

DECISION

VARIATION OF DETERMINATION IASC/DET/9724 ALLOCATING CAPACITY ON THE PAPUA NEW GUINEA ROUTE TO QANTAS AIRWAYS LIMITED (ACN 009 661 901)

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Members:

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1. The applications

1.1. On 5 August 1997 the Commission received an application for shelf capacity to Papua New Guinea (PNG) from Doskite Pty Ltd ACN 009 630 380 (trading as Qwestair), a wholly owned subsidiary of Pel-Air Aviation. In accordance with Commission procedures, on 11 August 1997, Qwestair's application was advertised. The Commission called for submissions about Qwestair's application and other applications for all or part of the available capacity to PNG. The closing date for applications and submissions was 25 August 1997.

1.2. The Commission received applications for capacity from Qantas Airways Limited ACN 009 661 901 (Qantas), Janlin Pty Ltd ACN 000 627 010 (trading as Cape York Air) and Lessbrook Pty Ltd ACN 010 855 875 (trading as Transair). Applicants were given until 2 October to comment on the additional information placed on the Register of Public Documents. No submissions were received.

Qwestair

1.3. Qwestair has applied for 0.4 B747 equivalent units in each direction on the south east Australia - PNG route and 0.5 units northbound and 0.3 units southbound on the northern Australia - PNG route. Qwestair is proposing to operate freight only services between Brisbane and Port Moresby and Cairns and Port Moresby.

1.4. On the Brisbane - Port Moresby route, Qwestair is proposing to operate four Westwind aircraft per week in each direction.

1.5. On the Cairns - Port Moresby route, Qwestair is proposing to operate 5 Metroliner flights per week between Cairns and Port Moresby with three of these flights carrying freight between Port Moresby and Cairns.

Qantas

1.6. Qantas has applied for an additional 0.05 B747 equivalent units in a southbound direction on the northern Australia - PNG route. Qantas is proposing to operate the additional capacity on a code share basis with Air Niugini between Port Moresby and Cairns.

1.7. As the amount of capacity sought by Qantas is small, it has requested that its existing determination be varied by increasing the capacity allocated under it rather than be issued a fresh determination. Qantas has applied to the Commission to vary Determination IASC/DET/9724, increasing Qantas' allocation from 1.55 to 1.60 units in a southbound direction on the northern Australia - Papua New Guinea route.

Transair

1.8. Transair has applied for 0.4 B747 equivalent units in each direction on the south east Australia - PNG route and 0.5 units northbound and 0.3 units southbound on the northern Australia - PNG route. Transair is proposing to operate freight only services on both the Cairns - Port Moresby and Brisbane - Port Moresby routes.

1.9. On the southern route Transair would operate four Westwind flights in each direction between Brisbane and Port Moresby.

1.10. On the northern route Transair would operate either a Westwind or a Metroliner five times per week in a northern direction between Cairns and Port Moresby with three of these flights carrying freight between Port Moresby and Cairns.

Cape York Air

1.11. Cape York Air has applied for 0.3 B747 equivalent units in each direction on the PNG northern route and is proposing to operate three services per week with a Brasilia EMB-120 aircraft between Cairns and Mount Hagen.

1.12. All non-confidential material supplied by the applicants is filed on the Register of Public Documents. Confidential material supplied by the applicants is filed on the Commission's confidential register.

2. Provisions of relevant Air Services Agreements

2.1. The Memorandum of Understanding (MOU) of 23 October 1996 and the Australia - PNG Air Services Agreement (ASA) of 8 December 1980 provide for the operation of international air services and multiple designation of Australian carriers.

2.2. The MOU provides for the following capacity per week:

Between South East Australia and PNG:

- with immediate effect, 2.6 B747 equivalent units;
- from October 1998, an additional 0.9 units.

Between Northern Australia (defined in the MOU as points north of Brisbane but not including Brisbane) and PNG:

- with immediate effect, 4.0 B747 equivalent units of capacity.

2.3. Qantas has been allocated 1.8 B747 equivalent units of capacity in each direction on the southern route and Qwestair has been allocated 0.4 B747 equivalent units of capacity in each direction on the southern route.

2.4. Flight West Airlines Pty Ltd has been allocated 2.1 B747 equivalent units of capacity in each direction on the northern route. Qantas has been allocated 1.4 B747 equivalent units of capacity per week in a northbound direction and 1.55 B747 equivalent units of capacity per week in a southbound direction on the northern route.

2.5. Accordingly, there are 0.4 B747 equivalent units of capacity in each direction on the southern route, and 0.5 B747 equivalent units of capacity per week in a northbound direction and 0.35 units of capacity per week in a southbound direction on the northern route for PNG on the Register of Available Capacity.

