

DETERMINATION

RENEWAL OF DETERMINATION A-20 ALLOCATING CAPACITY ON THE UNITED STATES (SOUTH PACIFIC) ROUTE TO QANTAS AIRWAYS LIMITED (ACN 009 661 901)

Determination Number:
IASC/DET/9716

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1. The Determination subject to renewal

1.1. On 22 July 1992, the Minister issued Determination A-20 (the determination) which allocated the equivalent of 20 B747, seven B767 and one B747 freighter aircraft (southbound only) per week between Australia and the United States (South Pacific route) to Qantas Airways Limited ACN 009 661 901 (Qantas), and such additional capacity as is specifically allowed to Qantas before 1 July 1997 under the existing terms of the air services agreement between Australia and the USA. The determination, issued under section 54 of the *International Air Services Commission Act 1992* (the Act) and effective from 1 July 1992, expires on 30 June 1997.

2. The application

2.1. The Act requires the Commission to commence its consideration of the renewal of a determination at least 12 months before that determination is due to expire. In accordance with its procedures, on 20 May 1996, the Commission invited Qantas to express its interest (or otherwise) in renewing the determination. On 24 May 1996, Qantas wrote to the Commission seeking a renewal of the determination.

2.2. On 21 June 1996, the Commission published a notice inviting submissions from any interested person about the renewal of the determination, and other applications for an allocation of all or part of the capacity that is subject to renewal. The closing date for submissions and other applications was 19 July 1996. Qantas was the only applicant and no other submissions were received.

2.3. All non-confidential material supplied by the applicant is filed on the Register of Public Documents. Confidential material supplied by the applicant, including copies of final and/or draft code share agreements with British Airways, American Airlines, Canadian Airlines International and Air Pacific, is filed on the Commission's confidential register.

3. Qantas services to the United States

3.1. The nature of the Air Transport Agreement between Australia and the United States (see 4.1 below) is such that there is effectively no ceiling imposed on the capacity which Qantas may operate on the South Pacific route. Qantas has therefore been able to increase the capacity it operates on the route since the determination was issued without the need to apply to the Commission for additional capacity.

3.2. The services currently being operated by Qantas on the United States route are as follows:

Sydney - Los Angeles & v.v.	(seven B747 services/week)
Melbourne - Sydney - Los Angeles & v.v.	(seven B747 services/week)
Melbourne - Auckland - Los Angeles & v.v.	(five B747 services/week)
Melbourne - Sydney - Honolulu - Sydney	(seven B747 services/week)

3.3. Qantas also purchases 432 seats per week to the United States (between Nadi and Los Angeles) under a code share arrangement on flights operated by Air Pacific. The Commission has received a copy of the code share agreement covering this arrangement dated 14 October 1996.

3.4. Qantas has code share arrangements in place with three other carriers under which those carriers obtain seats on Qantas operated flights to the United States:

- British Airways may purchase the equivalent of up to 312 seats per week in each direction between Auckland and Los Angeles of which it is currently utilising 180 seats. Qantas has yet to lodge a completed code share agreement with the Commission covering these arrangements.
- American Airlines may purchase up to an average 519 seats per week in each direction on the route between Australia and the United States. Qantas has yet to lodge a completed code share agreement with the Commission covering these arrangements.
- Canadian Airlines International purchases 1,006 seats per week in each direction between Australia and Honolulu under a code share agreement, a copy of which has been lodged with the Commission.

3.5. Qantas also operates two B747 all cargo services per week from the United States to Australia and has access to 24 tonnes of capacity on a weekly Federal Express flight under a code share arrangement in respect of which the Commission does not have a copy of a completed agreement. Qantas does not provide any northbound all cargo services to the United States.

3.6. Qantas has also entered into a cargo code share agreement with American Airlines (see 6.1 below) which, if approved by the Commission, will enable American Airlines to bring mail from the United States to Australia on Qantas operated flights. Qantas has supplied the Commission with a confidential copy of the agreement dated 13 March 1997.

3.7. Qantas has a broad ranging commercial agreement with British Airways, the Joint Services Agreement, but that agreement does not apply to this route.

3.8. In response to a request by the Commission for information in the context of this application for renewal, Qantas has provided the Commission with information concerning its operations on the route including the cities served, any operational or regulatory problems encountered (of which according to Qantas there were none) and current published fares.

4. Provisions of relevant Air Services Agreements

4.1. The Air Transport Agreement of 1946 and the 1989 Capacity Agreement between the United States of America and Australia, as amended, provide for the operation of international air services between Australia and the United States on three routes, a South Pacific route, a North Pacific route, and a Guam and the Commonwealth of the Northern Mariana Islands route. The Agreements provide for the multiple designation of Australian carriers with the one restriction that no more than two designated airlines of either country can operate on the North Pacific route at any one time.

