



Australian Government

International Air Services Commission

INTERIM DETERMINATION

Determinations: [2013] IASC 128
The Route: France - Route 3 (New Caledonia)
The Applicants: Pionair Australia Pty Ltd (ACN 21 102 715 506); and
Pacific Air Express (Australia) Pty Ltd
(ACN 26 074 265 553)
Public Register File: IASC/APP/201310 and IASC/APP/201317

The Commission allocates one all-cargo service per week to Pionair on the France Route 3 (New Caledonia route) for three years.

1 The applications

1.1 On 25 March 2013, Pionair Australia Pty Ltd (Pionair), trading as Skyforce Aviation Pty Ltd (SkyForce), applied for one all-cargo service per week with capacity up to 28 tonnes on the New Caledonia route. Pionair stated that it planned to use a BAe146-200QC aircraft with a payload capacity of 12 tonnes on services originating in Brisbane.

1.2 On 11 April 2013, Pacific Air Express (Australia) Pty Ltd (PAE) applied for an allocation of one B737-300F (17.5 tonnes) service per week on the New Caledonia route to enable it to operate a shared service with Air Caledonie International (Aircalin), operating Brisbane-Noumea-Vila-Brisbane.

1.3 Both airlines sought an allocation for five years. PAE stated in its original application that it is in a position to fully utilise the capacity by 30 June 2013. In a subsequent submission dated 6 July 2013, PAE stated that subject to approval by the New Caledonian Government, PAE and Aircalin would be jointly capable of commencing the service within three months of gaining approval by the relevant authorities of both the Australian and New Caledonian Governments.

1.4 In its submission of 5 July 2013, Pionair, stated that the airline would expect to start operating the Brisbane-Noumea service within eight weeks from obtaining all regulatory approvals.

1.5 The Commission invited submissions about the applications. Submissions were received from Pionair, PAE, Aircalin and the Australian Competition and Consumer Commission (ACCC). Pionair and PAE also provided the Commission with separate submissions containing confidential information which they asked not to be published.

1.6 All non-confidential material is available on the Commission's website (www.iasc.gov.au). Confidential material is filed on the Commission's confidential

register.

The airline submissions

1.7 In its 25 March 2013 application, Pionair informed the Commission that it is a holder of an Australian High Capacity Passenger and Cargo Air Operator's Certificate (AOC) and that it has on file with the New Caledonian authorities the technical approval to operate within the French territories of New Caledonia. Pionair further stated (in its 25 March 2013 application) that it currently operates a Convair 580 all-cargo aircraft with a payload capacity of 6000 kgs and that it was expecting delivery of the first of two BAe 146-200QC aircraft with a payload capacity of 12000 kgs. Subsequently, on 12 April 2013, Pionair informed the Commission that it had received delivery of its BAe 146-200QC aircraft.

1.8 On 13 May 2013, Pionair advised the Commission that while Pionair is the applicant for the capacity, SkyForce, which is a separate company, is the commercial arm of Pionair and would be operating and marketing the service. On 5 July 2013, however, Pionair informed the Commission that Pionair (the applicant) will be the operator of the aircraft, no longer Skyforce, as Pionair holds the AOC and owns the aircraft which will service the New Caledonia route.

1.9 As Pionair holds an AOC in its own right, Pionair claims that it satisfies the requirement of the New Caledonian Government that the entity applying for capacity must hold an AOC in its own right. Pionair further informed the Commission that it has already applied for aircraft technical acceptance to operate into Noumea. Pionair provided the Commission a copy of a landing approval for a commercial flight on 30 June 2013 given by the New Caledonian Government on 26 June 2013 to operate a charter service. Pionair stated that this landing approval indicates that the New Caledonian Government deems Pionair as 'technically acceptable to operate' in that country.

1.10 PAE, in its application of 11 April 2013, stated that it is a long established Australian cargo airline with considerable experience in developing scheduled freighter services and an extensive customer base in the region. PAE stated further that combined with Aircalin's customers, it would have sufficient freight to make the route viable for both airlines on a scheduled service.

