

DETERMINATION

AN ALLOCATION OF NEW CAPACITY ON THE THAILAND ROUTE TO QANTAS AIRWAYS LIMITED (ACN 009 661 901)

Determination Number:
IASC/DET/9806

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Date: 23 April 1998

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1. The application

1.1. The Commission gave notice on 16 March 1998 inviting applications for, and submissions about, an allocation of new capacity between Australia and Thailand. An application was received from Qantas Airways Limited ACN 009 661 901 (Qantas).

1.2. Qantas is seeking an allocation of seven code share services per week on the Australia – Thailand route on flights to be operated by British Airways. The code share services would be operated in accordance with the code share agreement between Qantas and BA of 5 October 1997, a copy of which has previously been lodged with the Commission.

1.3. On 3 April 1998 the Commission gave notice that it had received an application from Qantas for new capacity to Thailand and invited submissions about the application. The closing date for submissions was 17 April 1998. A submission was received from the Australian and International Pilots Association (AIPA) supporting an application from Qantas for the code share capacity.

1.4. All non-confidential material supplied by the applicant and submissions from other parties are filed on the Register of Public Documents. Confidential material supplied by the applicant is filed on the Commission's confidential register.

2. Current services to Thailand

2.1. Five airlines offer direct services between Australia and Thailand. These are Qantas (23 flights per week utilising 19.85 B747 equivalent units - from its allocation of 21.8 units of capacity), Thai International (14 flights utilising 11.55 B747 equivalent units), Alitalia (3 flights), BA (7 flights) and Olympic Airways (2 flights). These airlines account for 87% of total origin/destination traffic, with Qantas and BA accounting for 51% of the origin/destination traffic. British Airways code shares on Qantas operated services.

2.2. Indirect flights are provided by Cathay Pacific, Garuda, Singapore Airlines and Malaysia Airlines.

3. Provisions of relevant Air Services Agreements

3.1. The Australia - Thailand Air Services Agreement of 26 February 1960 and the Memorandum of Understanding (MOU) of 24 February 1998 provide for designated carriers to operate services in accordance with agreed capacity entitlements.

3.2. The MOU also provides that the designated airlines of each country, while operating along agreed routes, may enter into code sharing arrangements as the non-operating airline with any airlines of third countries. There are, however, limitations specified in the MOU on the number of services which may be used in such code shares,

as follows:

From 24 February 1998: 7 weekly services;
 From October 1998: 11 weekly services;
 From March 1999: 16 weekly services;
 From March 2000: 21 weekly services; and
 From March 2001: 28 weekly services.

4. Characteristics of the Australia - Thailand route

4.1. In the year ended 31 December 1997 traffic on the Australia - Thailand route totalled approximately 626,800 passenger movements. Of these passenger movements 42% were passengers with a destination of either Australia or Thailand, travelling directly between the two countries (direct traffic). A total of 9% of movements involved passengers travelling indirectly between the two countries (indirect traffic). The remaining 49% of the movements involved passengers travelling directly between Australia and Thailand to and from countries beyond Thailand or Australia (beyond traffic).

4.2. Details of the passenger movements on the route between the years ended 31 December 1994 and 31 December 1997 are summarised below.

**Australia - Thailand Passenger Movements
 Years Ended 31 December 1994 - 31 December 1997**

Traffic category	Year ended December					Compound annual growth rate 94-97
	1994	1995	1996	1997		
Direct traffic	209,100	240,400	272,700	265,400	(42.3%)	8.3%
(Annual % change)		(+15.0%)	(+13.4%)	(-2.7%)		
Indirect traffic	74,400	78,700	74,200	57,800	(9.2%)	-8.1%
(Annual % change)		(+5.8%)	(-5.7%)	(-22.1%)		
Beyond traffic	245,500	256,200	283,100	303,500	(48.4%)	7.3%
(Annual % change)		(+4.4%)	(+10.5%)	(+7.2%)		
Total traffic	528,900	575,300	630,000	626,800	(100.0%)	5.8%
(Annual % change)		(+8.8%)	(+9.5%)	(-0.5%)		

Note: Data in the above table have been derived from information supplied by the Australian Bureau of Statistics and include both scheduled and charter traffic. Figures may not add to totals due to rounding.

