Australian Government

International Air Services Commission

DECISION

Decision:	**[2013] IASC 208**
Variation of:	**[2011] IASC 119**
The Route:	**France Route 1**
The Applicant:	**Qantas Airways Limited ACN 009 661 901**
Public Register:	**IASC/APP/201301**

The Commission varies the Determination to allow the capacity to be used by Qantas to provide services jointly with Emirates on the France route.

1 The application

1.1 On 19 December 2011, the International Air Services Commission (the Commission) issued Determination [2011] IASC 119 (the Determination) which allocates 250 one-way seats per day averaged over 12 months in each direction on France Route 1 under the Australia-France air services arrangements. The Determination permits Qantas to provide services jointly on the route with British Airways and Air France.

1.2 On 22 January 2013, Qantas Airways Limited (Qantas) applied for a variation to the Determination to enable Qantas to utilise the allocated capacity to provide services jointly with Emirates.

1.3 On 24 January 2013, the Commission published a notice inviting submissions about the application , in accordance with section 22 of the *International Air Services Commission Act 1992* (the Act). No submissions were received.

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

2 Relevant air services arrangements

2.1 Under the Australia – France air services arrangements, the designated Australian airlines may enter into arrangements with other airlines, including airlines of third countries, to undertake services through code share, blocked space or other joint venture arrangements up to a total of 400 one way seats per day on an average annual basis. Currently, all 400 seats are allocated (250 to Qantas and 150 to Virgin Australia).

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 assessed the application 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, 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.

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 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 applications.

3.7 The Commission notes that Qantas is an established international carrier which is clearly capable of obtaining the necessary approvals and of implementing its application. This means that there is public benefit arising from the use of the entitlements.

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

3.9 Given the current public discussion about the partnership between Qantas and Emirates, the Commission decided to consult the ACCC. In its submission to the Commission dated 7 March 2013, the ACCC referred to its Draft Determination of 20 December 2012 on the Qantas-Emirates alliance, in which the ACCC concluded that the alliance is unlikely to result in material public detriments through its effect on competition on international air services between Australia and the UK/ Europe. The ACCC did not have concerns about the proposed code share arrangements between Qantas and Emirates on the France route.

3.10 In its letter of 7 March 2013, the ACCC informed the Commission of the following:

> In its Draft Determination, the ACCC considered that while the alliance will reduce the number of competitive offerings on the relevant routes by one, a range of options exist for Australian consumers to travel to Europe via various mid points. In looking at Paris as an example, the ACCC noted that there were nine competing carriers operating Sydney-Paris services, with additional options available using code share services (such as the Qantas and Virgin Australia services).
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> These factors led the ACCC to the preliminary conclusion that the alliance is unlikely to result in material public detriments through its effect on competition on international air passenger transport services between Australia and the (sic) Europe, which includes the route under consideration by the IASC.

3.11 In light of the above, the Commission did not assess the application against the paragraph 5 criteria.

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), 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.

3.13 In the interests of providing commercial and operational flexibility, consistent with requirements of the Act, the Commission will approve the variation requested by Qantas.

3.14 Consistent with paragraph 3.7 of the Policy Statement, in relation to joint services, the Commission will include a condition requiring the airlines to take all reasonable steps to ensure that passengers are informed, at the time of booking, of the carrier that is actually operating the flight.

3.15 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 [2013] IASC 208

4.1 In accordance with section 25 of the Act, the Commission varies Determination [2011] IASC 119, which allocates capacity on France Route 1, by:

adding the following conditions to the Determination:

- the capacity may be used by Qantas to provide services jointly with 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, the airlines 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 the airlines 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	Stephen Bartos	Ian Douglas
Chairperson	Member	Member