



Australian Government
International Air Services Commission

DECISION

Decision: [2017] IASC 213
Variation of: [2015] IASC 115
The Route: Hong Kong
The Applicant: Qantas Airways Ltd
(ABN 16 009 661 901)
Public Register File: IASC/APP/201737

The Commission varies Determination [2015] IASC 115 to permit the use of the capacity on the Hong Kong route for code sharing between Qantas and El Al Airlines. The permission is valid for the duration of the determination commencing from 31 August 2017.

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 [2015] IASC 115 (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 Hong Kong and Brisbane/Melbourne/Sydney and vice versa. 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 on the Hong Kong route will commence from 4 September 2017.

1.2 The Determination, allocates to Qantas 28 frequencies of capacity per week in each direction on the Hong Kong 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 British Airways, Jet Airways and Finnair.

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 currently 35 frequencies per week available for allocation to Australian carriers for passenger services between Sydney, Melbourne, Brisbane and Perth and Hong Kong. There are no limits on capacity that may be operated between Hong Kong and points in Australia other than Sydney, Melbourne, Brisbane and Perth.

2.2 Under the Australia-Hong Kong air services arrangements, a designated airline may enter into code share arrangements, as the marketing or operating airline, with airlines of Australia, Hong Kong or third countries.

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 Hong Kong and various points in Australia, thus providing various travel options to consumers. Both Qantas and Virgin Australia offer direct services in addition to Cathay Pacific and Hong Kong Airlines. Cathay Pacific offers up to 75 weekly direct services from Hong Kong into Adelaide, Brisbane, Cairns, Melbourne, Perth

and Sydney. Several third country airlines code share as marketing carriers on Cathay Pacific-operated services.

3.9 Qantas operates 28 weekly services into Hong Kong from Brisbane, Melbourne and Sydney. British Airways, Finnair and Jet Airways code share as marketing carriers on the Qantas-operated services. The addition of El Al in the pool of third country airlines which code share on Qantas-operated services will add to the number of carriers that market services on the route and would provide more travel options to the public. The Commission considers the proposed code share with El Al is unlikely to have a detrimental impact on competition.

3.10 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 not see the need to apply the additional criteria in paragraph 5 of the Policy Statement.

3.11 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 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 an established international carrier which is clearly capable of obtaining the necessary regulatory approvals and of implementing its proposed services.

3.12 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.

3.13 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 Hong Kong route in accordance with the Australia-Hong Kong air services arrangements. As is its normal practice, the Commission has also decided to include a condition requiring the airlines to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

3.14 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.

4 Decision varying Determination [2015] IASC 115 allocating capacity to Qantas on the Hong Kong route ([2017] IASC 213)

4.1 In accordance with section 25 of the Act, the Commission varies Determination [2015] IASC 115 which allocates 28 frequencies per week of capacity in each direction to Qantas on the Hong Kong route in accordance with the Australia- Hong Kong air services arrangements, 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 Hong Kong;

- 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 [2015] IASC 115.

Dated: 31 August 2017



IAN DOUGLAS
Chairperson



IAN HARRIS
Commissioner