



## Australian Government

### International Air Services Commission

#### RENEWAL DETERMINATION

**Determination:** [2013] IASC 101  
**Renewal of:** [2007] IASC 105  
**The Route:** Germany  
**The Applicant:** Qantas Airways Ltd  
(ACN 009 661 901) (Qantas)  
**Public Register File:** IASC/APP/201216

**The Commission's delegate makes a fresh determination allocating three frequencies per week on the Germany route for five years and allowing the capacity to be used by and with a wholly owned subsidiary.**

#### 1 The application for renewal

1.1 On 11 October 2007, the Commission issued Determination [2007] IASC 105 (the Determination) allocating three frequencies per week in each direction on the Germany route under the Australia – Germany air services arrangements. The Determination permits code sharing between Qantas and British Airways and was subsequently varied by Decision [2007] IASC 215 to permit code sharing between Qantas and Iberia Airlines (Iberia).

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 18 February 2013. In view of this, the Commission sent, on 12 August 2012, a letter to Qantas inviting it to apply for renewal if it wished to renew the Determination.

1.3 On 3 September 2012, Qantas applied to the Commission for a renewal of the Determination with all the conditions previously permitted including permitting the use of the capacity to provide services jointly with British Airways and Iberia.

1.4 Further, in its application, Qantas requested the addition of conditions enabling capacity to be used by any wholly-owned subsidiary of Qantas and to be used by Qantas to provide services jointly with any wholly-owned subsidiary of Qantas.

1.5 The Commission published a notice on 4 September 2012, in accordance with sections 12 and 17 of the Act, inviting other applications for an allocation of the capacity subject to renewal. No other applications were received.

1.6 All material supplied by the applicant is available on the Commission's website ([www.iasc.gov.au](http://www.iasc.gov.au)).

## **2 Delegate's consideration**

2.1 In accordance with section 27AB of the Act and regulation 3A of the International Air Services Commission Regulations 1992, the delegate of the Commission may consider the Qantas application. (For purposes of this determination, references to the Commission include the delegate of the Commission).

2.2 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.

2.3 Under paragraph 6.2 of the Minister's Policy Statement (No. 5) of 19 May 2004 (the Policy Statement), in circumstances where there is only one applicant for allocation of capacity on a route, only the criteria in paragraph 4 are applicable. Paragraph 4 provides that the use of entitlements by Australian carriers under a bilateral arrangement is of benefit to the public unless such carriers are not reasonably capable of obtaining the necessary approvals to operate on the route and are not reasonably capable of implementing their applications.

2.4 The Commission notes that:

- there are no other applicants seeking capacity on the route; and
- Qantas and its wholly-owned subsidiary, Jetstar Airways, are established international carriers and are therefore reasonably capable of obtaining the necessary approvals to operate on the route and of implementing their applications.

2.5 Under paragraph 8.1 of the Policy Statement, there is a presumption in favour of the carrier seeking the renewal.

2.6 In these circumstances, the Commission concludes that the renewal of Determination [2007] IASC 105 would be of benefit to the public.

2.7 Further, Qantas has requested the addition of conditions to enable capacity to be used by any wholly-owned subsidiary of Qantas and to be used by Qantas to provide services jointly with any wholly-owned subsidiary of Qantas. Qantas has also requested that the new Determination will continue to permit the capacity to be used by Qantas to provide services jointly with Iberia and British Airways.

2.8 Subsection 15(1) of the Act allows a determination to include such terms and conditions as the Commission thinks fit. Subsection 15(2) provides, in part, that the

determination:

- must include a condition stating the extent (if any) to which any such carrier may use that capacity by providing joint international air services with another Australian carrier or any other person; and
- may include a condition that, to the extent that any of the capacity is allocated to a particular Australian carrier, it may be used in whole or in part by any one or more of the following: (i) the carrier; (ii) a wholly-owned subsidiary of the carrier; (iii) if that carrier is a wholly-owned subsidiary of another Australian carrier—that other carrier.

