DECISION

Decision:	**[2018] IASC 241**
Variation of:	**[2017] IASC 110**
The Route:	**United States of America (USA)**
The Applicant:	**Qantas Airways Limited (ABN 16 009 661 901)**
Public Register File:	**IASC/APP/201870**

> **The Commission varies Determination [2017] IASC 110 to permit the use of the capacity on the USA route for code sharing between Qantas and Alaska Airlines. The permission is valid for the duration of the determination commencing from 10 December 2018.**

1   The application

1.1   On 21 November 2018, Qantas Airways Limited (Qantas) applied to the International Air Services Commission (the Commission) to vary Determination [2017] IASC 110, as varied (the Determination), to enable Alaska Airlines to code share on flights operated by Qantas on the USA route starting from 15 January 2019. Qantas provided, on a confidential basis, a copy of its code share agreement with Alaska Airlines dated 24 December 2005 including the amendment agreement of October 2018.

1.2   Determination [2017] IASC 110, as amended, allocates to Qantas unlimited capacity on the USA route and is valid until 2 April 2028. Qantas and its wholly-owned subsidiary, Jetstar Airways Pty Ltd (Jetstar), are permitted to utilise the capacity. The Determination, as amended, permits the use of the capacity for code sharing between Qantas and Jetstar and between Qantas and American Airlines and WestJet Airlines[1]

1.3   As required under section 22 of the *International Air Services Commission Act 1992* (the Act), the Commission published, on 21 November 2018, a notice inviting submissions about the application for variation to enable Alaska Airlines to code share on Qantas services. No submissions were received. All non-confidential material supplied by the applicant is available on the Commission's website, www.iasc.gov.au.

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2   Relevant provisions of the air services arrangements

2.1   Paragraph 7(2)(aa) of the Act provides that the Commission must not allocate available capacity contrary to any restrictions on capacity contained in a bilateral arrangement(s). Any variation made to an existing allocation of capacity should also not be contrary to any restrictions on capacity contained in a bilateral arrangement(s).

2.2   The Australia-USA air services arrangements provide for unlimited frequency and capacity of services to enable designated airlines of both parties to operate international air services between points in Australia and the USA.

2.3   Additionally, designated carriers of both parties may enter into cooperative marketing arrangements such as blocked-space, code sharing or leasing arrangements with an airline(s) of either party, an airline(s) of a third country and a surface (land or maritime) transportation provider of any country.

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   In accordance with section 11 of the Act, the Minister for Infrastructure, Transport and Regional Development, the Hon. Michael McCormack MP, made the International Air Services Commission Policy Statement 2018 (the Policy Statement) which came into force and effect on 28 March 2018. The Policy Statement sets out the criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity.

3.5   Section 18 of the Policy Statement which specifically deals with 'transfer applications' such as the current application, effectively provides that, in assessing whether the variation requested would not be of benefit to the public for purposes of subsection 25(2) of the Act, the Commission is to have regard to certain matters including the 'reasonable capability criterion' in section 8 of the Policy Statement and may have regard to any of the additional criteria set out in section 9 of the Policy Statement that it considers to be relevant.

3.6   Under the 'reasonable capability criterion' in section 8 of the Policy Statement, the Commission is to assess the extent to which an Australian carrier is reasonably capable of obtaining any licences, permits or other approvals required to operate on and service the route

and of using the capacity allocated under the determination. The Commission notes that Qantas is an established international carrier and finds that it is reasonably capable of obtaining any licences, permits or other regulatory approvals required to operate on and service the route and of using the capacity allocated on the route. The Commission further notes that Alaska Airlines has not previously operated on the Australia route, either as the operator of the service or as marketing carrier in a code share arrangement. In light of this, the Commission sought advice from the Department of Infrastructure, Regional Development and Cities (the Department) on whether Alaska Airlines would be reasonably capable of obtaining the necessary regulatory approvals and of implementing its proposed code share services. On 3 December 2018, the Department confirmed it has received an application from Alaska Airlines for a codeshare-only International Air Licence, and that from the Department's view, Alaska Airlines is reasonably capable of obtaining the relevant regulatory approvals to codeshare with Qantas.

