

Response to Questions on Notice

The Department of Infrastructure and Regional Development provides the following information covering questions on notice from the Department's appearance before the Committee on 18 March 2014.

Further information on Virgin Australia's structure and compliance with the Air Navigation Act and designation criteria

Details on the structure and operation of Virgin Australia International Holdings (VAIH) are outlined in documents released at the time of the restructure of Virgin Australia's operations in 2012. In brief, the 2012 restructure split Virgin Australia's then operations into two primary operations, Virgin Australia Holdings (VAH) and VAIH.

- VAH is the holding company for Virgin Australia's domestic services. It is listed on the ASX and shares are tradeable.
- VAIH is the holding company responsible for the international airline operations of Virgin Australia, including Virgin Australia International Airlines, Virgin Australia Airlines (SE Asia) and Virgin Australia Airlines (NZ).

VAH provides long term economic and operational support to VAIH through service and funding agreements.

- Under the terms of a Services Agreement, VAIH has appointed VAH to exclusively manage all of VAIH's operations. This agreement ensures that VAIH has access to all of the resources it requires to carry on the international airline operations
- VAH also makes funds available to VAIH under a Loan Agreement to ensure that VAIH has access to sufficient funding to carry on the international airline operations.

VAIH is a separate, independent company and is not a wholly-owned subsidiary of VAH. According to the information statement at the time of the restructure, a subsidiary of VAH, Virgin Australia International Operations, holds less than one per cent of the shares in VAIH. Virgin Australia's latest annual report (page 134) notes that VAH has no equity holdings in either VAIH or VAIH's subsidiaries.

The majority of VAIH's board are independent members. The board is comprised of three independent directors (including an independent chairperson) and two VAH nominees.

It is this independent board that controls VAIH by setting the strategic direction of the company. Under the terms of the Services Agreement, VAH prepares regular draft budget and business plans for VAIH operations and these are submitted to the VAIH board for consideration and approval.

The constitution of VAIH contains provisions restricting foreigners from holding more than 49 per cent of VAIH and mechanisms for the board of VAIH to force the sale of foreign held shares if necessary to bring it below 49 per cent. To meet the criteria for designation as an Australian international airline, the VAIH constitution also requires:

- At least two-thirds of the board members to be Australian citizens;
- The Chairman of the board to be an Australian citizen;
- The head office of the international airline operations to be located in Australia; and
- The operational base of the international airline operations to be located in Australia.

We understand VAH provides VAIH subsidiaries with aircraft under the terms of the Services Agreement, and that these aircraft are used to operate Virgin Australia's international services.

Based on the information available to the Department, VAIH is compliant with the regulatory requirements which apply to Australian international airlines.

Assistance for national security or emergency assistance

Section 67 of the *Defence Act 1903* provides that:

- “The owner of any vehicle, horse, mule, bullock, aircraft, aircraft material, boat or vessel, or of any goods, required for naval, military or air-force purposes, shall, when required to do so by an officer authorized in that behalf by the regulations, furnish it for those purposes, and shall be recompensed therefor in the manner prescribed, and the owners of any vehicles, horses, mules, bullocks, aircraft, aircraft material, boats or vessels may be required by the regulations to register them periodically.”

On its terms, the provision would apply equally to Virgin Australia and Qantas.

The Department is not aware of any instances in which this provision has been invoked in order to require Qantas to provide its aircraft for assistance.

The Department of Foreign Affairs and Trade works closely with Qantas on planning for and responding to large-scale international crises. This includes using Qantas to evacuate Australians to safety and ready access to operational information from Qantas and its network of partners during, and in the lead-up to, serious incidents overseas.

The Government also engages with other airlines on assistance matters.

Review mechanisms for decisions made under the *Air Navigation Act 1920*

There are no provisions that expressly exclude the Minister’s actions under section 11A or 11B of the *Air Navigation Act 1920* from being subject to judicial review.

Australia's air services agreements/arrangements

A list of Australia’s bilateral agreements/arrangements is at Attachment A.

Response to Questions on Notice from Senator Sterle

1. Is there a list of current “Australian international airlines”?

There are six Australian international airlines:

- Qantas Airways Limited
- Jetstar Airways Pty Limited
- Virgin Australia International Airlines Pty Limited
- Virgin Australia Airlines (SE Asia) Pty Limited
- Tasman Cargo Airlines Pty Limited
- Pacific Air Express Australia Pty Limited

2. Which airlines currently benefit as Australian international airlines under Air Service Agreements? Can you list them?

