

# DECISION

## VARIATION OF DETERMINATION IASC/DET/9716 ALLOCATING CAPACITY ON THE UNITED STATES ROUTE TO QANTAS AIRWAYS LIMITED (ACN 009 661 901)

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Date: 23 April 1998

Members:

James K Bain  
Chairman

Russell V Miller  
Member

Michael L Lawriwsky  
Member

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# **1. The application**

1.1. On 25 March 1998 Qantas Airways Limited ACN 009 661 901 (Qantas) applied to the Commission to vary Determination IASC/DET/9716 allocating capacity on the United States (South Pacific) routes to Qantas to enable Qantas to code share with United Parcel Service (UPS) on that route.

1.2. Under the proposal Qantas would code share between 40 and 50 tonnes of cargo capacity on one UPS operated freighter service per week, from the United States to Australia. The code share would operate for at least twelve months dating from 17 April 1998. A copy of the code share agreement was not included with the application but was provided to the Commission, together with a public register version, on 14 April 1998.

1.3. On 1 April 1998, the Commission published a notice inviting submissions from any interested persons about the Qantas application. No submissions were received.

1.4. All non-confidential material supplied by the applicant and submissions from other parties are filed on the Register of Public Documents. Confidential material supplied by the applicant is filed on the Commission's confidential register.

# **2. Current services to the United States**

2.1. Qantas operates three B747 all cargo services per week from the United States to Australia and has access to 24 tonnes of capacity on a weekly Federal Express flight under a code share. Qantas does not provide any cargo only services from Australia to the United States.

2.2. Qantas also has a cargo code share agreement with American Airlines which enables American Airlines to bring mail from the United States to Australia on Qantas operated flights.

2.3. Other carriers offering cargo only services between Australia and the United States are UPS (one B747 per week), American International Airlines (one B747 per week), Evergreen (three B747s per week), Federal Express (two B747s or MD11s per week) and Polar Air Cargo (five B747s per week).

# **3. Provisions of relevant Air Services Agreements**

3.1. The Air Transport Agreement of 1946 and the 1989 Capacity Agreement between the United States of America and Australia, as amended, provide for the operation of international air services between Australia and the United States on three routes, a South Pacific route, a North Pacific route, and a Guam and the Commonwealth of the Northern Mariana Islands route. The Agreements provide for the multiple designation of Australian carriers with the one restriction that no more than two

designated airlines of either country can operate on the North Pacific route at any one time.

3.2. The Agreements provide for cooperative marketing arrangements between the airlines of the two countries conditional upon the arrangements not including cabotage or revenue pooling.

3.3. The Agreements make no restrictions on cargo only flights between Australia and the United States.

## **4. Legislative framework**

4.1. The legislative framework for varying determinations made under the *International Air Services Commission Act 1992* (the Act) is set out in Attachment A.

4.2. Carriers to whom a determination allocates capacity may, at any time, apply to the Commission, under section 21 of the Act, for the determination to be varied. Under section 24(1), the Commission must make a decision either confirming the determination or varying the determination as requested in the application.

4.3. Under section 24(2), 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 unless the Commission is satisfied that the allocation, as so varied, would be of benefit to the public.

4.4. In exercising its powers, the Commission must take account of the objects of the Act as set out in section 3 and of the requirement of section 6(3)(b) that the Commission have regard to Australia's international obligations concerning the operation of international air services.

4.5. Section 6(3)(a) also requires the Commission to comply with policy statements made by the Minister under section 11. The current Policy Statement dated 23 April 1997 includes criteria to be applied by the Commission in assessing the benefit to the public of allocations of capacity and of variations to existing determinations.

## **5. Commission's assessment**

5.1. A carrier cannot use allocated capacity by providing services jointly with any other carrier without the prior approval of the Commission. For this purpose, the Commission considers that the provision of services jointly includes, *inter alia*, code-sharing, seat exchanges, block space arrangements and revenue pooling.

