14 August 2015

- 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