2.6. The aircraft substitution formula contained in the Australia - PNG air services arrangements states that any flight with an aircraft smaller than a BAe-146 or F28 is considered to utilise 0.1 B747 equivalent units of capacity. However, capacity utilised via code sharing may utilise less than 0.1 B747 equivalent units.

2.7. The Commission sought advice from the Department of Transport and Regional Development (DoTRD) concerning interpretation of the aircraft substitution formula. DoTRD advised that, as the MOU stands, only a service operated via a code share could utilise increments of less than 0.1 B747 equivalent units. None of the applicants, other than Qantas, is proposing code share services.

3. Framework for allocating capacity

General legislative framework

3.1. Allocations of capacity are made in accordance with the *International Air Services Commission Act 1992*. Under section 11 of the Act, the Minister makes Policy Statements setting out matters relevant to the Commission's performance of its functions, including criteria to be applied by the Commission in assessing the benefit to the public. The current Policy Statement (No.3) was issued by the Minister on 23 April 1997. The legislative framework for making a Determination allocating available capacity under the Act is set out in Attachment A.

3.2. Paragraph 4 of the Policy Statement leads the Commission, as a first step, to assess whether the applicants are reasonably capable of obtaining the necessary approvals to operate on the route and whether they are reasonably capable of implementing their proposals.

3.3. The criteria applicable to assessing benefit to the public of an allocation of capacity, where there is more than one applicant and the amount of available capacity is less than the total amount sought by applicants, are set out in Attachment B.

Framework for varying determinations

3.4. Qantas has applied for a variation to its existing PNG determination. The legislative framework for varying determinations made under the *International Air Services Commission Act 1992* is set out in Attachment C.

3.5. Carriers to whom a determination allocates capacity may, at any time, apply to the Commission, under section 21 of the Act, for the determination to be varied. Under section 24(1), the Commission must make a decision either confirming the determination or varying the determination as requested in the application.

3.6. Under section 24(2), 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 unless the Commission is satisfied that the allocation, as so varied, would be of benefit to the public.

3.7. In exercising its powers, the Commission must take account of the objects of the Act as set out in section 3 and of the requirement of section 6(3)(b) that the Commission have regard to Australia's international obligations concerning the operation of international air services.

3.8. Section 6(3)(a) also requires the Commission to comply with policy statements made by the Minister under section 11. The current Policy Statement, dated 23 April 1997, includes criteria to be applied by the Commission in assessing the benefit to the public of allocations of capacity.

4. Other issues

4.1. Under the aircraft substitution formula in the PNG MOU, the smallest aircraft equates to 0.1 B747 equivalent units. As noted above, the Commission has received an opinion from DoTRD that, as the MOU stands, only a service operated via a code share could utilise increments of less than 0.1 B747 equivalent units.

4.2. Qantas is proposing to operate services on a code share basis with Air Niugini and has applied for only 0.05 B747 equivalent units in the southbound direction of the northern Australia - PNG route.

4.3. As no applicant besides Qantas is proposing to operate services on a code share basis, Qantas is the only applicant which can utilise increments of 0.05 units of capacity.

5. Applicant's claims

5.1. Qantas has informed the Commission that the minor increase in capacity would allow it to increase the frequency of its services between Port Moresby and Cairns from six to seven per week.

5.2. Qantas advised the Commission that the allocation would also allow Qantas to offer its code on four A310 services weekly, rather than on two at present, and that the use of larger aircraft would be of benefit to the public.

5.3. Qantas has sought a variation to its existing determination rather than a new determination because the amount of capacity involved is minor, and it would be more convenient to Qantas to have only one determination instead of two.

5.4. The Act and the Policy Statement permit the Commission to allocate capacity to a carrier by way of varying an existing determination provided that the amount of capacity involved is minor. Thus Qantas' request is consistent with the legislative framework.

6. Commission's assessment

6.1. Whilst there are competing applications, the fact that no applicant other than Qantas can utilise 0.05 units of capacity on the Australia - PNG route means that the Commission can assess the Qantas application without prejudicing the other applications.

6.2. The only relevant criteria to be applied in assessing the benefit to the public of the Qantas application is whether Qantas is reasonably capable of obtaining the necessary approvals and of implementing its proposals.

6.3. Qantas is a major international carrier and is already operating a substantial number of services to PNG. Qantas has the approvals required to operate on the PNG route and has already obtained approval for its current timetable.

6.4. The Commission concludes that Qantas is reasonably capable of obtaining the approvals necessary to operate on the route and of implementing its proposal and that the variation requested would be of benefit to the public. The Commission will grant Qantas the variation it has requested.

7. Commission Decision IASC/DEC/9719

7.1. The Commission finds that a variation of Determination IASC/DET/9724 as requested by Qantas would be of benefit to the public. It varies Determination

IASC/DET/9724 by replacing “1.55 B747 units” in paragraph 8.2 with “1.6 B747 units”, and replacing “26 October 1997” in paragraph 8.4 “28 October 1997”.

