



Australian Government

International Air Services Commission

DECISION

Decision: [2011] IASC 201
Variation of: [2007] IASC 118
The Route: New Zealand
The Applicant: Pacific Blue Airlines (Australia) Pty Ltd
(ACN 097 892 389) (Pacific Blue Australia)
Public Register File: IASC/APP/201026

1 The application

1.1 On 20 December 2010, Pacific Blue Australia applied for a variation of Determination [2007] IASC 118 to permit Delta Air Lines Inc (Delta) to code share on Pacific Blue Australia services between Australia and Auckland and Christchurch. The determination allocates unlimited passenger and freight capacity to Pacific Blue Australia on the New Zealand route.

1.2 Pacific Blue Australia provided the Commission with a copy of its confidential code share agreement with Delta. This is a free sale type arrangement which involves co-ordinated pricing and marketing between the carriers. The full set of arrangements which make up the Joint Venture (of which this code share is part), also include revenue pooling founded on the principle of “metal neutrality”, whereby Pacific Blue Australia and Delta will adopt revenue allocation arrangements that make it irrelevant which aircraft the passenger travels on. The Joint Venture between Delta and the Virgin Blue Group of airlines includes the United States route, as well as the New Zealand route.

1.3 Because of the extensive level of co-ordination involved in the arrangements, the Virgin Blue Group has previously sought authorisation of the full set of arrangements from the ACCC, as well the US Department of Transportation (DoT) for the US route. While the ACCC approved the Joint Venture on 10 December 2009, approval from the DoT is still pending. In the interim, Pacific Blue Australia is seeking to progress approval in relation to this proposed code share on the New Zealand route, given the interim order from the DoT indicates that evidence of progressing regulatory approvals for co-operation in third country markets will be taken into account by the DoT in its final assessment of the Joint Venture application. The Commission understands that Pacific Blue Australia intends to seek authorisation for the arrangements from the New Zealand Ministry of Transport.

1.4 All public material supplied by the applicant is filed on the Register of Public Documents.

1.5 The Commission published a notice on 20 December 2010 inviting submissions about the application. A submission was received from the Victorian State Government supporting Pacific Blue Australia’s application.

2 Provisions of the relevant air services arrangements

2.1 The Australia – New Zealand air services arrangements permit the designated airlines of both parties to enter into code share, blocked space or other co-operative marketing arrangements with any other airline as the marketing and/or operating airline, provided only that the airlines hold the authority to conduct air transport on the routes or segments concerned. The airlines must also make it clear to the purchaser at the point of sale which airline will be the operating airline and with which airline/s the purchaser is entering into a contractual arrangement.

3 Commission's assessment

3.1 When considering an application to vary a determination, the Commission must decide whether the determination, as varied, would be of benefit to the public. Under paragraph 6.3 of the Minister's policy statement, where a carrier requests a variation of a determination to allow it flexibility in operating its capacity and no submission is received about the application, only the criteria in paragraph 4 of the policy statement are applicable. Under paragraph 4, the use of Australian entitlements by a carrier that is reasonably capable of obtaining the necessary approvals (4(b)(i)) and of implementing its proposals (4(b)(ii)) is of benefit to the public. For an established carrier such as Pacific Blue Australia, this means there is public benefit arising from the use of the entitlements.

3.2 Under section 15(2)(e) of the *International Air Services Commission Act 1992* (the Act), a carrier cannot use allocated capacity to provide joint services with any other carrier without the prior approval of the Commission. Under the Minister's policy statement, the Commission is normally expected to authorise applications for the use of capacity to code share where this is provided for under the relevant air services arrangements. As noted above, the Australia – New Zealand air services arrangements provide for code sharing between airlines of either party and any other airline. However, where the Commission is concerned that a code share proposal may not be of benefit to the public, it may subject the application to detailed assessment against the paragraph 5 public benefit criteria in the policy statement.

3.3 The Commission has carefully considered the proposed code share arrangements, noting particularly that they involve joint pricing of services and a revenue pooling arrangement. The Commission is aware that the Virgin Blue Group has sought and received authorisation from the ACCC for the proposed Joint Venture with Delta. As noted above, the ACCC granted approval to the Joint Venture on 10 December 2009 for five and a half years, noting that it is satisfied that the public benefit likely to result from the Joint Venture outweighs the public detriment.

3.4 The Commission has taken account of this decision by the ACCC to authorise the conduct. The Commission notes that in making its decision the ACCC considered the Joint Venture is likely to give rise to route connectivity benefits for consumers, enhanced route coverage and schedules, and more sustainable competition. The ACCC also recognised that revenue sharing under the Joint Venture would give the applicants an incentive to offer low cost code share inventory on their respective domestic sectors, facilitating lower fares. Accordingly, the Commission will not subject the proposals to the paragraph 5 criteria in the Minister's 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 New Zealand route.

3.5 The Commission considers the Australia – New Zealand route is highly competitive with Air New Zealand, the Qantas Group and Pacific Blue Australia offering strong competition. There are also multiple third-country carriers currently operating on the route, including Emirates, Lan Chile, and Aerolineas Argentinas. The addition of joint services by Pacific Blue Australia and Delta is unlikely to lessen competition, despite the co-ordination of pricing and schedules and the revenue pooling arrangement, given that the two carriers do not currently operate in competition with each other.

3.6 In authorising code share arrangements, the Commission normally includes a condition of approval that the code share partners must price and sell their services separately from each other and must not share or pool revenues. In this case, the Commission will approve code sharing consistent with the code share agreement between Pacific Blue Australia and Delta; that is, there will be no condition of approval preventing joint pricing of services or pooling of revenue. However, the Commission’s authorisation does not prejudice any consideration by the ACCC about the longer term authorisation of the arrangements. Should the ACCC decide not to continue authorisation, then IASC approval would be terminated, although the carriers would still be able to code share without such co-ordination. The Commission will include a condition of approval to this effect. The Commission notes that it has granted similar conditional approval in the case of the Qantas/British Airways joint service arrangements, where the parties also engage in joint pricing.

4 Decision [2011] IASC 201

4.1 In accordance with section 24 of the Act the Commission varies Determination [2007] IASC 118, as requested by Pacific Blue Australia, by adding the following conditions:

- “the capacity may be used by Pacific Blue Australia to provide services jointly with Delta in accordance with:
 - the code share agreement between Pacific Blue Australia and Delta dated 8 July 2009; or
 - any subsequent code share agreement between Pacific Blue Australia and Delta for operations on the Australia – New Zealand route with the prior approval of the Commission;
- Under the arrangements with Delta, Pacific Blue Australia may only price and market its services on the route jointly with Delta 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;
- To the extent that the capacity is used to provide joint services on the route, Pacific Blue Australia must take all reasonable steps to ensure that

passengers are informed of the carrier actually operating the flight at the time of booking.”

Dated: 24 January 2011

Ian Smith
Member Presiding

Stephen Bartos
Member