



Australian Government

International Air Services Commission

DECISION

Decision: [2017] IASC 210
Variation of: [2011] IASC 123
The Route: Thailand
The Applicant: Qantas Airways Ltd
(ABN 16 009 661 901)
Public Register File: IASC/APP/20121

The Commission varies Determination [2011] IASC 123 to permit the use of the capacity on the Thailand route for code sharing between Jetstar Airways Pty Ltd and Finnair. The permission is valid for the duration of the determination commencing from the date of issue of this decision.

1 The application

1.1 On 10 May 2017, the International Air Services Commission (the Commission) received an application from Qantas Airways Limited (Qantas) seeking to vary Determination [2011] IASC 123 (the Determination), as amended, to enable Finnair to code share on flights operated by Qantas' wholly-owned subsidiary, Jetstar Airways Pty Limited (Jetstar) on the Thailand route. Qantas provided a copy of the confidential code share agreement between Jetstar and Finnair. Qantas further indicated the code share between Jetstar and Finnair on various routes including Thailand will commence on 15 June 2017.

1.2 The Determination, as amended, allocates to Qantas 35.6 B747 equivalent units of capacity per week in each direction for passenger services and 26 third country code share frequencies per week on the Thailand route. The Determination permits the capacity to be used by either Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas.

1.3 The original Determination and subsequent variations permit code share services between Qantas and the following airlines: a Qantas' wholly-owned subsidiary; Bangkok Airways; British Airways; Emirates; Finnair; Jet Airways; and Jetstar Asia.

1.4 On 10 May 2017, the Commission published a notice, in accordance with section 22 of the Act, inviting submissions about the application for variation to enable Finnair to code share on flights operated by Jetstar. 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 The Australia-Thailand air services arrangements permit an Australian designated airline to enter into code-sharing arrangements with another Australian designated airline, as a non-operating airline, and the capacity utilised will only be counted against the operating airline.

2.2 An Australian designated airline may also enter into code share arrangements, as a non-operating airline, with any third country airlines. There are currently seven services per week available for third party code share arrangements. In addition to the seven weekly frequencies available for allocation, any Australian designated airline is entitled to utilise any unused passenger capacity allocated to that airline for third country code sharing. It is understood that one unused B747 equivalent service per week in each direction is translated as one third country code share frequency per week in each direction. In such cases, one code share service is counted against the designated airline under its own entitlement as one frequency of capacity.

2.3 Any Australian designated airline may enter into code share arrangements, as the operating airline, with any airline or airlines of a third country on any number of frequencies within its capacity entitlements.

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 Thailand and various points in Australia, thus providing various travel options to consumers. Both Qantas and Jetstar offer direct services and Qantas code shares on Jetstar-operated services.

3.9 In the year ended December 2016, Thai Airways captured 63.0% share of passenger traffic between Australia and Thailand, followed by Jetstar at 20.2%; Qantas had 10.4% market share followed by Emirates at 6.0%, which operates services between Australia and United Arab Emirates via Thailand; Virgin Australia, whose direct services ceased in February 2016, had 0.4% share of the market.¹

3.10 In terms of “single flight number” passenger operations, in the year ended December 2016, there were 6,673 flights between Australia and Thailand. Thai Airways operated 59.0% of these flights, followed by Jetstar (17.6%); then Emirates via Dubai (13.0%); and Qantas (10.0%).²

3.11 Qantas operates seven weekly services between Sydney and Bangkok; Bangkok Airways, Emirates, Finnair and Jet Airways code share on Qantas’ services. Qantas, on the other hand code shares on services operated by Jetstar, Bangkok Airways, Emirates, Jet Airways and Jetstar Asia. Jetstar operates direct services between Melbourne and Bangkok/Phuket; and between Sydney and Phuket.³

3.12 In the Commission’s view, allowing Finnair to code share on Jetstar-operated services between Australia and Thailand will add to the number of carriers that market services on the route and is unlikely to have a detrimental impact on competition.

3.13 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 apply the additional criteria set out in paragraph 5 of the Policy Statement.

3.14 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 and Jetstar are established international carriers which are clearly capable of obtaining the necessary regulatory

¹ Source: Bureau of Infrastructure, Transport and Regional Economics (BITRE)

² Source: Bureau of Infrastructure, Transport and Regional Economics (BITRE)

³ Source: Northern Summer 2017 International Airlines Timetable Summary, www.infrastructure.gov.au

approvals and of implementing their proposed services.

3.15 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.

3.16 The Commission has decided to add conditions permitting the use of the capacity for the provision of code share services between Jetstar and Finnair on the Thailand route in accordance with the Australia-Thailand 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.

3.17 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 [2011] IASC 123 allocating capacity to Qantas on the Thailand route ([2017] IASC 210)


4.1 In accordance with section 25 of the Act, the Commission varies Determination [2011] IASC 123 which allocates to Qantas capacity on the Thailand route, by:

adding the following conditions to the Determinations:

- the capacity may be used by Qantas' wholly-owned subsidiary Jetstar to provide code share services with Finnair in accordance with the code share agreement between the Jetstar and Finnair dated 15 May 2017 and the air services arrangements between Australia and Thailand;
- Qantas must apply to the Commission for approval of any proposed variations to the code share agreement between Jetstar and Finnair 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 or Jetstar 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 [2011] IASC 123.

Dated: 7 June 2017



IAN DOUGLAS
Chairperson



IAN HARRIS
Commissioner