



Australian Government

International Air Services Commission

DECISION

Decision: [2018] IASC 212
Variation of: [2014] IASC 102
The Route: New Zealand
The Applicant: Qantas Airways Limited
(ACN 009 661 901) (Qantas)
Public Register File: IASC/APP/201820

The Commission varies Determination [2014] IASC 102 to permit the use of the capacity on the New Zealand route for code sharing between Qantas and China Airlines. The permission is valid for the duration of the determination commencing from the date of issue of this decision.

1 The application

1.1 On 4 April 2018, the International Air Services Commission (the Commission) received an application from Qantas seeking to vary Determination [2014] IASC 102, as varied (the Determination), to enable China Airlines to code share on flights operated by Qantas on the New Zealand route.

1.2 The Determination allocates to Qantas unlimited passenger and cargo capacity on the New Zealand route.

1.3 On 5 April 2018, 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 to enable China Airlines to code share on flights operated by Qantas. 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 The Commission must not allocate available capacity contrary to any restrictions on capacity contained in a bilateral arrangement(s) (paragraph 7(2)(aa) of the Act). Any variation made to an existing allocation of capacity should also not be contrary to any restrictions on capacity contained in a bilateral arrangement(s).

2.2 Under the Australia-New Zealand air services arrangements, there is unlimited capacity for Australian carriers to operate scheduled passenger and freight services between Australia and New Zealand, via and beyond third countries.

2.3 Additionally, a designated airline of Australia may enter into code-share and other cooperative marketing arrangements, whether as the operating or marketing airline, with any airline including airlines of third countries.

3 The Commission's assessment

3.1 Qantas' 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 of the Act.

3.2 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.

3.3 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.

3.4 Under section 11 of the Act, the Minister for Infrastructure and Transport, the Hon. Michael McCormack MP, made the *International Air Services Commission Policy Statement 2018* (the Policy Statement) on 28 March 2018. The Policy Statement sets out the criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity.

3.5 Section 18 of the Policy Statement sets out the criteria that the Commission is to apply in assessing whether the variation requested in a transfer application would not be of benefit to the public for the purpose of subsection 25(2) of the Act. It provides that the Commission is to have regard to the reasonable capability criterion, and may have regard to any of the additional criteria that it considers to be relevant. The Commission is also to have regard to the matters specified in paragraph 18(2)(b) of the Policy Statement to the extent that they are relevant to the variation under consideration.

3.6 'Reasonable capability criterion' is defined in section 8 of the Policy Statement to mean the extent to which Australian carriers are reasonably capable of obtaining the necessary approvals to operate on and service the route and of using the capacity allocated under the determination. The 'additional criteria' to which the Commission may have regard are set out in section 9 of the Policy Statement.

3.7 The Commission considered the application of the reasonable capability criterion to the circumstances of this application. The Commission notes that Qantas is an established international carrier, and therefore finds that it is reasonably capable of obtaining the necessary regulatory approvals and of using capacity on the route.

3.8 The Commission did not have regard to the additional criteria in section 9 of the

Policy Statement. The Commission notes that there is unlimited capacity on the New Zealand route and that it has received no adverse submissions opposing the variation sought in Qantas' transfer application. This means that the variation sought by Qantas has not been contested, and would not limit the ability of other carriers to apply for or utilise capacity on the route. In these circumstances, there is nothing before the Commission to indicate that its assessment of benefit to the public for the purpose of subsection 25(2) of the Act would be assisted by having regard to the additional criteria.

3.9 The Commission finds that the matters specified in paragraph 18(2)(b) of the Policy Statement are not relevant to the variation under consideration. There is nothing to suggest that Qantas' transfer application involves speculative activity, and Qantas has exercised the allocation in question for a period of more than six months.

3.10 Having considered the criteria set out in section 18 of the Policy Statement, the Commission is not satisfied that the allocation, as proposed to be varied in Qantas' application, would not be of benefit to the public. Therefore, in accordance with section 25 of the Act, the Commission must make a decision varying the determination in a way that gives effect to the variation requested in the transfer application.

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

3.12 The Commission has decided to add conditions permitting the use of the capacity for the provision of code share services between Qantas and China Airlines on the New Zealand route. As required by section 23 of the Policy Statement, the Commission has included a condition requiring the airlines 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 Decision varying Determination [2014] IASC 102 allocating capacity to Qantas on the New Zealand route ([2018] IASC 212)

4.1 In accordance with section 25 of the Act, the Commission varies Determination [2014] IASC 102 (as varied) which allocates to Qantas unlimited passenger and cargo capacity on the New Zealand route, by:

adding the following conditions to the Determination:

- The capacity may be used by Qantas to provide code share services with China Airlines in accordance with the code share agreement between Qantas and China Airlines of 16 March 2018 and the air services arrangements between Australia and New Zealand.
- Qantas must apply to the Commission for approval of any proposed variations to the code share agreement between Qantas and China Airlines which would change the relevant commercial aspects of the agreement.

- 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 Determination [2014] IASC 102.

Dated: 8 May 2018



IAN DOUGLAS
Chairperson



JAN HARRIS
Commissioner



KAREN GOSLING
Commissioner