



Australian Government

International Air Services Commission

DECISION

Decision: [2003] IASC 215
Revocation of: IASC/DET/9916 (Solomon Islands),
IASC/DET/9917 (Nauru)
IASC/DET/9918 and [2002] IASC 121 (France Route 3
- New Caledonia) and
IASC/DET/9919 (Vanuatu) (the Determinations)
The Airline: Transpac Express Pty Ltd
(ACN 086 284 675) (Transpac)
Public Register: IASC/APP/200326

1 Background

1.1 On 10 September 1999 the Commission issued Determinations IASC/DET/9916 allocating 50 tonnes of freight capacity on the Solomon Islands route, IASC/DET/9917 allocating one B737 equivalent on the Nauru route, IASC/DET/9918 allocating one B737 freighter on France Route 3 - New Caledonia and IASC/DET/9919 allocating 25 tonnes of freight capacity on the Vanuatu route. On 15 October 2002 the Commission issued Determination [2002] IASC 121 allocating 0.75 units of passenger capacity on France Route 3 – New Caledonia to Transpac.

1.2 The Determinations issued in 1999 included a condition that the capacity be fully utilised by 10 December 1999. This deadline was subsequently extended on several occasions by means of resolution to 31 October 2003 for freight capacity on the Nauru, Solomon Islands and Vanuatu routes. On the New Caledonia route the deadline for use of the freight capacity remained at 30 September 2000.

1.3 On 6 September 2002 Transpac applied for an allocation of passenger capacity on the New Caledonia route. In considering Transpac's application the Commission noted in [2002] IASC 121 that Transpac "has previously dealt with the Commission and obtained allocations of capacity in 1999 to operate all-cargo services on four south-west Pacific routes. Transpac has not exercised this capacity, despite being granted extensions of time by the Commission in which to do so. This failure to operate raised some concerns for the Commission about the capabilities of Transpac to mount services in dealing with a fresh application, in which Transpac has indicated its intention to exercise its previously allocated capacity on the Vanuatu and Solomon Islands routes. However, recent advice from Transpac has satisfied the Commission that reasons beyond Transpac's control were the cause of Transpac's inability to start services on those routes, and that those obstacles were no longer present."

1.4 The Commission considered that Transpac's new plan to combine passenger and freight operations would improve the utilisation of its aircraft and spread the fixed costs in establishing and maintaining the proposed operations and hence increased the likelihood of services commencing.

1.5 In its application Transpac proposed commencing services in January 2003. The Commission, mindful of the time needed to have all the necessary approvals in place, set a full utilisation date of 31 October 2003.

1.6 In allocating 0.75 units of capacity per week on the New Caledonia route the Commission exhausted the capacity available on the route. Qantas Airways Limited has allocations totalling 1.75 units of passenger capacity and Transpac has the 0.75 units plus 1 B737 freighter. On the Nauru route, a single designation route, Transpac was the designated Australian carrier.

1.7 In June 2003 HeavyLift in applying for freight capacity on a number of routes expressed interest in operating freight capacity on the New Caledonia and Nauru routes. In the same month Virgin Blue expressed interest in operating passenger capacity on the New Caledonia route.

1.8 On 17 June 2003 the Commission sought from Transpac an update on its progress. Transpac, in a letter dated 5 July 2003, advised that it had "the ability to proceed with the setup and commencement of scheduled airline operations, both passenger and air cargo services, within the deadline require by the IASC in its Determination."

1.9 On 27 August 2003 the Commission wrote informing Transpac that an extension of time beyond 31 October 2003 would not be appropriate given the interest from other Australian carriers in operating services on the New Caledonia and Nauru routes. The Commission also informed Transpac that it was likely to conduct a review of any determinations for which Transpac was not utilising its capacity by 31 October 2003.

1.10 Section 10(1) of the *International Air Services Commission Act 1992* (the Act) provides that the Commission "may, at any time, conduct a review of a determination if it believes that there may be grounds for varying, suspending or revoking the determination." On 24 October 2003 the Commission wrote to Transpac noting that it seemed certain that services would not commence by the due date. The Commission informed Transpac that in accordance with Section 10(1) of the Act it had decided to conduct a review of Transpac's determinations, on the grounds that it considered Transpac would be in breach of the conditions of its determinations after 31 October 2003.

1.11 On 27 October 2003 Transpac stated "that operations would not be able to be commenced until 1 April 2004 due to the need to have the approval of the aircraft selected by the different authorities concerned."

1.12 The Commission published a notice on 3 November 2003 calling for submissions about the review and, in anticipation of the Commission possibly revoking the determinations, applications for, or submissions about allocation of all or part of the capacity that is the subject of the review.

2 Submissions and applications received

2.1 In response to the published notice the Commission received applications for capacity currently held by Transpac from Virgin Blue and HeavyLift Cargo Airlines. Virgin Blue is seeking an allocation of 0.75 units of passenger capacity on the New Caledonia route. HeavyLift is seeking allocation of all the freight capacity currently held by Transpac on the New Caledonia, Nauru and Vanuatu routes. (0.25 units, one B737 and 25 tonnes per week respectively). In addition, HeavyLift is seeking 25 of the 50 tonnes currently held by Transpac on the Solomon Islands route.

2.2 No submission was received from Transpac.

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

3 The draft decision

3.1 On 28 November 2003 the Commission issued a Draft Decision proposing to revoke all of Transpac's determinations. Submissions about the Draft Decision were invited, including from Transpac. None were received.

4 Commission's assessment

4.1 Section 23(1) of the Act requires the Commission, having conducted a review pursuant to s.10(1), to make a decision confirming, varying, suspending or revoking a determination. Section 23(2) provides that the Commission may make a decision to vary, suspend or revoke a determination only if it is satisfied that:

- a) a term or condition of the determination has been breached; or
- b) due to a change of circumstances, it is inevitable that a breach of such a term or condition will occur; or
- c) an Australian carrier that, under the determination, is to use capacity to which the determination relates no longer intends to use fully that capacity.

4.2 The general criteria against which the benefits to the public are assessed by the Commission in the circumstances of this review are set out in paragraph 4 of the Minister's policy statement.

4.3 The first issue for the Commission to decide is whether Transpac is or will inevitably be in breach of any or all of its determinations, or no longer intends to fully use its capacity. If so, it has the discretion to revoke, suspend or vary the determinations.

4.4 The Commission finds that Transpac is in breach of the conditions in all determinations the subject of this review. The carrier has never commenced operations on any route. Transpac is clearly in breach of the condition of its determinations that capacity be fully utilised by at the latest 31 October 2003.

4.5 Having found that Transpac is in breach of all of its determinations, Section 23(2) of the Act requires the Commission to conclude that the determinations be

revoked, varied or suspended. The Commission will revoke all of Transpac's determinations and the applications from Virgin Blue and HeavyLift are the subject of separate determinations.

5 Decision [2003] IASC 215

5.1 The Commission, in accordance with Section 23 of the Act, revokes Determinations IASC/DET/9916 (Solomon Islands), IASC/DET/9917 (Nauru), IASC/DET/9918 and [2002] IASC 121 (France Route 3 - New Caledonia) and IASC/DET/9919 (Vanuatu).

Dated: 12 December 2003

John Martin
Chairman

Michael Lawriwsky
Member

Stephen Lonergan
Member