



Australian Government

International Air Services Commission

DECISION

Decision: [2013] IASC 213
Variation of: [2010] IASC 104
The Route: Italy
The Applicant: Qantas Airways Limited
ACN 009 661 901
Public Register: IASC/APP/

The Commission varies Determination [2010] IASC 104 to permit Qantas to code share on Emirates' services on the Italy route.

1 The application

1.1 On 18 December 2012, Qantas Airways Limited (Qantas) applied for a variation to Determination [2010] IASC 104 (the Determination), which allocates 400 third country code share seats on the Italy route, to enable Qantas to code share on Emirates. Currently the Determination allows the capacity to be used to provide joint services with British Airways only.

1.2 On 18 December 2012, the Commission published a notice, in accordance with section 22 of the Act, inviting submissions about the application. A submission was received from Virgin Australia on 11 January 2012.

1.3 All non-confidential material supplied by the applicant and by Virgin Australia is available on the Commission's website, www.iasc.gov.au.

2 Commission's assessment

2.1 Qantas' application seeks to vary the Determination 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 and has been assessed in accordance with section 25.

2.2 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.

2.3 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.

2.4 Pursuant to section 11 of the Act, the Minister issued Policy Statement No. 5 dated 19 May 2004 (the Policy Statement). The Policy Statement sets out the range of criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity. It also provides other guidance to the Commission in performing its functions.

2.5 Paragraph 6.3 of the Policy Statement provides that, subject to paragraph 6.4, where a carrier requests a variation of a determination to allow it flexibility in operating its capacity, including to use the Australian capacity in a code share arrangement with a foreign carrier, and no submission is received about the application, only the criteria in paragraph 4 of the Policy Statement are applicable.

2.6 Paragraph 6.4 of the Policy Statement provides that the Commission may apply the additional criteria set out in paragraph 5 where submissions are received about the application for a variation, provided those criteria were considered when the original application for allocation of capacity was made, or in circumstances set out in paragraph 3.6, including where no submissions are received. Paragraph 3.6 provides as follows:

Where capacity that can be used for code sharing operations is available under air services arrangements, including where foreign airlines have rights to code share on services operated by Australian carriers, the Commission would generally be expected to authorise applications for use of capacity to code share. However, if the Commission has serious concerns that a code share application (or other joint service proposal) may not be of benefit to the public, it may subject the application to more detailed assessment using the additional criteria set out in paragraph 5 (whether the application is contested or not). Before doing so, the Commission will consult with the Australian Competition and Consumer Commission.

2.7 The paragraph 5 criteria were not considered when the original application for allocation of capacity was made. In regard to paragraph 3.6, Virgin Australia asserts that the application must be assessed through an examination of the additional criteria in paragraph 5 of the Policy Statement which are invoked by paragraph 6.4. This provides that the Commission may apply the paragraph 5 criteria in circumstances outlined in paragraph 3.6. Virgin Australia says it would expect that, given Qantas holds all the code share capacity, effectively preventing competing code share services by another Australian airline, and with Emirates and Qantas enjoying more than 50% market share on the route, the Commission would have serious concerns that the application may not be of benefit to the public.

2.8 The Commission does have concerns about the lack of code share capacity available for allocation to another Australian carrier and this issue is being addressed in its consideration of Qantas' application for renewal of Determination [2007] IASC 113 and Virgin Australia's application for 300 of the seats allocated under that determination. However, the Commission does not have serious concerns that this application for a variation to Determination [2010] 104 to allow Qantas to code share on Emirates may not be of benefit to the public. In this regard, the Commission notes there are several significant carriers operating one stop services between Australia and Italy via their home countries and that Qantas' two stop code share service to Italy with British Airways over London was less attractive to consumers.

2.9 For the above reasons the Commission did not apply the criteria in paragraph 5 of the Policy Statement and assessed the application against the criteria in paragraph 4 only.

2.10 The Commission also notes that this code share application forms part of the broader Qantas/Emirates alliance proposal. In its Draft Determination on the matter the ACCC concluded that the alliance is unlikely to result in material public detriments through its effect on competition on air services between Australia and the UK/ Europe. The ACCC notes that Qantas and Emirates services from Australia to the UK/ Europe via Dubai will compete with services from Australia to UK/ Europe via alternative hubs such as Singapore and Hong Kong. Further, the ACCC is of the view the alliance will face competition from a large number of established carriers with the ability and incentive to expand their operations in response to any attempt by the alliance to reduce or limit growth in capacity. These carriers include Singapore Airlines, Etihad Airways, Qatar Airways, China Southern Airlines, China Eastern Airlines and Air China

2.11 Under paragraph 4 of the Policy Statement, the use of entitlements by Australian carriers under a bilateral arrangement is of benefit to the public unless such carrier is not reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its application.

2.12 The Commission notes that Qantas is an established international carrier which is clearly capable of obtaining the necessary approvals and of implementing its proposal. This means that there is public benefit arising from the use of the entitlements. The Commission will, therefore, authorise the use of the capacity for code sharing on Emirates and vary the determination as requested by Qantas.

2.13 Subsection 15(1) of the Act empowers the Commission to include such terms and conditions as it thinks fit. Paragraph 15(2)(e), however, requires the inclusion of a condition in a determination stating the extent to which the carrier may use that capacity in joint services with another carrier.

2.14 Nothing in this decision should be taken as indicating either approval or disapproval by the ACCC. This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

3 Decision [2013] IASC 213

3.1 In accordance with section 25 of the Act, the Commission varies Determination [2010] IASC 104, which allocates capacity on the Italy route, by:

adding the following conditions to the Determination:

- the capacity may be used by Qantas to code share on Emirates in accordance with;
 - the code share agreement between Qantas and Emirates dated 21 January 2013; or
 - any subsequent code share agreement between Qantas and Emirates, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under the code share agreement with Emirates, Qantas must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of booking. Nothing in this determination exempts Qantas from complying with the Australian Consumer Law; and
- under the arrangements with Emirates, Qantas may only price and market its services, or share or pool revenues/profits on the route jointly with Emirates, as long as such practices are authorised by the Australian Competition and Consumer Commission under the *Competition and Consumer Act 2012* or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal.

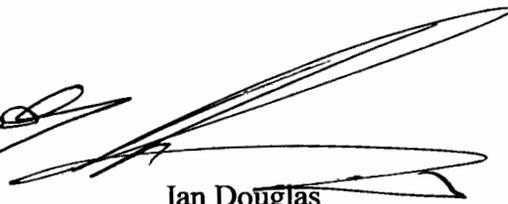
Dated: 8 March 2013



Jill Walker
Chairperson



Stephen Bartos
Member



Ian Douglas
Member