4.3. In the year ended 31 December 1997, Australian residents comprised 57% of the direct passenger traffic. Australians visiting Thailand did so mainly for a holiday (69%) or for business (14%). In the same year, Thailand visitors travelled to Australia mainly for a holiday (60%) or for education (12%).

5. Legislative framework

5.1. Allocations of capacity are made in accordance with the *International Air Services Commission Act 1992* (the Act). Under section 11 of the Act, the Minister makes Policy Statements setting out matters relevant to the Commission's performance of its functions, including criteria to be applied by the Commission in assessing the benefit to the public. The current Policy Statement (No. 3) was issued by the Minister on 23 April 1997. The legislative framework for making a determination allocating available capacity under the Act is set out in Attachment A.

5.2. The criteria applicable to assessing benefit to the public of an allocation of capacity, where there is only one applicant and no submissions are received about, or opposing the allocation, are those set out in Attachment B.

6. Commission's assessment of the applicant's claims

6.1. Under the Policy Statement, the relevant criteria to be applied in assessing benefit to the public when there is only one applicant is whether the applicant is reasonably capable of obtaining the necessary approvals and whether it is reasonably capable of implementing its proposals. If submissions are received about or opposing the allocation of capacity to a particular carrier, the Commission may also apply additional public benefit criteria specified in paragraph 5 of the Policy Statement.

6.2. As the AIPA submission supports the Qantas application, there were no opposing submissions, the application is for code sharing capacity specifically provided for as separate capacity under the MOU and the Commission has previously approved the form of the code share agreement between Qantas and British Airways, the Commission has decided that it is not necessary to apply the paragraph 5 criteria in this case.

6.3. Qantas is an established international carrier already operating services in its own right on the Australia – Thailand route and is already involved in a code share arrangement on the route, approved by the Commission, whereby British Airways code shares on Qantas operated services – see Commission Decision IASC/DEC/9804. The Commission considers that Qantas has the technical and financial resources to implement its proposal.

6.4. The Commission concludes that Qantas is reasonably capable of obtaining the necessary approvals to implement its proposal. Accordingly, the Commission concludes

that the allocation to Qantas of seven code share services per week of capacity on the Australia – Thailand route, to be operated on an airline of a third country, would be of benefit to the public.

7. Role of the ACCC

7.1. The Policy Statement and its associated Explanatory Memorandum make clear that the ACCC retains primary responsibility for competition policy matters. Nothing in the Commission's decision should be taken as indicating either approval or disapproval by the ACCC. The Commission's decision is made without prejudicing, in any way, possible future consideration by the ACCC of the code share agreement or operations under it.

8. Other issues

Commencement of operations

8.1. Qantas proposes to commence utilisation of the capacity from 1 May 1998. The Commission will specify that Qantas must commence utilisation of the capacity from the week commencing 1 May 1998, or from such other date as approved by the Commission.

Period of the determination

8.2. Qantas has sought a determination for five years from the date of the determination. The Commission will grant Qantas a determination for five years from the date of the determination.

Other issues

8.3. Section 15(2)(d) of the Act specifies that the Commission must include a condition in determinations stating the extent to which the carrier may use that capacity in joint services with another carrier. The Commission will specify in this determination that Qantas may use the allocated capacity to operate joint services with BA in accordance with the code share agreement dated 5 October 1997 lodged with the Commission.

8.4. The Commission normally includes conditions in determinations approving code shares that the Australian carrier must price and sell its services on the route independently and that it must not share or pool revenues. However, the Trade Practices Commission (TPC) has issued an authorisation for a broad ranging joint services agreement. That agreement specifically provided for revenue pooling on routes including the Australia-Thailand route. Accordingly, to the extent that revenue pooling is permitted in relation to this route by an authorisation issued by the TPC the

Commission will not include such conditions in this determination. However, the Commission will be inserting conditions that such activities will not be allowed in the event that the ACCC withdraws any relevant TPC authorisation in relation to these matters.

