



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2024] IASC 102
Renewal of:	[2019] IASC 119
The Route:	Japan (Tokyo Haneda)
The Applicant:	Virgin Australia International Airlines Pty Limited (ABN 63 125 580 823)
Public Register File:	IASC/APP/202404

The Commission makes a fresh determination allocating to Virgin Australia International Airlines Pty Limited one daily frequency of passenger capacity per week in each direction on the Japan (Tokyo Haneda) route. The capacity may be used by Virgin Australia International Airlines Pty Limited to provide code share services with All Nippon Airways, Air Canada and Qatar Airways, subject to certain conditions. The determination is valid for five years from 28 October 2024.

1 The application for renewal

1.1 On 28 October 2019, the International Air Services Commission (the Commission) issued Determination [2019] IASC 119 (the Determination) allocating to Virgin Australia International Airlines Pty Ltd (Virgin Australia), one daily frequency in each direction to operate passenger services on the Australia-Japan route to service Tokyo Haneda airport. The Determination permits Virgin Australia to utilise the capacity to provide code share services with All Nippon Airways (ANA), subject to certain conditions.

1.2 The Determination was subsequently varied by Decision [2023] IASC 212 on 16 November 2023 to permit the utilisation of capacity for Air Canada and Qatar Airways to offer code share services, as marketing carriers, on Virgin Australia operated services.

1.3 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 original determination. The Determination is due to expire on 27 October 2024. In view of this, the Commission sent, on 1 November 2023, a letter to Virgin Australia inviting it to apply for renewal if it wished to renew the Determination.

1.4 On 12 January 2024, Virgin Australia applied to the Commission for a renewal of the Determination for a further five-year period from 28 October 2024 and requested the retention of all existing conditions.

1.5 As required by sections 12 and 17 of the Act, the Commission published, on 15 January 2024, a notice on its website and subsequently sent a notification by email to stakeholders inviting other applications for capacity on the route. No other applications were received.

1.6 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 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-Japan air services arrangements provide for unrestricted capacity to operate international air services on the route, except to or from Tokyo Haneda Airport. The air services arrangements provide for three return daily frequencies for the operation of passenger services between Australia and Tokyo Haneda Airport. Two daily frequencies may be used during daytime hours at Tokyo Haneda Airport, while one daily frequency may be used during the prescribed night-time period (between 2200 and 0655 hours). According to the Register of Available Capacity, there are no frequencies available for allocation for services to Tokyo Haneda.

2.3 Additionally, designated carriers of Australia may enter into code share services on the specified routes with a designated airline(s) of Australia, with a designated airline(s) of Japan or with an airline(s) of third countries, subject to approvals of the aeronautical authorities of both countries.

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. Subsection 8(2) provides in part that 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 Pursuant to section 11 of the Act, the Minister issued the International Air Services Commission Policy Statement 2018 (the Policy Statement), which came into effect on 28 March 2018.

3.3 Section 14 of the Policy Statement applies where the Commission is proposing to make a fresh determination under section 8 of the Act, and is considering whether the allocation of capacity in the original determination is no longer of benefit to the public for the purpose of section 8(2)(a)(i) of the Act. Section 14(2) of the Policy Statement

provides that, without limiting the matters to which the Commission may have regard, an allocation is generally no longer of benefit to the public if:

- the carrier has failed to service the route effectively (s 14(2)(a)); and
- there are other applications for some or all of the capacity (s 14(2)(b)); 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 (s 14(2)(c)).

3.4 The Commission notes that, under subsection 14(2) of the Policy Statement, an allocation will generally no longer be of benefit to the public where all of the above conditions are satisfied.

3.5 There are no other applications for some or all of the capacity to which the determination in question relates, and therefore the condition in section 14(2)(b) of the Policy Statement is not satisfied. The Commission therefore finds that the proposed allocation does not fall within the class of allocations that are generally no longer of benefit to the public contemplated by subsection 14(2) of the Policy Statement.

3.6 However, subsection 14(2) of the Policy Statement operates ‘without limiting the matters to which the Commission may have regard’. In view of the circumstances pertaining to the COVID-19 pandemic, the Commission has proceeded to consider whether the allocation is no longer of benefit to the public in all the circumstances.

3.7 On 11 March 2020, the World Health Organization declared the outbreak of COVID-19 a pandemic. In response, the Australian Government introduced a range of health, financial and other measures to prevent and minimise the transmission of COVID-19.

3.8 In this context, on 24 March 2020 the Prime Minister announced that the Australian Government was introducing a ‘do not travel’ ban on Australians travelling overseas under the *Biosecurity Act 2015*. On 27 October 2021, the Government announced it would lift the international travel ban for certain categories of travellers from 1 November 2021, subject to certain conditions. On 7 February 2022, the Prime Minister announced that Australian international borders would re-open from 21 February 2022.

3.9 The Commission notes that in early 2020, in response to the COVID-19 pandemic, the Japanese Government introduced an international travel ban, subject to certain conditions, limiting international travel in to and out of Japan. In September 2022, the Japanese Prime Minister announced that the Japanese border would re-open from October 2022.

3.10 With the imposition of travel restrictions in March 2020, Virgin Australia suspended its scheduled international flights.

