



Australian Government

International Air Services Commission

DECISION

Decision: [2014] IASC 201
Variation of: [2013] IASC 115
The Route: Indonesia
The Applicant: Qantas Airways Ltd
(ACN 009 661 901) (Qantas)
Public Register File: IASC/APP/201337

The Commission makes a decision consolidating all of Qantas' capacity on the Indonesia route into [2013] IASC 115 by varying that determination, and in separate decisions, by varying Qantas' other determinations to expire on the date when the variation to [2013] IASC 115 comes into effect.

1 The applications

1.1 On 4 November 2013, the Commission received applications from Qantas seeking variations to all but one of its determinations on the Indonesia route to effectively consolidate its capacity allocations on the route.

1.2 Qantas holds 10 determinations on the Indonesia route which allocate a total of:

- 14,468 seats of capacity per week for services between Australia and Indonesia; and
- 2,148 seats with 12 frequencies per week, seven of which may serve Denpasar, for services beyond Indonesia.

1.3 Additionally, Qantas holds Determination [2013] IASC 135 which allocates unlimited passenger capacity on the route between points in Australia, except Sydney, Melbourne, Brisbane and Perth, and points in Indonesia, valid for 10 years.

1.4 Qantas has requested a variation to Determination [2013] IASC 115 to increase the allocation for services between Australia and Indonesia to a total of 14,468 seats per week, and for services beyond Indonesia, to 2,148 seats and 12 frequencies, seven of which may serve Denpasar.

1.5 Qantas further seeks to vary the following determinations to amend their expiry dates to the date when the variation to Determination [2013] IASC 115 takes effect, should that variation be granted by the Commission:

- [2009] IASC 104
- [2009] IASC 108
- [2009] IASC 114

- [2010] IASC 117
- [2011] IASC 104
- [2011] IASC 109
- [2011] IASC 127
- [2013] IASC 105
- [2013] IASC 114.

1.6 The effect of these variations, if approved, would be to consolidate Qantas' 10 determinations of limited capacity on the Indonesia route into one determination.

1.7 The Commission published a notice on 4 November 2013, in accordance with section 22 of *International Air Services Commission Act 1992* (the Act), inviting submissions about the proposed variations. No submissions were received.

1.8 All material supplied by the applicant is available on the Commission's website (www.iasc.gov.au).

2 Requirements under the Act and the Policy Statement

2.1 An Australian carrier may, at any time, apply under section 21 of the Act 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.

2.2 Subsection 24(1) of the Act provides that the Commission must, having conducted a review to decide an application to vary a determination, make a decision: (a) confirming the determination; or (b) varying the determination in a way that gives effect to the variation requested. Subsection 24(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 unless the Commission is satisfied that the allocation, as so varied, would be of benefit to the public.

2.3 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.

2.4 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.

2.5 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 carrier is not reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its application.

2.6 The Commission notes that Qantas is seeking to consolidate 10 of its existing determinations with the desire to retain all capacity entitlements it has been allocated. Qantas is not seeking additional capacity.

2.7 The Commission further notes that Qantas 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 the use of the capacity entitlements which Qantas currently holds under multiple determinations in accordance with the Australia-Indonesia air services arrangements.

3 The Commission's consideration

3.1 In this instance, Qantas has applied to have one determination ([2013]IASC 115) varied to include all its allocated capacity (apart from unlimited capacity provided for in [2013] IASC 135) and to have its other determinations varied to expire on the date when the variation to [2013] IASC 115 comes into effect.

3.2 The Commission considers Qantas has effectively applied for a variation of each of the 10 determinations. In light of this, the Commission will make a decision for each of the 10 determinations which Qantas seeks to vary.

3.3 The Qantas applications are in accordance with Procedures for Applications for Consolidation of Determinations issued by the Commission in September 2013 which are, in turn, consistent with the Act and the Policy Statement.

Requirement to fully utilise capacity allocation

3.4 In its capacity utilisation report for the 2013 Northern Winter scheduling period, provided to the Commission on 12 November 2013, Qantas indicated that on the Indonesia route it utilises the following:

- between Australia and Indonesia (third/fourth freedom capacity), 10,563 seats per week out of an allocation of 14,468 seats per week from Sydney, Melbourne, Brisbane and Perth; and
- beyond Indonesia (fifth freedom capacity), 1,800 seats and seven beyond frequencies per week out of an allocation of 2,148 seats and 12 beyond frequencies per week.

3.5 This means that Qantas does not utilise 3,905 seats per week of third/fourth freedom capacity and 348 seats and five beyond frequencies per week of fifth freedom capacity.

3.6 The Commission has expressed concerns to Qantas about the need to return capacity that is not being utilised, particularly on a route where capacity is limited and highly contested, consistent with the 'use it or lose it' principle contained in the Minister's Policy Statement. The Register of Available Capacity indicates that there are

only 1,972 seats per week of capacity from Sydney, Melbourne, Brisbane and Perth available for immediate allocation.

3.7 In Determination [2013] IASC 134 (renewing an allocation of 720 seats in favour of Virgin Australia International Airlines Pty Ltd), the Commission noted that traffic growth on the Indonesia route had averaged 24% per annum since 2008, although this growth has slowed over the last two years. It further noted that traffic between Perth and Denpasar, which accounts for 41% of total traffic between Australia and Indonesia, had grown by an average of 31% per annum over the five years since 2008, the highest annual growth on any city pair^[1].