Ownership and control of the carrier

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

9. Determination allocating shelf capacity on the Thailand route to Qantas (IASC/DET/9806)

9.1. The Commission finds that an allocation of capacity to Qantas on the Australia - Thailand route as sought would be of benefit to the public.

9.2. The Commission makes a determination in favour of Qantas, allocating seven services per week in each direction between Australia and Thailand, in accordance with the Memorandum of Understanding between Australia and Thailand of 24 February 1998, which must be used by Qantas as the non-operating carrier under code sharing arrangements with an airline of a third country.

9.3. The determination is for five years from the date of the determination.

9.4. The determination is subject to the following conditions:

- Qantas is required to fully utilise the capacity;
- Qantas is only permitted to utilise the capacity to provide services jointly with British Airways in accordance with the code share agreement dated 5 October 1997, subject to the following conditions:
 - the approval to code share with British Airways lapses if:
 - : an application for authorisation of the code share agreement under the *Trade Practices Act 1974* is made and finally rejected by the Australian Competition and Consumer Commission or the Australian Competition Tribunal, in the event of review by that Tribunal; or
 - : a final order is made revoking the authorisation of the Joint Services Agreement by the Australian Competition and Consumer Commission or Australian Competition Tribunal,

in the event of review by that Tribunal; or

: a court makes final orders that the code share agreement is contrary to the *Trade Practices Act 1974*

- Qantas may only price and market its services, or share or pool revenues, on the route jointly with British Airways as long as such practices are authorised under the *Trade Practices Act 1974* or otherwise authorised by the Australian Competition and Consumer Commission or Australian Competition Tribunal, in the event of review by that Tribunal; and
- Qantas must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight.
- 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 - Thailand Air Services 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 - Thailand Air Services Agreement.

Dated: 23 April 1998

James K Bain
Chairman

Russell V Miller
Member

Michael L Lawriwsky
Member

A. Legislative framework

1. Subsection 7(1) of the Act allows the Commission to make a determination allocating available capacity.
2. Under section 13 of the Act, the Commission must, by notice, invite applications for and submissions about an allocation of shelf capacity.
3. Under subsection 13(4), any person may apply to the Commission for a determination allocating the capacity.
4. Subsection 7(2) requires that the determination:
 - (a) must not allocate available capacity unless the Commission is satisfied that the allocation would be of benefit to the public; and
 - (b) if more than one application was made relating to the allocation - must make the allocation that the Commission is satisfied, having regard to the applications made, would be of the greatest benefit to the public.
5. Under subsection 7(3), 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 statements made by the Minister under section 11.
6. The section 11 Policy Statement dated 23 April 1997, includes criteria to be applied by the Commission in assessing the benefit to the public of allocations of capacity. The criteria applicable to assessing benefit to the public of an allocation of shelf capacity where there is only one applicant and no submissions were received about, or opposing, the allocation, are those contained in paragraphs 4 and 6 of the Policy Statement.
7. Section 15 of the Act relates to the contents of determinations including the imposition of conditions relating to the use of capacity. Section 16 relates to notifications of determinations.

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

Paragraph 4 requirements

4. GENERAL CRITERIA FOR ASSESSING BENEFIT TO THE PUBLIC

4.1 Subject to paragraph 6, 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 as 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 6.2 requirements

6. CRITERIA APPLICABLE IN PARTICULAR CIRCUMSTANCES

One applicant or sufficient available capacity

6.2 In circumstances where:

(a) there is only one applicant (or where more than one application is made but all applications except one are withdrawn) for allocation of capacity on a route; or

(b) there is more than one applicant but, subject to paragraph 7.4, the amount of available capacity is equal to or exceeds the total amount of capacity applied for

only the criteria in paragraph 4 are applicable. However, if submissions are received about, or opposing, the allocation of capacity to a particular carrier, the Commission may also apply the additional criteria in paragraph 5.