1.11 It is noted, however, that, to date, the Commission has not received information that the proposed PAE-Aircalin code sharing arrangements have been fully negotiated and finalised. Aircalin wrote to the Commission on 7 May 2013 informing the Commission that Aircalin is currently in discussions with PAE to undertake a code-shared weekly B737 freighter service on the Brisbane-Noumea route. PAE, in its submission of 6 July 2013, informed the Commission that PAE met with Aircalin representatives on 4 July 2013 to discuss the proposed code sharing arrangements. However, there was no indication that the negotiations have been completed. Neither was there information as to when PAE and Aircalin would likely complete their negotiations.

1.12 Pionair and PAE have made several submissions addressing the paragraph 5 criteria of the Policy Statement No. 5, dated 19 May 2004 issued by the Minister (the Policy Statement), and commenting on the submissions of the other applicant.

1.13 In its submission of 18 April 2013, Pionair expressed the view that its application for an independent service should be preferred as opposed to PAE's proposal for a joint service with Aircalin, the national carrier of New Caledonia. Pionair claims that it would provide competition with the national carrier, whereas the PAE/Aircalin arrangement would undermine any competition on the route and essentially restrict the market to a one-price service. In its submission of 13 May 2013, Pionair maintained that the BAe 146 dedicated cargo aircraft it would be using is a superior aircraft for the route in terms of the freight it can carry and size of the aircraft, than the B737-330F aircraft of PAE.

1.14 In its submission of 6 May 2013, PAE maintained that the present air freight market will not support a year round "stand alone" Brisbane-Noumea freighter service and that commercially viable load factors will only be achievable when combined with the market share held by Aircalin. In addition, PAE stated that the Commission should recognise that establishing a new air service in the Pacific region has its own unique political and bureaucratic challenges which are often best negotiated in union with the local airline. PAE claimed that the PAE/Aircalin code shared freighter service will be sustained throughout the year because of the wider marketing ability and combined customer base of both airlines for Brisbane-Noumea freight and the addition of PAE's existing Brisbane-Port Vila freight.

1.15 These submissions are available on the Commission's website.

2 Provisions of the 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. Under the Australia-New Caledonia air services arrangements, there is provision for one all-cargo service per week with capacity up to 28 tonnes. As no Australian carrier is operating all-cargo services on the route, this capacity is currently available for allocation.

2.2 Under the arrangements, designated airlines may enter into code share, block space or other cooperative marketing arrangements with any other airlines, with the exception of third country airlines. The capacity operated under such arrangements is counted only against the capacity of the country designating the operating airline.

2.3 The arrangements allow designated airlines of each party to use aircraft (or aircraft and crew) leased from any company, including other airlines, provided only that the operating aircraft and crew meet the applicable operating and safety standards and requirements in accordance with the laws and regulations of both parties.

3 Relevant provisions of the Act and the Policy Statement

3.1 Under section 7 of the *International Air Services Commission Act 1992* (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.

3.2 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.

3.3 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.

3.4 Paragraph 4.1(b) of the Policy Statement states that it is not of benefit to the public 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 applications.

3.5 If the Commission finds that both applicants satisfy the paragraph 4 criteria and the total amount of capacity applied for exceeds the amount of available capacity on the route, the Commission is required to apply the additional criteria in paragraph 5 in assessing the benefit to the public. The additional criteria recognise various forms of public benefit such as competition benefits, tourism benefits, consumer benefits, trade benefits and industry structure.

3.6 The Commission is not required to apply all of the additional criteria described in paragraph 5 if it is satisfied that the criteria relevant to the application have been met. However, the Commission is required to take as the preeminent consideration, the competition benefits of each application.

3.7 If, however, the Commission finds that one applicant does not satisfy the paragraph 4 criteria, and the other remaining applicant satisfies the paragraph 4 criteria, it is not necessary for the Commission to apply the paragraph 5 criteria. In this instance, the Commission will allocate the capacity to the applicant satisfying the paragraph 4 criteria without assessing the applications against the paragraph 5 criteria.

