



Australian Government

International Air Services Commission

DECISIONS

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

Decision: [2023] IASC 202
Variation Of: [2017] IASC 117
Public Register File: IASC/APP/202318

Decision: [2023] IASC 203
Variation Of: [2017] IASC 121
Public Register File: IASC/APP/202319

The Commission varies Determinations [2017] IASC 117 and [2017] IASC 121 to permit the use of the capacity on the Vanuatu 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

1.1 On 15 February 2023, Virgin Australia applied to the International Air Services Commission (the Commission) seeking to vary Determinations [2017] IASC 117 (as varied) and [2017] IASC 121 (as varied) to permit the utilisation of capacity for code share services between Virgin Australia and Qatar Airways on the Vanuatu route. Specifically, it is proposed that Qatar Airways will offer code share services, as marketing carrier, on flights operated by Virgin Australia on the Vanuatu route, under a free-sale arrangement.

1.2 The determinations allocate to Virgin Australia 720 seats and 180 seats of capacity on the Vanuatu route and permit the use of capacity by Virgin Australia for the provision of code share services with Singapore Airlines, Tiger International Number1, and Etihad Airways.

1.3 In its application, Virgin Australia sought to retain the conditions that permit the provision of code share services with Singapore Airlines. It also sought to remove conditions permitting the provision of code share services with Etihad Airways and Tiger International Number1.

1.4 In accordance with section 22 of the *International Air Services Commission Act 1992* (the Act), on 16 February 2023, the Commission published Virgin Australia's application on the Commission's website inviting submissions about the application. No 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 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-Vanuatu air services arrangements, Australian designated carriers have the right, over all or any part of their route, to enter into code share, blocked space or other cooperative marketing arrangements, as the marketing and/or operating airline, with another designated airline(s) of Australia, with the designated airline(s) of Vanuatu, and/or the designated airline(s) of third parties.

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 application 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 a) obtaining the necessary approvals to operate on and service the route, and b) 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 therefore finds that it is reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated under the determination.

3.8 The Commission does not have serious concerns about the proposed code sharing by Virgin Australia and Qatar Airways on the Vanuatu route. The Commission notes that it has received no adverse submissions opposing the variation sought in Virgin Australia’s transfer application.

3.9 Furthermore, the Commission notes that the Australian Competition and Consumer Commission (the ACCC) has, on 8 September 2022, authorised the alliance between Virgin Australia and Qatar Airways, subject to certain conditions (ACCC authorisation number AA1000608 refers).

3.10 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 Vanuatu route.

3.11 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.

3.12 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 Qatar Airways to code share, as marketing carrier, on flights operated by Virgin Australia on the Australia-Vanuatu 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 Determination in a way that gives effect to the variation requested in the transfer application.

3.13 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.

3.14 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 Vanuatu route. As required by section 23 of the Policy Statement, the Commission has included a condition requiring the airlines to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flights.

3.15 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 Decision varying Determinations [2017] IASC 117 and [2017] IASC 121 which allocate capacity to Virgin Australia International Airlines Pty Ltd on the Vanuatu route ([2023] IASC 202 and [2023] IASC 203)

4.1 In accordance with section 25 of the Act, the Commission varies Determinations [2017] IASC 117 and [2017] IASC 121 which allocate capacity to Virgin Australia International Airlines Pty Ltd on the Vanuatu route, by:

adding the following conditions to the Determinations:

- The capacity may be used by Virgin Australia International Airlines Pty Ltd to provide code share with Qatar Airways in accordance with the code share agreement between Virgin Australia and Qatar Airways, made effective on 21 June 2022, and the air services arrangements between Australia and Vanuatu.
- Virgin Australia International Airlines Pty Ltd must apply to the Commission for approval of any proposed variations to the code share agreement between Virgin Australia International Airlines Pty Ltd and Qatar Airways which would change the relevant commercial aspects of the structure of the agreement from a free sale code share arrangement to a block space, or if the airlines propose 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 conditions to the Determinations:

- The capacity may be utilised by Tiger International Number1 Pty Ltd, as long as it remains a wholly-owned subsidiary of VAIA; or such other wholly-owned subsidiary of Virgin Australia International Airlines Pty Ltd that the Commission approves in writing, as long as it remains a wholly-owned subsidiary of Virgin Australia International Airlines Pty Ltd; and

- The capacity may be used by Virgin Australia to provide code share services with Etihad Airways in accordance with the code share agreement between Virgin Australia and Etihad Airways made effective on 26 August 2010 and the air services arrangements between Australia and Vanuatu.

4.2 This decision comes into effect from the date of issue and is valid for the duration of Determinations [2017] IASC 117 and [2017] IASC 121.

Dated: 24 March 2023


GENEVIEVE BUTLER
Chairperson


JANE MCKEON
Commissioner