



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2018] IASC 114
Renewal of:	[2013] IASC 112
The Route:	Papua New Guinea (PNG)
The Applicant:	Virgin Australia Airlines (SE Asia) Pty Ltd (Virgin Australia) ABN 79 097 892 389
Public Register	IASC/APP/201751

The Commission makes a fresh determination allocating to Virgin Australia 900 seats of passenger capacity per week in each direction on the Papua New Guinea route. The capacity may be utilised for the provision of code share services between Virgin Australia and PNG Air. The determination is valid for five years from 12 September 2018.

1 The application for renewal

1.1 On 8 March 2013, the Commission issued Renewal Determination [2013] IASC 112 (the Determination) allocating, in favour of Virgin Australia, 900 seats per week in each direction on the Papua New Guinea (PNG) route. The Determination is valid for five years from 12 September 2013. Additionally, the Determination permits the use of the capacity for the provision of code share services, under a hard-block arrangement, between Virgin Australia and Airlines of PNG (now PNG Air)¹.

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. As the Determination is due to expire on 11 September 2018, the Commission sent, on 7 September 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 21 September 2017 for a renewal of the Determination for a further five-year period from 12 September 2018. 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.

1.4 Virgin Australia, however, subsequently requested that the Commission defer

¹ Airlines PNG changed its business name in 2015 (source: Airlines PNG 2015 Annual Report)

its consideration of the application for renewal until such time as the airline finalised its new code share agreement with PNG Air. On 6 August 2018, Virgin Australia provided, on a confidential basis, a final copy of its free-sale code share agreement with PNG Air made on 1 August 2018.

1.5 The Commission noted the intention of Virgin Australia and PNG Air to move their code share arrangement from hard-block to free-sale. As this would change the terms and conditions of the existing determination sought to be renewed, the Commission requested comments from the Australian Competition and Consumer Commission (ACCC) and invited the public to make submissions about the proposed changes to the determination. The ACCC provided comments to the Commission on 27 August 2018 but no submissions from other stakeholders were received.

1.6 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 provides that the Commission must not allocate available capacity contrary to any restrictions on capacity contained in a bilateral arrangement(s). Any variation made to an existing allocation of capacity should also not be contrary to any restrictions on capacity contained in a bilateral arrangement(s).

2.2 The Australia – PNG air services arrangements allow multiple designation of Australian airlines to operate on the PNG route. The Register of Available Capacity indicates there are 400 seats of capacity available for immediate allocation on this route.

2.3 Under the terms of the Australia – PNG air services arrangements, any Australian designated airline is entitled to perform any of their agreed services through code sharing, blocked space and/or any other cooperative service arrangements with any designated airlines of either Australia or PNG, over the whole or any part of the specified routes in the Route Schedule.

2.4 All code share arrangements must be operated in compliance with route, traffic rights and capacity entitlements applicable to each country. Under the air services arrangements, capacity that is marketed and sold by a code share partner under its own designator counts as the exercise of capacity entitlements of the country of that code share partner.

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 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 (the 2018 Policy Statement), which came into effect on 28 March 2018. The 2018 Policy Statement replaces and repeals the International Air Services Policy Statement No. 5 made in 2004 (the 2004 Policy Statement). However, section 26, Part 6 of the 2018 Policy Statement provides that the Commission is to apply the 2004 Policy Statement, despite its repeal, for applications received before the commencement of the 2018 Policy Statement. As Virgin Australia's application was received on 21 September 2017, prior to the commencement of the 2018 Policy Statement on 28 March 2018, the Commission has applied the requirements of the 2004 Policy Statement in assessing the renewal application.

3.3 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 2004 Policy Statement.

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

3.5 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.

3.6 The Commission 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. In these circumstances, the Commission is satisfied that allocating 900 seats of capacity on the PNG route to Virgin Australia is of benefit to the public.

3.7 Furthermore, Virgin Australia has sought authorisation to use the capacity for the provision of code share services, on a free-sale basis, with PNG Air. The Commission notes that the Determination sought to be renewed has authorised the use of the capacity for code sharing, under a hard-block arrangement, between Virgin Australia and Airlines PNG (now known as PNG Air).