4 Freight traffic and capacity on the route

4.1 Qantas and Aircalin currently operate passenger and bellyhold freight services on the New Caledonia route. There are no dedicated freighter services on the route.¹

4.2 Aircalin currently operates one A330 and three A320 services per week between Sydney and Noumea and two A320 services per week between Brisbane and Noumea. Qantas currently operates one B767 and two B737 services per week between Sydney and

¹ Source: International Airlines Timetable Summary at <http://www.infrastructure.gov.au/aviation/international/timetable.aspx>

Noumea and one B737 service per week between Brisbane and Noumea. Qantas and Aircalin code share on each other's services for passengers, but not for bellyhold freight.

4.3 Freight capacity is limited to residual bellyhold capacity after the incumbent airlines meet the capacity demands of their passenger operations. Available freight capacity therefore tends to vary depending on the aircraft type and on the requirement for passenger checked baggage. The Commission estimates that currently there is, on average, 37-46 tonnes of scheduled uplift capacity available for freight each week on the route. Of this, Aircalin operates 25-32 tonnes of freight capacity per week and Qantas operates 12-14 tonnes per week, on average.

4.4 Based on these estimates, the available freight capacity has not been fully utilised in either direction by either airline in recent years. For example, in 2012:

- 26.4 tonnes of freight per week, on average, was carried between Australia and New Caledonia. The vast bulk of this freight (25.2 tonnes per week) was carried from Australia to New Caledonia.
- Aircalin carried 21.4 tonnes per week, on average, of which 20.7 tonnes was carried from Australia to New Caledonia.
- Qantas carried 5 tonnes per week, on average, of which 4.4 tonnes was carried from Australia to New Caledonia.²

5 Commission's assessment of the applications against the paragraph 4 criteria

PAE

Ability to obtain necessary approvals

5.1 PAE is an international freight carrier which currently holds freight capacity on the Papua New Guinea (PNG) and Vanuatu routes. PAE was initially allocated capacity to operate services on the PNG route in 2003 under determination [2003] IASC 123. While it was able to conduct a series of charter flights over a period of three months between Brisbane and Lae, PAE was unable to commence its planned scheduled international services between 2004 and 2006 due to reasons which the Commission understands to be not entirely within its control. Consistent with the 'use it or lose it' principle, in May 2006, determination [2003] IASC 123 was revoked. PAE was again allocated capacity on the PNG route in December 2009 under [2009] IASC 134 and it commenced a weekly service between Australia and PNG in April 2010. In 2010, PAE was allocated an additional 17.5 tonnes of freight capacity and this enabled it to operate a second weekly service. In 2011, it was again allocated a further 17.5 tonnes of freight capacity to operate a third weekly service on the PNG route. PAE's third weekly service, however, is categorised as 'subject to loading' which means the service may be cancelled if there is not enough cargo to be carried.

5.2 In 2009, PAE was also allocated 35 tonnes of freight capacity per week on the

² Data supplied by the Bureau of Infrastructure, Transport and Regional Economics (BITRE).

Vanuatu route but the capacity was subsequently reduced to 17.5 tonnes in November 2010. PAE currently operates a weekly service between Australia and Port Vila (Vanuatu).

5.3 In 2011, PAE was allocated 17.5 tonnes per week of freight capacity in each direction on the Fiji route. However, this allocation was not utilised and in 2013, upon the request of PAE, the capacity was revoked.

5.4 The operations of PAE on the PNG and Vanuatu routes clearly indicate that PAE is an established international carrier reasonably capable of obtaining the necessary approvals to operate on those routes and of implementing air service operations. However, in relation to this application for capacity on the New Caledonia route, PAE must be reasonably capable of obtaining the necessary approvals from the New Caledonian Government.

5.5 PAE conducts its air services operations under an Aircraft, Complete Crew, Maintenance and Insurance (ACMI) lease agreement with Toll and Airwork, otherwise known as a wet-lease. Airwork owns and operates (including supplying the crew) the B737 freight aircraft which Toll leases and Toll in turn leases the aircraft (including the crew) to PAE. Toll and PAE are responsible for paying all fuel, landing fees, air navigation fees, ground handling etc for the aircraft on their respective route networks. Toll and PAE do not hold AOCs but Airwork does. PAE has advised the Commission that it allowed its AOC to lapse some years ago when it entered into its present arrangement with Airwork/Toll, and that as this arrangement is commercially satisfactory, it has no current plans to resume B737F operations using its own AOC.

