Australian Government

International Air Services Commission

DECISION

Decision:	**[2013] IASC 205**
Variation of:	**[2007] IASC 116**
The Route:	**Singapore**
The Applicant:	**Qantas Airways Limited ACN 009 661 901**
Public Register:	**IASC/APP/201302**

The Commission's delegate varies Determination [2007] IASC 116 to add a condition allowing the capacity to be used by Qantas to provide services jointly with Emirates.

1 The application

1.1 On 22 January 2013, Qantas Airways Limited (Qantas) applied for a variation to Determination [2007] IASC 116 (the Determination) which allocates unlimited capacity and frequency on the Singapore route other than all-cargo services under the Australia-Singapore air services arrangements. The Determination was subsequently varied, as follows, to permit Qantas to code share with the following airlines:

- Decision [2007] IASC 214, with Iberia Airlines;
- Decision [2009) IASC 206, with Japan Airlines;
- Decision [2010] IASC 202, with China Eastern Airlines; and
- Decision [2011] IASC 202, with Finnair.

1.2 On 24 January 2013, the Commission published a notice, in accordance with section 22 of the Act, inviting submissions about the application for variation. No submissions were received. All material supplied by the applicant is available on the Commission's website, www.iasc.gov.au.

2 Delegate's assessment

2.1 In accordance with section 27AB of the *International Air Services Commission Act 1992* (the Act) and regulation 3A of the *International Air Services Commission Regulations 1992*, the delegate of the Commission may consider the application for variation. (For purposes of this decision, all references to the Commission include the delegate of the Commission).

2.2 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 will have to be assessed in accordance with section 25.

2.3 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.

2.4 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.

2.5 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.

2.6 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.

2.7 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.

2.8 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.

2.9 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.

2.10 The Commission notes that under the Australia – Singapore air services arrangements, designated Australian airlines may determine the frequency and capacity of services on the Singapore route. The arrangements also allow designated Australian airlines to enter into unrestricted codeshare, blocked space or other cooperative marketing arrangements with any other airline, including airlines of third parties.

2.11 The Commission does not have serious concerns that the use of the capacity on the Singapore route in joint services with Emirates may not be of benefit to the public.

2.12 Under subsections 28(e), (f) and (g) of the Act, in performing its functions, the Commission may:

- inform itself on anything relevant to a matter before it in any way it thinks fit; and
- receive information or submissions orally or by written statements; and
- in respect of a matter before it, consult such persons as it thinks fit.

2.13 In this regard, the Commission consulted the ACCC given the current public discussions concerning the partnership between Qantas and Emirates. The ACCC advised the Commission it has no concerns about this route and did not make any further comment.

2.14 Further, the Commission notes that in its Draft Determination of 20 December 2012 on the Qantas-Emirates alliance, the ACCC discussed extensively the impact on competition of the proposed alliance to services between Australia and Singapore. The ACCC concluded that "the alliance is unlikely to significantly increase the ability and incentive of Qantas and Emirates to unilaterally reduce or limit growth in capacity on routes between Australia and Singapore".

2.15 The ACCC considered whether the Qantas-Emirates alliance weakens the current constraints on airlines successfully coordinating their price or capacity decisions on overlap routes. To the extent that Emirates currently acts to impede successful coordination between Qantas and Singapore Airlines, the alliance, by removing that impediment, will increase the likelihood of successful coordination in the future. The ACCC further considered that it is unlikely that Emirates is currently an important source of disruption to coordination. However, Singapore Airlines' commitment to grow capacity and strong incentives to compete aggressively to secure more Singapore destination traffic are key sources of disruption to coordination and there are unchanged by the alliance. In view of this, the ACCC concluded that "the alliance is unlikely to result in material public detriment through its effect on competition on international air passenger transport services between Australia and Singapore".

2.16 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.

2.17 In view of the above, the delegate, on behalf of the Commission, will authorise the use of the capacity in joint services with Emirates. The delegate will vary the determination as requested by Qantas.

2.18 Nothing in this decision, however, 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 205

3.1 In accordance with section 25 of the Act, the delegate, on behalf of the Commission, varies Determination [2007] IASC 116, which allocates capacity on the Singapore route, 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, 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 under the *Competition and Consumer Act 2012* or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal.

Dated: 19 February 2013

Marlene Tucker
Executive Director
Delegate of the IASC Commissioners