



Virgin Australia & Air New Zealand – request to vary compliance with condition 1(b) of authorisations A91227 & A91228

27 July 2011

DECISION

The Australian Competition and Consumer Commission (the ACCC) has decided to vary the requirement on Virgin Australia (formerly Virgin Blue) and Air New Zealand (the applicants) to comply fully with condition 1(b) of authorisations A91227 & A91228 for the Northern Summer 2011 (NS11)¹ and Northern Winter 2011 (NW11)² scheduling seasons, subject to the applicants notifying the ACCC as soon as practicable of any material changes in demand conditions so that the variation can be amended accordingly.

BACKGROUND

On 6 May 2010, the applicants sought authorisation for an alliance between the airlines involving coordination and agreement in respect of trans-Tasman passenger services (the Alliance). On 16 December 2010, the ACCC issued a determination granting conditional authorisation to the Alliance for three years. The conditions of authorisation require the applicants to meet certain seat capacity requirements (see Attachment A of the ACCC's Determination).

THE REQUEST TO VARY COMPLIANCE WITH CONDITIONS

On 3 June 2011, Virgin Australia and Air New Zealand submitted a request to vary their compliance with condition 1(b) of authorisations A91227 & A91228 as a result of the February 2011 earthquake in Christchurch, New Zealand.

The earthquake has caused a significant reduction in demand for flights to and from Christchurch. As a consequence, the applicants seek a variation to the requirement to comply fully with the seat capacity obligations on trans-Tasman routes in condition 1(b) of authorisations A91227 & A91228 for the NS11 and NW11 scheduling seasons only.

¹ 1 April 2011-31 October 2011.

² 1 November 2011-31 March 2012.

Specifically, the applicants seek to vary the requirement to fly not less than 100% of the Base Year Alliance Seat Capacity³ by:

- 71,608 seats (or a 3.0% reduction in seat capacity) for the NS11 season and
- 95,815 seats (or a 5.6% reduction in seat capacity) for the NW11 season.

In the absence of any further request for a variation during the term of authorisation, other than for the NS11 and NW11 scheduling seasons, the applicants will continue to comply with the requirement in condition 1(b) to fly no less than 100% of the trans-Tasman Base Year Alliance Seat Capacity, as specified in the conditions of authorisations A91227 & A91228.

Further information regarding the application is available on the ACCC's public register at www.accc.gov.au/AuthorisationsRegister.

THE VARIATION PROCESS

Pursuant to condition 2(g) of authorisations A91227 & A91228 the ACCC may vary the requirement to comply with the conditions either permanently or on a temporary basis.

A request to the ACCC for a variation must indicate the nature of the variation applied for and be accompanied by such information required for the ACCC to assess the application. The ACCC will consult in good faith with the applicant and may also undertake public consultation, including inviting submissions from any interested person within a specified period of time.

CONSULTATION

The ACCC undertook interested party consultations in order to consider the request for variation.

The ACCC received three submissions. Jumpjet Airlines Limited considered that the variation was reasonable although it was unsupportive of the Alliance more generally. Wellington Stakeholder Group stated that they did not wish to make specific comments in relation to the application for variation but considered the maintenance of a healthy competitive environment in the market for trans-Tasman air services remained important. An individual objected to the requested reduction in capacity on the basis that it may lead to price rises and a reduction in demand when entry by another carrier makes an increase in capacity more necessary.

³ Defined as the seat capacity specified in respect of a Nominated Route or the Trans-Tasman as set out in Schedule A to the conditions – see Attachment A – Conditions of Authorisations 91227 & A91228 in *Determination: Applications for authorisation lodged by Virgin Blue & Ors in respect of an airline alliance between the applicants*, 16 December 2010 at p. 95 at [5.473] – [5.479] published at: <http://www.accc.gov.au/content/index.phtml/itemId/927433/fromItemId/401858/display/acccDecision>

REASONS FOR DECISION

The ACCC considers that:

- the Christchurch earthquake was a force majeure event which constitutes Exceptional Circumstances under the conditions of authorisations A91227 & 91228
- the significant reduction in demand for airline travel to and from Christchurch resulting from the earthquake provides a reasonable basis for allowing the requested variation to the compliance obligations of the applicants for the NS11 and NW11 scheduling seasons
- the requested variation does not materially alter the balance between public benefit and detriment identified in the ACCC's determination of 16 December 2010.

Accordingly, the ACCC has decided to vary the requirement on the applicants to comply fully with condition 1(b) of authorisations A91227 & A91228 for the NS11 and NW11 scheduling seasons, subject to the applicants notifying the ACCC as soon as practicable of any material changes in demand conditions so that the variation may be amended accordingly.

As a result of this variation, the obligations on the applicants under condition 1(b) will be as follows:

- For NS11, in respect of the trans-Tasman, the applicants must fly not less than 97% of the trans-Tasman Base Year Alliance Seat Capacity (2,288,642 seats).
- For NW11, in respect of the trans-Tasman, the applicants must fly not less than 94.4% of the trans-Tasman Base Year Alliance Seat Capacity (1,629,690 seats).

In the absence of any further request for a variation during the term of authorisation, other than for the NS11 and NW11 scheduling seasons, the applicants will continue to comply with the requirement in condition 1(b) to fly not less than 100% of the trans-Tasman Base Year Alliance Seat Capacity, as specified in authorisations A91227 & A91228.

The applicants' compliance with the varied trans-Tasman Base Year Alliance Seat Capacity for NS11 and NW11 will be subject to compliance audits in accordance with clause 3.5 of the conditions of authorisations A91227 & A91228.