



Australian Government

International Air Services Commission

DECISION

Decision: [2014] IASC 220
Variation of: [2006] IASC 109
The Route: New Zealand
The Applicant: Qantas Airways Ltd
(ACN 009 661 901) (Qantas)
Public Register File: IASC/APP/201445

The Commission's delegate varies Determination [2006] IASC 109 by adding a condition allowing the capacity to be used by Qantas to provide services jointly with Japan Airlines.

1 The application

1.1 On 3 February 2013, the Commission received an application from Qantas seeking a variation to Determination [2006] IASC 109 (the Determination) to permit Japan Airlines to code share on selected flights operated by Qantas from 4 March 2014. The Determination is valid for 10 years and allocates unlimited passenger and freight capacity to Qantas on the New Zealand route. The Determination also allows Qantas to use the capacity to provide services jointly with its wholly-owned subsidiary (Jetstar), British Airways, Lan Chile, Aerolineas Argentinas, American Airlines and Air Tahiti Nui. The Determination was subsequently varied by Decisions [2008] IASC 211, [2009] IASC 202 and [2013] IASC 223 to allow code sharing with China Eastern, Etihad and Emirates, respectively.

1.2 On 4 February 2014, the Commission published a notice, in accordance with section 22 of *International Air Services Commission Act 1992* (the Act), inviting submissions about the proposed variation. No submissions were received.

1.3 All material supplied by the applicant is available on the Commission's website (www.iasc.gov.au).

2 Relevant provisions of the air services arrangements

Under the Australia – New Zealand air services arrangement, a designated airline of Australia may enter into code-share, blocked space or other cooperative marketing arrangement, as the marketing and/or operating airline with another Australian airline or airlines, with a New Zealand airline or airlines, or with an airline or airlines of a third country provided that the airline or airlines hold the appropriate authority or authorities.

3 Delegate's consideration

3.1 In accordance with section 27AB of the Act and regulation 3A of the International Air Services Commission Regulations 1992, the delegate of the Commission may consider the Qantas application. (For purposes of this determination, references to the Commission include the delegate of the Commission).

3.2 Under section 21 of the Act, an Australian carrier may, at any time, apply to have a determination varied. Under subsection 10(2) of the Act, the Commission must conduct a review of a determination if an Australian carrier applies for variation of a determination under section 21. However, before conducting a review under section 10, the Commission must, by notice, invite submissions about the review of the determination as required under section 22. As indicated above, the Commission published a notice about the application and invited submissions but no submissions were received.

3.3 Qantas' application to vary the Determination is 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.

3.4 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.

3.5 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.

3.6 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.

3.7 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.

3.8 Paragraph 6.4 states that the Commission may apply the criteria in paragraph 5 where submissions are received, provided those criteria were considered when the

original application for allocation of capacity was made, or in the circumstances set out in paragraph 3.6 of the Policy Statement.

3.9 Under paragraph 3.6, 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).

3.10 The Commission did not identify serious concerns that the proposed code share between Qantas and Japan Airlines on the New Zealand route may not be of benefit to the public. The Commission considers Japan Airlines is unlikely to operate its own services between Australia and New Zealand and therefore it is unlikely for the airlines to be in competition on this route absent the code share arrangement. In this instance, the Commission has applied the criteria in paragraph 4 of the Policy Statement only.

3.11 Under paragraph 4, 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.

3.12 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 Qantas' use of the capacity entitlements allocated under the Determination in accordance with the Australia-New Zealand air services arrangements.

3.13 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.

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

3.15 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

4 Decision [2014] IASC 220

4.1 In accordance with section 25 of the Act, the delegate, on behalf of the Commission, makes a decision varying Determination [2006] IASC 109 which

allocates unlimited capacity and frequency to Qantas in accordance with the Australia-New Zealand air services arrangements by:

adding the following conditions to the Determination:

- “ the capacity may be used by Qantas to provide services jointly with Japan Airlines in accordance with;
 - the code share agreement between Qantas and Japan Airlines dated 1 June 2009 as amended by the Amendment Agreement which comes into effect from 4 March 2014; or
 - any subsequent code share agreement between Qantas and Japan Airlines, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- to the extent that the capacity is used to provide 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 varying Determination [2006] IASC 109 will take effect from the date of this instrument.

Dated: 28 February 2014



Marlene Tucker
Executive Director
Delegate of the IASC Commissioners