



Australian Government

International Air Services Commission

DETERMINATION

Determination:	[2019] IASC 107
The Route:	Cook Islands
The Applicant:	Qantas Airways Limited (Qantas) (ABN 16 009 661 901)
Public Register File:	IASC/APP/201908

The Commission's delegate makes a determination allocating to Qantas 372 seats per week in each direction of passenger capacity on the Cook Islands route. The capacity may be used by either Qantas or its wholly-owned subsidiary, Jetstar Airways Pty Limited. The determination is valid for five years from 2 April 2019.

1 The application

1.1 On 15 March 2019, Qantas applied to the International Air Services Commission (the Commission) for an allocation of 372 seats per week in each direction of passenger capacity on the Cook Islands route. Qantas stated in its application that its wholly-owned subsidiary, Jetstar Airways Pty Limited (Jetstar), will operate the additional capacity as it plans to add two more weekly services on the Cook Islands route, using an Airbus 320 aircraft configured with up to 186 seats. Qantas sought the additional capacity on the following basis:

- the allocation is requested for a period of five years from the date of the determination;
- the capacity will be fully utilised by 31 October 2019;
- the capacity may be utilised by Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas; and
- 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.

1.2 In accordance with section 12 of the International Air Services Commission Act 1992 (the Act), on 18 March 2019, the Commission published Qantas' application

on the Commission's website inviting other applications on the Cook Islands route. No other applications were received.

1.3 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). 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 According to the Register of Available Capacity, there are 1,200 seats per week of passenger capacity in each direction available for allocation to Australian carriers to operate services between Australia and Cook Islands.

2.3 Under the Australia-Cook Islands air services arrangements, Australian designated airlines may enter into cooperative marketing arrangements such as code sharing, blocked space and aircraft leasing, whether as the operating or marketing airline, with an airline(s) of the same party, an airline(s) of the Cook Islands, or with an airline(s) of a third country. Capacity offered by a designated airline, as the marketing airline on services operated by another airline(s), will not be counted against any capacity entitlements of the party designating the marketing airline.

3 Delegate's consideration

3.1 Subsection 12(3) of the Act allows any person to apply to the Commission for a determination allocating capacity to enable an Australian carrier to operate international air services.

3.2 Subsection 7(1) of the Act empowers the Commission to make a determination allocating available capacity. Subsection 7(2) requires, in part, that the Commission's determination must not allocate capacity unless the Commission is satisfied that the allocation would be of benefit to the public and would not be contrary to any restrictions on capacity contained in bilateral arrangements, or combination of bilateral arrangements.

3.3 Further, subsection 7(3) of the Act provides that in assessing the benefit to the public of an allocation of capacity, the Commission must apply the criteria set out in the policy statement made by the Minister pursuant to section 11 of the Act.

3.4 In accordance with section 27AB of the Act and regulation 10 of the International Air Services Commission Regulations 2018, the delegate of the Commission may consider Qantas' application. (For the purposes of this determination, all references to the Commission include the delegate of the Commission).

3.5 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. The Policy Statement sets out the criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity.

3.6 Qantas is seeking the allocation of 372 seats per week of capacity in each direction on the Cook Islands route. Additionally, for flexibility, Qantas requested permission for the capacity to be used by either Qantas or its wholly-owned subsidiary, Jetstar. Currently, Qantas has a total capacity allocation on this route of 744 seats being utilised by Jetstar which operates 3 to 4 services per week from Australia to Cook Islands via Auckland (New Zealand)¹. The additional capacity is intended to be used by Jetstar to enable the airline to add two weekly services on the Cook Islands route, using an Airbus 320 aircraft configured with up to 186 seats.

3.7 The Commission's delegate notes there are no other applicants seeking capacity on the route and no opposition to the application. Section 12 of the Policy Statement provides, in part, that in circumstances where there is only one applicant for allocation of capacity on a route, and there is no opposition to the application, the Commission is to have regard to the 'reasonable capability criterion' in section 8 of the 2018 Policy Statement and need not have regard to any other matter.

3.8 Under 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 allocated under a determination are reasonably capable of: (a) obtaining any licenses, 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

3.9 The Commission's delegate notes that Qantas and its wholly-owned subsidiary Jetstar are established international carriers and, as such, are reasonably capable of obtaining the necessary approvals to operate on the route and of implementing their proposed services. Accordingly, the delegate has concluded that Qantas and its wholly-owned subsidiary fulfil the criteria under section 8 and has decided to allocate the capacity requested. The delegate has also decided to permit the capacity to be used by either Qantas or its wholly-owned subsidiary Jetstar.

3.10 Qantas requested the Commission to permit the capacity to be used for the provision of joint services by Qantas and any wholly-owned subsidiary of the Qantas group. The Commission's delegate considers that the proposed joint services on the Cook Islands route between Qantas and a wholly-owned subsidiary of the Qantas Group would have minimal impact on competition. For this reason, the delegate has decided to include such condition, as requested by Qantas.

3.11 Subsection 15(1) of the Act empowers the Commission to include such terms and conditions as it thinks fit. Paragraph 15(2)(e) requires the inclusion of a condition stating the extent to which the carrier may use that capacity in joint services with another carrier. As required by section 23 of the Policy Statement, where the

¹ Northern Winter 2018-19 Timetable Summary (28 October 2018-30 March 2019)

Commission authorises a carrier to utilise the allocated capacity to provide joint or code share services with another carrier, the Commission will include a condition requiring the airlines concerned to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

3.12 Nothing in this decision should be taken as indicating either approval or disapproval by the 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 Cook Islands route to Qantas ([2019] IASC 107)

4.1 In accordance with section 7 of the Act, the Commission's delegate makes a determination in favour of Qantas, allocating 372 seats of capacity per week in each direction on the Cook Islands route in accordance with the Australia - Cook Islands air services arrangements.

4.2 The determination is valid for five years from 2 April 2019.

4.3 The determination is subject to the following conditions:

(a) 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;

(b) Qantas is required to fully utilise the capacity from no later than 31 October 2019 or such other date approved by the Commission;

(c) neither Qantas nor its wholly-owned subsidiary is permitted to use the capacity to provide services jointly with another Australian carrier or any other person unless approved by the Commission;

(d) subject to the preceding condition, 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;

(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; and

(f) 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 – Cook Islands 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: 2 April 2019



MARLENE TUCKER
Executive Director
Delegate of the IASC Commissioners