



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2018] IASC 107
Renewal of:	[2014] IASC 104
The Route:	Korea
The Applicant:	Virgin Australia International Airlines Pty Ltd (Virgin Australia) ABN 63 125 580 823
Public Register:	IASC/APP/201819

The Commission's delegate makes a determination allocating to Virgin Australia 1,000 seats per week on the Korea route. The capacity is permitted to be used for the provision of code share services with Singapore Airlines. The determination is valid for five years from 14 March 2019.

1 The application for renewal

1.1 On 14 March 2014, the Commission issued Determination [2014] IASC 104 (the Determination) allocating, in favour of Virgin Australia, 1,000 seats of capacity on the Korea route. Under the capacity allocation, Virgin Australia is authorised to offer code share services, as a marketing carrier, on flights operated by Singapore Airlines.

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 13 March 2019. In view of this, the Commission sent, on 13 March 2018, 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 16 March 2018 for a renewal of the Determination for a further five-year period from 14 March 2019. Additionally, Virgin Australia requested the retention of the existing condition permitting the use of the capacity for the provision of code share services with Singapore Airlines.

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).

2 Relevant provisions of the air services arrangements

2.1 Paragraph 7(2)(aa) of the Act requires the Commission not to allocate available capacity contrary to any restrictions on capacity contained in the relevant bilateral arrangement.

2.2 Under the Australia - Korea air services arrangements, designated airlines of Australia may operate 8,500 seats per week between Korea and the following Australian gateways: Sydney, Melbourne, Brisbane and Perth. A total of 1,500 seats have been allocated (500 seats to Qantas and 1,000 seats to Virgin Australia). Virgin Australia's capacity allocation is now subject of this renewal application. There are currently 7,000 seats per week in each direction available for Australian-designated airlines to operate services between Sydney, Melbourne, Brisbane and Perth and Korea. Capacity between other points in Australia and Korea is unrestricted.

2.3 Under the Australia – Korea air services arrangements, a designated Australian airline(s) may, subject to certain conditions, enter into cooperative marketing arrangements such as blocked space, code sharing or leasing arrangements, whether as the operating airline(s) or marketing airline(s) with an Australian airline(s), airline(s) of Korea or of any third country or countries. The capacity offered by a designated Australian airline(s), as a marketing airline(s), on services operated by other airlines, including third country airlines, is counted against the capacity entitlements of Australia (the country designating the marketing airline).

3 Delegate's consideration

3.1 In accordance with section 27AB of the Act and regulation 3A of the International Air Services Commission Regulations 1992, the delegate of the Commission may consider the Virgin Australia application. (For purposes of this determination, references to the Commission include the delegate of the Commission).

3.2 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.

3.3 On 20 March 2018, the Hon. Michael McCormack MP, Deputy Prime Minister and Minister for Infrastructure and Transport, issued the International Air Services Commission Policy Statement 2018 (2018 Policy Statement), which came into force and effect from 28 March 2018. Under part 6 of the 2018 Policy Statement, in deciding an application that was received before the commencement of the 2018 Policy Statement, the Commission is required to apply the 2004 International Air Services Policy Statement No. 5 (2004 Policy Statement).

3.4 As Virgin Australia submitted to the Commission this renewal application on 16 March 2018, before the commencement of the 2018 Policy Statement, the Commission is required to apply the criteria set out in the 2004 Policy Statement.

3.5 Under paragraph 8 of the 2004 Policy Statement, 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 Policy Statement.

3.6 In its application, Virgin Australia states that the airline continues to offer code share services to Korea on flights operated by Singapore Airlines. Virgin Australia also states that its utilisation of the capacity on the Korea route continues to be variable and that it wishes to retain the full capacity allocation.

3.7 The Commission's delegate does not have information that Virgin Australia has failed to service the route effectively. Additionally, there is no other carrier applying for the capacity.

3.8 Under paragraph 6.2 of the 2004 Policy Statement, in circumstances where there is only one applicant for allocation of capacity on a route, 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.

3.9 The Commission's delegate notes that: (i) there are no other applicants seeking the capacity for which Virgin Australia has applied; and (ii) Virgin Australia is an established international carrier reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its application.

3.10 In these circumstances, the Commission's delegate is satisfied that allocating 1,000 seats per week of capacity to Virgin Australia is of benefit to the public.

3.11 Further, Virgin Australia sought authority to continue utilising the capacity to offer code share services operated by Singapore Airlines.

3.12 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.

3.13 Under paragraph 3.6 of the 2004 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).

3.14 Virgin Australia does not operate its own services between points in Australia and Korea but the airline maintains a network presence on the route through code sharing with Singapore Airlines. As Virgin Australia and Singapore Airlines do not operate competing services on the route, the Commission's delegate considers that Virgin Australia's continued code sharing with Singapore Airlines on the Korea route has minimal competition impact on the route. For this reason, the delegate did not consider it necessary to assess the application against the additional criteria in paragraph 5 of the 2004 Policy Statement and did not specifically consult the ACCC.

3.15 The delegate notes that the ACCC re-granted, on 23 September 2016, authorisation for the Virgin Australia Group and Singapore Airlines to continue their existing airline alliance for a further period of five years. Under the alliance, Virgin Australia and Singapore Airlines are able to coordinate their operations and code share on each other's regular air passenger transport networks.

3.16 In view of the above, the delegate 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 Singapore Airlines, as requested. 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 [2014] IASC 104 allocating capacity on the Korea route to Virgin Australia ([2018] IASC 107)

4.1 The Commission's delegate allocates to Virgin Australia, pursuant to section 8 of the Act, 1,000 seats per week in each direction on the Korea route in accordance with the terms of the Australia – Korea air services arrangements.

4.2 The determination is valid for five years from 14 March 2019.

4.3 The determination is subject to the following conditions:

- Virgin Australia is required to fully utilise the capacity by no later than 30 June 2018, or from such other date approved by the Commission;
- only Virgin Australia is permitted to use the capacity;
- Virgin Australia is not 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 Virgin Australia to code share on services operated by Singapore Airlines in

accordance with the code share agreement between Virgin Australia and Singapore Airlines which came into effect on 2 February 2012, 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 code share or 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 – Korea 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 April 2018



Marlene Tucker
Executive Director
Delegate of the IASC Commissioners