



Australian Government
International Air Services Commission

DECISION

Determination: [2015] IASC 210
Variation of: [2013] IASC 130
The Route: Indonesia
The Applicant: Virgin Australia International Airlines Pty Ltd
(ABN 63 125 580 823)
Public Register File: IASC/APP/201522

The Commission varies Determination [2013] IASC 130 to add a condition allowing the capacity to be used by an Australian carrier which is a wholly-owned subsidiary of Virgin Australia International Airlines Pty Ltd.

1 The application

1.1 On 4 September 2015, Virgin Australia International Airlines Pty Ltd (VAIA) applied to the International Air Services Commission (the Commission) for a variation of Determination [2013] IASC 130 (the Determination) which allocates 1,080 seats of passenger capacity per week in each direction to and from Sydney, Melbourne (including Avalon), Brisbane and Perth on the Indonesia route under the Australia-Indonesia air services arrangements. The Determination was varied by [2013] IASC 225 allowing Delta Air Lines (Delta) to code share on the route.

1.2 The application proposes that another Australian carrier which is a wholly-owned subsidiary of VAIA be authorised to utilise the capacity. VAIA sought the variation to provide increased flexibility for the use of the capacity.

1.3 This is one of VAIA's applications to vary five determinations to permit a wholly-owned subsidiary to utilise some capacity on the Indonesia route. The Commission will make a separate decision for each of the five determinations proposed to be varied.

1.4 All non-confidential material supplied by the applicant is available on the Commission's website (www.iasc.gov.au).

2 Submissions received

2.1 In accordance with section 22 of the *International Air Services Commission Act 1992* (the Act), the Commission published, on 4 September 2015, a notice inviting submissions about the application.

2.2 On 17 September 2015, Qantas Airways Limited (Qantas) made a submission on the application. In its submission, Qantas observed that the applications contain no information on the entity that will utilise the capacity, other than it is a 'wholly-owned subsidiary' of VAIA, nor do they provide any information about how that subsidiary will operate the

capacity. Qantas asserted that this lack of information makes it unclear how VAIA and the relevant subsidiary, in exercising the requested variation, will comply with the requirements of the Act and the Minister's Policy Statement (No. 5) of 19 May 2004 (the Minister's Policy Statement). Qantas further said that clarification and support for the assertion that the unnamed subsidiary is actually an 'Australian carrier' and that it is reasonably likely to obtain the necessary regulatory approvals and licenses to operate the proposed service is necessary to complete the assessment.

2.3 Qantas further stated that should the Commission make a decision varying the determinations as requested, they anticipate any decision to include conditions directed at ensuring certain ownership and control criteria are satisfied and maintained and for the Commission to closely monitor compliance with such conditions.

2.4 On 22 September 2015, VAIA responded to the Qantas submission. VAIA stated that there is no requirement in the Act (or the implementing regulations) that compels applications by Australian carriers to disclose the name of the wholly-owned subsidiary (or subsidiaries) proposed to use the capacity allocation. In any case, VAIA confirmed the capacity allocated on the Indonesia route will be utilised by Tigerair which appears on the public database of the Australian Securities and Investments Commission (ASIC) as Tiger International Number1 Pty Ltd with ACN 606 131 944 and ABN 61 606 131 944 (hereinafter referred to as 'Tigerair').

2.5 VAIA further stated that, in its view, the 'Commission does not possess any powers to assess, monitor or enforce ownership and control requirements for Australian international airlines' and that this role resides exclusively with the Department of Infrastructure and Regional Development (the Department).

2.6 VAIA also expressed dissatisfaction over what it claims as 'non-compliance' with the Commission's procedures. VAIA refers to the acceptance by the Commission of Qantas' submission made on 17 September 2015 given that Qantas lodged its notice of intention to make a submission at 8:15 pm on 11 September 2015 – that is, three hours and 15 minutes later than the advised lodgement time of 5:00 pm on the same day. VAIA considers a decision should have been made by the Commission on 14 September 2015.

2.7 The Commission will deal with the issues raised by VAIA concerning procedures in item 3 and the substantive issues raised by Qantas and VAIA in item 5 below.

