



## **Virgin Australia and Air New Zealand – request to vary compliance with conditions 1(a) and 1(b) of authorisations A91227 & A91228**

**4 August 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 conditions 1(a) and 1(b) of authorisations A91227 & A91228 for the Northern Summer 2011 (NS11)<sup>1</sup> scheduling season.

### **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).

On 27 July 2011, the ACCC decided to vary the requirement on the applicants to comply fully with condition 1(b) of authorisations A91227 & A91228 for the Northern Summer 2011 and Northern Winter 2011 scheduling seasons as a result of the Christchurch earthquake. Details of this variation are available on the ACCC's public register at [www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister).

### **THE REQUEST TO VARY COMPLIANCE WITH CONDITIONS**

On 1 July 2011, Virgin Australia and Air New Zealand submitted a request to vary the requirement to comply with conditions 1(a) and 1(b) of authorisations A91227 & A91228 for the current scheduling season, NS11, as a result of the June 2011 Chilean volcanic ash cloud activity over Australia and New Zealand.

The Chilean Puyehue-Cordon Caulle volcanic eruptions on 4 June 2011 and consequent dispersion of ash plume across southern Australian and New Zealand air space from 12 to 17 June and between 21 and 30 June created unsafe conditions for flying as ash cloud can cause

---

<sup>1</sup> 1 April 2011-31 October 2011.

significant damage to aircraft with severe implications for passenger safety. Virgin Australia cancelled 150 trans-Tasman services and Air New Zealand cancelled two trans-Tasman services as a consequence. Accordingly, the applicants seek a variation to the requirement to comply fully with the seat capacity obligations on Nominated Routes in condition 1(a) and trans-Tasman and routes in condition 1(b) of authorisations A91227 & A91228 for the NS11 scheduling season only.

Specifically, the applicants seek to vary the requirement to fly not less than 100% of the Base Year Alliance Seat Capacity<sup>2</sup> by:

- 8,820 seats (or a 1.21% reduction in seat capacity) on Nominated Routes for the NS11 season and
- 26,914 seats (or a 1.1% reduction in seat capacity) on trans-Tasman services for the NS11 season.

The applicants further seek agreement from the ACCC to an automatic variation for any further cancellations as a result of risks associated with volcanic ash contamination which the applicants would report to the ACCC and the auditor at the end of the NS11 scheduling season.

In the absence of any further request for a variation during the term of authorisation, other than for the NS11 and NW11<sup>3</sup> scheduling seasons, the applicants state that they will continue to comply with the requirements in conditions 1(a) and 1(b) to fly not less than 100% of the trans-Tasman Base Year Alliance Seat Capacity and not less than 100% of the Scheduling Season 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](http://www.accc.gov.au/AuthorisationsRegister).

## THE VARIATION PROCESS

Pursuant to condition 2(g) to 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.

---

<sup>2</sup> 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>

<sup>3</sup> The ACCC decided to vary the requirement on the applicants to comply fully with condition 1(b) for the NW11 scheduling season as a result of the February 2011 earthquake in Christchurch, New Zealand. See ACCC Decision to vary the requirement on the applicants to comply fully with condition 1(b) to authorisations A91227 & A91228, 27 July 2011

## CONSULTATION

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

The ACCC received a submission from Jumpjet Airlines Limited indicating that the variation was reasonable although it was unsupportive of the Alliance more generally

## REASONS FOR DECISION

The ACCC considers that:

- the presence of the Chilean volcanic ash cloud over southern Australia and New Zealand for two sustained periods in June 2011 was a force majeure event which constitutes Exceptional Circumstances under the conditions of authorisations A91227 & A91228
- the significant risks to flight safety resulted in the cancellation of 150 trans-Tasman services by Virgin Australia (including on Nominated Routes) and the cancellation of two trans-Tasman services by Air New Zealand
- the safety implications and risks provide a reasonable basis for the cancellations and in turn for allowing the requested variation to the requirement on the applicants to comply fully with conditions 1(a) and 1(b) for the NS11 scheduling season
- the requested variation to the requirement to comply fully with conditions 1(a) and 1(b) 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 conditions 1(a) and 1(b) of authorisations A91227 & A91228 for the NS11 scheduling season.

As a result of this variation, the applicants will be considered to have complied with their obligations under conditions 1(a) and 1(b) of authorisations A91227 & A91228 for NS11 provided they meet the following requirements:

- in respect of the trans-Tasman, the Applicants must fly not less than 95.9% of the total trans-Tasman Base Year Alliance Seat Capacity. That is, the Applicants must fly not less than 2,261,728 seats – being the total trans-Tasman Base Year Alliance Seat Capacity (2,360,250) less the reduction in seat capacity due to the Christchurch earthquake (71,608 or 3%) less the reduction in seat capacity due to the Chilean volcanic ash cloud activity (26,914 or 1.1%)
- in respect of the Nominated Routes, the Applicants must fly not less than 98.79% of the total Nominated Route Base Year Alliance Seat Capacity. That is, the Applicants must fly not less than 718,011 seats – being the total Nominated Route Base Year Alliance Seat Capacity (726,831) less the reduction in seat capacity due to the Chilean volcanic ash cloud activity (8,820 or 1.21%).

Specifically, the applicants must meet the following varied Alliance Seat Capacity requirements for NS11 for each Nominated Route:

	<b>Varied NS11 seats</b>
Auckland-Brisbane	320,212
Brisbane-Dunedin	47,038
Brisbane-Wellington	141,722
Melbourne-Wellington	55,555
Sydney-Wellington	107,871
Sydney-Queenstown	45,613
Total Nominated Route Alliance Seat Capacity	718,011
Trans-Tasman Alliance Seat Capacity	2,261,728

In the absence of any further request for a variation to comply fully with condition 1 over the remaining authorisation period, the applicants will comply with the requirement to fly not less than 100% of the trans-Tasman Base Year Alliance Seat Capacity (but for NW11 where the applicants will comply with the requirement to fly not less than 94.4% of the trans-Tasman Base Year Alliance Seat Capacity as varied as a result of the Christchurch earthquake) and not less than 100% of the Scheduling Season Alliance Seat Capacity, as specified in the conditions of authorisation.

The ACCC has decided not to grant the applicants an automatic variation to the obligation to comply fully with conditions 1(a) and 1(b) for any further cancellations as a result of risks associated with volcanic ash contamination. The ACCC considers that the existing variation provisions in the conditions of authorisations A91227 & A91228 will adequately cover any further requests related to volcanic ash activity.

The applicants' compliance with the revised Alliance Seat Capacity for NS11 will be subject to compliance audits in accordance with clause 3.5 of the conditions of authorisations A91227 & A91228.