5.6 In view of PAE's wet-leasing arrangements, the Commission, on 6 June 2013, sought the advice of the Department of Infrastructure and Transport (the Department) on whether wet-leasing is acceptable by the New Caledonian Government. The Department advised the Commission, on 7 June 2013, that, from the perspective of the New Caledonian authorities, any airline intending to operate or offer air services to New Caledonia must hold an AOC in its own right notwithstanding that the aircraft which the airline uses to conduct its services to New Caledonia may be operated by another entity with an AOC. The Department further advised that it is its understanding that New Caledonian authorities permit wet-leasing of an aircraft but require the airline which leases the aircraft to hold an AOC in its own right, even though that AOC may not actually be used for the operation of the wet-leased aircraft.

5.7 On 26 June 2013, the Commission informed PAE of the Department's advice and gave it an opportunity to advise the Commission if it considers it will be able to obtain permission from the New Caledonian Government to operate in that country. PAE acknowledged the above interpretation by the New Caledonian Government of the air services arrangements between Australia and New Caledonia. However, it advised that, with the support of Aircalin (with which it proposes to code share on the route), it intends to seek a review of such interpretation with the New Caledonian Government.

5.8 On 3 July 2013, the Commission requested the Department to seek confirmation from the relevant authority in New Caledonia that its interpretation of the air services arrangements remains the same. On 10 July 2013, the Department advised the Commission that it sought confirmation from the Directorate of Civil Aviation of New

Caledonia on the issue of required approvals to provide air services to New Caledonia by airlines which do not have their own Air Operator's Certificate. The Directorate of Civil Aviation (DCA) of New Caledonia has confirmed that New Caledonian authorities will not provide authorisation to any company which does not hold its own Air Operator's Certificate. The DCA stressed this is their fundamental position which is based on their interpretation of the International Civil Aviation Organization's principles and is incorporated into New Caledonian and French law.

5.9 The advice from the DCA of New Caledonia indicates that based on its interpretation of its air services legislation, PAE will not be given authorisation by the New Caledonian Government to operate in New Caledonia as it does not have an AOC in its own right. In light of this, the Commission considers that PAE will not be reasonably capable of obtaining the necessary approvals to operate air services on the New Caledonia route.

Ability to implement its proposals

5.10 As discussed above, PAE is unlikely to be able to obtain the necessary permit from the New Caledonian Government and therefore will not be able to operate air services to New Caledonia. In light of this, the Commission concludes that PAE is not reasonably capable of implementing its proposed services to New Caledonia.

5.11 It is to be noted, however, that the Commission's finding in this case that PAE fails to satisfy the paragraph 4 criteria is based on the confirmation from the DCA of New Caledonia that New Caledonian authorities will not provide authorisation to any company which does not hold its own AOC. If PAE held an appropriate AOC in its own right and was able to obtain the necessary regulatory approvals from the New Caledonian authorities, the Commission would have arrived at a different finding.

Pionair

Ability to obtain necessary approvals

5.12 Although Pionair was allocated capacity on the PNG route by the Commission in 2010, it never used the capacity and it has not operated scheduled international services. Pionair's international operations, to date, consist only of charter services. As with any airline seeking to operate scheduled international services, Pionair must obtain an international airline licence from the Department before it can commence services. An airline must also be designated by Australia to bilateral partner countries to operate international services as an Australian national carrier. In line with its normal practice for potential new entrant airlines, the Commission sought advice from the Department on whether it considered Pionair to be reasonably capable of obtaining the licensing, designation and operational approvals necessary to operate scheduled services on the New Caledonia route.