2.9 Under paragraph 3.6 of the Policy Statement, where capacity that can be used for code share operations is available under air services arrangements, including where foreign airlines have rights to code share on services operated by Australian carriers, the Commission would generally be expected to authorise applications for use of capacity to code share. However, if the Commission has serious concerns that a code share application (or other joint service proposal) may not be of benefit to the public, it may subject the application to more detailed assessment using the additional criteria set out in paragraph 5 (whether the application is contested or not). Before doing so, the Commission will consult with the Australian Competition and Consumer Commission (the ACCC).

2.10 The Commission notes that under the Australia – Germany air services arrangements, any designated airline of Australia, whether as the operating or non-operating airline, may enter into cooperative marketing arrangements such as blocked space, code sharing or leasing arrangements with another Australian airline, an airline of Germany or an airline of a third country.

2.11 The Commission does not have serious concerns that the continued use of the capacity on the Germany route in joint services with Iberia and British Airways may not be of benefit to the public. In this regard, it did not consult the ACCC on the matter. However, the Commission notes that, in its Draft Determination dated 20 December 2012 on the Qantas-Emirates alliance, the ACCC concluded that there was strong competition on routes between Australia and the UK/Europe due to the comparatively high number of airlines currently operating on the routes.

2.12 In relation to Qantas' request that the capacity may be used by and jointly with its wholly-owned subsidiary, the Commission considers that including these conditions is consistent with the object of the Act and the Policy Statement, both of which make it clear that the Commission should have regard to the need for Australian airlines to be able to compete effectively with one another and with foreign airlines.

2.13 In the interests of providing commercial and operational flexibility, consistent with requirements of the Act, the Commission will include the conditions as requested by Qantas.

2.14 In relation to joint services, the Commission will include a condition which requires Qantas and the relevant airlines to comply with the Australian Consumer Law

and to take all reasonable steps to ensure that passengers are informed of the carrier that is actually operating the flight.

2.15 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 Commission's current practice and current air services arrangements. Under the Act, the Commission may make changes to the terms and conditions included in the original determination where warranted by changes in circumstances since the original determination was made.

### **3 Determination for renewal and variation of Determination [2007] IASC 105 allocating capacity on the Germany route to Qantas ([2013] IASC 101)**

3.1 The delegate of the Commission makes, in accordance with section 8 of the Act, a determination in favour of Qantas, allocating three frequencies per week in each direction on the Germany route under the Australia – Germany air services arrangements.


3.2 The determination is for five years from 19 February 2013.

3.3 The determination is subject to the following conditions:

- Qantas is required to fully utilise the capacity;
- only Qantas or another Australian carrier which is a wholly owned subsidiary of Qantas is permitted to utilise the capacity;
- 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 without the approval of the Commission;
- the capacity may be used by Qantas to provide services jointly with any wholly-owned subsidiary of Qantas;
- the capacity may be used by Qantas to provide services jointly with Iberia Airlines (Iberia) in accordance with:
  - the code share agreement dated 5 June 2009 between Qantas and Iberia; or
  - any new code share agreement, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under any code share agreement with Iberia:

- Qantas must price and sell its services on the route independently of Iberia; and
- Qantas must not share or pool revenues on the route with Iberia; and
- the capacity may be used by Qantas to provide services jointly with British Airways in accordance with:
  - the code share agreement as amended on 27 September 2011; or
  - any new code share agreement, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under the arrangements with British Airways, Qantas may only price and market its services, or share or pool revenues/profits on the route, jointly with British Airways as long as such practices are authorised under the *Competition and Consumer Act 2010* or otherwise authorised by the Australian Competition Tribunal, in the event of review by that Tribunal;
- to the extent that the capacity is used to provide joint services on the route, Qantas and any wholly-owned subsidiary of Qantas 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 Qantas from complying with the Australian Consumer Law; and
- 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–Germany 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 or be in a position to exercise effective control of Qantas, without the prior consent of the Commission.

Dated: 7 February 2013



Marlene Tucker  
Executive Director  
Delegate of the IASC Commissioners