



Australian Government

International Air Services Commission

DECISION

Decision: [2010] IASC 208
The Route: New Zealand
The Applicant: Pacific Blue Airlines (Australia) Pty Ltd
(ACN 097 892 389) (Pacific Blue Australia)
Public Register File: IASC/APP/201019

1 The application

1.1 On 30 September 2010, Pacific Blue Australia applied to the Commission for a variation to Determination [2007] IASC 118 to authorise code sharing with Etihad Airways on services operated by Pacific Blue Australia between points in Australia and Auckland and Christchurch. The determination allocates unlimited passenger and freight capacity to Pacific Blue Australia on the New Zealand route.

1.2 Pacific Blue Australia provided the Commission with a copy of its confidential code share agreement with Etihad Airways. This is a free sale type arrangement which involves co-ordinated pricing and marketing between the carriers, but no revenue pooling of sharing.

1.3 Concurrently, in a separate but related application, V Australia sought the Commission's approval for allocations of capacity and to code share with Etihad Airways on a range of other routes. That application is dealt with in separate Commission determinations.

1.4 The Commission published a notice on 4 October 2010, inviting other applications for capacity. No submissions were received.

1.5 All public material supplied by the applicant is filed on the Register of Public Documents. Confidential supporting information supplied by the applicant is filed on the Commission's Confidential Register.

2 Provisions of relevant air services arrangements

2.1 The Australia – New Zealand air services arrangements permit the designated airlines of both parties to enter into code share, blocked space or other co-operative marketing arrangements with any other airline as the marketing and/or operating airline, provided only that the airlines hold the authority to conduct air transport on the routes or segments concerned. The airlines must also make it clear to the purchaser at the point of sale which airline will be the operating airline and with which airline/s the purchaser is entering into a contractual arrangement.

3 Commission's assessment

3.1 When considering an application to vary a determination, the Commission must decide whether the determination, as varied, would be of benefit to the public. Under paragraph 6.3 of the Minister's policy statement, where a carrier requests a variation of a determination to allow it flexibility in operating its capacity and no submission is received about the application, only the criteria in paragraph 4 of the policy statement are applicable. Under paragraph 4, the use of Australian entitlements by a carrier that is reasonably capable of obtaining the necessary approvals (4(b)(i)) and of implementing its proposals (4(b)(ii)) is of benefit to the public. For an established carrier such as Pacific Blue Australia, this means there is public benefit arising from the use of the entitlements.

3.2 Under section 15(2)(e) of the *International Air Services Commission Act 1992* (the Act), a carrier cannot use allocated capacity to provide joint services with any other carrier without the prior approval of the Commission. Under the Minister's policy statement, the Commission is normally expected to authorise applications for the use of capacity to code share where this is provided for under the relevant air services arrangements. As noted above, the Australia – New Zealand air services arrangements provide for code sharing between airlines of either party and any other airline. However, where the Commission is concerned that a code share proposal may not be of benefit to the public, it may subject the application to detailed assessment against the paragraph 5 public benefit criteria in the policy statement.

3.3 The Commission has carefully considered the proposed code share arrangements, noting particularly that they involve joint pricing of services, although no revenue pooling or sharing. The Commission is aware that the Virgin Blue Group has sought authorisation from the ACCC for the proposed alliance with Etihad Airways. The conduct proposed includes co-operation on joint pricing and scheduling of services. The ACCC has granted interim approval to the alliance, noting that Virgin Blue and Etihad Airways do not operate any competing services. The ACCC also had regard to the lead time required to market and sell tickets before the commencement of long-haul services in granting interim authorisation.

3.4 The Commission has taken account of the ACCC's interim authorisation in deciding that it does not have serious concerns that the arrangement would not be of benefit to the public. Accordingly, the Commission will not subject the proposals to the paragraph 5 criteria in the Minister's policy statement. The Commission considers that there is unlikely to be any lessening of public benefit through authorising the code sharing arrangement in relation to the New Zealand route. The New Zealand route is highly competitive with a number of Australian, New Zealand and third-country carriers participating on it.

3.5 In authorising code share arrangements, the Commission normally includes a condition of approval that the code share partners must price and sell their services separately from each other and must not share or pool revenues. In this case, the Commission will approve code sharing consistent with the code share agreement between Pacific Blue Australia and Etihad Airways; that is, there will be no condition of approval preventing joint pricing of services. However, the Commission's authorisation does not prejudice any consideration by the ACCC about the longer term authorisation of the arrangements. Should the ACCC decide not to continue authorisation, then IASC approval

of co-ordinated pricing and marketing would be terminated, although the carriers would still be able to code share without such co-ordination. The Commission will include a condition of approval to this effect. The Commission notes that it has granted similar conditional approval in the case of the Qantas/British Airways joint service arrangements, where the parties also engage in joint pricing.

4 Decision [2010] IASC 208

4.1 In accordance with section 24 of the Act the Commission varies Determination [2007] IASC 118, as requested by Pacific Blue Australia, by adding the following conditions:

- “the capacity may be used by Pacific Blue Australia to provide services jointly with Etihad Airways in accordance with:
 - the code share agreement between Pacific Blue Australia and Etihad Airways dated 26 August 2010; or
 - any subsequent code share agreement between Pacific Blue Australia and Etihad Airways, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under any code share agreement with Etihad Airways:
 - Pacific Blue Australia must not share or pool revenues on the route with Etihad Airways;
- under the arrangements with Etihad Airways, Pacific Blue Australia may only price and market its services on the route jointly with Etihad Airways as long as such practices are authorised under the *Trade Practices Act 1974* or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal;
- to the extent that the capacity is used to provide joint services on the route, Pacific Blue Australia must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of booking;”

Dated: 25 October 2010

Ian Smith
Member Presiding

Stephen Bartos
Member