



Australian Government

International Air Services Commission

DETERMINATION

Decision: [2013] IASC 118
The Route: France (Route 3) / New Caledonia
The Applicant: Qantas Airways Limited
(ACN 009 661 901) (Qantas)
Public Register: IASC/APP/201301

The Commission's delegate issues Determination [2013] IASC 118 allocating to Qantas an additional 150 seats per week in each direction on the New Caledonia route valid for a period of five years.

1 The application

1.1 On 19 February 2013, Qantas Airways Limited (Qantas) applied for an allocation of 150 seats per week on France Route 3 (New Caledonia). The requested capacity is in addition to its total allocation of 788 seats per week in each direction on the New Caledonia route. Qantas has requested the additional capacity to accommodate aircraft substitution on the route.

1.2 Qantas has also requested the allocation on the following basis:

- the allocation is valid for a period of five years from the date of the determination;
- the capacity will be fully utilised by 31 March 2014;
- the capacity may be utilised by Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas;
- the capacity may be used by Qantas to provide services jointly with any wholly-owned subsidiary of the Qantas Group;
- the capacity may be used by Qantas to provide services jointly with Air Caledonie International (Aircalin).

1.3 On 20 February 2013, the Commission published a notice, in accordance with section 12 of the Act, inviting other applications in relation to the capacity. No other applications were received.

1.4 All material supplied by the applicant is available on the Commission's website (www.iasc.gov.au).

2 Provisions of relevant air services arrangements

2.1 Australia and New Caledonia entered into a Memorandum of Understanding (MOU) in November 2011 pursuant to the Agreement between Australia and France relating to Air Transport signed on 13 April 1965. These arrangements allow for the operation of international air services between Australia and France Route 3/ Air Caledonia and the multiple designation of Australian carriers. Further, under these arrangements, the designated airlines of each party are able to, over all or any part of their respective routes, enter into code share, blocked space, or other cooperative marketing arrangements, as either the operating or the marketing airline, with any other airline or airlines, with the exception of third country airlines, including airlines of the same party.

2.2 Under the Australia – New Caledonia air services arrangements, there are 862 seats available for allocation and from the start of the IATA Northern Summer season 2013, there will be 1,012 seats available.

3 Delegate's assessment

3.1 In accordance with section 27AB of the *International Air Services Commission Act 1992* (the Act), regulation 3A of the *International Air Services Commission Regulations 1992*, and the Instrument of Delegation dated 6 November 2012, the delegate of the Commission may consider the application for allocating available capacity under section 7 of the Act as there is only one application for the capacity. (For purposes of this decision, all references to the Commission include the delegate of the Commission).

3.2 Under section 7 of the Act, the Commission may make a determination allocating available capacity. However, the Commission must not allocate available capacity unless the Commission is satisfied that the allocation would be of benefit to the public and must not allocate available capacity contrary to any restrictions on capacity contained in a bilateral arrangement, or a combination of bilateral arrangements, permitting the carriage to which the capacity relates.

3.3 Subsection 7(3) provides that 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.

3.4 The Minister issued Policy Statement No. 5 dated 19 May 2004 (the Policy Statement) pursuant to section 11 of the Act. The Policy Statement sets out the range of criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity. It also provides other guidance to the Commission in performing its functions.

3.5 Paragraph 6.2 provides, in part, that where there is only one applicant on the route, only the criteria in paragraph 4 are applicable.

3.6 Under the paragraph 4 criteria, the Commission assessed whether Qantas is reasonably capable of obtaining the necessary approvals and whether it is reasonably capable of implementing its proposals.

3.7 The Commission notes that Qantas is an established international carrier which is clearly capable of obtaining the necessary approvals and of implementing its proposal. This means that there is public benefit arising from the use of the entitlements.

3.8 Qantas has also requested that:

- the capacity be allowed to be utilised by either Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas; and
- the capacity be allowed to be used by Qantas to provide services jointly with any wholly-owned subsidiary of the Qantas Group and / or Air Caledonie International (Aircalin).

3.9 The Commission notes that under the Australia – New Caledonia air services arrangements, a designated Australian carrier is permitted to enter into code share, blocked space, or other cooperative marketing arrangements, as either the operating or the marketing airline, with any other airline or airlines (with the exception of third country airlines) including airlines of the same party.

3.10 The Commission notes that this is a thin route which may not be capable of sustaining substantial competition and that since 1993 the Commission has authorised the operation of capacity by Qantas in joint services with Air Caledonie. All existing determinations allocating capacity in favour of Qantas on the New Caledonia route permit code sharing with Air Caledonie.

3.11 In the interests of providing commercial and operational flexibility, consistent with requirements of the Act, the Commission will authorise the capacity to be used by either Qantas or its wholly-owned subsidiary and the use of the capacity in joint services with a wholly-owned subsidiary of the Qantas Group and/ or Air Caledonie (Aircalin).

3.12 In relation to joint services, the Commission will include a condition which requires Qantas 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.

3.13 The inclusion of the above conditions is consistent with subsection 15(1) of the Act which empowers the Commission to include such terms and conditions as it thinks fit. In relation to provision of joint services, subsection 15(2) provides, in part, that the determination:

- (e) 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

(ea) 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.

3.14 Nothing in this decision, however, 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 [2013] IASC 118

4.1 In accordance with section 7 of the Act, the delegate, on behalf of the Commission, makes a determination in favour of Qantas allocating 150 seats per week in each direction under the Australia – New Caledonia air services arrangements, subject to the conditions set out below.

4.2 The determination is valid for five years from the date of this determination.

4.3 The determination is subject to the following conditions:

- Qantas is required to fully utilise the capacity by 31 March 2014;
- the capacity may be utilised by Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas;
- the capacity may be utilised by Qantas to provide services jointly with any wholly-owned subsidiary of the Qantas Group;
- the capacity may be utilised by Qantas to provide services jointly with Air Caledonie International (Aircalin) in accordance with:
 - the code share agreement between Qantas and Air Caledonie International dated 4 June 2004, as amended on 6 March 2013; or
 - any subsequent code share agreement between the parties, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- under any code share agreement with Air Caledonie International:
 - Qantas must price and sell its services on the route independently of Air Caledonie International;
 - Qantas must not share or pool revenues on the route with Air Caledonie International;

- under the code share agreement with Air Caledonie International, Qantas must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of booking;
- Qantas or any other carrier is not permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person without the prior approval of the Commission;
- where the capacity is used to provide joint services on the route, nothing in this determination exempts Qantas from complying with the Australian Consumer Law. The airlines are required to take all reasonable steps to ensure that passengers are informed, at the time of booking, 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 – France Route 3 (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 or be in a position to exercise effective control of Qantas, without the prior consent of the Commission.

Dated: 25 March 2013



Marlene Tucker
Executive Director
Delegate of the IASC Commissioners