3 Commission's procedures and natural justice requirements

3.1 Section 22 of the Act requires the Commission to invite, by notice, submissions about a review of a determination. Any person may make submissions to the Commission about the review. Section 52 provides that notices issued under section 22 must be published in the way provided for in the regulations or in the way the Commission thinks appropriate if the regulations do not so provide. There are no regulations on how to publish notices.

3.2 To comply with the requirements of section 22, the Commission published the following notice on its website concerning the VAIA applications:

The Commission has received an application from Virgin Australia seeking a variation to the following determinations on the Indonesia route:

- [2013] IASC 116
- [2013] IASC 127
- [2013] IASC 130
- [2013] IASC 131
- [2013] IASC 134

to permit a wholly-owned subsidiary of Virgin Australia to use the capacity.

In accordance with section 22 of the *International Air Services Commission Act 1992*, the Commission invites submissions about the application. The closing date for notice of intention to make a submission is COB (i.e. 5pm) on 11 September 2015, with the submission due by COB 18 September 2015. If no notice of intention is received by COB 11 September 2015, the Commission may proceed to make a decision.

3.3 The Commission also sent an email to over 140 stakeholders (including Qantas and VAIA officers) notifying them of the VAIA applications and inviting submissions as set out in the notice published on the Commission's website. Any person may request to be included in the Commission's notification list.

3.4 Qantas lodged a notice of intention to make a submission at 8:15 pm on 11 September 2015 and subsequently lodged its submission to the Commission on 17 September 2015. The Commission accepted the Qantas submission given no decision had yet been made and it was submitted within the two-week timeframe to provide submissions as set out in the notice.

3.5 VAIA expressed the view that accepting the Qantas submission after Qantas failed to lodge a notice of intention to make a submission by 5pm on 11 September 2015 violates the Commission's published procedures. VAIA claimed a decision should have been made on 14 September 2015. The Commission does not agree with this assertion.

3.6 The Commission has published a guideline entitled 'Advice for Submitters', a policy developed to facilitate the orderly receipt of submissions. This guideline sets out a procedure which, if followed, in relation to a submission, can 'guarantee' that the Commission will consider the submission which means that the Commission will not proceed to making a decision before receipt of a submission. The guideline does not establish a procedure which would require the Commission to refuse to accept or disregard a submission in circumstances where certain steps outlined in the procedure are not strictly followed.

3.7 The Commission is mindful that administrative power must be exercised in accordance with administrative law principles, including the obligation to have regard to all relevant considerations and to observe the requirements of procedural fairness. If the Commission receives a submission before it makes a decision on a variation application, as a matter of procedural fairness, it must consider that submission and to the extent that it is relevant to the applicable criteria, must take it into account as a relevant consideration.

3.8 The notice itself states that 'if no notice of intention is received by COB 11 September 2015, the Commission may proceed to make a decision'. It does not say that a decision must be made as soon as the 5:00 pm deadline lapses. In fact, the Commission's Service Charter provides that the Commission will make decisions about uncontested applications within four weeks of receipt of the application. If an application is contested or opposed, the Commission will make a decision within 12 weeks or inform the relevant airline involved if there are reasons why a decision should take longer.

4 Relevant provisions of the air services arrangements

The Australia – Indonesia air services arrangements allow multiple designation of Australian airlines to operate on the Indonesia route.

5 Commission's assessment

The wholly-owned subsidiary

5.1 Qantas expressed concern that VAIA's application does not include information on the entity that will utilise the capacity, other than it is a 'wholly-owned subsidiary' of VAIA, nor does it provide any information about how that subsidiary will operate the capacity. VAIA contended that there is no requirement in the Act (or the implementing regulations) that compels applications by Australian carriers to disclose the name of the wholly-owned subsidiary (or subsidiaries) proposed to use the capacity allocation.

5.2 The Commission considers that if it were to accept VAIA's assertion, then it should also accept the view that when a carrier applies for capacity, it is not compelled to disclose its identity and its proposed operations because nothing in the Act or the regulations compel an Australian carrier to be named when applying for capacity. The Commission considers this view is untenable.