3.8 Qantas subsequently provided the Commission with commercial-in-confidence projections for its utilisation of capacity on the Indonesia route over the Northern Winter timetable period, which ends on 30 March 2014.

3.9 Taking into account the need to give Qantas flexibility to respond to growth on the Indonesia route, the Commission will consolidate Qantas' determinations on the route without requesting the airline to return its unused capacity. The Commission, however, reiterates its view expressed in Determination [2013] IASC 134 in favour of Virgin Australia that should the airline fail to fully utilise its capacity and not hand back the unutilised capacity, it could be in breach of a condition of its determinations. In such circumstances, the Commission reserves the right to conduct a review of the relevant determination(s) under section 10 of the Act.

Conditions of determinations

3.10 The Commission notes the 10 determinations which Qantas seeks to consolidate contain different conditions and, in some instances, conditions which differ slightly in wording but which are substantively the same. Furthermore, there are conditions which, upon closer examination, appear ambiguous.

3.11 The last determination which allocated new (as opposed to renewal) capacity to Qantas was Determination [2011] IASC 109. It allocated 7,350 seats per week, by far the largest single allocation to Qantas on the Indonesia route, and included a condition requiring Qantas to fully utilise the capacity from no later than 1 April 2014 or from such other date approved by the Commission. Other determinations (e.g. [2010] IASC II7; [2011] IASC 127; [2013] IASC 114; [2013] IASC 115) contain a condition requiring Qantas to fully utilise the capacity without indicating a specific date from which it should fully utilise the capacity.

3.12 As part of the consolidation process, the Commission has reviewed the various conditions contained in the 10 determinations to determine which conditions remain current and should be reflected in the determination which will continue to be in force after the other nine determinations are varied to bring forward their expiry dates.

3.13 Section 15(2)(c) of the Act states that a determination must include a condition that the capacity be fully utilised except so far as the determination provides otherwise

[1] Bureau of Infrastructure, Transport and Regional Economics

in relation to a specified period from the date when the determination comes into force. Determination [2013] IASC 115 (the determination to remain in force when the other determinations expire) contains a condition that the capacity must be fully utilised. The Commission decided to revise this condition to reflect the condition in Determination [2011] IASC 109 that the capacity must be fully utilised from no later than 1 April 2014 or from such other date approved by the Commission.

3.14 Determination [2013] IASC 115 also includes a condition that the capacity may be used by any wholly owned subsidiary of Qantas to provide joint services with Qantas. The Commission decided to clarify this condition to make it clear that the capacity may also be used by Qantas to provide joint services with any wholly owned subsidiary.

3.15 Furthermore, the following condition appears in at least eight of the determinations to be revised: “Qantas is not permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person without the approval of the Commission”. This condition will be retained in Determination [2013] IASC 115 but slightly modified, consistent with Determination [2010] IASC 117, to read as: “neither Qantas nor another Australian carrier which is a wholly-owned subsidiary of Qantas is permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person without the approval of the Commission”.

3.16 All other conditions contained in Determination [2013] IASC 115 will remain.

4 Decision varying Determination [2013] IASC 115 allocating capacity on the Indonesia route to Qantas ([2014] IASC 201)

4.1 In accordance with section 24 of the Act, the Commission makes a decision varying Determination [2013] IASC 115 to increase capacity allocated to Qantas on the Indonesia route as follows:

- between Australia and Indonesia, to 14,468 seats per week; and
- beyond Indonesia, to 2,148 seats per week with 12 frequencies per week, seven of which may serve Denpasar.

4.2 The Commission also makes a decision varying Determination [2013] IASC 115 by:

replacing the existing conditions to the Determination with the following conditions:

- Qantas is required to fully utilise the capacity from no later than 1 April 2014 or from such other date approved by the Commission;
- only Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas is permitted to utilise the capacity;

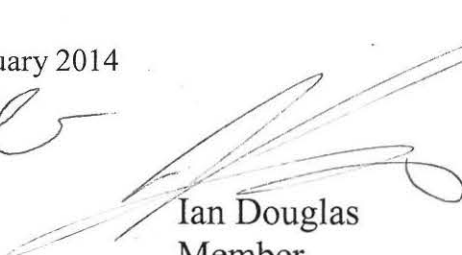
- neither Qantas nor another Australian carrier which is a wholly-owned subsidiary of Qantas is permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person without the prior approval of the Commission;
- the capacity may be used by Qantas to provide joint services with any wholly-owned subsidiary and by any wholly owned subsidiary of Qantas to provide joint services with Qantas;
- where the capacity is used to provide joint services on the route, nothing in this determination exempts Qantas and any wholly owned subsidiary from complying with the Australian Consumer Law. The airlines are required to take all reasonable steps to ensure that passengers are informed, at the time of booking, of the carrier actually operating the flight; and
- changes in relation to the ownership and control of Qantas are permitted except to the extent that any change:
 - results in the designation of the airline as an Australian carrier under the Australia – Indonesia air services arrangements being withdrawn; or
 - has the effect that another Australian carrier, or a person (or group of persons) having substantial ownership or effective control of another Australian carrier, would take substantial ownership of Qantas or be in a position to exercise effective control of Qantas, without the prior consent of the Commission.

4.3 This decision varying Determination [2013] IASC 115 will take effect from the date of this instrument.

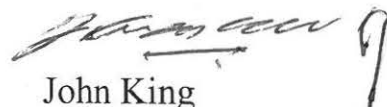
Dated: 3 February 2014



Jill Walker
Chairwoman



Ian Douglas
Member



John King
Member