



Australian Government
International Air Services Commission

DECISION

Decision: [2017] IASC 214
Variation of: [2017] IASC 108
The Route: Thailand
The Applicant: Qantas Airways Ltd
(ABN 16 009 661 901)
Public Register File: IASC/APP/201738

The Commission varies Determination [2017] IASC 108 to permit the use of the capacity on the Thailand route for code sharing between Qantas and El Al Airlines. The permission is valid for the duration of the determination commencing from the date of issue of this decision.

1 The application

1.1 On 9 August 2017, the International Air Services Commission (the Commission) received an application from Qantas Airways Limited (Qantas) seeking to vary Determination [2017] IASC 108 (the Determination) to permit the utilisation of capacity for code share services with El Al Airlines (El Al). The proposal is for El Al to offer code share services on flights operated by Qantas between Australia and Thailand. Qantas provided a copy of the confidential code share agreement between Qantas and El Al. Qantas further indicated the code share between Qantas and El Al will commence from 4 September 2017.

1.2 The Determination, allocates to Qantas 35.6 B747 equivalent units and 26 third country code share frequencies per week of passenger capacity on the Thailand route. The Determination also allows the capacity to be used by Qantas in joint services with any Qantas wholly-owned subsidiary and code share services with Bangkok Airways, British Airways, Emirates, Finnair, Jet Airways and Jetstar Asia.

1.3 On 11 August 2017, the Commission published a notice, in accordance with section 22 of the Act, inviting submissions about the application for variation to enable El Al to code share on flights operated by Qantas. No submissions were received. All non-confidential material supplied by the applicant is available on the Commission's website, www.iasc.gov.au.

2 Relevant provisions of the air services arrangements

2.1 According to the Register of Available Capacity, there are 9.4 B747 equivalent units of capacity per week of passenger capacity. In the event that the Australian designated airlines wish to operate capacity which would result in the total capacity available to all

airlines of Australia being exceeded by an amount of 0.3 B747-400 equivalent or less, the aeronautical authorities will permit such minor variations.

2.2 An Australian designated airline may enter into code-sharing arrangements with another Australian designated airline, as a non-operating airline, and the capacity utilised will only be counted against the operating airline.

2.3 An Australian designated airline may also enter into code share arrangements, as a non-operating airline, with any third country airlines. There are currently seven services per week available for third party code share arrangements. In addition to the seven weekly frequencies available for allocation, any designated airlines (of Australia or Thailand) are entitled to utilise any unused passenger capacity allocated to that airline for third country code sharing. It is understood that one unused B747 equivalent service per week in each direction is translated as one third country code share frequency per week in each direction. In such cases, one code share service is counted against the designated airline under its own entitlement as one frequency of capacity.

2.4 Any Australian designated airline may enter into code share arrangements, as the operating airline, with any airline(s) of a third country on any number of frequencies within its capacity entitlements.

3 Commission's assessment

3.1 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.

3.2 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.

3.3 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.

3.4 Pursuant to section 11 of the Act, then Minister for Transport and Regional Services, the Hon. John Anderson MP issued Policy Statement No. 5 (hereinafter referred to as the Policy Statement) dated 19 May 2004. 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.

3.5 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.

3.6 Paragraph 6.4 provides, in part, that the Commission may apply the criteria in paragraph 5 in the circumstances set out in paragraph 3.6 of the Policy Statement.

3.7 Under paragraph 3.6, where capacity that can be used for code share operations is available under the relevant 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 (the ACCC).

3.8 The Commission notes there are a number of major carriers offering either own-operated or code share services between Thailand and various points in Australia, thus providing various travel options to consumers.

3.9 Thai Airways is the biggest operator offering 39 weekly frequencies between Bangkok and Brisbane/Melbourne/Perth/Sydney. Several third country airlines code share as marketing carriers on the services operated by Thai Airways.¹

3.10 Jetstar Airways Pty Ltd operates between 11 to 14 weekly services from Melbourne to Bangkok and Phuket (vice versa) and Sydney to Phuket (vice versa). Qantas code shares on Jetstar-operated flights between Melbourne and Bangkok. Qantas operates daily flights between Sydney and Bangkok and code shares with Bangkok Airways, Emirates, Finnair, Jet Airways and Jetstar Asia.²

3.11 In the Commission's view, allowing El Al to code share on Qantas-operated services between Australia and Thailand will add to the number of carriers that market services on the route and is unlikely to have a detrimental impact on competition.

3.12 In light of the above, the Commission does not have concerns that the code share application may not be of benefit to the public. For this reason, it did not specifically consult the ACCC and did apply the additional criteria set out in paragraph 5 of the Policy Statement.

3.13 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 carriers are not reasonably capable of obtaining the necessary approvals to operate on the route and of implementing their proposals. The Commission notes that Qantas is established international carrier which is clearly capable of obtaining the necessary regulatory approvals and of implementing its proposed services.

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

3.15 The Commission has decided to add conditions permitting the use of the capacity for the provision of code share services between Qantas and El Al on the Thailand route in accordance with the Australia-Thailand air services arrangements. As is its normal practice, the Commission has also decided to include a condition requiring the airlines to take all

¹ Northern Summer 2017 International Airlines Timetable Summary (26 March 2017 - 28 October 2017)

² Northern Summer 2017 International Airlines Timetable Summary (26 March 2017 - 28 October 2017)

reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

3.16 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.

4 Decision varying Determination [2017] IASC 108 allocating capacity to Qantas on the Thailand route ([2017] IASC 214)

4.1 In accordance with section 25 of the Act, the Commission varies Determination [2017] IASC 108 which allocates to Qantas capacity on the Thailand route, by:

adding the following conditions to the Determinations:

- the capacity may be used by Qantas to provide code share services with El Al in accordance with the code share agreement between Qantas and El Al dated 5 June 2017 and the air services arrangements between Australia and Thailand;
- Qantas must apply to the Commission for approval of any proposed variations to the code share agreement between Qantas and El Al which would change the relevant commercial aspects of the agreement from a free sale code share arrangement to a block space, or vice versa, or if Qantas proposes to add third country routes on which the airlines will code share where Australian capacity entitlements will be used for services on that route;
- in providing code share (or joint) services, the airlines may not jointly price and market their services, or share or pool revenues/profits on the route, unless such practices are authorised by the ACCC or otherwise by the Australian Competition Tribunal, in the event of review by the Tribunal; and
- to the extent that the capacity is used to provide code share (or joint) services on the route, the airlines must take all reasonable steps to ensure that passengers are informed, at the time of booking, of the carrier actually operating the flight. Nothing in this determination exempts the airlines from complying with the Australian Consumer Law.

4.2 This decision comes into effect from the date of issue and is valid for the duration of Determination [2017] IASC 108.

Dated: 31 August 2017


IAN DOUGLAS
Chairperson


IAN HARRIS
Commissioner