5.3 The Commission considers that to make an informed decision whether a carrier complies with the relevant requirements of the Act and the Policy Statement, the Commission needs to be informed of the entity that will utilise the capacity and of the proposed services of the user of the capacity. It is for this reason that when VAIA approached the Commission on 7 August 2015 in relation to its applications to vary several determinations on the Indonesia route to allow a wholly-owned subsidiary to use the capacity (without naming the subsidiary that will utilise the capacity), the Commission considered it could not make a decision based on the lack of relevant information in the applications. The Commission decided at its meeting of 7 August 2015 to invite VAIA's representatives to a meeting to be briefed on which entity will utilise the capacity including the approach VAIA would take in seeking the various regulatory approvals required for the wholly-owned subsidiary to operate the proposed services in light of the requirements of the Act and the Policy Statement.

5.4 On 27 August 2015, VAIA provided documents to the Commission marked 'commercial-in-confidence' in support of its anticipated applications. On 4 September 2015, the Commission and VAIA representatives met at which time the latter confirmed that the proposed user of the capacity would be Tigerair and provided information about the proposed international operations of Tigerair. This information is consistent with the media release of the Virgin Australia Group on 7 August 2015 announcing the 'plans to optimise its international network' on key trans-Tasman and short-haul international routes.

5.5 The media release announced that, from 23 March 2016, Tigerair will use three all-economy configured Boeing 737-800 aircraft to offer the following services to Denpasar (Bali), subject to regulatory and operational approvals being secured:

- Adelaide-Denpasar: five return services per week
- Melbourne-Denpasar: daily return services
- Perth-Denpasar: daily return services.

5.6 The same media release announced that from 23 March 2016 (the same date when Tigerair commences its direct services to Denpasar), VAIA will withdraw from the following routes:

- Adelaide-Denpasar: five return services per week
- Melbourne-Denpasar: daily return services
- Perth-Denpasar: eight return services per week.

5.7 From the media release, it is clear the proposed user of the capacity on the Indonesia route is Tigerair.

5.8 In relation to VAIA's assertion that the 'Commission does not possess any powers to assess, monitor or enforce ownership and control requirements for Australian international airlines' and that this role resides exclusively with the Department, the Commission acknowledges that the designation of Australian international airlines is a function and responsibility of the Department. The Commission notes that Australian carriers seeking designation are required to demonstrate their capability to comply with the requirements of the relevant air services arrangements including the requirement that the relevant airlines are substantially owned and effectively controlled by Australian nationals.

5.9 The Commission further notes that section 15(2)(f) of the Act provides that a determination 'must include a condition stating the extent to which changes in the ownership or control of any such carrier are permitted while the determination is in force'. In light of this requirement of the Act, the Commission includes in all its determinations a condition stating that changes in relation to ownership and control of the relevant airlines authorised to utilise the capacity are permitted except to the extent that such change results in the designation of the Australian carrier under the relevant air services arrangements being withdrawn.

Application of relevant criteria

5.10 The application seeks to vary the Determination so as to include a condition referred to in section 15(2)(ea) of the Act. Additionally, the application seeks a variation to a condition in the Determination which is of a kind referred to in section 15(2)(d). In light of this, the variation sought is a transfer application as defined under subsection 4(1) of the Act. The application, therefore, will be decided under section 25 of the Act.

5.11 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.

5.12 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.

5.13 Pursuant to section 11 of the Act, the Minister issued Policy Statement No. 5 dated 19 May 2004 (the Policy Statement). The Policy Statement sets out the range of criteria which the Commission is required to apply in assessing the benefit to the public of

allocations of capacity. It also provides other guidance to the Commission in performing its functions.

5.14 Paragraph 6.5 of the Policy Statement provides that in circumstances where a carrier requests a variation of a determination to allow it flexibility in operating capacity allocated to it to include a condition of a type referred to in section 15(2)(ea) of the Act, the criteria in paragraph 4 of the Policy Statement are applicable to any persons of the description used in that section.

