



Australian Government
International Air Services Commission

RENEWAL DETERMINATION

Determination: [2017] IASC 110
Renewal of: [2008] IASC 103
The Route: United States of America
The Applicant: Qantas Airways Ltd (Qantas)
ABN 16 009 661 901
Public Register File: IASC/APP/201713

The Commission's delegate makes a fresh determination allocating to Qantas unlimited passenger and cargo capacity to operate scheduled international air services between Australia and the United States of America, valid for 10 years from 2 April 2018.

1 The application for renewal

1.1 On 2 April 2008, the Commission's delegate issued, in favour of Qantas, Determination [2008] IASC 103 (the Determination) allocating unlimited passenger and cargo capacity on the United States of America (USA) route. The Determination is valid for 10 years.

1.2 Under section 17 of the *International Air Services Commission Act 1992* (the Act), the Commission must start its consideration of the renewal of a determination at least 12 months before the expiry of the Determination. The Determination expires on 1 April 2018. In view of this, the Commission sent, on 5 April 2017, a letter to Qantas inviting it to apply for renewal if it wished to renew the Determination. Qantas subsequently applied on 25 May 2017 for a renewal of the Determination for a further 10 years and sought permission to permit the following:

- the capacity may be used by Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas;
- the capacity may be used by Qantas to provide joint services with any wholly-owned subsidiary and by any wholly-owned subsidiary of the Qantas Group to provide joint services with Qantas; and
- the capacity may be used by Qantas to provide services jointly with American Airlines.

1.3 As required by sections 12 and 17 of the Act, the Commission published a notice on 25 May 2017 inviting other applications for capacity. No applications were received.

1.4 All non-confidential material supplied by Qantas is available on the Commission's website (www.iasc.gov.au).

2 Relevant provisions of the air services arrangements

2.1 Under the Australia-USA air services arrangements, Australian designated airlines may operate passenger and cargo services without limitation on capacity and frequencies in each direction between Australia and the USA.

2.2 Australian airlines may enter into cooperative marketing arrangements such as blocked-space, code sharing or leasing arrangements with an airline (or airlines) of either party, a third country, and a surface (land or maritime) transportation provider of any country.

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 Qantas application. (For purposes of this determination, references to the Commission include the delegate of the Commission.)

3.2 In considering an application for renewal of a determination under section 8 of the Act, the Commission must make the same allocation of capacity as the original determination unless the Commission is satisfied that the allocation is no longer of benefit to the public. In assessing the benefit to the public of an allocation of capacity, the Commission must apply the criteria set out for that purpose in the policy statement made by the Minister under section 11 of the Act.

3.3 Pursuant to section 11 of the Act, then Minister for Transport and Regional Services, the Hon. John Anderson MP issued Policy Statement No. 5 (hereinafter referred to as the Minister's Policy Statement) dated 19 May 2004. The Minister's 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.

3.4 Under paragraph 6.2 of the Minister's Policy Statement, in circumstances where there is only one applicant for allocation of capacity on a route, only the criteria in paragraph 4 are applicable. Paragraph 4 provides that 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 are not reasonably capable of implementing their applications.

3.5 The Commission's delegate notes that:

- there are no other applicants seeking capacity on the route; and
- Qantas and its wholly-owned subsidiary, Jetstar, are established international carriers and are therefore reasonably capable of obtaining the necessary approvals to operate on the route and of implementing their proposed services.

3.6 Under paragraph 8.1 of the Minister's Policy Statement, there is a presumption in favour of the carrier seeking the renewal which can only be rebutted by applying the following criteria, where the start-up phase has concluded:

- whether the carrier seeking renewal has failed to service the route effectively; and
- whether the use of the capacity in whole or in part by another Australian carrier that has applied for the capacity would better serve the public having regard to the criteria set out in paragraphs 4 and 5.

3.7 The Commission's delegate notes that there are no other applicants seeking capacity on the route and there is no information to suggest that Qantas has failed to service the route effectively. For this reason, the delegate is satisfied that renewing the capacity allocation would be of benefit to the public.

3.8 Qantas has also requested to allow the capacity to be used by either Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas, including for joint services, and for any wholly-owned subsidiary of the Qantas Group to provide joint services with Qantas. Qantas also requested permission for the use of the capacity in joint services with American Airlines.

3.9 Under paragraph 3.6 of the Minister's Policy Statement, 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 does not have serious concerns about the proposed use of the capacity in joint services with a wholly-owned subsidiary of Qantas and with American Airlines. The Commission's delegate notes that, on 25 February 2016, the ACCC gave authorisation for five years to the alliance between Qantas and American Airlines (ACCC authorisation numbers A91502 and A91503). The authorisation involves the coordination of operations by Qantas and American Airlines on trans-Pacific routes pursuant to a Joint Business Agreement and associated agreements. The alliance enables the airlines to operate on a metal neutral basis, meaning that the airlines would be essentially indifferent as to which carrier operates a particular flight. In authorising the alliance, the ACCC considered that the conduct is unlikely to result in any

significant detriment in any relevant area of competition. The ACCC further considered that American Airlines would be unlikely to operate trans-Pacific services in its own right without the alliance.¹

3.11 In view of the above, the Commission's delegate did not specifically consult the ACCC and did not see the need to apply the additional criteria in paragraph 5 of the Minister's Policy Statement. The Commission's delegate decided to include the conditions as requested by Qantas.

3.12 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 normal practice, the Commission's delegate will also include a condition which requires the airlines utilising the capacity to comply with the Australian Consumer Law.

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 Determination allocating unlimited capacity on the United States of America route to Qantas ([2017] IASC 110)

4.1 The Commission's delegate makes, under section 8 of the Act, a determination in favour of Qantas, allocating unlimited capacity and frequency on the United States of America route in accordance with the Australia – United States of America air services arrangements.

4.2 The determination is for ten years from 2 April 2018.

4.3 The determination is subject to the following conditions, which apply to Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas:

- the capacity is required to be utilised from no later than the date this determination comes into effect 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 unless approved by the Commission;

¹ <http://registers.accc.gov.au/content/index.phtml/itemId/1187050/fromItemId/401858>

- subject to the preceding condition, the capacity may be used by Qantas to provide joint services with any wholly-owned subsidiary and by any wholly-owned subsidiary of the Qantas Group to provide joint services with Qantas;
- additionally, the capacity may be used by Qantas to provide services jointly with American Airlines in accordance with the code share agreement between Qantas and American Airlines dated 23 September 2004, as amended;
- Qantas must apply to the Commission for approval of any proposed variations to the code share arrangement with American Airlines which would change the relevant commercial aspects of the respective code share arrangements 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 will be used for services on that route;
- where the capacity is used to provide joint services on the route, 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. Nothing in this determination exempts the airlines from complying with the Australian Consumer Law; and
- changes in relation to the ownership and control of Qantas or a wholly-owned subsidiary permitted to utilise the capacity are permitted except to the extent that any change:
 - results in the designation of the relevant airline as an Australian carrier under the Australia–USA 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 Qantas' wholly-owned subsidiary permitted to utilise the capacity, or be in a position to exercise effective control of the airline, without the prior consent of the Commission.

Dated: 9 June 2017



Marlene Tucker
 Executive Director
 Delegate of the IASC Commissioners