



Australian Government

International Air Services Commission

DECISIONS

The Route: Italy
The Applicant: Virgin Australia International Airlines Pty Ltd
(Virgin Australia) ABN 63 125 580 823

Decision: [2022] IASC 211
Variation Of: [2017] IASC 107
Public Register File: IASC/APP/202225

Decision: [2022] IASC 212
Variation Of: [2017] IASC 119
Public Register File: IASC/APP/202226

Decision: [2022] IASC 213
Variation Of: [2021] IASC 116
Public Register File: IASC/APP/202227

Decision: [2022] IASC 214
Variation Of: [2022] IASC 106
Public Register File: IASC/APP/202229

The Commission varies Determinations [2017] IASC 107, [2017] IASC 119, [2021] IASC 116 and [2022] IASC 106 to permit the use of the capacity on the Italy route for code sharing between Virgin Australia and Qatar Airways. The permission is valid for the duration of the Determinations commencing from the date of issue of these decisions.

1 The application

1.2 On 12 July 2022, Virgin Australia applied to the International Air Services Commission (the Commission) for a variation, to permit the utilisation of capacity for code share services with Qatar Airways on the Italy route for the following determinations:

- [2017] IASC 107;
- [2017] IASC 119;
- [2021] IASC 116; and
- [2022] IASC 106.

1.3 Specifically, it is proposed that Virgin Australia will offer code share services, as marketing carrier, on flights operated by Qatar Airways on the Australia-Doha-Milan route and the Australia-Doha-Rome route for the remaining term of the determinations.

1.4 The determinations¹ allocate to Virgin Australia capacity of 600 third country code share seats and permit provision of joint services with Singapore Airlines and Etihad Airways. In its application, Virgin Australia sought to retain the condition that permits code sharing with Singapore Airlines, and notes that Etihad Airways may continue to market Virgin Australia operated domestic services and services operated on the New Zealand route².

1.5 In accordance with section 22 of the *International Air Services Commission Act 1992* (the Act), on 12 July 2022, the Commission published Virgin Australia's application on the Commission's website inviting submissions about the application. No submissions 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 Under paragraph 7(2)(aa) of the Act, 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 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 were 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.

2.3 Australian 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.

2.4 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).

¹ Determination [2017] IASC 107, as renewed by Determination [2022] IASC 106; and Determination [2017] IASC 119 as renewed by Determination [2021] IASC 116.

² Determination [2017] IASC 113 on the New Zealand route.

3 The Commission's consideration

3.1 Virgin Australia's application seeks to vary the determinations to include a condition of a kind referred to in paragraph 15(2)(e) of the Act. In view of this, the application is a transfer application³ as so defined in subsection 4(1) of the Act. The Commission has assessed the application in accordance with section 25 of the Act.

3.2 Subsection 25(1) provides that the Commission must make a decision varying the determination in a way that gives effect to the variation requested, subject to subsection 25(2). Subsection 25(2) states that the Commission must not make a decision varying the determination in a way that varies, or has the effect of varying an allocation of capacity if the Commission is satisfied that the allocation, as so varied, would not be of benefit to the public.

3.3 Under section 26 of the Act, in assessing the benefit to the public of a variation of an allocation of capacity, the Commission is required to apply the criteria set out in any policy statement issued by the Minister under section 11 of the Act.

3.4 Under section 11 of the Act, the Minister made *the International Air Services Commission Policy Statement 2018* (the Policy Statement) which came into effect on 28 March 2018. The Policy Statement sets out the criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity.

3.5 Section 18 of the Policy Statement specifically deals with 'transfer applications' such as this one. It provides that, in assessing whether the variation requested would not be of benefit to the public for the purpose of subsection 25(2) of the Act, the Commission is to have regard to the 'reasonable capability criterion' set out in section 8 of the Policy Statement and may have regard to any of the additional criteria set out in section 9 that the Commission considers to be relevant. The Commission is also to have regard to the matters specified in paragraph 18(2)(b) of the Policy Statement to the extent that they are relevant to the variation under consideration.

3.6 'Reasonable capability criterion' is defined in section 8 of the Policy Statement to mean the extent to which Australian carriers are reasonably capable of obtaining the necessary approvals to operate on and service the route and of using the capacity allocated under the determination. The 'additional criteria' to which the Commission may have regard are set out in section 9 of the Policy Statement.

3.7 The Commission considered the application of the reasonable capability criterion to the circumstances of this application. The Commission notes that Virgin Australia is an established international carrier and is therefore reasonably capable of

³ Subsection 4(1) defines 'transfer application' to mean 'an application, by an Australian carrier to whom a determination allocates capacity, for one or both of the following:

(a) a variation of the determination in a way that allocates, or has the effect of allocating, that capacity to another Australian carrier;

a variation of the determination that varies, or has the effect of varying, one or more conditions of a kind referred to in paragraph 15(2)(d), (e) or (f).

obtaining the necessary regulatory approvals to operate on the route and of implementing its application.

