



Australian Government
International Air Services Commission

DECISION

Decision:	[2014] IASC 221
Variation of:	[2006] IASC 109
The Route:	New Zealand
The Applicant:	Qantas Airways Ltd (ACN 009 661 901) (Qantas)
Public Register File:	IASC/APP/201448

The Commission's delegate varies Determination [2006] IASC 109 by adding a condition allowing the capacity to be used by Jetstar Airways to provide services jointly with Emirates.

1 The application

1.1 On 13 February 2013, Qantas applied to the Commission seeking a variation to Determination [2006] IASC 109 (the Determination) to permit Emirates to code share on services operated by Qantas' wholly-owned subsidiary, Jetstar Airways (Jetstar), on the New Zealand route commencing on 6 April 2014. The Determination is valid for 10 years and allocates unlimited passenger and freight capacity to Qantas on the New Zealand route. The Determination also allows Qantas to use the capacity to provide services jointly with a wholly-owned subsidiary (such as Jetstar), British Airways, Lan Chile, Aerolineas Argentinas, American Airlines and Air Tahiti Nui. The Determination was subsequently varied by Decisions [2008] IASC 211, [2009] IASC 202 and [2013] IASC 223 to allow code sharing with China Eastern, Etihad and Emirates, respectively.

1.2 The Commission published a notice on 14 February 2014, in accordance with section 22 of *International Air Services Commission Act 1992* (the Act), inviting submissions about the proposed variation. No submissions were received.

1.3 All 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 There is unlimited capacity for Australian carriers to operate scheduled passenger and freight services between Australia and New Zealand and between New Zealand and third countries. Australian carriers may enter into code share and other cooperative marketing arrangements with any airline, including airlines of third countries, as the marketing and/or operating airline.

3 Delegate's consideration

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 Qantas application. (For purposes of this determination, references to the Commission include the delegate of the Commission).

3.2 Under section 21 of the Act, an Australian carrier may, at any time, apply to have a determination varied. Under subsection 10(2) of the Act, the Commission must conduct a review of a determination if an Australian carrier applies for variation of a determination under section 21. However, before conducting a review under section 10, the Commission must, by notice, invite submissions about the review of the determination as required under section 22. As indicated above, the Commission published a notice about the application and invited submissions but no submissions were received.

3.3 Qantas' application to vary the Determination is 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 has been assessed in accordance with section 25.

3.4 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.

3.5 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.

3.6 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.

3.7 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.

3.8 Paragraph 6.4 states that the Commission may apply the criteria in paragraph 5 where submissions are received, provided those criteria were considered when the original application for allocation of capacity was made, or in the circumstances set out in paragraph 3.6 of the Policy Statement.

3.9 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 notes that the ACCC, on 27 March 2013, authorised the alliance between Qantas and Emirates, subject to certain conditions (ACCC authorisation numbers A91332 and A91333). The authorisation covers the conduct of Qantas and those of its related bodies corporate in which Qantas holds more than 50% (such as Jetstar) and Emirates and its subsidiaries. In granting authorisation, the ACCC concluded that the Qantas-Emirates alliance was likely to result in public benefits through enhanced products and service offerings and improved operating efficiency. While the ACCC considered that the alliance was likely to result in detriments through its effect on competition in regions where Qantas and Emirates currently compete, in most regions the ACCC identified competitive constraints which meant that these detriments were likely to be minimal.

3.11 The one exception was the Trans-Tasman route in relation to which the ACCC was concerned that Qantas and Emirates would have the ability and incentive to reduce or limit growth in capacity in order to raise fares. To address this concern, the ACCC imposed a condition which requires the airlines to maintain at least their pre-alliance aggregate capacity on the four overlapping trans-Tasman routes (Sydney-Auckland, Melbourne-Auckland, Brisbane-Auckland and Sydney-Christchurch), subject to a review to consider whether increases in minimum required capacity are warranted.

3.12 In Decision [2013] IASC 223 issued on 25 July 2013, the Commission approved joint services between Qantas and Emirates on the route using the criteria under paragraph 4 of the Policy Statement. Similarly, in this instance, the Commission did not identify serious concerns that the proposed code share arrangement between Jetstar and Emirates on the Trans-Tasman route may not be of benefit to the public. Accordingly, the Commission has decided to apply only the criteria in paragraph 4 of the Policy Statement.

3.13 Under paragraph 4, 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.

3.14 The Commission notes that Jetstar 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 Jetstar's use of the capacity entitlements allocated under the Determination in accordance with the Australia-New Zealand air services arrangements.

3.15 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.

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

3.17 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 [2014] IASC 221

4.1 In accordance with section 25 of the Act, the Commission makes a decision varying Determination [2006] IASC 109 which allocates unlimited capacity and frequency to Qantas in accordance with the Australia-New Zealand air services arrangements by:

adding the following conditions to the Determination:

- “the capacity may be used by Jetstar to provide services jointly with Emirates in accordance with;
 - the code share agreement between Jetstar and Emirates dated 11 February 2014; or
 - any subsequent code share agreement between Jetstar and Emirates, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- in providing joint services, the airlines may not jointly price and market their services, or share or pool revenues/profits on the route, unless such practices are authorised under the *Competition and Consumer Act 2012* or otherwise authorised by the Australian Competition Tribunal, in the event of review by the Tribunal; and
- to the extent that the capacity is used to provide joint 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 varying Determination [2006] IASC 109 will take effect from the date of this instrument.

Dated: 12 March 2014



Marlene Tucker
Executive Director
Delegate of the IASC Commissioners