5.13 The Department provided a response on 3 May 2013. The Department advised that Pionair applied for an international airline licence on 25 March 2013. The Department requested on 3 and 16 April 2013 supplementary material to enable it to process the application. The Department also indicated that Pionair had been advised that its AOC needed to be upgraded to permit regular public transport operations and that its

Transport Security Program needed to be updated as well to reflect changes in its proposed operations. The Department concluded that until the above issues were resolved and additional information received, it could not give an unqualified assurance to the Commission that Pionair would be reasonably capable of obtaining the licensing, designation and operational approvals necessary to operate services on the route.

5.14 The Commission followed-up with the Department verbally to establish whether Pionair had provided the Department with the supplementary material to support its application for an international airline licence. The Department advised that Pionair had informed the Department that it had submitted an application to CASA for an upgrade of its AOC. Pionair has also informed the Commission that it had submitted an application to CASA to upgrade its AOC.

5.15 In relation to the requirement of the New Caledonian Government that the airline conducting the service must have an AOC, the Commission considers that Pionair would reasonably be able to fulfil this requirement once CASA has upgraded its AOC. In this regard, Pionair has provided evidence to the Commission that it has previously obtained landing approval of a commercial flight for a charter service into New Caledonia.

5.16 From the information available to it, the Commission considers Pionair is reasonably capable of obtaining the necessary approvals to operate on the New Caledonia route.

Ability to implement its proposals

5.17 Pionair has provided the Commission, on a confidential basis, with financial statements for both Pionair and Skyforce (its trading arm), including balance sheets and cash flow forecasts for its proposed scheduled services and other activities.

5.18 Pionair has also provided letters of support from four companies, which the Commission has taken into account in its assessment of Pionair's claims. The Chairman and major shareholder of Skyforce/Pionair, Stephen Ferris, has also given the Commission a letter of support. In the letter, he states that he purchased the business from its existing owners in 2011 and is fully committed to its success, and should the need arise, is willing to inject further funds.

5.19 The Commission notes that it recently granted an interim determination in favour of Pionair allocating 18 tonnes of freight capacity per week in each direction on the PNG route valid for three years (refer to [2013] IASC 129). The Commission, in that case, found Pionair to be reasonably capable of implementing its proposed air services on the route.

5.20 As the Commission stated in [2010] IAS 110 allocating capacity to Pionair on the PNG route, it is not necessary or possible for the Commission to be certain that a new carrier will be able to start and sustain services over the long term in order for an allocation to be made. The Commission need only be satisfied that the airline is 'reasonably capable' of obtaining the necessary approvals and of implementing its proposals.

5.21 Further, Pionair informed the Commission that it expects to be able to start operating the Brisbane-Noumea service within eight weeks from when CASA has upgraded its AOC to allow for scheduled international services.

5.22 On the basis of the information available to it, the Commission considers that Pionair would be reasonably capable of obtaining the necessary approvals to operate on the New Caledonia route and of implementing its proposed weekly service on the route.

6 Paragraph 5 criteria

6.1 As noted previously, paragraph 5 of the Policy Statement provides additional criteria for assessing benefit to the public and requires that the Commission take as the preeminent consideration the competition benefits of each application.

6.2 In this instance, however, as only one applicant has met the paragraph 4 criteria and there are no competition concerns with the proposals of that applicant, the Commission considers it is not necessary to consider the application against the paragraph 5 criteria.

7 Conclusion

7.1 In this case, there is only one (all-cargo) service per week which may be allocated and the Commission must decide which of the applicants satisfies the relevant criteria.

7.2 The Commission considers that the threshold test is satisfaction of the paragraph 4 criteria contained in the Policy Statement. Paragraph 4 clearly provides that it is not of benefit to the public for the Commission to allocate capacity to Australian carriers unless such carriers:

- are reasonably capable of obtaining the necessary approvals to operate on the route; and
- are reasonably capable of implementing their proposed services as contained in their applications.

7.3 As discussed above, PAE appears to be unlikely to be able to obtain approval from the New Caledonian Government to operate air services to that country. For this reason, the Commission considers that PAE would not be reasonably capable of obtaining the necessary approvals to operate on the New Caledonia route and of implementing its proposed services on this route.

