



## Australian Government

### International Air Services Commission

#### RENEWAL DETERMINATION

|                              |   |
|------------------------------|---|
| <b>Determination:</b>        | <b>[2020] IASC 104</b>  |
| <b>Renewal of:</b>           | <b>[2016] IASC 104</b>  |
| <b>The Route:</b>            | <b>France Route 3 (New Caledonia)</b>                           |
| <b>The Applicant:</b>        | <b>Qantas Airways Limited<br/>(ABN 16 009 661 901) (Qantas)</b> |
| <b>Public Register File:</b> | <b>IASC/APP/202018</b>  |

**The Commission makes a fresh determination allocating to Qantas 788 seats per week in each direction of passenger capacity on the New Caledonia route. The capacity may be used by either Qantas or its wholly-owned subsidiary, Jetstar Airways Pty Limited and for Qantas to provide code share services with Aircalin. The determination is valid for five years from 9 May 2021.**

#### 1 The application for renewal

1.1 On 9 May 2016, the International Air Services Commission (the Commission) issued Determination [2016] IASC 104 (the original determination) allocating, in favour of Qantas, 788 seats of passenger capacity per week in each direction on the New Caledonia route. The original determination sets out certain conditions, including conditions permitting:

- the use of the capacity by either Qantas or its wholly-owned subsidiary, Jetstar Airways Pty Limited (Jetstar);
- the provision of joint services between Qantas and any wholly-owned subsidiary of the Qantas Group; and
- the use of the capacity for the provision of code share services between Qantas and Aircalin subject to passengers being informed of the carrier actually operating the flight.

1.2 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 original determination is due to expire on 8 May 2021. In view of this, the Commission sent, on

01 May 2020, a letter to Qantas inviting it to apply for renewal if it wished to renew the determination.

1.3 On 18 May 2020, Qantas applied to the Commission for a renewal of the determination for a further five-year period from 9 May 2021. Qantas also requested retaining all existing conditions.

1.4 In accordance with sections 12 and 17 of the Act, the Commission published, on 18 May 2020, Qantas' application on the Commission's website inviting other applications for capacity on the New Caledonia route. No other applications were received.

1.5 All non-confidential material supplied by the applicant is available on the Commission's website ([www.iasc.gov.au](http://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). Any variation made to an existing allocation of capacity should also not be contrary to any restrictions on capacity contained in a bilateral arrangement(s).

2.2 In accordance with the Australia-France air services agreement signed on 13 April 1965, as amended, designated carriers of Australia may operate passenger services up to 2,400 seats per week in each direction on the New Caledonia route. Qantas has been allocated 1,044 seats per week in each direction; 1,356 seats per week of capacity in each direction remain available for allocation.

2.3 Additionally, under the Australia-New Caledonia air services arrangements, designated airlines of Australia may enter into code share, blocked space or other cooperative marketing arrangements, as either the operating or marketing airline, with any other airline(s), with the exception of airlines of third countries, including airlines of the same party. The airlines participating in such arrangements must hold the appropriate authority to conduct international air transport on the routes or segments concerned.

## **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 section 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. 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 section 14(2) of the Policy Statement.

3.5 However, section 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.

3.6 On 11 March 2020, the World Health Organisation declared the outbreak of COVID-19 (coronavirus) a pandemic. In response the Australian Government introduced a range of health, financial and other measures to minimise the number of people becoming infected or sick with COVID-19.

3.7 In this context, on 24 March 2020 the Prime Minister announced that the Government was introducing a ‘do not travel’ ban on Australians travelling overseas under the Biosecurity Act 2015. This ban is intended to limit travellers returning to Australia with coronavirus and to reduce the risks of spreading the coronavirus to other countries. The Prime Minister’s media statement indicated that the prohibition was aligned with the Government’s decision to raise the Smartraveller Travel Advice to Level 4 – “Do not go overseas. A travel ban is in place.” At this time, the ban on overseas travel remains in place in Australia.