See the answer to Question 1 above.

3. How does an airline become an AIA?

Australian international airlines are required to be designated under relevant Air Services Agreements and hold an International Airline Licence issued by the Department of Infrastructure and Regional Development.

4. What sections of the Air Nav Act prescribe the requirements to become an AIA? Is it only 11A? Does an airline need to apply to become an AIA or is it automatic?

Section 11A of the *Air Navigation Act 1920* limits foreign ownership in an Australian international airline to 49 per cent. Other requirements applicable to Australian international airlines are outlined in the answer to Question 3 above.

5. What entitlements do AIA's get from the Government?

Designated Australian international airlines are able to access Australian air traffic rights negotiated under our bilateral agreements. The International Air Services Commission allocates capacity entitlements to Australian airlines for the operation of international airline services.

6. How does an airline become an AIA?

See the answer to Question 3.

7. How does an airline cease to be an AIA?

An Australian airline would cease to be able to offer international services if it did not meet the requirements set out in the answer to Question 3. In practice, its International Airline Licence would be cancelled. An Australian airline can also choose to cease to be an Australian International Airline and surrender its International Airline Licence.

8. What would the effect be, if the provisions of section 7 of the QSA were made part of s11A of the ANA?

- **On Jetstar in respect to:**
 - **where its HQ is located?**
 - **Board composition and Chair**
 - **Location of its facilities and operations?**

The Department would require advice from Jetstar to determine how the proposal would impact their operations.

- **On Virgin (VAH) in respect to:**
 - **where its HQ is located?**
 - **Board composition and Chair**
 - **Location of its facilities and operations?**

Virgin Australia Holdings is not an Australian international airline and amendments to the ANA requirements for Australian international airlines would have no impact on Virgin Australia Holdings.

The Department would require additional advice to determine how the proposal would impact Virgin Australia's international operations.

- **On other AIAs?**
 - **where its HQ is located?**
 - **Board composition and Chair**
 - **Location of its facilities and operations?**

The Department would require advice from the relevant airline concerned to determine how the proposal would impact their international operations.

9. Please provide a list of the counterpart legislation relating to requirements on national carriers (eg counterpart to section 11A of ANA) from the following overseas jurisdictions: United States, United Kingdom, Japan, UAE, France, New Zealand and Canada.

The Department does not hold this information.

10. Which of these nations legislate via their Parliaments for their national carriers, and what areas do they legislate, including:

- **Foreign investment limits?**
- **Board/Chair nationality?**
- **Principal place of business?**
- **Operational base?**
- **Head office location?**

The Department does not hold this information.

Response to Questions on Notice from Senator Xenophon

- 1. In testimony, it appeared that Virgin Australia International Holdings Pty Ltd (VAIH) has a Board but no other management or operating structure other than a contract for management and operational services. Is it therefore accurate to describe VAIH as a 'virtual international airline' (ie one which solely exists to allow unlimited foreign investment in the associated airline without breaching Australia's air service agreements)?**

'Virtual international airline' is not a term that is used in regulations or by the Department of Infrastructure and Regional Development.

- 2. In testimony, it appeared that the distinction between Virgin Australia Holdings Ltd (VAH) and VAIH was based on having separate Boards, although there are two common directors. In regard to what we might call the Virgin 'virtual international airline' model:**

- a. What are the tests that the Department applies to establish independence between the two entities?**

In assessing applications to be designated under an air services agreement, the Department applies the designation tests contained in the relevant air services agreement and the designation criteria developed by the Department to ensure airlines comply with those tests. In assessing applications for International Airline Licences, the Department applies the provisions in the *Air Navigation Act 1920*, the *Air Navigation Regulations 1947* and the *International Airline Licences Guidance Notes*.

There is no specific test or criteria for determining the independence between two entities.

- b. Where are they published?**

Air services agreement treaties are published on the Department of Foreign Affairs and Trade Treaties Database website. The Department's designation criteria and International Airline Licences Guidance Notes are published on the Department's website. Acts and Regulations are published on the Comlaw website.