5.2. The Commission will normally determine whether or not an application to code share should be approved utilising the public benefit criteria contained in paragraph 5 of the Policy Statement. This is consistent with the objects set out in section 3 of the Act.

5.3. The Commission's task is to determine whether the Determination, as varied, would be of benefit to the public. As the Commission noted in IASC/DEC/9723, this means that the Commission should decide whether, following the proposed variation, there would at least be the same level of public benefits as before the variation. If not then the application should be rejected. The Commission does not see this as requiring a finding that the variations themselves result in increased benefits.

5.4. The code share proposal will result in additional freight capacity being offered in the market by Qantas from the United States to Australia and that there will be an additional gateway, Louisville, from the United States to Australia. On this basis the Commission concludes that the application should be approved.

## **6. Role of the ACCC**

6.1. The Policy Statement and its associated Explanatory Memorandum make clear that the ACCC retains primary responsibility for competition policy matters. Nothing in the Commission's decision should be taken as indicating either approval or disapproval by the ACCC. The Commission's decision is made without prejudicing, in any way, possible future consideration by the ACCC of the code share agreement or operations under it.

## **7. Other issues**

7.1. The Commission will specify in the relevant determination that Qantas may code share on UPS operated flights consistent with the code share agreement between Qantas and UPS dated 14 April 1998.

7.2. When approving joint services the Commission normally includes conditions in determinations approving code shares that the Australian carrier must price and sell its services on the route independently and that it must not share or pool revenues. These conditions already appear in IASC/DET/9716 and will apply to the arrangements between Qantas and UPS.

## **8. Decision (IASC/DEC/9810 – United States)**

8.1. The Commission approves the variation of Determination IASC/DET/9716, allocating capacity on the Australia – United States route to Qantas, to permit Qantas to code share on United Parcel Service operated freighter services on the route covered by that Determination in accordance with:

- the code share agreement between Qantas and United Parcel Service dated 14 April 1998, or, with the prior approval of the Commission, variations to that agreement or any new arrangement (whether or not it replaces the existing agreement); and
- conditions in the Determination relating to joint services.

8.2. This Decision is not to be construed as affecting any possible consideration of the code share agreement by the Australian Competition and Consumer Commission on matters which are the responsibility of that Commission.

Dated: 23 April 1998

James K Bain  
Chairman

Russell V Miller  
Member

Michael L Lawriwsky  
Member

## A. Legislative framework

1. Under section 21 of the *International Air Services Commission Act 1992* (the Act) an Australian carrier to whom a determination allocates capacity may at any time apply to the Commission for the determination to be varied.
2. Section 10(2) of the Act requires the Commission to conduct a review of a determination if the Australian carrier to whom the determination allocates capacity applies to the Commission under section 21 for the determination to be varied. Before conducting a review under section 10 the Commission must, by notice, invite submissions about the review of the determination (subsection 22(1)).
3. Section 24 of the Act relates to decisions on applications for variations. Under subsection 24(1), subject to this section, the Commission must, having conducted a review to decide an application for a determination to be varied, make a decision:
  - (a) confirming the determination; or
  - (b) varying the determination in a way that gives effect to the variation requested in the application.
4. Section 24(2) of the Act states the Commission must not make a decision varying the determination in a way that varies, or has effect of varying, an allocation of capacity unless the Commission is satisfied that the allocation, as so varied, would be of benefit to the public.
5. Section 24(3) of the Act states that the Commission must vary a determination as requested in an application if:
  - (a) an Australian carrier to which a determination allocates capacity applies in accordance with section 21 for the determination to be varied; and
  - (b) the only effect of the variation would be to reduce the capacity allocated to the carrier.
6. In exercising its powers, the Commission must take account of the objects of the Act as set out in section 3 and of the requirement of section 6(3)(b) that the Commission have regard to Australia's international obligations concerning the operation of international air services.
7. Section 6(3)(a) also requires the Commission to comply with policy statements made by the Minister under section 11.
8. The section 11 Policy Statement dated 23 April 1997 includes criteria to be applied by the Commission in assessing the benefit to the public of allocations of capacity.