3.8 Under the new code share arrangements made on 1 August 2018 between Virgin Australia and PNG Air, the latter will put its code, as marketing carrier, on services operated by Virgin Australia between Brisbane and Port Moresby and on certain domestic services within Australia. The code share arrangement is proposed to commence on 1 October 2018.

3.9 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 ACCC.

3.10 The Commission sought comments from the ACCC, pursuant to section 28 of the Act, as to whether it had concerns about the proposed move from a hard-block to a free-sale code share arrangement on the PNG route. Section 28 provides, in part, that the Commission may: (i) inform itself on anything relevant to a matter before it in any way it thinks fit; (ii) receive information or submissions orally or by written statements; and (iii) consult such persons as it thinks fit.

3.11 In its letter to the Commission dated 27 August 2018, the ACCC stated as follows:

The ACCC considers that the code share arrangement between Virgin Australia and PNG Air is unlikely to lessen competition in the immediate term. In addition, while the ACCC considers a hard block arrangement preferable to free sale arrangement, it considers that in the circumstances, the application of a free sale arrangement is unlikely to remove any significant competitive rivalry. The ACCC therefore does not hold any significant concerns with the proposal.

3.12 The Commission notes that there are three international carriers operating services between Brisbane and Port Moresby. Qantas and Air Niugini operate seven weekly services each between Brisbane and Port Moresby while Virgin Australia operates five weekly services². The Commission further notes that PNG Air does not operate services on any city pairs between Australia and PNG. As such, there is no competition between Virgin Australia and PNG Air on the PNG route. It is likely that the proposed code share would have minimal impact on competition on the PNG route. Moreover, the combined efforts of Virgin Australia and PNG Air in marketing and selling seats on Virgin Australia flights would more likely increase the likelihood of the Virgin Australia services being sustained. The Commission further considers that allowing PNG Air to code share on services operating by Virgin Australia may provide additional travel options to the public. The continued presence of Virgin Australia on the Brisbane Port-Moresby sector benefits competition on the PNG route .

3.13 In light of the above, the Commission does not have serious concerns in relation to the continued use of capacity for code sharing with PNG Air. For this reason, it did not consider it necessary to assess the application against the additional criteria in paragraph 5 of the 2004 Policy Statement.

3.14 In view of the above, the Commission has decided to include a condition authorising the use of the capacity for the provision of free-sale code share services

² Northern Summer 2018 Timetable Summary (March-October 2018)

between Virgin Australia and PNG Air as requested.

3.15 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.

3.16 Section 15 of the Act provides that a determination may include such terms and conditions as the Commission thinks fit. Subsection 19(3) of the Act provides that, in including terms and conditions in the fresh determination, the Commission may make such changes to the terms and conditions included in the original determination sought to be renewed, including adding or deleting terms and conditions, where warranted by changes in circumstances since the original determination was made. The wording of the fresh determination below reflects the view of the Commission that determinations which renew original determinations should contain updated terms and conditions consistent with the Commission's current practice and current air services arrangements.

4 Determination for renewal of [2013] IASC 112 allocating capacity on the PNG route to Virgin Australia ([2018] IASC 114)

4.1 The Commission allocates to Virgin Australia, pursuant to section 8 of the Act, 900 seats of capacity in each direction on the PNG route in accordance with the terms of the Australia – PNG air services arrangements.

4.2 The determination is valid for five years from 12 September 2018.

4.3 The determination is subject to the following conditions:

- Virgin Australia is required to fully utilise the capacity from no later than 31 December 2018, or from such other date approved by the Commission;
- only Virgin Australia is permitted to utilise the capacity;
- subject to the succeeding paragraphs, 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;
- the capacity may be used by Virgin Australia to provide code share services with PNG Air in accordance with the code share agreement between the airlines dated 1 August 2018, as may be 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 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 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 – PNG 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: 4 September 2018



IAN DOUGLAS
Chairperson



IAN HARRIS
Commissioner