



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2019] IASC 123
Renewal of:	[2014] IASC 114
The Route:	Cook Islands
The Applicant:	Virgin Australia International Airlines Pty Ltd (Virgin Australia) (ABN 63 125 580 823)
Public Register:	IASC/APP/201930

The Commission makes a fresh determination allocating to Virgin Australia International Airlines Pty Ltd (VAIA) 180 seats per week of capacity in each direction on the Cook Islands route. The fresh determination permits the capacity to be used by either VAIA or its wholly-owned subsidiary, Tiger International Number1 Pty Ltd and is valid for five years from 13 October 2020.

1 The application for renewal

1.1 On 20 October 2014, the International Air Services Commission (the Commission) issued Determination [2014] IASC 114 (the Determination) allocating, in favour of Virgin Australia Airlines (SE Asia) Pty Ltd (VAASEA), 180 seats per week of capacity in each direction on the Australia-Cook Islands route. In Decision [2018] IASC 222 dated 21 September 2018, the Commission varied the Determination, upon VAASEA's request, to transfer the capacity allocation to Virgin Australia International Airlines Pty Ltd (VAIA) and permit the capacity to be used by either VAIA or its wholly-owned subsidiary, Tiger International Number1 Pty Ltd.

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 12 October 2020. In view of this, the Commission sent, on 11 October 2019, a letter to VAIA inviting it to apply for renewal if it wished to renew the Determination.

1.3 VAIA applied to the Commission on 25 October 2019 for a renewal of the Determination for a further five-year period from 13 October 2020.

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 VAIA 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-Cook Islands air services arrangements permit multiple designation of carriers to operate air transport services between Australia and Cook Islands. According to the register of available capacity, there are 828 seats per week in each direction available for allocation to Australian carriers.

2.3 Additionally, on the specified joint services routes, any designated carrier of Australia may enter into cooperative marketing arrangements such as blocked space, code sharing and aircraft leasing whether as the operating or marketing carrier with: (a) a designated airline(s) of Australia; (b) a designated airline(s) of Cook Islands; (c) or with an airline(s) of a third country.

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 In accordance with 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 7 of the Policy Statement explains that, in assessing the benefit to the public of an allocation of capacity when deciding to make, renew or vary a determination, 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.

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 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.

3.6 The Commission notes that there are no other applicants seeking capacity on the route and there is no information to suggest that VAIA has failed to service the route effectively. For this reason, the Commission decided to only apply the reasonable capability criterion under section 8 of the Policy Statement and did not consider it necessary to assess the application against the additional criteria in section 9 of the Policy Statement.

3.7 In relation to Tiger International, as the Commission stated in Decision [2018] IASC 221, it consulted the Department of Infrastructure, Regional Development and Cities (the Department) to assess whether Tiger International is reasonably capable of: (a) obtaining any licenses, permits or other approvals required to operate on and service the route; and (b) using the capacity allocated under the determination. The Department advised the Commission that it considers Tiger International as reasonably capable of obtaining the designation, licensing and other operational approvals to operate scheduled services on the Cook Islands route. In light of this, the Commission has formed the view that Tiger International fulfils the reasonably capable criterion in section 8 of the Policy Statement. The Commission is satisfied that renewing the capacity allocation in favour of VAIA and permitting the capacity to be used by VAIA and/ or Tiger International would be of benefit to the public.

3.8 Subsection 15(1) of the Act allows a determination to include such terms and conditions as the Commission thinks fit. Subsection 19(3) of the Act provides that “[i]n including terms and conditions in the determination, the Commission 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 are warranted because of changes in circumstances since the original determination was made”. VAIA, in its application requested for the retention of all conditions in the Determination sought to be renewed. In light of this, the Commission has decided to issue this fresh determination with the conditions set out below.

4 Determination for renewal of [2014] IASC 114 allocating capacity on the Cook Islands route to Virgin Australia International Airlines ([2019] IASC 123)

4.1 The Commission allocates to Virgin Australia International Airlines Pty Ltd (VAIA), pursuant to section 8 of the Act, 180 seats per week of capacity in each direction on the Australia-Cook Islands route in accordance with the terms of the Australia – Cook Islands air services arrangements.

4.2 The determination is valid for five years from 13 October 2020.

4.3 The determination is subject to the following conditions:

- (a) VAIA is required to fully utilise the capacity from no later than 31 December 2020 or such other date approved by the Commission;
- (b) the capacity may be utilised by:
- VAIA; or
 - Tiger International Number1 Pty Ltd, as long as it remains a wholly-owned subsidiary of VAIA; or
 - such other wholly-owned subsidiary of VAIA that the Commission approves in writing, as long as it remains a wholly-owned subsidiary of VAIA;
- (c) VAIA is not permitted to utilise the capacity to provide code share or joint services with another carrier or any other person without the approval of the Commission;
- (d) changes in relation to the ownership and control of the airlines authorised to use the capacity are permitted except to the extent that any change:
- results in the designation of the airline(s) as an Australian carrier under the Australia-Cook Islands 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 the airline(s) or be in a position to exercise effective control of the airline(s), without the prior consent of the Commission.

Dated: 28 November 2019



IAN DOUGLAS
Chairperson



KAREN GOSLING
Commissioner