



Australian Government

International Air Services Commission

DECISION

Decision: [2013] IASC 214
Variation of: [2007] IASC 113
The Route: Italy
The Applicant: Qantas Airways Limited
ACN 009 661 901
Public Register: IASC/APP/201306

The Commission varies Determination [2007] IASC 113 to reduce the capacity allocated to Qantas to 300 seats per week and to permit Qantas to code share on Emirates' services on the Italy route.

1 The application

1.1 On 8 March 2013, Qantas Airways Limited (Qantas) applied for a variation to Determination [2007] IASC 113 (the Determination), which allocates 600 third country code share seats on the Italy route and allows Qantas to code share on services by Cathay Pacific on the route.

1.2 Qantas has sought a variation to the Determination to reduce the allocated capacity to 300 seats and to enable it to code share with Emirates on the route. Currently the Determination allows the capacity to be used to provide joint services with Cathay Pacific only. Qantas has also amended its 3 September 2012 application for renewal of the Determination to reflect these variations. The amendment to the renewal application is the subject of a separate decision.

1.3 On 12 March 2012, the Commission published a notice, in accordance with section 22 of the *International Air Services Commission Act 1992* (the Act), inviting submissions about the application. 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 Provisions of the air services arrangements

2.1 There are seven frequencies per week of available capacity for designated airlines of Australia (Australian airlines). Australian airlines are entitled to perform their services with wet lease, code sharing, blocked space and/or other cooperative service arrangements with any airline.

2.2 Australian airlines may enter into arrangements with an airline or airlines of a

third country to carry out services through code share arrangements. These code share arrangements may constitute up to 1000 seats per week in total in each direction. Currently all this capacity is allocated to Qantas.

2.3 Where the operating carrier is an airline of a third country, the marketing carrier may exercise own stopover rights at one point in the Route Schedule in the territory of a third country. This point may be changed at the option of the concerned airline(s).

2.4 Australian airlines may operate to two points in Italy, to be nominated by the aeronautical authorities of Australia. On 24 December 2009, on behalf of Qantas, the Department of Infrastructure, Transport, Regional Development and Local Government nominated Milan as the second point to which Australian airlines may operate, with Rome to remain as the first nominated point. The Department also nominated Singapore as the point in the Route Schedule in the territory of a third country at which own stopover rights may be exercised by Australian carriers marketing code share services.

3 Commission's assessment

3.1 Qantas has sought the following variations to the Determination:

- to reduce the allocated capacity from 600 seats to 300 seats; and
- to enable the capacity to be used by Qantas to provide services jointly with Emirates.

3.2 In relation to the reduction of capacity, subsection 24(3) of the Act effectively provides that if an Australian carrier applies for a variation of its determination to reduce the capacity allocated to the carrier, the Commission must vary the determination to reduce the allocated capacity.

3.3 In view of this, the Commission has decided to grant the request of Qantas to reduce its capacity under the Determination to 300 seats per week in each direction on the Italy route.

3.4 In relation to Qantas' request to permit code sharing with Emirates on the route, the Commission notes that the request is to vary the Determination to include a condition of a kind referred to in paragraph 15(2)(e) of the Act. In light of this, this aspect of 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.

3.5 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.

3.9 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.

3.10 Under paragraph 3.6 of the Policy Statement, where capacity that can be used for code share 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 (the ACCC).

3.11 The Commission initially had concerns about the lack of code share capacity available for allocation to another Australian carrier on the Italy route. The current application by Qantas to vary its Determination to return to the Register of Available Capacity 300 seats of third country code share on the Italy route has lessened the Commission's concerns. The Commission, notes, however, that Qantas still has 700 of the 1000 available third country code share seats and that Virgin Australia has previously applied for 300 seats on the route. The Commission would expect Qantas to return more capacity if it is not being fully utilised.

3.12 Further, in its Decision [2013] IASC 213 of 8 March 2013, the Commission granted Qantas' request to permit code sharing on the Italy route on 400 seats allocated under Determination [2010] IASC 104. Consistent with that decision, the Commission does not have serious concerns that allowing Qantas to code share on Emirates on the Italy route, in relation to the 300 third country code share seats that are the subject of this application, may not be of benefit to the public. As the Commission noted in Decision [2013] IASC 213, there are several significant carriers operating one stop services between Australia and Italy via their home countries.

3.13 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 noted 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.

3.14 For the above reasons and as no submissions were received on the Qantas application for variation, 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.

3.15 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.

3.16 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.

3.17 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.

3.18 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 214

4.1 In accordance with section 24 of the Act, the Commission varies Determination [2007] IASC 113 by reducing the capacity to 300 third country code share seats per week in each direction on the Italy route under the Australia-Italy air services arrangements.

4.2 Further, the Commission, in accordance with section 25 of the Act, varies Determination [2007] IASC 113 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.

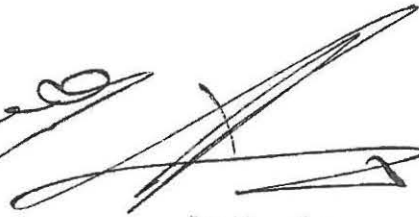
Dated: 25 March 2013



Jill Walker
Chairperson



Stephen Bartos
Member



Ian Douglas
Member