7.2. The Determination, as varied in accordance with this decision is set out in Attachment D.

Dated 28 October 1997

James K Bain
Chairman

Russell V Miller
Member

A. Legislative framework

1. Subsection 7(1) of the Act allows the Commission to make a determination allocating available capacity.
2. Under section 12 of the Act, the Commission must, by notice, invite applications for and submissions about an allocation of new capacity.
3. Under subsection 12(3), any person may apply to the Commission for a determination allocating the capacity.
4. Subsection 7(2) requires that the Determination:
 - (a) must not allocate available capacity unless the Commission is satisfied that the allocation would be of benefit to the public; and
 - (b) if more than one application was made relating to the allocation - must make the allocation that the Commission is satisfied, having regard to the applications made, would be of the greatest benefit to the public.
5. Under subsection 7(3), in assessing the benefit to the public of an allocation of capacity, the Commission must apply the criteria set out for that purpose in the policy statements made by the Minister under section 11.
6. The section 11 Policy Statement dated 23 April 1997, includes criteria to be applied by the Commission in assessing the benefit to the public of allocations of capacity. The criteria applicable to assessing benefit to the public of an allocation of capacity where there is only one applicant are those contained in paragraphs 4 and 6 of the Policy Statement. However, if submissions are received about, or opposing, the allocation of capacity to a particular carrier, the Commission may also apply the additional criteria contained in paragraph 5 of the Policy Statement.
7. Section 15 of the Act relates to the contents of Determinations including the imposition of conditions relating to the use of capacity. Section 16 relates to notifications of Determinations.

B. Relevant criteria under paragraphs 4 and 5 of the Policy Statement

Paragraph 4 requirements

4. GENERAL CRITERIA FOR ASSESSING BENEFIT TO THE PUBLIC

4.1 Subject to 6 below, the general criteria against which the benefit to the public is to be assessed by the Commission in considering the circumstances in relation to an allocation of capacity or the renewal or review of a determination allocating capacity to an Australian carrier are as set out below:

Use of Australian carrier entitlements

- (a) Subject to (b), the use of the entitlements of Australian carriers under a bilateral arrangement is of benefit to the public.

Carrier capabilities

- (b) It is not of benefit to the public for the Commission to allocate capacity to Australian carriers unless such carriers:
- (i) are reasonably capable of obtaining the necessary approvals to operate on the route; and
 - (ii) are reasonably capable of implementing their proposals.

Paragraph 5 requirements

5. ADDITIONAL CRITERIA FOR ASSESSING BENEFIT TO THE PUBLIC

5.1 The following additional criteria are applicable in assessing the benefit to the public in all circumstances other than as provided in relation to particular circumstances described in 6 below:

Tourism Benefits

- (a) The extent to which proposals will promote tourism to and within Australia. The Commission should have regard to:
- the level of promotion, market development and investment proposed by each of the applicants; and
 - route service possibilities to and from points beyond the Australian gateway(s) or beyond the foreign gateway(s).

Consumer Benefits

- (b) The extent to which proposals will maximise benefits to Australian consumers. The Commission should have regard to:
- the degree of choice (including, for example, choice of airport(s), seat availability, range of product);
 - efficiencies achieved as reflected in lower tariffs and improved standard of services;
 - the stimulation of innovation on the part of incumbent carriers; and
 - route service possibilities to and from points beyond the Australian gateway(s) or beyond the foreign gateway(s).

Trade Benefits

- (c) The extent to which proposals will promote international trade. The Commission should have regard to:
- the availability of frequent, low cost, reliable freight services for Australian exporters and importers.

Competition Benefits

- (d) The extent to which proposals will contribute to the development of a competitive environment for the provision of international air services. The Commission should have regard to:
- the need to develop strong Australian carriers capable of competing effectively with one another and the airlines of foreign countries;
 - the number of Australian carriers using capacity on a particular route and the existing distribution of capacity;
 - the extent to which applicants are proposing to provide capacity on aircraft they will operate themselves as, in the long term, operation of capacity on own aircraft is likely to result in more competitive outcomes;
 - the provisions of any commercial agreement between an applicant and another airline affecting services on the route but only to the extent of determining comparative competition benefit between competing proposals; and
 - any determinations made by the Australian Competition and Consumer Commission or the Australian Competition Tribunal in relation to a carrier operating or proposing to operate on all or part of the route; and

- any decisions on notifications made by the Australian Competition and Consumer Commission in relation to a carrier operating or proposing to operate on all or part of the route.

Industry Structure

- (e) The extent to which proposals will impact positively on the Australian aviation industry.

Other Criteria

- (f) Such other criteria as the Commission considers relevant.

5.2 The Commission is not obliged to apply all the criteria set out in 5.1 if it is satisfied that the important criteria in the circumstances have been met.