3.8 The Commission has carefully considered the proposed code share arrangements, noting particularly that the proposed conduct will involve Qatar Airways specifying pricing of fares at which Virgin Australia may market the proposed services. The Commission is aware that Virgin Australia has sought authorisation from the Australian Competition and Consumer Commission (ACCC) for the proposed alliance with Qatar Airways. The ACCC has granted interim authorisation to the alliance, noting that Virgin Australia and Qatar Airways do not operate any competing services. The Commission notes that the interim authorisation of the proposed conduct is on a restricted basis, where the proposed conduct does not occur on an international route, or a flight segment of an international route, involving an origin airport and destination airport (a city pair) on which Virgin Australia operates or markets services under a codeshare arrangement that allows Virgin Australia to set airfares independently.

3.9 The Commission has taken account of the ACCC's interim authorisation of the Virgin Australia – Qatar Airways alliance in deciding that it does not have serious concerns that the arrangement would not be of benefit to the public.

3.10 The Commission also notes that it received no submissions opposing the variation sought in the Virgin Australia transfer application.

3.11 Accordingly, in these circumstances, there is nothing before the Commission to indicate that its assessment of benefit to the public for the purpose of subsection 25(2) of the Act would be assisted by having regard to the additional criteria in section 9 of the Policy Statement. The Commission considers that there is unlikely to be any lessening of public benefit through authorising the code sharing arrangement in relation to the Italy route.

3.12 The Commission finds that the matters specified in paragraph 18(2)(b) of the Policy Statement are not relevant to the variation under consideration. The Commission does not have information to suggest that Virgin Australia's transfer application involves speculative activity. Virgin Australia is an established international carrier which currently holds multiple determinations and other regulatory approvals enabling the carrier to operate scheduled international air services on various routes.

3.13 Having considered the criteria set out in section 18 of the Policy Statement, the Commission is satisfied that the allocation, as proposed to be varied permitting Virgin Australia to code share, as marketing carrier, on flights operated by Qatar Airways on the Australia-Italy route, would be of benefit to the public. Therefore, in accordance with section 25 of the Act, the Commission must make a decision varying the determinations in a way that gives effect to the variation requested in the transfer application.

3.14 Subsection 15(1) of the Act empowers the Commission to include such terms and conditions in a determination as it thinks fit. Paragraph 15(2)(e) requires the inclusion of a condition stating the extent to which the carrier may use capacity allocated under a determination in joint services with another carrier.

3.15 The Commission has decided to add conditions permitting the use of the capacity for the provision of code share services between Virgin Australia and Qatar Airways on the Italy route. As required by section 23 of the Policy Statement, the Commission has decided to include a condition requiring the airlines to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

3.16 In authorising code share arrangements, the Commission normally approves code share arrangements where the code share partners price and sell their services separately from each other. In this case, the Commission approves the utilisation of capacity for code share services consistent with the code share agreement between Virgin Australia and Qatar Airways; that is, there will be no condition of approval preventing Virgin Australia marketing the proposed services at pricing which is specified by Qatar Airways as long as such practices are authorised under the *Competition and Consumer Act 2010* or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal. This approval does not extend to any joint pricing of flight services operated by the airlines.

3.17 Nothing in this decision should be taken as indicating either approval or disapproval by the ACCC. This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC or any consideration by the ACCC about the longer term authorisation of the arrangements.

4 Decisions varying Determinations [2017] IASC 107, [2017] IASC 119, [2021] IASC 116 and [2022] IASC 106 allocating capacity to Virgin Australia on the Italy route ([2022] IASC 211, [2022] IASC 212, [2022] IASC 213, and [2022] IASC 214)

4.1 In accordance with section 25 of the Act, the Commission varies Determinations [2017] IASC 107 (as varied), [2017] IASC 119 (as varied), [2021] IASC 116 and [2022] IASC 106, which allocate capacity to Virgin Australia on the Italy route, by:

adding the following conditions to the Determinations:

- The capacity may be used by Virgin Australia to code share on services operated by Qatar Airways in accordance with the code share agreement between Virgin Australia and Qatar Airways, made effective on 16 June 2022, and the air services arrangements between Australia and Italy.
- Under the arrangements with Qatar Airways, Virgin Australia may market the proposed services at pricing which is specified by Qatar Airways as long as such practices are authorised under the *Competition and Consumer Act 2010* or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal.

- Virgin Australia must apply to the Commission for approval of any proposed variations to the code share agreement which would change the relevant commercial aspects of the structure of the agreement, 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 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 the Australian Consumer Law.

removing the following condition to the Determinations:

- The capacity may be used by Virgin Australia to code share on services operated by Etihad Airways in accordance with the code share agreement between Virgin Australia and Etihad Airways, made effective on 26 August 2010 (as amended), and the air services arrangements between Australia and Italy.

4.2 These decisions come into effect from the date of issue and are valid for the duration of Determinations [2017] IASC 107, [2017] IASC 119, [2021] IASC 116 and [2022] IASC 106.

Dated: 10 August 2022



GENEVIEVE BUTLER
Chairperson



JANE MCKEON
Commissioner