



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2022] IASC 106
Renewal of:	[2017] IASC 107
The Route:	Italy
The Applicant:	Virgin Australia International Airlines Pty Limited ABN 63 125 580 823 (Virgin Australia)
Public Register File:	IASC/APP/202205

The Commission makes a fresh determination allocating to Virgin Australia 300 seats per week in each direction on the Italy route, for code share services with Singapore Airlines and Etihad Airways. The determination is valid for five years from 8 April 2023.

1 The application for renewal

1.1 On 3 May 2017, the International Air Services Commission (the Commission) issued Renewal Determination [2017] IASC 107 (the Determination) renewing the allocation of 300 third country code share seats of capacity per week on the Italy route in favour of Virgin Australia International Airlines Pty Limited (Virgin Australia). The Determination is valid for five years from 8 April 2018.

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 original determination. The Determination is due to expire on 7 April 2023. In view of this, the Commission sent, on 10 December 2021, a letter to Virgin Australia inviting it to apply for renewal if it wished to renew the Determination.

1.3 On 13 January 2022, Virgin Australia applied to the Commission for a renewal of the Determination for a further five-year period from 8 April 2023, and also requested the retention of all relevant conditions.

1.4 As required by sections 12 and 17 of the Act, the Commission published, on 14 January 2022, a notice on its website and subsequently sent a notification by email to stakeholders inviting other applications on the route. No applications or submissions were received.

1.5 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 Under the Australia-Italy air services arrangements, designated airlines of Australia (Australian airlines) may operate seven frequencies per week with any aircraft type. Three weekly frequencies have been allocated to Qantas in January 2022. Australian airlines are entitled to perform their services with wet lease, code sharing, blocked space and/or other cooperative service arrangements with any airline.

2.2 Australian designated airlines may enter into arrangements with an airline or airlines of a third country to carry out services through code share arrangements. These code share arrangements may constitute up to 1,700 seats per week in total in each direction on an annual average basis between Italy and Australia. Virgin Australia has been allocated a total of 600 third country code share seats while Qantas holds a total allocation of 1,000 code share seats.

2.3 According to the Register of Available Capacity, there are currently 100 seats per week in each direction available for immediate allocation to Australian airlines for code share with third country airlines.

2.4 In June 2017, the Australia – Italy air services arrangements were updated to include an explicit reference that the weekly capacity entitlements allocated for code share services are to be averaged over 12 months. Under the averaging methodology, a carrier may exceed its weekly capacity allocation for code share services from time to time so long as the total amount of capacity utilised during the year does not exceed the total annual capacity allocation (weekly capacity allocated multiplied by 52 weeks).

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. Subsection 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 (coronavirus) a pandemic. In response the Australian Government introduced a range of health, financial and other measures to minimise the number of people becoming infected or sick with COVID-19.

3.8 In this context, on 24 March 2020 the Prime Minister announced that the Government was introducing a ‘do not travel’ ban on Australians travelling overseas under the Biosecurity Act 2015. This ban was intended to limit travellers returning to Australia with coronavirus and to reduce the risks of spreading the coronavirus to other countries. The Prime Minister’s media statement indicated that the prohibition was aligned with the Government’s decision to raise the Smartraveller Travel Advice to Level 4 – “Do not go overseas. A travel ban is in place.” On 27 October 2021, the Government announced it would lift the international travel ban for certain categories of travellers from 01 November 2021, subject to certain conditions.¹ On 7 February 2022, the Prime Minister announced that Australian international borders would re-open from 21 February 2022.²

3.9 In assessing the current Virgin Australia application for the renewal of its capacity allocation of 300 seats per week in each direction of passenger capacity on the Italy route, the Commission considered whether Virgin Australia has failed to service the route effectively.

¹ <https://www.pm.gov.au/media/interview-david-koch-and-natalie-barr-sunrise-0>

² <https://www.pm.gov.au/media/reopening-tourists-and-other-international-travellers-secure-our-economic-recovery>

3.10 Until travel restrictions linked to the COVID-19 pandemic were imposed by the Australian Government in March 2020, the Virgin Australia Group was utilising the capacity allocation to offer code share services, as a marketing carrier, on flights operated by Singapore Airlines (Milan and Rome) and Etihad Airways (Milan, Rome and Venice). Prior to the COVID pandemic, there was no information to suggest that Virgin Australia failed to service the Australia-Italy route effectively.

3.11 In its application for renewal of capacity, Virgin Australia indicated that its code share agreements with Singapore Airlines and Etihad Airways are current and valid. Virgin Australia provided the Commission evidence that it continues to code share on Singapore Airlines' services to and from Milan and Rome. Virgin Australia has also informed the Commission it remains under active discussions with Etihad on specific code share routes.

3.12 The Commission notes that airlines globally have also been operating reduced networks in response to the impact of the COVID-19 pandemic on travel demand. This has affected the ability of Australian carriers to offer code share services in some international markets.

3.13 The Commission considers that the temporary suspension of the provision of code share services by Virgin Australia on the Italy route was in response to the COVID-19 travel restrictions. The Commission therefore finds that the temporary suspension of Virgin Australia's code share services in these circumstances does not mean that Virgin has failed to service the route effectively.

3.14 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.

3.15 The Commission notes that Virgin Australia is an established carrier which, under normal circumstances, operates scheduled international services on various routes and finds that the carrier is reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated on the Australia-Italy route.

3.16 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 (see section 8(2)(a) of the Act).

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

3.18 Under section 19 of the Act, the Commission "must include the same terms and conditions as the original determination to which it relates" (s 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 are warranted because of changes in circumstances since the original determination was made” (s 19(3)).

3.19 Pursuant to section 19 of the Act, the Commission has decided to include certain conditions as set out in item 4 below.

3.20 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 Italy route to Virgin Australia International Airlines Pty Ltd ([2022] IASC 106)

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Virgin Australia International Airlines Pty Ltd (Virgin Australia), allocating 300 seats per week in each direction on the Italy route, averaged on an annual basis, in accordance with the Australia - Italy air services arrangements.

4.2 The determination is valid for five years from 8 April 2023.

4.3 The determination is subject to the following conditions:

- (a) Virgin Australia is required to fully utilise the capacity from the date this determination comes into effect or such other date as may be approved by the Commission.
- (b) Only Virgin Australia is permitted to utilise the capacity.
- (c) Virgin Australia is not permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person unless approved by the Commission.
- (d) As approved by the Commission, 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.
- (e) Additionally, the capacity may be used by Virgin Australia to code share on services operated by Etihad in accordance with the code share agreement between Virgin Australia and Etihad which came into effect on 26 August 2010, as amended.

- (f) 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.
- (g) 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 Virgin Australia from complying with the Australian Consumer Law.
- (h) 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 — Italy 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: 11 February 2022



GENEVIEVE BUTLER
Chairperson



JANE MCKEON
Commissioner