



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination: [2018] IASC 117
Renewal of: [2013] IASC 132
The Route: Fiji
The Applicant: Virgin Australia Airlines (SE Asia) Pty Ltd
(ABN 79 097 892 389)
Public Register: IASC/APP/201839

The Commission makes a fresh determination allocating to Virgin Australia Airlines (SE Asia) Pty Ltd unrestricted capacity in each direction for services between points in Australia other than Sydney, Melbourne, Brisbane and Perth and authorised points in Fiji. The determination is valid for 99 years from 9 July 2019.

1 The application for renewal

1.1 On 19 July 2013, the Commission's delegate issued Determination [2013] IASC 132 (the Determination) allocating, in favour of Virgin Australia Airlines (SE Asia) Pty Ltd (Virgin Australia), unrestricted passenger capacity in each direction on the Fiji route between points in Australia other than Sydney, Melbourne, Brisbane and Perth and authorised points in Fiji.

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 8 July 2019. In view of this, the Commission sent, on 2 July 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 10 July 2018 for a renewal of the Determination for a further 99-year period from 9 July 2019.

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 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 – Fiji air services arrangements allow multiple designation of Australian airlines to operate on the Fiji route. The Register of Available Capacity indicates that designated airlines of Australia may determine the frequency of service, capacity and aircraft type to be operated on the specified routes to or from points in Australia other than Sydney, Melbourne, Brisbane and Perth. This means that there is unrestricted capacity to operate services to or from points in Australia other than Sydney, Melbourne, Brisbane and Perth.

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 in accordance with section 11 of the Act, the International Air Services Commission Policy Statement 2018 (the Policy Statement), which came into effect on 28 March 2018.

3.3 The Commission is to have regard to the ‘reasonable capability criterion’ in section 8 and the additional criteria in section 9, when circumstances so warrant under Division 3 of Part 3 of the Policy Statement. Section 7 of the Policy Statement explains this.

3.4 Under section 14 of the 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 there are other applications for some or all of the capacity; and the Commission is satisfied that a different allocation of capacity would be of greater benefit to the public, having regard to the criteria set out in sections 8 and 9 of the Policy Statement.

3.5 Furthermore, regulation 9 of the International Air Services Commission Regulations 2018 which came into force and effect on 1 October 2018 provides that for purposes of subparagraph 15(2)(c)(ii)¹ of the Act, a determination is not required to

¹Subparagraph 15(2)(c) of the Act provides that a determination must include a condition that the capacity be fully used, except so far as: (i) the determination provides otherwise in relation to a specified period commencing when the determination comes into force; or (ii) the regulations otherwise permit.

include a condition that capacity allocated by the determination be fully used if available capacity is not restricted by the bilateral arrangement or combination of arrangements permitting the carriage to which the capacity relates. This means that the use-it-or-lose-it principle does not apply where the capacity entitlements under the relevant bilateral arrangement are unrestricted.

3.6 In its application, Virgin Australia states that the airline continues to operate services to Fiji from Brisbane, Sydney and Melbourne, and it wishes to retain the capacity allocated under the Determination (being renewed) to provide flexibility to commence services on the route from points other than Brisbane, Sydney, Melbourne and Perth. Additionally, the Commission notes there is no other carrier applying for the capacity. For this reason, the Commission has decided to apply section 8 of the Policy Statement and did not find it necessary to apply the additional criteria in section 9.

3.7 Under the ‘reasonable capability criterion’ in section 8 of the Policy Statement, in assessing the public benefit of an application, the Commission is to have regard to the extent to which all Australian carriers that are, or would be, permitted to use the capacity allocated under a determination are reasonably capable of: (a) obtaining any licences, permits or other approvals required to operate on and service the route to which the determination relates; and (b) using the capacity allocated under the determination.

3.8 Virgin Australia is an established carrier operating scheduled international air services and the Commission finds it is reasonably capable of obtaining any licences, permits or other approvals required to operate on and service the Fiji route and of using the capacity allocated under the determination. In light of this, the Commission is satisfied that allocating unrestricted passenger capacity in each direction on the Fiji route between points in Australia other than Sydney, Melbourne, Brisbane and Perth and authorised points in Fiji would be of benefit to the public.

3.9 Furthermore, subsection 20(2) of the Policy Statement provides that if a determination allocates capacity on a route where capacity is not limited under the relevant bilateral arrangement, the period during which the determination is to be in force should be fixed at 99 years.

3.10 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 legislative requirements and current air services arrangements.

4 Determination for renewal of [2013] IASC 132 allocating capacity on the Fiji route to Virgin Australia ([2018] IASC 117)

4.1 The Commission allocates to Virgin Australia, pursuant to section 8 of the Act, unrestricted passenger capacity in each direction on the Fiji route to operate services between points in Australia other than Sydney, Melbourne, Brisbane and Perth and authorised points in Fiji route in accordance with the terms of the Australia – Fiji air services arrangements.

4.2 The determination is valid for 99 years from 9 July 2019.

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 2019 or such other date approved by the Commission;
- only Virgin Australia is permitted to utilise 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;
- 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 Virgin Australia as an Australian carrier under the Australia – Fiji 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: 12 October 2018



IAN DOUGLAS
Chairperson



JAN HARRIS
Commissioner



KAREN GOSLING
Commissioner