



Australian Government
International Air Services Commission

DECISION

Decision: [2016] IASC 219
Variation of: [2011] IASC 123
The Route: Thailand
The Applicant: Qantas Airways Limited
(Qantas) ABN 16 009 661 901
Public Register File: IASC/APP/201637

The Commission's delegate varies Determination [2011] IASC 123 to permit the use of the capacity for code share services between Qantas and Jet Airways on the Thailand route.

1 The application

1.1 On 6 September 2016, Qantas applied for a variation to Determination [2011] IASC 123 (as varied by Decisions [2013] IASC 206, [2014] IASC 211 and [2014] IASC 226) to enable Jet Airways to code share on flights operated by Qantas on the Thailand route. In its application, Qantas indicated that Jet Airways will code share on Qantas services between Bangkok and Sydney and Qantas will place its code on Jet Airways' services between Bangkok and Mumbai/ New Delhi,

1.2 On 7 September 2016, 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 for variation. 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 Australia – Thailand air services arrangements

2.1 The Australia – Thailand air services arrangements allow the designated airlines of Australia to enter into code share arrangements as the operating airline with any airline(s) of a third country on any number of frequencies per week within its entitlement.

2.2 The designated airlines of Australia may also enter into code share arrangements as the non-operating airline with any airline(s) of third countries, which has the appropriate authorisation from both Contracting Parties:

- with up to 40 weekly services in each direction; and
- in addition, on such number of frequencies that the designated airline is entitled to operate but which are not operated.

2.3 It is understood that any unused passenger capacity (not being code share or cargo capacity) may be converted by the designated airlines of Australia into additional third country code share capacity on the basis of one unused B747 equivalent service per week in each direction being equal to one third country code share frequency per week. In such cases, one code share service is counted against that designated airline under its own entitlement as one frequency of capacity.

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 application for variation. (For purposes of this decision, all references to the Commission include the delegate of the Commission).

3.2 Qantas's application 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 has 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 Paragraph 6.3 of the Minister's Policy Statement (No. 5) of 19 May 2004 (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.

3.6 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.

3.7 The Commission notes that Qantas is an established international carrier capable of obtaining the necessary approvals to operate on the route and of implementing its proposals.

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.

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 Jet Airways does not operate its own services between Australia and Thailand. The Commission considers it is unlikely for Qantas and Jet Airways to be competitors on this route. The Commission further notes that a number of major carriers offer services between Australia and Thailand either operating directly or under code share arrangements.

3.11 In light of this, the Commission has no serious concerns that the proposed code share between Qantas and Jet Airways would impact on competition on the Australia-Thailand route. For this reason, the Commission did not specifically consult the ACCC and did not consider it necessary to apply the additional criteria in paragraph 5.

3.12 In light of the above, the Commission has decided to permit the use of the capacity for code share services between Qantas and Jet Airways to be conducted in accordance with the Australia-Thailand air services arrangements.

3.13 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. As is its normal practice, the Commission will also include a condition which requires Qantas to comply with the Australian Consumer Law and to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

3.14 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 Decision varying Determination [2011] IASC 123 allocating capacity to Qantas on the Thailand route ([2016] IASC 219)

4.1 In accordance with section 25 of the Act, the delegate of the Commission, varies Determination [2011] IASC 123 which allocates 35.6 B747 equivalent units of capacity per week in each direction for passenger services and 26 third country code share frequencies per week in each direction to Qantas on the Thailand route, by:

adding the following conditions to the Determination:

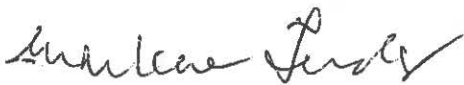
- the capacity may be used by Qantas for code share services with Jet Airways in accordance with the code share agreement between Qantas and Jet Airways dated 6 September 2006, as amended and the air services arrangements between Australia and Thailand;
- Qantas must apply to the Commission for approval of the use of the capacity if there are variations to the code share arrangement which would change the relevant commercial aspects of the code share arrangement from a free sale code share arrangement to a block space, or vice versa, or if Qantas proposes to add third country routes on which the airlines will code share where Australian capacity entitlements will be used for services on the route;
- under any code share agreement with Jet Airways, Qantas must price and sell its services on the route independently of Jet Airways and must not share or pool revenues on the

route with Jet Airways unless such practices are authorised under the *Competition and Consumer Act 2010*;

- 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 The variation takes effect from the date of this instrument and is valid for the duration of Determination [2011] IASC 123.

Dated: 22 September 2016



Marlene Tucker
Executive Director
Delegate of the IASC Commissioners