4.2. The Agreements provide that designated airlines may increase their capacity on each of the United States routes, within ceilings, on a year by year basis when nominated average load factors are met, or in order to reduce load factors to a nominated level.

4.3. The Agreements make no restrictions on all cargo flights between Australia and the United States.

5. Legislative framework

5.1. Renewal of a determination is made in accordance with the *International Air Services Commission Act 1992*. The legislative framework for considering a renewal of a determination under the Act is set out in Attachment A.

5.2. Under section 11 of the Act, the Minister may make Policy Statements setting out matters relevant to the Commission's performance of its functions. The current Policy Statement (No.2) was issued by the Minister on 27 March 1995 and includes criteria to be applied by the Commission in considering the renewal of a determination.

5.3. The criteria applicable to assessing the renewal of a determination in circumstances where capacity is not limited under a bilateral agreement are those set out in Attachment B. Those criteria apply to this application.

6. Responses to the draft determination

6.1. The Commission issued a draft determination on 3 March 1997 and invited submissions on the draft, requesting comments by 21 March 1997. The only submission received was from Qantas which sought the incorporation of a recently negotiated cargo code share agreement with American Airlines (see 3.6 above) into the final determination.

7. Commission's consideration of the renewal of the determination

7.1. Under the Policy Statement the criteria that has to be met by a carrier seeking renewal of capacity in circumstances where capacity is not limited by a bilateral agreement are that the carrier:

- (i) is reasonably capable of obtaining the necessary approvals to operate on the route; and
- (ii) is reasonably capable of implementing its proposals.

7.2. In this case Qantas is the only applicant and there have been no submissions in respect of the application for renewal. Qantas already holds all necessary approvals and currently operates a large number of services on the route.

7.3. Accordingly, the Commission concludes that the renewal of Determination A-20 allocating capacity to the United States on the South Pacific route to Qantas would be of benefit to the public.

8. Other issues

Terms and conditions of the fresh determination

8.1. Under section 19(3) of the Act, the Commission may make such changes (if any) to the terms and conditions included in the original determination as it is satisfied are warranted because of changes in circumstances since the original determination was made.

8.2. Since the original Section 54 Determination was made the Commission has had an opportunity to refine the terms and conditions which should apply to its determinations. In these circumstances the Commission believes that fresh determinations which renew original determinations should contain terms and conditions which are consistent with those applying to determinations currently issued by the Commission. These are set out in the Determination.

Period of the fresh determination

8.3. The Commission will grant Qantas a fresh determination for a period of 5 years effective from 1 July 1997.

Utilisation of the capacity

8.4. The Commission will specify that Qantas be required to utilise the capacity from 1 July 1997.

8.5. The Commission will specify that:

- the capacity is only to be used by Qantas; and
- Qantas may utilise the capacity to provide services jointly with British Airways, American Airlines, Canadian Airlines International, Air Pacific and Federal Express subject to the limitations specified in this fresh determination.

Ownership and control of the carrier

8.6. The Commission's view is that the determination should include the usual limitations on changes in the ownership and control of Qantas. These are specified below.

9. Determination for renewal of Determination A-20 allocating capacity on the United States (South Pacific) route to Qantas (IASC/DET/9716)

9.1. The Commission finds a renewal of Determination A-20, allocating capacity on the Australia - United States (South Pacific) route to Qantas would be of benefit to the public.

9.2. The Commission makes a fresh determination in favour of Qantas, providing that Qantas may operate capacity on the South Pacific route in each direction between Australia and the United States consistent with the terms of the Australia - United States Air Transport Agreement.

9.3. The determination is for 5 years from 1 July 1997.

9.4. The determination is subject to the following conditions:

- Qantas is required to utilise the allocated capacity from 1 July 1997;
- only Qantas is permitted to utilise the capacity;
- Qantas may use the capacity to provide services jointly with British Airways subject to:
 - a copy of the completed Qantas/British Airways joint services agreement signed by Qantas and British Airways being lodged with the Commission for approval prior to 30 June 1997 or such other date approved by the Commission; and
 - the Commission approving the agreement with such additional conditions (if any) as the Commission may require;