- c. Who is the decision-maker and what is the explicit head of power that identifies and empowers the decision-maker?**

The Secretary of the Department of Infrastructure and Regional Development is the decision maker for the issuing of International Airline Licences (Regulation 17A of the *Air Navigation Regulations 1947*). This power has been delegated to certain officers within the Department of Infrastructure and Regional Development. The designation of an airline is an executive function done under relevant air services agreements and is exercised by the Department.

- 3. For an organisation like VAIH which conducts no operations and controls no aircraft or crews in its own right, how does it satisfy the Guidance Notes requirement to firstly identify an operational base and secondly to confirm the location of that base?**

VAIH is a holding company for its international airlines, including the Australian designated airlines: Virgin Australia International Airlines Pty Limited and Virgin Australia Airlines (SE Asia) Pty Limited. These airlines were assessed against the criteria outlined in the answer to Question 2 and have been designated as Australian international airlines and issued International Airline Licences.

4. In testimony, it was not clear what defines ‘operational base’. What are the tests and where are they published?

Operational base is not defined in the Act or Regulations. These matters are examined and assessed in the context of individual applications.

5. Regardless of what one or some of our bilateral partners may think of Australia designating ‘virtual’ airlines to exercise Australian capacity rights, what tests must the management and the operational services provider satisfy given that the International Airline Licence is granted to the ‘virtual’ airline? Where are they published?

All Australian International Airlines must meet the requirements set out in the answer to Question 2.

6. Are there any restrictions on who may provide management and the operational services to an Australian-designated ‘virtual international airline’? Where are they published?

‘Virtual international airline’ is not a term that is used in regulations or by the Department of Infrastructure and Regional Development.

All Australian International Airlines must meet the requirements set out in the answer to Question 2. There are no specific restrictions in the Act or Regulations related to who may provide management and operational services to an Australian International Airline. However, any arrangements for the provision of management and operational services to Australian International Airlines must be consistent with our bilateral air services arrangements which set out the extent to which airlines designated under the relevant agreement can use aircraft or aircraft and crew leased from another company. All operations, whether conducted by the designated airline or another company, are subject to safety, security and other operational approvals.

7. In testimony, it was thought that there was nothing to prevent, for example, Singapore Airlines, taking on the contract(s) for the provision of management and operational services to VAIH. Is it possible that the Secretary might decide to allow such an arrangement to prevail and that those management and operational services could be provided from Singapore using Singapore resources?

In the event an Australian international airline were to advise the Department of Infrastructure and Regional Development that it intended to use a foreign airline, such as Singapore Airlines, to provide management or operational services, this would be assessed against the requirements outlined in the answer to Question 2a.

Australia's air services agreements/arrangements

Country/Economy	Signed	Status
Argentina	11 March 1992	Interim effect Supplemented by MoU of 2005**
Azerbaijan	8 December 2012	Instrument of less than treaty status
Austria	22 March 1967	In force Supplemented by MoU of 2005, 2003, and 1999*
Bahrain	29 April 1995	In force Supplemented by MoU of 2003*
Bangladesh	Initialled 15 August 2008	Interim effect**
Belarus	31 May 2013	Instrument of less than treaty status
Belgium	23 November 2012	Interim effect
Brazil	21 April 2010	Interim effect
Brunei Darussalam	30 April 1992	In force Supplemented by MoU of 2007*
Canada	5 July 1988	In force Supplemented by MoU of 2000*
Chile	7 September 2001	In force
China	23 March 2004	In force
Cook Islands	18 September 2001	In force
Croatia	4 September 2013	Interim effect**
Czech Republic	23 September 2010	In force
Denmark	Initialled 16 October 1998	Interim effect** Supplemented by ROD of 2011
Egypt	10 March 1997	In force Supplemented by MoU of 2012*
Ethiopia	29 July 2013	Instrument of less than treaty status
Fiji	24 March 1982	In force Supplemented by MoU of 1999**
Finland	Initialled 15 June 1999	Interim effect**
former Yugoslav Republic of Macedonia	16 May 2012	Instrument of less than treaty status
France (treaty includes French Polynesia and New Caledonia)	13 April 1965	In force Supplemented by MoUs of 2012, 2011 and 1996*