7.4 On the other hand, Pionair appears to satisfy the New Caledonian requirement to operate air services in that country as Pionair has an AOC in its own right, although it is still awaiting approval from CASA to upgrade its AOC. The Commission considers that Pionair would be reasonably capable of obtaining the necessary regulatory approvals to operate between Australia and New Caledonia and of implementing its proposed services on the New Caledonia route.

7.5 The Commission, however, decided not to allocate the capacity for five years, as requested by Pionair. The Commission normally issues interim determinations valid for a period of three years to new carriers, particularly where capacity is restricted, and on this particular route, there is only one weekly service available for allocation. Additionally, given that Pionair does not have a track record of conducting and sustaining scheduled international services, and that its experience is mainly in providing charter services, the Commission considers it would not be advisable to lock-in the capacity for a period of five years. The Commission notes that under the previous ownership of Pionair, the airline was allocated 12 tonnes of capacity on the PNG route in September 2010, but it was never able to use that capacity in spite of being granted three extensions to fully utilise the capacity. The determination was subsequently revoked on 11 May 2012.

7.6 Pionair has not provided a specific date by which it will fully utilise the capacity. It indicated, however, that it will be able to commence operation within eight weeks from when it obtains all regulatory approvals including CASA's upgrade of its AOC. The Commission accepts that it is difficult to nominate a specific date given that Pionair does not know when it will obtain all the regulatory approvals necessary to implement the proposed services. Nonetheless, paragraph 9.1 of the Policy Statement provides that for the purposes of specifying when allocated capacity must be fully used, the Commission should specify as short a period as is reasonable having regard to the steps required to commence operations.

7.7 The Commission has decided to require Pionair to fully utilise its capacity by 31 December 2013. In the Commission's view, this timeframe should enable Pionair adequate time to obtain the regulatory approvals necessary to implement its planned services. Should Pionair not be able to fully utilise the allocated capacity by 31 December 2013, the Commission would expect Pionair to hand back the allocated capacity unless it can satisfy the Commission that the causes of any delay are beyond its control.

7.8 As part of monitoring the full utilisation of the capacity, the Commission has decided to require Pionair to submit a quarterly capacity utilisation report on the New Caledonia route.

8 Draft Interim Determination

8.1 On 31 July 2013, the Commission publicly released a draft version of this interim determination. Submissions on the draft interim determination were invited. PAE made a confidential submission to clarify the reasons for its inability to utilise the capacity it was allocated under determination [2003] IASC 123 on the PNG route (which is referred to in paragraph 5.1 of this document). The Commission amended paragraph 5.1 to clarify PAE's operations on the PNG route.

8.2 PAE acknowledged that its inability to meet the current requirement of the New Caledonian Government for an operator to hold an AOC in its own right left the Commission in a position where it could not allocate the freight capacity to PAE.

9 Interim Determination allocating capacity on the Australia – France Route 3 (New Caledonia route) to Pionair ([2013] IASC 128)

9.1 In accordance with section 7 of the Act, the Commission makes an interim determination in favour of Pionair, allocating one all-cargo service per week with capacity up to 28 tonnes on the Australia - France Route 3 (New Caledonia route), in accordance with the terms of the Australia – New Caledonia air services arrangements.

9.2 This interim determination is valid for three years from the date it is issued.

9.3 In accordance with section 15 of the Act, the interim determination is subject to the following conditions:

- Pionair is required to utilise the capacity from no later than 31 December 2013, or from such other date approved by the Commission;
- Pionair is required to submit to the Commission within two weeks at the end of each quarter a report about its utilisation of the capacity;
- only Pionair is permitted to operate the capacity;
- Pionair is not permitted to operate the capacity to provide joint services with another Australian carrier or any other person without the approval of the Commission; and
- changes in relation to the ownership and control of Pionair are permitted except to the extent that any change:
 - results in the designation of the airline as an Australian carrier under the Australia – 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 Pionair or be in a position to exercise effective control of Pionair, without the prior consent of the Commission.

Dated: 19 August 2013



Jill Walker
Chairwoman



Ian Douglas
Member