5.15 Section 15(2)(ea) of the Act provides for the inclusion of a condition in the determination that the capacity may be used in whole or in part by one or more of the following:

- (a) the carrier (to whom the capacity is allocated);
- (b) a wholly-owned subsidiary of the carrier; and
- (c) if the carrier is a wholly-owned subsidiary of another Australian carrier—that other carrier.

5.16 Paragraph 6.5 requires the Commission to apply the criteria in paragraph 4 of the Policy Statement to any of the persons listed in section 15(2)(ea). Paragraph 4 of the Policy Statement provides, in part, that it is not of benefit to the public for the Commission to allocate capacity to an Australian carrier (or a wholly-owned subsidiary) unless such carrier:

- (a) is reasonably capable of obtaining the necessary approvals to operate on the route; and
- (b) is reasonably capable of implementing their applications.

5.17 The Commission sought advice from the Department to determine if Tigerair is reasonably capable of obtaining the designation, licensing and operational approvals necessary to operate on the Indonesia route. On 18 September 2015, the Department advised the Commission that on the basis of information provided by Tigerair, the Department has determined that Tigerair complies with the relevant ownership and control requirements of the *Air Navigation Act 1920* as well as the requirements for designation as an Australian international airline. The Department further advised that on 3 August 2015, the Department formally designated Tigerair under the Australia-Indonesia air services arrangements.

5.18 After a careful assessment of the available information before it, the Commission has come to the view that Tigerair is reasonably capable of obtaining the necessary approvals to operate on the Indonesia route and reasonably capable of implementing its proposed operations. This means that there is public benefit arising from the proposed use of the capacity on the Indonesia route by Tigerair.

5.19 The Commission further notes that the passenger traffic between Australia and Indonesia continues to grow, averaging over 10 per cent per annum in the five years to 2015. Indonesia is currently one of Australia's largest countries for outbound resident traffic with over 1.1 million passengers in the year ending July 2015.¹ Jetstar International, Garuda Indonesia, VAIA, Air Asia Indonesia, and Qantas operate services on the routes between Australia and Indonesia.

¹ Source: ABS 3401.0 – Overseas Arrivals and Departures, Australia, July 2015

5.20 The Commission considers that Tigerair's proposed services between Australia and Denpasar will likely benefit consumers as Tigerair's presence on the Indonesia route will likely promote competition on this popular route.

5.21 In light of the above, the Commission has decided to vary the conditions in the Determination, as requested by VAIA, to authorise the use of the capacity by an Australian carrier which is a wholly-owned subsidiary of VAIA. In accordance with section 15(1) of the Act, the Commission may include such terms and conditions as it thinks fit.

6 Decision [2015] IASC 210 varying Determination [2013] IASC 130

6.1 In accordance with section 25 of the Act, the Commission varies Determination [2013] IASC 130, which allocates 1,080 seats of passenger capacity per week in each direction to and from Sydney, Melbourne (including Avalon), Brisbane and Perth on the Indonesia route under the Australia-Indonesia air services arrangements by:

Deleting the conditions in the Determination and *replacing* the conditions with the following:

- “VAIA is required to fully utilise the capacity;
- only VAIA or another Australian carrier which is a wholly-owned subsidiary of VAIA is permitted to utilise the capacity;
- neither VAIA nor another Australian carrier which is a wholly-owned subsidiary of VAIA is permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person without the approval of the Commission;
- subject to the preceding condition, the capacity may be used by VAIA to provide services jointly with Delta in accordance with the code share agreement between VAIA and Delta dated 8 July 2009, as amended;
- VAIA must apply to the Commission for approval of any proposed variations to the code share agreement which would change the relevant commercial aspects of the respective code share arrangements from a free sale code share arrangement to a block space, or vice versa, or if VAIA 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 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; and
- changes in relation to the ownership and control of the airlines authorised to utilise the capacity are permitted except to the extent that any change:
 - results in the designation of the airline as an Australian carrier under the Australia – Indonesia 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 the airlines or be in a position to exercise effective control of the airlines, without the prior consent of the Commission.”

Dated: 24 September 2015



JOHN KING
Presiding Commissioner



IAN DOUGLAS
Commissioner