



Australian Government

International Air Services Commission

DECISION

Decision: [2017] IASC 207
Variation of: [2007] IASC 118
The Route: New Zealand
The Applicant: Virgin Australia Airlines (SE Asia) Pty Ltd
(Virgin Australia) ABN 79 097 892 389
Public Register File: IASC/APP/201701

The International Air Services Commission varies Determination [2007] IASC 118 to permit the capacity entitlements on the New Zealand route to be used for code share services between Air Canada and Virgin Australia.

1 The application

1.1 On 15 December 2016, Virgin Australia applied to the International Air Services Commission (the Commission) for a variation to Determination [2007] IASC 118 to enable Air Canada to offer code share services on flights operated by Virgin Australia on the New Zealand route. A copy of the code share agreement was provided to the Commission on 11 April 2017. Virgin Australia plans to implement the code share with Air Canada on 10 May 2017 providing all regulatory approvals are in place.

1.2 The Commission published a notice, in accordance with section 22 of the *International Air Services Commission Act 1992* (the Act), inviting submissions about the application for variation. No submissions were received. 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 the Australia – New Zealand air services arrangements, there is unlimited capacity for Australian carriers to operate scheduled passenger and freight services between Australia and New Zealand, via and beyond to third countries.

2.2 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 assessment

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 and has been assessed in accordance with section 25.

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. On 19 May 2004, then Minister for Transport and Regional Services, the Hon. John Anderson MP issued a Policy Statement (hereinafter referred to as the Minister's Policy Statement), concerning the way the Commission is to perform its functions including the criteria for assessing public benefit.

3.4 Paragraph 6.3 of the Minister's 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.

3.5 Paragraph 6.4 provides, in part, that the Commission may apply the additional criteria in paragraph 5 in the circumstances set out in paragraph 3.6 of the Minister's Policy Statement.

3.6 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).

3.7 The Commission notes that while the application was submitted in December 2016, material information (i.e., a copy of the code share agreement between Virgin Australia and Air Canada) was not provided to the Commission until April 2017.

3.8 The Commission further notes that Air Canada does not operate its own services between Australia and New Zealand but currently offers code share services on flights operated by Air New Zealand. Virgin Australia operates over 80 weekly services between Australia and New Zealand, increasing to over 90 weekly services during high season. Air Berlin, Air New Zealand, Alitalia, Delta, Etihad and Singapore Airlines code share on services operated by Virgin Australia on the route.¹

¹ International Airlines Timetable Summary, Northern Winter 2016-2017 (30 October 2016-25 March 2017), <www.infrastructure.gov.au>

3.9 The Commission considers it is unlikely that Air Canada would operate on the Australia-New Zealand route. In light of this, the Commission has no serious concerns that the proposed code share between Virgin Australia and Air Canada would impact on competition on the Australia-New Zealand route. For this reason, the Commission did not specifically consult the ACCC and did not consider it necessary to apply the additional criteria in paragraph 5 of the Minister's Policy Statement.

3.10 Under paragraph 4 of the Minister's 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.

3.11 In light of the above, the Commission has decided to permit the use of the capacity for code share services between Virgin Australia and Air Canada. The permission to use the capacity for code share services between Virgin Australia and Air Canada must be conducted in accordance with the Australia-New Zealand air services arrangements.

3.12 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.

3.13 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 [2007] IASC 118 allocating capacity to Virgin Australia on the New Zealand route ([2017] IASC 207)

4.1 In accordance with section 25 of the Act, the Commission varies Determination [2007] IASC 118 which allocates unlimited capacity per week in each direction to Virgin Australia on the New Zealand route, by:

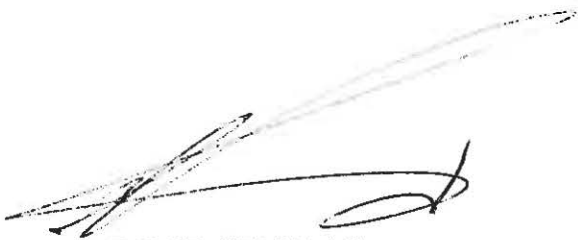
adding the following conditions to the Determination:

- the capacity may be used by Virgin Australia for code share services with Air Canada to be conducted in accordance with Australia's air services arrangements with New Zealand and the code share agreement between Virgin Australia and Air Canada dated 1 April 2017;
- Virgin Australia must apply to the Commission for approval of the use of the capacity if there are variations to the code share arrangement which would change the relevant commercial aspects of the code share arrangement 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 the 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.

4.2 The variations take effect from the date of this instrument.

Dated: 19 April 2017



IAN DOUGLAS
Chairperson



JAN HARRIS
Commissioner