- Qantas may use the capacity to provide cargo services jointly with American Airlines in accordance with the cargo blocked space agreement between Qantas and American Airlines dated 13 March 1997 as extended, or with prior approval by the Commission, as amended from time to time;
- Qantas may use the capacity to provide passenger services jointly with American Airlines subject to:
 - a copy of the completed Qantas/American Airlines joint services agreement signed by Qantas and American Airlines being lodged with the Commission for approval prior to 30 June 1997 or such other date approved by the Commission; and
 - the Commission approving the agreement with such additional conditions (if any) as the Commission may require;
- Qantas may use the capacity to provide services jointly with Federal Express provided Qantas first lodges with the Commission a signed copy of any agreements with Federal Express for the joint service and those agreements are approved by the Commission with such conditions (if any) as the Commission may require;
- Qantas may use the capacity to provide services jointly with Canadian Airlines International (CAI) in accordance with:
 - the Joint Operation Agreement between Qantas and CAI made on 7 April 1991 as extended from time to time in accordance with its terms, or as varied only in relation to matters, other than revenue sharing, contained within annexes made pursuant to Article 13. To the extent that revenue sharing comes within Article 14, Commission approval is also not required; or
 - variations to the Joint Operation Agreement (other than as permitted above), subject to the prior approval of the Commission; or
 - any new joint service arrangements between Qantas and CAI for operations on the Australia - United States route whether or not it replaces the existing Agreement, with the prior approval of the Commission;
- Qantas may use the capacity to provide services jointly with Air Pacific in accordance with:
 - the Capacity Purchase/Sale Agreements between Qantas and Air Pacific as extended from time to time in accordance with their terms,

or as varied except in relation to Article 1 - Capacity Sale (and associated attachments) and Article 3 - Schedule of Flights (and associated attachments); or

- variations to the Capacity Purchase/Sale Agreements which relate to any of the excepted matters referred to above, subject to the prior approval of the Commission; or
- any new joint service arrangements between Qantas and Air Pacific for operations on the Australia - United States route whether or not it replaces one or both of the existing Agreements, with the prior approval of the Commission;

and in any case, in accordance with this determination,

- to the extent that the capacity is used to provide joint services with other carriers, Qantas must:
 - price and sell its services on the route independently;
 - not pool revenues with the other carriers;
 - take all reasonable steps to ensure passengers utilising Qantas capacity on flights operated by other carriers are informed, at the time of ticket reservation, that such services are operated by the other carriers and any aircraft changes.
- 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 - United States Air Transport Agreement 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, and

- changes in relation to the management, status or location of operations and Head Office of Qantas are permitted except to the extent that any change would result in the airline ceasing to be an airline designated by the Australian Government for the purposes of the Australia - United States Air Transport Agreement.

Dated: 27 March 1997

James K Bain
Chairman

Brian L Johns
Member

Russell V Miller
Member

A. Legislative framework

1. Under subsection 17(1) of the Act, the Commission must start its consideration of the renewal of a determination at least 12 months before the end of the period during which the determination is in force.
2. Under subsection 17(2) of the Act, before starting its consideration, the Commission must, by notice, invite submissions about the renewal.
3. Under subsection 17(3), any person may make submissions to the Commission about the renewal.
4. Under subsection 8(1), the Commission may, at any time while a determination is in force, make a fresh determination allocating capacity to which the original determination relates.
5. Under subsection 8(2), the fresh determination:
 - (a) must make the same allocation of capacity as the original determination unless:
 - (i) the Commission is satisfied that that allocation is no longer of benefit to the public; or
 - (ii) the original determination is an interim determination; and
 - (b) comes into force immediately after the end of the period during which the original determination was in force.
6. Under subsection 8(3), if the fresh determination does not make the same allocation of capacity as the original determination, it must not make a different allocation of capacity unless the Commission is satisfied that that allocation would be of benefit to the public.
7. 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 dated 27 March 1995 made under section 11 of the Act. The criteria applicable to assessing benefit to the public for the purposes of renewal of determinations are those contained in paragraph 8 of the Policy Statement.
8. Subsection 19(1) of the Act relates to the contents of determinations made under section 8 of the Act. Subsection 19(2) specifies the period during which the determination is to be in force.

9. Under subsection 19(3), in including terms and conditions in the determination, the Commission 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.

10. Section 20 relates to notifications of determinations.

B. Relevant criteria under paragraphs 4, 6 and 8 of the Policy Statement

Paragraph 6.1 requirements

6. CRITERIA APPLICABLE IN PARTICULAR CIRCUMSTANCES

Capacity not limited

6.1 In circumstances where capacity is not limited under a bilateral arrangement, only the criteria in paragraph 4 are applicable.

Paragraph 4 requirements

4.1 Subject to 6 below, the general criteria against which the benefit to the public is to be assessed by the Commission in considering the circumstances in relation to an allocation of capacity or the renewal or review of a determination allocating capacity to an Australian carrier are set out below:

Use of Australian carrier entitlements

(a) Subject to (b), the use of the entitlements of Australian carriers under a bilateral arrangement is of benefit to the public.

Carrier Capabilities

(b) It is not of benefit to the public for the Commission to allocate capacity to Australian carriers unless such carriers:

- (i) are reasonably capable of obtaining the necessary approvals to operate on the route; and
- (ii) are reasonably capable of implementing their proposals.

Paragraph 8 requirements

Paragraph 8 requires that Paragraph 6.1 must be taken into account.