C. Legislative framework for variations to existing determinations

8. Under section 21 of the *International Air Services Commission Act 1992* (the Act) an Australian carrier to whom a determination allocates capacity may at any time apply to the Commission for the determination to be varied.

9. Section 10(2) of the Act requires the Commission to conduct a review of a determination if the Australian carrier to whom the determination allocates capacity applies to the Commission under section 21 for the determination to be varied. Before conducting a review under section 10 the Commission must, by notice, invite submissions about the review of the determination (subsection 22(1)).

10. Section 24 of the Act relates to decisions on applications for variations. Under subsection 24(1), subject to this section, the Commission must, having conducted a review to decide an application for a determination to be varied, make a decision:

- (a) confirming the determination; or
- (b) varying the determination in a way that gives effect to the variation requested in the application.

11. Section 24(2) of the Act states the Commission must not make a decision varying the determination in a way that varies, or has 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.

12. In exercising its powers, the Commission must take account of the objects of the Act as set out in section 3 and of the requirement of section 6(3)(b) that the Commission have regard to Australia's international obligations concerning the operation of international air services.

13. Section 6(3)(a) also requires the Commission to comply with policy statements made by the Minister under section 11.

14. The section 11 Policy Statement dated 23 April 1997, includes criteria to be applied by the Commission in assessing the benefit to the public of allocations of capacity.

15. Subject to section 6, section 4 relates to general criteria for assessing benefit to the public. In particular:

Use of Australian carrier entitlements

- (a) Subject to (b), the use of the entitlements of Australian carriers under a bilateral arrangement is of benefit to the public.

Carrier capabilities

- (b) It is not of benefit to the public for the commission to allocate capacity to Australian carriers unless such carriers:
 - (i) are reasonably capable of obtaining the necessary approvals to operate on the route; and
 - (ii) are reasonably capable of implementing their proposals.

16. Section 6.3 requires the Commission to assess the benefit to the public in circumstances where a carrier requests a variation of a determination to allow it flexibility in operating its capacity, including changes in seating or freight carrying arrangements or configurations, aircraft type or points to be served, which may result in a minor increase in capacity. The Commission need only satisfy itself that the proposed variation does not adversely affect the application of the criteria in section 4.

D. Determination as amended

8.1 The Commission finds a renewal of Determinations A-12 and B-6 allocating capacity on the Australia - Papua New Guinea route to Qantas would be of benefit to the public.

8.2 The Commission makes a fresh determination in favour of Qantas, allocating the following capacity between Australia and Papua New Guinea under the Australia - Papua New Guinea Air Services Agreement:

- the equivalent of 1.8 B747 units per week in each direction on Route I(a) being between South East Australia and Papua New Guinea;
- the equivalent of 1.4 B747 units per week northbound on Route I(b) being between Northern Australia and Papua New Guinea; and
- the equivalent of 1.6 B747 units per week southbound on Route I(b) being between Papua New Guinea and Northern Australia.

8.3 The determination is for 5 years from 1 July 1997.

8.4 The determination is subject to the following conditions:

- Qantas is required to commence utilisation of the allocated capacity from 1 July 1997;
- Qantas is required to fully utilise the allocated capacity from 28 October 1997;
- only Qantas is permitted to utilise the capacity;
- Qantas may use the capacity to provide services jointly with Air Niugini in accordance with:
 - the Capacity Purchase/Sale Agreement between Qantas and Air Niugini for the Cairns - Port Moresby route made on 23 October 1987 as extended from time to time in accordance with its terms; or
 - variations to the agreement, subject to the prior approval of the Commission; or
 - any new joint service arrangement between Qantas and Air Niugini for operations on the Australia - Papua New Guinea route whether or not it

replaces the existing Agreement, with the prior approval of the Commission;

and in any case, in accordance with this determination,

- to the extent that the capacity is used to provide services jointly with Air Niugini:
 - Qantas must price and sell its services on the routes independently;
 - Qantas must not pool revenues with Air Niugini;
 - Qantas must take all reasonable steps to ensure passengers are informed, at the time of ticket reservation, of the carrier operating the flight;
- changes in relation to the ownership and control of Qantas are permitted except to the extent that any change:
 - results in the designation of the airline as an Australian carrier under the Australia - Papua New Guinea Air Services Agreement being withdrawn; or
 - has the effect that another Australian carrier, or a person (or group of persons) having substantial ownership or effective control of another Australian carrier, would take substantial ownership of Qantas or be in a position to exercise effective control of Qantas, without the prior consent of the Commission, and
- changes in relation to the management, status or location of operations and Head Office of Qantas are permitted except to the extent that any change would result in the airline ceasing to be an airline designated by the Australian Government for the purposes of the Australia - Papua New Guinea Air Services Agreement.