



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2019] IASC 129
Renewal of:	[2015] IASC 115
The Route:	Hong Kong
The Applicant:	Qantas Airways Limited (Qantas) ABN 16 009 661 901
Public Register:	IASC/APP/201917

The Commission makes a fresh determination allocating to Qantas 28 frequencies of capacity per week in each direction between Australia and Hong Kong. The capacity may be utilised by Qantas or Jetstar Airways Pty Limited. Qantas is permitted to utilise the capacity to provide code share services with the following third country airlines: British Airways, Finnair, Air France, LATAM Airlines and El Al Airlines. The determination is valid for five years from 23 November 2020.

1 The application

1.1 On 23 November 2015, the Delegate of the International Air Services Commission (the Commission) issued in favour of Qantas Airways Limited (Qantas) Determination [2015] IASC 115 (the Determination) allocating 28 frequencies of capacity per week in each direction on the Hong Kong route. Qantas and its wholly-owned subsidiary (Jetstar Airways Pty Limited) are permitted to utilise the capacity. The Determination also permits the capacity to be used by Qantas for code sharing with any Qantas' wholly-owned subsidiary and with the following third country airlines: British Airways, Finnair and Jet Airways¹. The Determination was subsequently varied to permit Qantas to utilise the capacity for code sharing with El Al Airlines²; LATAM Airlines³; and Air France⁴.

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 22 November 2020. In view of this, the Commission sent, on 06 November 2019, a letter to Qantas inviting it to apply for renewal if it wished to renew the Determination. Qantas subsequently applied on 15 November 2019 for a renewal of the Determination for a further period of five years from 23 November 2020 and requested to retain the following

¹ Jet Airways has ceased operating services in April 2019.

² Decision [2017] IASC 213

³ Decision [2017] IASC 218

⁴ Decision [2018] IASC 214

existing conditions:

- permit the capacity to be used by Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas, which in this case is Jetstar Airways Pty Limited (Jetstar);
- permit the capacity to 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 under code share agreements with British Airways, Finnair, Air France, LATAM Airlines and El Al Airlines.

1.3 As required by sections 12 and 17 of the Act, the Commission published a notice on 15 November 2019 inviting other applications for capacity. No applications were received. All non-confidential material supplied by the applicant is available on the Commission's website (www.iasc.gov.au).

2 Relevant provisions of the air services arrangements

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

2.2 Under the Australia – Hong Kong air services arrangements, there are 70 frequencies per week in each direction for passenger services which may be allocated to Australian designated carriers to operate passenger air services to and from Sydney, Brisbane, Melbourne and Perth. There is unlimited capacity to and from all other points in Australia. There are 2 frequencies per week for the operation of all-cargo services. The passenger capacity and all-cargo capacity entitlements may be used interchangeably.

2.3 Qantas has been allocated 28 frequencies of passenger capacity per week in each direction and one frequency to operate all-cargo services; the 28 frequencies of passenger capacity are the subject of this application for renewal. Virgin Australia has an allocation of 14 frequencies per week in each direction. 28 frequencies of passenger capacity and one frequency per week in each direction for dedicated freight service remain unallocated and are available for allocation to Australian carriers.

2.4 Furthermore, designated airlines of Australia may at their discretion freely convert and revert capacity for the operation of passenger services and all-cargo services between Hong Kong and Sydney, Melbourne, Brisbane and Perth on the basis of one passenger frequency for one all –cargo frequency or vice versa.

2.5 Under the Australia–Hong Kong air services arrangements, a designated airline of Australia may, subject to conditions, enter into code share arrangements, whether as the operating or marketing airline, in respect of passenger or freighter services with another designated airline(s) of Australia, an airline(s) of Hong Kong and an airline(s) of a third country or countries. Capacity used under code share arrangements by the marketing carrier is counted against the capacity entitlements of the operating carrier.

3 Commission's consideration

3.1 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.

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

3.3 Under section 14 of the Policy Statement, there is a presumption in favour of making the same allocation of capacity to the carrier seeking the renewal. However, if the Commission is considering whether the capacity allocation is no longer of benefit to the public, the Commission may have regard to the following matters:

- (a) the carrier seeking renewal has failed to service the route effectively; and
- (b) there are other applications for some or all of the capacity; and
- (c) the Commission, having regard to the reasonable capability criterion and any of the additional criteria that it considers relevant, is satisfied that a different allocation of the capacity would be of greater benefit to the public.