3.7   It is noted that there are a number of major carriers offering either own-operated or code share services between various points in Australia and USA, thus providing various travel options to consumers. Qantas, the largest operator on the route, operates up to 51 weekly services between Australia and the USA in the Northern Winter 2018 scheduling period (going to Los Angeles from Brisbane, Melbourne or Sydney; to San Francisco from Melbourne or Sydney; to Dallas Fort Worth from Sydney; and Honolulu, also from Sydney). Jetstar operates up to nine direct services per week (to Honolulu from either Melbourne or Sydney). Virgin Australia operates up to 18 weekly services (to Los Angeles from Brisbane, Melbourne or Sydney). American Airlines, Delta, Hawaiian Airlines and United Airlines also operate direct services on the Australia-USA route. Several third country airlines code share with these airlines.[2]

3.8   In the Commission's view, allowing Alaska Airlines to code share on Qantas-operated services between Australia and the USA will add to the number of carriers that market services on the route and is unlikely to have a detrimental impact on competition. For this reason, the Commission did not find it necessary to have regard to the additional criteria in section 9 of the Policy Statement.

3.9   The Commission finds that the matters specified in paragraph 18(2)(b)[3] of the Policy Statement are not relevant to the variation under consideration. There is nothing to suggest that Qantas' transfer application involves speculative activity, and Qantas has exercised the allocation in question for a period of more than six months.

3.10   Having considered the criteria set out in section 18 of the Policy Statement, the Commission is not satisfied that the allocation, as proposed to be varied in Qantas' application, would not be of benefit to the public. Therefore, in accordance with section 25 of the Act, the Commission makes a decision varying the determination in a way that gives effect to the variation requested in the transfer application.

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[2] Northern Winter 2018 International Airlines Timetable Summary (28 October 2018 - 30 March 2019), www.infrastructure.gov.au

[3] Paragraph 18(2)(b) provides that the Commission is to have regard to the following matters, to the extent that they are relevant to the variation under consideration: (i) the undesirability of approving a transfer where doing so will, or is reasonably likely to, permit or encourage any form of speculative activity, including trading in capacity allocations for commercial benefit; (ii) the undesirability, other than in exceptional cases, of approving a transfer application made by a carrier that has never exercised an allocation for a period of less than six months.

3.11   Subsection 15(1) of the Act empowers the Commission to include such terms and conditions in a determination as it thinks fit. Paragraph 15(2)(e) requires the inclusion of a condition stating the extent to which the carrier may use the capacity allocated under a determination in joint services with another carrier.

3.12   The Commission has decided to add conditions permitting the use of the capacity for the provision of code share services between Qantas and Alaska Airlines on the USA route in accordance with the Australia-USA air services arrangements. In accordance with section 23 of the Policy Statement, Qantas is required to take all reasonable steps to ensure that passengers are informed at the time of booking that one or more other carriers may operate the flight.

3.13   Nothing in this decision should be taken as indicating either approval or disapproval by the Australian Competition and Consumer Commission (ACCC). This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

4   Decision varying Determination [2017] IASC 110 allocating capacity to Qantas on the USA route ([2018] IASC 241)
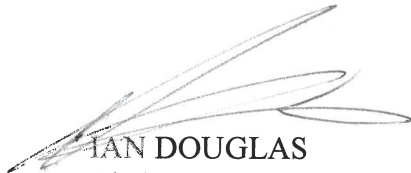
4.1   In accordance with section 25 of the Act, the Commission's Commission varies Determination [2017] IASC 110 which allocates unlimited capacity to Qantas on the USA route, by:

adding the following conditions to the Determination:

- the capacity may be used by Qantas to provide code share services with Alaska Airlines in accordance with the code share agreement between Qantas and Alaska Airlines made on 24 December 2005 and the air services arrangements between Australia and the USA;

- Qantas must apply to the Commission for approval of any proposed variations to the code share agreement between Qantas and Alaska Airlines 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 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 [2017] IASC 110.

Dated: 10 December 2018

IAN DOUGLAS
Chairperson

JAN HARRIS
Commissioner

KAREN GOSLING
Commissioner