



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2023] IASC 116
Renewal of:	[2019] IASC 103
The Route:	Korea
The Applicant:	Qantas Airways Limited (Qantas) (ABN 16 009 661 901)
Public Register File:	IASC/APP/202321

The Commission makes a fresh determination allocating to Qantas Airways Limited 400 seats of passenger capacity per week in each direction on the Korea route, subject to certain conditions. The capacity may be used by Qantas to provide code share services with Cathay Pacific Airways Limited. The determination is valid for five years from 6 February 2024.

1 The application for renewal

1.1 On 5 February 2019, the International Air Services Commission (the Commission) issued Determination [2019] IASC 103 (the Determination) allocating, in favour of Qantas, 400 seats of capacity per week on the Australia-Korea route.

1.2 The Determination is subject to certain conditions including permission for the capacity to be utilised by Qantas to provide code share services with Cathay Pacific Airways Limited (Cathay Pacific) and Hong Kong Dragon Airlines Limited (Cathay Dragon), between Hong Kong and Korea.

1.3 Section 17 of the *International Air Services Commission Act 1992* (the Act) requires the Commission to start its consideration of the renewal of a determination at least 12 months before the expiry of the original determination. The Determination is due to expire on 5 February 2024. In view of this, the Commission sent, on 2 February 2023, a letter to Qantas inviting it to apply for renewal if it wished to renew the Determination.

1.4 On 21 March 2023, Qantas applied to the Commission for a renewal of the Determination for a further five-year period and requested that all existing conditions be retained, except for the condition permitting Qantas to use the capacity to offer code share services with Hong Kong Dragon Airlines Limited (Cathay Dragon).

1.5 In accordance with sections 12 and 17 of the Act, the Commission published, on 22 March 2023, a notice on its website and subsequently sent a notification by email to stakeholders inviting other applications for capacity on the route. No other applications were received.

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

2 Air services arrangements

2.1 Paragraph 7(2)(aa) of the Act provides that the Commission must not allocate available capacity contrary to any restrictions on capacity contained in a bilateral arrangement(s).

2.2 According to the Register of Available Capacity, there are 5,907 seats per week of capacity in each direction available for allocation to Australian carriers to operate services to and from Sydney, Melbourne, Brisbane and Perth.

2.3 Under the Australia-Korea air services arrangements, Australian designated airlines may, subject to certain conditions, enter into cooperative marketing arrangements such as blocked space, code sharing or leasing arrangements, whether as the operating airline(s) or the marketing airline(s), in respect of passenger, combination and/or cargo air services with airline(s) of Australia, (an) airline(s) of Korea and (an) airline(s) of any third country or countries.

2.4 The capacity offered by a designated airline, as the marketing airline, on services operated by other airlines, including airlines of a third country or countries, shall be counted against any capacity entitlements of the contracting party designating the marketing airline. This means that the code share seats offered by an Australian designated airline, as the marketing carrier, are counted against Australian capacity entitlements.

3 Commission's consideration

3.1 Section 8 of the Act provides that the Commission may, at any time while a determination is in force, make a fresh determination allocating the capacity to which the original determination relates. Subsection 8(2) provides in part that the fresh determination 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.

3.2 Pursuant to section 11 of the Act, the Minister issued the International Air Services Commission Policy Statement 2018 (the Policy Statement), which came into effect on 28 March 2018.

3.3 Section 14 of the Policy Statement applies where the Commission is proposing to make a fresh determination under section 8 of the Act, and is considering whether the allocation of capacity in the original determination is no longer of benefit to the public for the purpose of section 8(2)(a)(i) of the Act. Section 14(2) of the Policy Statement provides that, without limiting the matters to which the Commission may have regard, an allocation is generally no longer of benefit to the public if:

- the carrier has failed to service the route effectively (s 14(2)(a)); and
- there are other applications for some or all of the capacity (s 14(2)(b)); and
- the Commission is satisfied that a different allocation of capacity would be of greater benefit to the public, having regard to the criteria set out in sections 8 and 9 of the Policy Statement (s 14(2)(c)).

3.4 The Commission notes that, under subsection 14(2) of the Policy Statement, an allocation will generally no longer be of benefit to the public where all of the above conditions are satisfied.

3.5 There are no other applications for some or all of the capacity to which the determination in question relates, and therefore the condition in section 14(2)(b) of the Policy Statement is not satisfied. The Commission therefore finds that the proposed allocation does not fall within the class of allocations that are generally no longer of benefit to the public contemplated by subsection 14(2) of the Policy Statement.

3.6 However, subsection 14(2) of the Policy Statement operates ‘without limiting the matters to which the Commission may have regard’. In view of the circumstances pertaining to the COVID-19 pandemic, the Commission has proceeded to consider whether the allocation is no longer of benefit to the public in all the circumstances.

3.7 On 11 March 2020, the World Health Organization declared the outbreak of COVID-19 a pandemic. In response, the Australian Government introduced a range of health, financial and other measures to prevent and minimise the transmission of COVID-19.