3.4 Under the reasonable capability criterion in section 8 of the Policy Statement, the Commission is to assess the extent to which all Australian carriers that are, or would be, permitted to use the capacity are reasonably capable of (a) obtaining any licences, permits or other approvals required to operate on and service the route to which the determination relate; and (b) using the capacity allocated under the determination. The Commission notes that Qantas and its wholly-owned subsidiary, Jetstar, are established international carriers and are reasonably capable of obtaining the necessary approvals to use the capacity to operate on the route and of using the capacity to be allocated.

3.5 The Commission further 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. The Commission, having considered the foregoing circumstances, did not consider it necessary to assess the application against the additional criteria in section 9 of the Policy Statement.

3.6 For the above reasons, the Commission is satisfied that renewing the capacity allocation for the use of either Qantas or its wholly-owned subsidiary Jetstar would be of benefit to the public.

3.7 In relation to the request to continue the permission for the capacity to be utilised for the provision of code share services with British Airways, Finnair, Air France, LATAM Airlines and El Al Airlines, the Commission notes that these third country airlines do not

operate services between Australia and Hong Kong and that Qantas and these third country airlines are not competitors on the Australia-Hong Kong route. The Commission therefore considers that the proposed code share arrangements have minimal impact on competition on the Australia-Hong Kong route. In view of this, the Commission has decided to approve the code share arrangements subject to the condition that the airlines concerned must take reasonable steps to ensure that passengers are informed at the time of booking of the carrier actually operating the flight.

3.8 Subsection 15(1) of the Act allows a determination to include such terms and conditions as the Commission thinks fit. Subsection 19(3) of the Act provides that, in including terms and conditions in the fresh determination, the Commission may make such changes to the terms and conditions included in the original determination sought to be renewed, including adding or deleting terms and conditions, where warranted by changes in circumstances since the original determination was made. The wording of the fresh determination below reflects the view of the Commission that determinations which renew original determinations should contain updated terms and conditions consistent with the legislative requirements and current air services arrangements.

3.9 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 for renewal of [2015] IASC 115 allocating capacity on the Hong Kong route to Qantas ([2019] IASC 129)

4.1 Pursuant to section 8 of the Act, the Commission allocates to Qantas 28 frequencies of passenger capacity per week in each direction on the Australia-Hong Kong route, in accordance with the terms of the Australia – Hong Kong air services arrangements.

4.2 The determination is valid for five years from 23 November 2020.

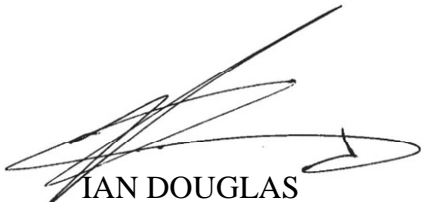
4.3 The determination is subject to the following conditions:

- (a) Qantas is required to fully utilise the capacity by no later than 31 October 2020 or such other date as may be approved by the Commission.
- (b) The capacity may be utilised by:
 - Qantas; or
 - Jetstar Airways Pty Limited, as long as it remains a wholly-owned subsidiary of Qantas; or
 - such other wholly-owned subsidiary of Qantas that the Commission approves in writing, as long as it remains a wholly-owned subsidiary of Qantas.

- (c) 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.
- (d) 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.
- (e) The capacity may be used by Qantas to provide services under code share arrangements with British Airways in accordance with the code share agreement between Qantas and British Airways dated 19 November 2013, as amended.
- (f) The capacity may be used by Qantas to provide services under code share arrangements with Finnair in accordance with the code share agreement between Qantas and Finnair dated 23 December 2010, as amended.
- (g) The capacity may be used by Qantas to provide code share services with El Al in accordance with the code share agreement between Qantas and El Al dated 5 June 2017, as amended.
- (h) The capacity may be used by Qantas to provide code share services with LATAM in accordance with the code share agreement between Qantas and LATAM which came into effect on 1 August 2014, as amended.
- (i) The capacity may be used by Qantas to provide code share services with Air France in accordance with the code share agreement between Qantas and Air France dated 23 May 2018 and the air services arrangements between Australia and Hong Kong.
- (j) Qantas must apply to the Commission for approval of any proposed variations to the code share agreement between Qantas and the third country airlines which would change the relevant commercial aspects of the agreement 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 entitlements will be used for services on that route.
- (k) To the extent that the capacity is used to provide joint or code share services on the route, the airlines must 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.

- (l) Changes in relation to the ownership and control of Qantas and/or its wholly-owned subsidiary are permitted except to the extent that any change:
- results in the designation of the airline as an Australian carrier under the Australia – Hong Kong 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 and/or its wholly-owned subsidiary or be in a position to exercise effective control of Qantas and/or its wholly-owned subsidiary, without the prior consent of the Commission.

Dated: 05 December 2019



IAN DOUGLAS
Chairperson



KAREN GOSLING
Commissioner