French Polynesia	31 January 2012	Instrument of less than treaty status
Germany	22 May 1957	In force Supplemented by MoUs of 1998 and 1996*
Ghana	11 December 2012	Instrument of less than treaty status
Greece	10 June 1971	In force Supplemented by MoU of 1997**
Hong Kong, China	15 September 1993	In force
Hungary	Initialled 5 December 2006	Interim effect**
Iceland	21 October 2011	Instrument of less than treaty status
India	6 March 2006	In force
Indonesia	7 February 2013	Interim effect
Ireland	26 November 1957	In force Supplemented by MoU of 2005*
Israel	2 May 2001	Instrument of less than treaty status
Italy	10 November 1960	In force Supplemented by MoUs of 2000 and 1998*
Japan	19 January 1956	In force Supplemented by various instruments including RoD of 2011*
Jordan	Initialled 10 December 2012	Interim effect**
Kenya	24 May 2012	Interim effect**
Korea, Republic of	26 February 1992	In force Supplemented by MoU of 2007*
Kuwait	Initialled 18 April 2012	Interim effect**
Laos	Initialled 27 February 2012	Interim effect**
Lebanon	11 March 1997	In force
Luxembourg	Initialled 27 April 1999	Interim effect**
Macau, China	24 August 1999	In force
Malaysia	4 October 1972	In force Supplemented by MoU of 2008*
Malta	11 September 1996	In force Supplemented by instruments of less than treaty status of 2003
Mauritius	Initialled 25 October 2007	Interim effect**

Mexico	9 April 2010	In force
Myanmar	23 September 1976	In force Supplemented by MoU of 1976*
Nauru	17 September 1969	In force Supplemented by various instruments*
Netherlands	25 September 1951	In force Supplemented by MoU of 1997*
New Caledonia	10 November 2011	Instrument of less than treaty status
New Zealand	8 August 2002	In force
Niue	Initialled 25 June 1999	Instrument of less than treaty status
Norway	Initialled 16 October 1998	Interim effect** Supplemented by ROD of 2011
Oman	Initialled 6 April 2011	Interim effect**
Pakistan	Signed 7 February 1998	Interim effect Supplemented by MoU of 2007**
Palau	2 May 2012	Interim effect
Papua New Guinea	8 December 1980	In force Supplemented by MoU of 2011 and 2010**
Paraguay	11 December 2012	Instrument of less than treaty status
Peru	22 January 2013	Instrument of less than treaty status
Philippines	24 October 2012	In force
Poland	28 April 2004	In force
Qatar	Initialled 16 March 2003	Interim effect Supplemented by MOU of 2009
Romania	3 April 2012	Instrument of less than treaty status
Russian Federation	11 July 1994	In force
Saudi Arabia	Initialled 10 April 2011	Interim effect**
Samoa	11 August 2000	In force
Serbia	14 May 2013	Interim effect**
Seychelles	18 January 2013	Instrument of less than treaty status
Singapore	3 November 1967	In force Supplemented by CMU of 2003*
Solomon Islands	21 August 2012	Interim effect**

South Africa	18 July 1995	In force Supplemented by MoU of 2008**
Spain	24 June 2009	In force
Sri Lanka	3 May 2012	In force
Sudan	8 December 2012	Instrument of less than treaty status
Sweden	Initialled 16 October 1998	Interim effect** Supplemented by ROD of 2011
Switzerland	28 November 2008	In force
Thailand	26 February 1960	In force Supplemented by MoU of 1998*
Tonga	23 August 2003	In force
Turkey	28 April 2010	In force
United Arab Emirates	8 September 2002	In force Supplemented by MoU of 2012*
United Kingdom	10 July 2008	In force
United States of America	31 March 2008	In force
Uruguay	11 December 2012	Instrument of less than treaty status
Vanuatu	2 July 2013	Interim effect**
Vietnam	31 July 1995	In force
Yemen	10 December 2012	Instrument of less than treaty status
Zambia	21 October 2011	Instrument of less than treaty status
Zimbabwe	Initialled 5 May 1998	Interim effect**

* Contains amendments subsequently negotiated and given interim effect by aeronautical authorities through arrangements of less than treaty status, but not yet brought into force and hence not yet included in the Treaties Database.

** A new or replacement treaty negotiated and given interim effect by aeronautical authorities through arrangements of less than treaty status, but not yet brought into force and hence not yet included in the Treaties Database.