

DECISION

DETERMINATION: IASC/DEC/9822
THE ROUTE: ITALY
THE APPLICANT: QANTAS AIRWAYS LIMITED
(ACN 009 661 901)
PUBLIC REGISTER FILES: IASC/APP/98026

1 The application

1.1 On 22 September 1998 Qantas Airways Limited (Qantas) applied to the Commission for variations to Determinations IASC/DET/9602 and IASC/DET/9624 allocating capacity on the Italy route to enable that capacity to be used to provide joint services with British Airways (BA) under a code share arrangement.

1.2 The proposed arrangement would enable BA to code share on the three services per week operated by Qantas between Australia and Italy. The application is not specific as to the number of seats to be code shared.

1.3 The code share would be operated under the code share agreement between BA and Qantas of 5 October 1997 previously supplied to the Commission and a summary of which is on the Public Register. That agreement, which has been the basis of previous code shares approved by the Commission between these airlines, provides for BA to code share on up to 50% of the seats on nominated Qantas operated services under a free sale arrangement.

1.4 The Commission published a notice inviting submissions from interested parties about the Qantas application. No submissions were received.

2 Provisions of relevant Air Services Agreements

2.1 The Australia - Italy Air Services Agreement of 10 May 1963 and the Memorandum of Understanding of 8 September 1998 permit code sharing, including third country carrier code shares on Australian carrier operated services.

3 Legislative framework

3.1 The legislative framework for varying determinations made under the *International Air Services Commission Act 1992* (the Act) provides that 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.

3.2 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.

3.3 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.

3.4 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.

4 Commission's assessment

4.1 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 has previously decided that the provision of services jointly includes, *inter alia*, code sharing, seat exchanges, block space arrangements and revenue pooling.

4.2 The Commission may 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.

4.3 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.

4.4 Qantas has submitted that the following benefits accrue from the proposed code share:

Tourism and consumer benefits: the proposal will provide United Kingdom and Australian originating passengers with additional service options for travel between Australia and the United Kingdom, including options for travel to and from regional United Kingdom cities by connections through a foreign international airport rather than at Heathrow;

Industry structure: the proposal will provide increased passenger traffic on the Qantas services, improving Qantas financial performance and the prospects of further Qantas flights on the route; and

Competition benefits: loads and revenues emanating from BA will contribute to Qantas sustaining and expanding its Italy services which is consistent with the Policy

Statement objective of developing strong Australian carriers capable of competing with other carriers.

4.5 In accordance with the Memorandum of Understanding between the Commission and the Australian Competition and Consumer Commission (ACCC), implemented to minimise duplication between the two bodies, the Commission sought the ACCC's view on the code share proposal.

4.6 The ACCC has stated that it is unlikely that the proposed code share operations would substantially lessen competition within the meaning of the *Trade Practices Act 1974* or cause any major consumer protection problems.

4.7 The ACCC notes that the code share operations with British Airways to Italy involve Australia- United Kingdom traffic transiting that country and do not involve fifth freedom traffic. The ACCC also acknowledges potential benefits including a wider choice of routes for consumers, an ability to accommodate increased United Kingdom traffic in peak periods and possible contributions to increased frequencies over time.

4.8 The Qantas proposal will result in up to 37% of the capacity currently available to Australian carriers on the Italy route being subject to code share.

4.9 After consideration of the claims made by Qantas and the submission made by the ACCC the Commission concludes that it should approve the code share, subject to certain conditions referred to below. The Commission is satisfied that variation of the Determinations as requested would not result in a diminution of public benefit.

5 Role of the ACCC

5.1 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.

6 Other issues

6.1 The Commission will specify in the relevant determination that Qantas may use the allocated capacity to operate joint services with BA in accordance with the code share agreement of 5 October 1997, a signed copy of which has been supplied to the Commission.

6.2 The Qantas application in relation to the Italy route has to be considered in the context of the Joint Services Agreement (JSA) between Qantas and BA which came into effect on 19 June 1995. That agreement, which is a broad ranging commercial agreement covering revenue sharing, joint fares, schedule co-ordination and integrated marketing, was authorised on public benefit grounds by the Trade Practices Commission (now the ACCC) on 12 May 1995. Although the JSA is a wide ranging agreement it does not include code share services.

6.3 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. To the extent that these activities are allowed on this route by an authorisation issued by the Trade Practices Commission (TPC) the Commission will not be including such conditions in the varied determination for the Italy route. However the Commission will be inserting conditions that such activities will not be allowed in the event that the ACCC withdraws any relevant TPC authorisation in relation to these matters.

7 Decision (IASC/DEC/9822)

7.1 The Commission approves the variation of Determinations IASC/DET/9602 and IASC/DET/9624, allocating capacity on the Australia - Italy route to Qantas, to permit Qantas to utilise the capacity in joint services with British Airways whereby British Airways would code share on Qantas operated services on the route in accordance with the code share agreement dated 5 October 1997, insofar as that agreement relates to the Australia – Italy route, subject to the following conditions:

- the approval to code share lapses if:
 - : an application for authorisation of the code share agreement under the *Trade Practices Act 1974* is made and finally rejected by the Australian Competition and Consumer Commission or the Australian Competition Tribunal, in the event of review by that Tribunal; or
 - : the 12 May 1995 authorisation of the Joint Services Agreement by the Australian Competition and Consumer Commission (ACCC) expires, or is revoked by the ACCC or the Australian Competition Tribunal, in the event of review by that Tribunal; or
 - : a court makes final orders that the code share agreement is contrary to the *Trade Practices Act 1974*;
- Qantas may only price and market its services, or share or pool revenues, on the route jointly with British Airways as long as such practices are authorised under the *Trade Practices Act 1974* or otherwise authorised by the Australian Competition and Consumer Commission or Australian Competition Tribunal, in the event of review by that Tribunal; and

- Qantas must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight.

Dated: 6 November 1998

Russell V Miller
Chairman

Michael L Lawriwsky
Member

Stephen Lonergan
Member