



Australian Government

International Air Services Commission

DECISIONS

Decisions: [2018] IASC 202, [2018] IASC 203 and [2018] IASC 204
Variation of: [2013] IASC 119, [2014] IASC 109 and [2017] IASC 118
The Route: Italy
The Applicant: Qantas Airways Limited
(ABN 16 009 661 901)
Public Register File: IASC/APP/201804, 201805, 201806

The Commission's delegate varies Determinations [2013] IASC 119, [2014] IASC 109 and [2017] IASC 118 to permit the use of the capacity on the Italy route for code sharing between Qantas and British Airlines. The permission is valid for the duration of the determinations commencing from the date of issue of this decision.

1 The application

1.1 On 22 December 2017, the International Air Services Commission (the Commission) received an application from Qantas Airways Limited (Qantas) seeking to vary the following Determinations:

- [2013] IASC 119 which allocates 300 third country code share seats per week
- [2014] IASC 109 which allocates 400 third country code share seats per week, and
- [2017] IASC 118 which allocates 300 third country code share seats per week.

1.2 The above Determinations permit Qantas to code share on flights operated by Emirates on the Italy route. Qantas seeks to vary the above Determinations to enable it also to offer code share services on flights operated by British Airways on the Italy route from 25 March 2018. Qantas provided the Commission a copy of the 2013 code share agreement between Qantas and British Airways with new amendments, made on 16 February 2018, to provide for new code share routes including a point in Italy.

1.3 On 22 December 2017, the Commission published a notice, in accordance with section 22 of the International Air Services Commission Act 1992 (the Act), inviting submissions about the application. 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 Paragraph 7(2)(aa) of the Act requires the Commission not to allocate available capacity contrary to any restrictions on capacity contained in a bilateral arrangement(s). This also means that any variations made to an existing allocation of capacity must not be contrary to any restrictions on capacity contained in a bilateral arrangement(s).

2.2 Under the Australia - Italy air services arrangements, designated airlines of Australia (Australian airlines) may operate seven frequencies per week with any aircraft type. None of this capacity is currently allocated and no Australian carrier operates its own services on the Italy route.

2.3 Under the air services arrangements, Australian airlines are entitled to perform their services with wet lease, code sharing, blocked space and/or other cooperative service arrangements with any airline. Australian airlines may enter into arrangements with an airline(s) of a third country to carry out services through code share arrangements. These code share arrangements may constitute up to 1,700 seats per week in total in each direction. Qantas currently holds a total capacity of 1,000 third country code share seats while 600 third country code share seats have been allocated to Virgin Australia. This leaves 100 third country code share seats per week in each direction still available for immediate allocation.

2.4 The updated Australia – Italy air services arrangements include an explicit reference that the weekly capacity entitlements allocated for code share services are to be averaged over 12 months. Under the averaging methodology, a carrier may exceed its weekly capacity allocation for code share services from time to time so long as the total amount of capacity utilised during the year does not exceed the total annual capacity allocation (weekly capacity allocated multiplied by 52 weeks).

3 Delegate’s assessment

3.1 In accordance with section 27AB of the Act and regulation 3A of the International Air Services Commission Regulations 1992, the delegate of the Commission may consider the applications. (For purposes of this decision, references to the Commission include the delegate of the Commission.)

3.2 Qantas’ applications seek to vary its multiple Determinations to include a condition of a kind referred to in paragraph 15(2)(e) of the Act. In view of this, the applications are transfer applications as so defined in subsection 4(1) of the Act and have been assessed in accordance with section 25.

3.3 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.

3.4 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.

3.5 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.

3.6 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.

3.7 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 delegate notes that Qantas is an established international carrier which is capable of obtaining the necessary regulatory approvals and of implementing its proposed code share services.

3.8 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. 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).

3.9 The delegate notes that Qantas does not operate its own services between points in Australia and Italy. The Commission considers it is unlikely for Qantas to compete with British Airways providing services between Australia and Italy. For this reason, the proposed code share between the airlines would have minimal impact on competition.

3.10 In light of the above, the delegate does not have concerns that the proposed code share services may not be of benefit to the public. For this reason, it did not specifically consult the ACCC and did not apply the additional criteria set out in paragraph 5 of the Policy Statement.

3.11 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.

3.12 The delegate has decided to add conditions permitting the use of the capacity for the provision of code share services between Qantas and British Airways on the Italy route in accordance with the Australia – Italy air services arrangements. As required in paragraph 3.7 of the Policy Statement, a condition is included that where the allocated capacity is used to provide joint (or code share) services, the airlines are required to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

3.13 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 Decisions varying Determinations [2013] IASC 119, [2014] IASC 109 and [2017] IASC 118 allocating capacity to Qantas on the Italy route ([2018] IASC 202, [2018] IASC 203 and [2018] IASC 204)

4.1 In accordance with section 25 of the Act, the delegate varies Determinations [2013] IASC 119, [2014] IASC 109 and [2017] IASC 118 which allocate to Qantas a total of 1,000 third country code share seats on the Italy route, by:

adding the following conditions to the Determinations:

- The capacity may be used by Qantas to provide code share services with British Airways in accordance with the code share agreement between the Qantas and British Airways made on 19 November 2013, as varied on 16 February 2018, and the air services arrangements between Australia and Italy.
- Qantas is required to fully use the capacity for third country code share with British Airways from no later than 31 July 2018, or such other date approved by the Commission.
- Qantas must apply to the Commission for approval of any proposed variations to the code share agreement between Qantas and British Airways 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 the airlines propose to add third country routes on which the airlines will code share where Australian capacity entitlements will be used for services on that route.
- To the extent that the capacity is used to provide code share 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 the Determinations varied.

Dated: 02 March 2018



MARLENE TUCKER
Executive Director