3.8 In this context, on 24 March 2020 the Prime Minister announced that the Australian Government was introducing a ‘do not travel’ ban on Australians travelling overseas under the *Biosecurity Act 2015*. On 27 October 2021, the Government announced it would lift the international travel ban for certain categories of travellers from 1 November 2021, subject to certain conditions. On 7 February 2022, the Prime Minister announced that Australian international borders would re-open from 21 February 2022.

3.9 With the imposition of travel restrictions in March 2020, the Qantas Group suspended the scheduled international flights of both Qantas and Jetstar in 2020-21.

3.10 In assessing the current Qantas application for the renewal of the Determination, the Commission considered whether Qantas has failed to service the route effectively.

3.11 Until travel restrictions linked to the COVID-19 pandemic were imposed by the Australian Government in March 2020, Qantas offered code share services on flights operated by Cathay Pacific on the Korea route. Prior to March 2020, there was no information to suggest that Qantas has failed to service the Australia-Korea route effectively.

3.12 The Commission considers that the temporary suspension in 2020-21 of Qantas’ code share services between Australia and Korea was directly in response to travel restrictions associate with the COVID-19 pandemic. The Commission therefore finds that the temporary suspension of Qantas’ services in these circumstances does not mean that it has failed to service the route effectively. Moreover, the Commission notes that since January 2023, Qantas has resumed providing code share services on flights operated by Cathay Pacific on the Korea route.

3.13 The Commission has also considered the ‘reasonable capability criterion’ in section 8 of the Policy Statement, i.e. the extent to which all Australian carriers that are, or would be, permitted to use the capacity allocated under a determination are reasonably capable of: (a) obtaining any licences, permits or other approvals required to operate on

and service the route to which the determination relates; and (b) using the capacity allocated under the determination.

3.14 The Commission notes that Qantas is an established carrier that currently operates services between Australia and Korea. The Commission therefore finds that Qantas is reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated on the Australia-Korea route.

3.15 There is no other information before the Commission that it considers to be relevant or material to its assessment of Qantas' application. Based on its findings above, the Commission is not satisfied that the allocation of capacity in the original determination is no longer of benefit to the public for the purposes of section 8(2)(a)(i) of the Act. Therefore, the Commission is required to make the same allocation of capacity as the original determination (see section 8(2)(a) of the Act).

3.16 The Commission will continue to monitor the utilisation of capacity by Qantas on this route.

3.17 As part of its application Qantas also requested to retain all existing conditions except for the condition permitting the use of the capacity to offer code share services with Cathay Dragon. Under section 19 of the Act, the Commission "must include the same terms and conditions as the original determination to which it relates" (s 19(1)(c)), but "may make such changes (if any) to the terms and conditions included in the original determination (including adding or deleting terms and conditions) as it is satisfied are warranted because of changes in circumstances since the original determination was made" (s 19(3)).

3.18 The Commission has decided to continue permitting the use of the capacity for code sharing with the airlines listed in item 4 below subject to conditions as stated.

3.19 Nothing in this decision should be taken as indicating either approval or disapproval by the Australian Competition and Consumer Commission (ACCC). This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

4 Determination allocating capacity on the Korea route to Qantas Airways Limited ([2023] IASC 116)

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Qantas Airways Limited, allocating 400 seats of capacity per week in each direction on the Korea route in accordance with the Australia – Korea air services arrangements.

4.2 The determination is valid for five years from 6 February 2024.

4.3 The determination is subject to the following conditions:

- (a) Qantas Airways Limited is required to fully utilise the capacity from no later than the date when the determination comes into effect, or such other date approved by the Commission.

- (b) The capacity may be utilised by Qantas Airways Limited.
- (c) Qantas Airways Limited is permitted to utilise the capacity to provide code share services on flights operated by Cathay Pacific Airways Limited between Hong Kong and Korea, in accordance with the code share agreement between the airlines made on 29 August 2018, as amended.
- (d) Qantas Airways Limited must apply to the Commission for approval of the use of the capacity if there are variations to the code share arrangement between Qantas Airways Limited and Cathay Pacific Airways Limited which would change the relevant commercial aspects of the code share arrangement from a free sale code share arrangement to a block space, or vice versa, or if Qantas Airways Limited proposes to add third country routes on which the airlines will code share where Australian capacity will be used for services on that route.
- (e) To the extent that the capacity is used to provide code share or joint services on the route, the airlines must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of the booking. Nothing in this determination exempts the airlines from complying with the Australian Consumer Law.
- (f) Changes in relation to the ownership and control of Qantas Airways Limited are permitted except to the extent that any change:
- results in the designation of the airline as an Australian carrier under the Australia — Korea 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 Airways Limited or be in a position to exercise effective control of Qantas Airways Limited, without the prior consent of the Commission.

Dated: 1 May 2023



Genevieve Butler
Chairperson



Jane McKeon
Commissioner