3.8 With the imposition of travel restrictions in March 2020, the Qantas Group suspended the scheduled international flights of both Qantas and Jetstar until the end of May 2020. On 5 May 2020, Qantas announced that Qantas and Jetstar would extend the cancellation of international flights from the end of May through to the end of July

2020. Currently, Qantas has suspended its operations between Australia and New Caledonia until the end of July 2020.

3.9 In assessing the current Qantas application for the renewal of its capacity allocation of 788 weekly seats on the New Caledonia route, the Commission considered whether Qantas has failed to service the route effectively. Until travel restrictions linked to the COVID-19 pandemic were imposed by the Australian Government in March 2020, Qantas operated two weekly services between Brisbane and Noumea and three to four weekly services between Sydney and Noumea. There is no information to suggest that Qantas has failed to service the route effectively up to March 2020.

3.10 The Commission considers that the current temporary suspension of Qantas flights between Australia and New Caledonia is in response to the Australian Government COVID-19 restrictions. Moreover, the Commission considers that it is highly likely that there will be an ongoing impact on international air services for some time, but that once the Government-imposed travel restrictions are lifted, it is likely that Qantas will be able to resume operating regular flights between Australia and New Caledonia. For these reasons, the Commission finds that the temporary suspension of Qantas' services in these circumstances does not mean that it has failed to service the route effectively.

3.11 The Commission has also considered the 'reasonable capability criterion' in section 8 of the Policy Statement, ie 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.

3.12 The Commission notes that Qantas and its wholly-owned subsidiary, Jetstar, are established carriers which, under normal circumstances, operate scheduled international services on various routes and finds that the carriers are reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated on the Australia-New Caledonia route.

3.13 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).

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

3.15 Qantas also requested to retain all existing conditions. 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)). Although the drafting of the conditions has been updated in parts, the Commission has not made any changes to the conditions in substance as it does not consider there have been changes in circumstances since the original determination was made that warrant it.

3.16 In particular, Qantas requested to retain the permission for the use of the capacity for the provision of joint services by Qantas and any wholly-owned subsidiary of the Qantas group. The Commission considers that such joint services between Qantas and a wholly-owned subsidiary of the Qantas Group on the New Caledonia route would have minimal impact on competition.

3.17 Further, Qantas also sought to retain the condition permitting the capacity to be used for the provision of code share services with Aircalin. The Commission notes that the New Caledonia route is a relatively small market and there are only two airlines providing direct services on this route, Qantas and Aircalin. Pre-COVID crisis, Aircalin was operating up to 12 weekly services between points in Australia and Noumea while Qantas operated five weekly services.<sup>1</sup> The Commission therefore considers that the continuation of the code share between Qantas and Aircalin would also have minimal impact on competition on the route.

3.18 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 New Caledonia route to Qantas ([2020] IASC 104)**

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Qantas, allocating 788 seats of capacity per week in each direction on the New Caledonia route in accordance with the Australia – New Caledonia air services arrangements.

4.2 The determination is valid for five years from 9 May 2021.

4.3 The determination is subject to the following conditions:

- Qantas is required to fully utilise the capacity from no later than 31 December 2021 or from such other date approved by the Commission;
- the capacity may be utilised by:
  - Qantas; or
  - Jetstar Airways Pty Limited, as long as it remains a wholly-owned subsidiary of Qantas; or

---

<sup>1</sup> Northern Winter 2019-2020 Timetable Summary (27 October 2019 – 28 March 2020).

- such other wholly-owned subsidiary of Qantas that the Commission approves in writing, as long as it remains a wholly-owned subsidiary of Qantas;
- neither Qantas nor its wholly-owned subsidiary that is permitted to use the capacity is authorised to provide code share or joint services with any other carrier or person unless approved by the Commission;
- the capacity may be used by Qantas to provide joint services with any wholly-owned subsidiary of the Qantas Group and by any wholly owned subsidiary of the Qantas Group to provide joint services with Qantas;
- Qantas is permitted to utilise the capacity to provide code share services with Aircalin in accordance with the code share agreement between the airlines made on 4 June 2004, as amended;
- Qantas must apply to the Commission for approval of the use of the capacity if there are variations to the code share arrangement between Qantas and Aircalin 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 proposes to add third country routes on which the airlines will code share where Australian capacity will be used for services on that route;
- 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; and
- 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 – New Caledonia 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: 19 June 2020

IAN DOUGLAS  
Chairperson

KAREN GOSLING  
Commissioner