



## Australian Government

### International Air Services Commission

#### DECISION

**Decision:** [2013] IASC 223  
**Variation of:** [2006] IASC 109  
**The Route:** New Zealand  
**The Applicant:** Qantas Airways Ltd  
(ABN 009 661 901) (Qantas)  
**Public Register File:** IASC/APP/201326

**The Commission's delegate varies determination [2006] IASC 109 to add a condition allowing the capacity to be used by Qantas to provide services jointly with Emirates.**

#### 1 The application

1.1 On 13 December 2001, the Commission issued in favour of Qantas Determination [2001] IASC 121 allocating unlimited passenger and freight capacity on the New Zealand route in accordance with the terms of the Australia – New Zealand air services arrangements. The Determination was subsequently renewed on 26 October 2006 by Determination [2006] IASC 109 (the determination).

1.2 The determination is valid for ten years from 1 July 2007 and allows for the capacity allocated to Qantas on this route to be provided jointly with Jetstar, British Airways, Lan Chile, Aerolineas Argentinas, American Airlines and Air Tahiti Nui. The determination was subsequently varied by Decisions [2008] IASC 211 and [2009] IASC 202 to allow code sharing with China Eastern and Etihad, respectively.

1.3 On 28 June 2013, Qantas applied for a variation to Determination [2006] IASC 109. The application proposes that Emirates will code share, as marketing carrier, on flights operated by Qantas on the Australia – New Zealand route.

1.4 The Commission published, on 28 June 2013, a notice, in accordance with section 22 of the Act, inviting submissions about the application. No applications were received.

1.5 All material supplied by the applicant is available on the Commission's website ([www.iasc.gov.au](http://www.iasc.gov.au)).

## **2 Air services arrangements**

Under the Australia – New Zealand air services arrangement, a designated airline of Australia may enter into code-share, blocked space or other cooperative marketing arrangement, as the marketing and/or operating airline with another Australian airline or airlines, with a New Zealand airline or airlines, or with an airline or airlines of a third country provided that the airline or airlines hold the appropriate authority or authorities.

## **3 Delegate's assessment**

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

3.2 The application from Qantas 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 will have to be 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, the Minister issued Policy Statement No. 5 dated 19 May 2004 (the Policy Statement). 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. It also provides other guidance to the Commission in performing its functions.

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 carrier is not reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its application.

3.8 The Commission notes that Qantas is an established international carrier which is clearly capable of obtaining the necessary approvals and of implementing its proposal. This means that there is public benefit arising from the use of the entitlements.

3.9 Paragraph 6.4 allows the Commission to apply the additional criteria in paragraph 5 of the Policy Statement in circumstances set out in paragraph 3.6. Under paragraph 3.6, where capacity that can be used for code share operations is available under 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).

3.10 The Commission does not have serious concerns about the proposed code sharing by Qantas and Emirates on the New Zealand route and so will not apply the additional criteria in paragraph 5 of the Policy Statement. The Commission notes that the ACCC has, on 27 March 2013, authorised the alliance between Qantas and Emirates including the trans-Tasman route, subject to certain conditions (ACCC authorisation numbers A91332 and A91333).

3.11 On the trans-Tasman route, the ACCC expressed concern that Qantas and Emirates will have the ability and incentive to reduce or limit growth in capacity in order to raise airfares. In order to address this concern, the ACCC imposed a condition that Qantas and Emirates must maintain at least a base level of capacity (i.e the number of seats operated by the applicants between 1 April 2012 and 31 March 2013 (separated into the Northern Summer and Northern Winter Seasons) for the term of the authorisation. This condition is restricted to the four routes that both airlines operated on prior to the alliance (Sydney-Auckland, Melbourne-Auckland, Brisbane-Auckland and Sydney-Christchurch).

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

3.13 The delegate, on behalf of the Commission, will authorise the use of the capacity by Qantas in joint services with Emirates. The delegate will vary the determination as requested by Qantas.

3.14 Nothing in this decision, however, 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.

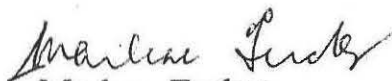
#### 4 Decision [2013] IASC 223

4.1 In accordance with section 25 of the Act, the delegate, on behalf of the Commission, varies Determination [2006] IASC 109, which allocates unlimited passenger and freight capacity for operation on the New Zealand route under the Australia – New Zealand air services arrangements by:

adding the following conditions to the Determination:

- “the capacity may be used by Qantas to provide services jointly with Emirates in accordance with;
  - the code share agreement between Qantas and Emirates dated 21 January 2013, as amended on 28 June 2013; or
  - any subsequent code share agreement between Qantas and Emirates, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under the code share agreement with Emirates, Qantas must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of booking. Nothing in this determination exempts Qantas from complying with the Australian Consumer Law; and
- under the arrangements with Emirates, Qantas may only operate, price and market its services, or share or pool revenues/profits on the route jointly with Emirates as long as such practices are authorised by the ACCC under the *Competition and Consumer Act 2012* or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal.

Dated: 25 July 2013



Marlene Tucker  
Executive Director  
Delegate of the IASC Commissioners