3.11 In assessing the current Virgin Australia application for the renewal of its capacity allocation, the Commission considered whether the airline has failed to service the route effectively.

3.12 The Commission notes that between 2020 and 2023, travel restrictions imposed by various countries in response to the COVID-19 pandemic seriously disrupted the international operations of airlines worldwide. Airlines faced continued uncertainty around the easing of travel restrictions, in addition to the effects on global supply chains and aircraft manufacturers' production schedules and accordingly, aircraft delivery timeframes.

3.13 In response to these extraordinary circumstances, the Commission issued Australian carriers a number of variations to extend the utilisation date of capacity allocations held by those carriers, including to Virgin Australia on the Japan (Tokyo Haneda) route.

3.14 The Commission considers that in the context of these extraordinary circumstances, Virgin Australia's delay in commencing its services to Tokyo-Haneda, does not mean that the airline has failed to service the route effectively. Moreover, the Commission notes that since June 2023, Virgin Australia has commenced operating regular services between Australia (Cairns) and Japan (Tokyo Haneda).

3.15 The Commission has also considered the 'reasonable capability criterion' in section 8 of the Policy Statement, i.e. 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.

3.16 The Commission notes that Virgin Australia is an established carrier which currently operates scheduled international services between Australia and Japan. The Commission therefore finds that the carrier is reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated.

3.17 There is no other information before the Commission that it considers to be relevant or material to its assessment of Virgin Australia's application. Based on its findings above, the Commission is not satisfied that the allocation of capacity in the original determination is no longer of benefit to the public for the purposes of section 8(2)(a)(i) of the Act. Therefore, the Commission is required to make the same allocation of capacity as the original determination.

3.18 The Commission will continue to monitor the utilisation of capacity by Virgin Australia on this route.

3.19 Under section 19 of the Act, the Commission "must include the same terms and conditions as the original determination to which it relates"(subsection 19(1)(c)), but "may make such changes (if any) to the terms and conditions included in the original determination (including adding or deleting terms and conditions) as it is satisfied that are warranted because of changes in circumstances since the original determination was

made”(subsection 19(3)).

3.20 As part of its application, Virgin Australia requested to retain all existing conditions, including permission for the carrier to offer code share services with ANA, Air Canada and Qatar Airways. The Commission has decided to issue this determination subject to the conditions set out in item 4 below.

3.21 Nothing in this decision should be taken as indicating either approval or disapproval by the Australian Competition and Consumer Commission (ACCC). This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

4 Determination allocating capacity on the Japan route to Virgin Australia International Airlines Pty Limited ([2024] IASC 102)

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Virgin Australia International Airlines Pty Limited, allocating one frequency per day in each direction on the Japan route to serve Tokyo Haneda Airport, in accordance with the Australia - Japan air services arrangements.

4.2 The determination is valid for 5 years from 28 October 2024.

4.3 The determination is subject to the following conditions:

- a) Virgin Australia International Airlines Pty Limited is required to fully utilise the capacity from the date the determination comes into effect or from such other date approved by the Commission.
- b) Only Virgin Australia International Airlines Pty Limited is permitted to utilise the capacity.
- c) Virgin Australia International Airlines Pty Limited is not permitted to utilise the capacity to provide code share or joint services with another Australian carrier or any other carrier unless approved by the Commission.
- d) Subject to the preceding condition, the capacity may be used by Virgin Australia International Airlines Pty Limited to provide code share services with:
 - i. All Nippon Airways, in accordance with the code share agreement between the airlines dated 24 September 2019, as amended;
 - ii. Air Canada in accordance with the code share agreement between the airlines made effective on 1 March 2023, as amended; and
 - iii. Qatar Airways, in accordance with the code share agreement between the airlines made effective on 21 June 2022, as amended.
- e) Should Virgin Australia International Airlines Pty Limited and ANA propose to code share on city pairs (sectors) where they operate parallel services, Virgin

Australia International Airlines Pty Limited is required to seek written approval from the Commission before such arrangement is implemented.

- f) Virgin Australia International Airlines Pty Limited must apply to the Commission for approval if there are variations to the code share arrangements which would:
- i. change the relevant commercial aspects of the code share arrangement(s) from a free sale code share arrangement to a blocked space, or vice versa; or
 - ii. if Virgin Australia International Airlines Pty Limited proposes to add sectors (city pairs) or third country routes on which the airlines will code share, where Australian capacity will be used for services on that route.
- g) Should Virgin Australia International Airlines Pty Limited and ANA propose to code share on city pairs (sectors) where they operate parallel services, Virgin Australia International Airlines Pty Limited is required to obtain written approval from the Commission before such an arrangement is implemented.
- h) 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 Australian Consumer Law.
- i) Changes in relation to the ownership and control of Virgin Australia International Airlines Pty Limited are permitted except to the extent that any change:
- results in the designation of Virgin Australia International Airlines Pty Limited as an Australian carrier under the Australia – Japan 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 International Airlines Pty Limited or be in a position to exercise effective control of the airline, without the prior consent of the Commission.

Dated: 21 February 2024


GENEVIEVE BUTLER
Chairperson


JANE MCKEON
Commissioner