



Australian Government
International Air Services Commission

DETERMINATION

Determination:	[2014] IASC 102
The Route:	New Zealand
The Applicant:	Qantas Airways Ltd (ACN 009 661 901) (Qantas)
Public Register File:	IASC/APP/201445

The Commission makes a new determination allocating unlimited passenger and freight capacity to Qantas on the New Zealand route and consolidating all conditions contained in multiple decisions on the route. The determination allows Qantas to code share with a wholly-owned subsidiary, Emirates, China Eastern, British Airways, LATAM Airlines Group, American Airlines, Air Tahiti Nui and Japan Airlines. The capacity may also be used by a wholly-owned subsidiary and Jetstar is permitted to code share with Emirates and American Airlines.

1 The application

1.1 On 13 February 2014, Qantas applied to the Commission for a new determination to replace its existing determination in order to consolidate multiple decisions varying its current determination and to include new joint services conditions.

1.2 Qantas currently holds Determination [2006] IASC 109 (the Determination) which allocates unlimited passenger and freight capacity on the New Zealand route. The Determination was varied by Decisions [2008] IASC 211, [2009] IASC 202, [2013] IASC 223, [2014] IASC 220 and [2014] IASC 221. The Determination, as varied, permits Qantas to provide joint services with the following:

- a Qantas wholly-owned subsidiary;
- British Airways;
- Lan Chile;
- Aerolineas Argentinas;
- American Airlines;
- Air Tahiti Nui;
- China Eastern Airlines;
- Etihad;
- Emirates; and
- Japan Airlines.

1.3 The Determination, as varied, also allows Qantas' wholly-owned subsidiary, Jetstar, to utilise the capacity and to provide services jointly with Qantas and Emirates.

1.4 Qantas requested the new determination on the following basis:

- that the new determination is valid for 10 years from the date it is issued;
- that the capacity may be utilised by Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas;
- that the capacity may be used by Qantas to provide joint services with any wholly-owned subsidiary and *vice versa*; Emirates; British Airways; Lan Chile (now part of the LATAM Airlines Group (LATAM)); American Airlines; Air Tahiti Nui; China Eastern; Japan Airlines; and China Southern Airlines; and
- that the capacity may be used by Qantas' wholly-owned subsidiary, Jetstar, to provide joint services with American Airlines and Emirates.

1.5 Qantas has stated that within 10 working days of the new determination being issued it will seek revocation of Determination [2006] IASC 109.

1.6 The Commission published a notice on 14 February 2014, in accordance with sections 12 and 22 of *International Air Services Commission Act 1992* (the Act), inviting other applications for an allocation of capacity and submissions about the application. No applications or submissions were received.

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

2 Relevant provisions of the air services arrangements

2.1 There is unlimited capacity for Australian carriers to operate scheduled passenger and freight services between Australia and New Zealand and between New Zealand and third countries. Australian carriers may enter into code share and other cooperative marketing arrangements with any airline, including airlines of third countries, as the marketing and/or operating airline.

3 Commission's consideration

3.1 The Qantas application is in accordance with Procedures for Applications for Consolidation of Determinations issued by the Commission in September 2013 which are, in turn, consistent with the Act and the International Air Services Policy Statement No 5 dated 19 May 2004 (the Policy Statement).

3.2 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.

3.3 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;
- the allocation would not be contrary to any restrictions on capacity contained in bilateral arrangements, or combination of bilateral arrangements; and
- if more than one application is made, the allocation would be of greatest benefit to the public.

3.4 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.

3.5 Pursuant to section 11 of the Act, the Minister issued Policy Statement No. 5 dated 19 May 2004. 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.

3.6 Under paragraph 6.1 of the Policy Statement, in circumstances where capacity is not limited under a bilateral agreement, only the criteria in paragraph 4 are applicable.

3.7 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.

3.8 The Commission notes that Qantas is an established international carrier and is therefore reasonably capable of obtaining the necessary approvals to operate on the route and of implementing its application.

3.9 Paragraph 11.1(b) of the Policy Statement provides that on routes where capacity and route rights are unrestricted the period for which the determination is in force will be 10 years.

3.10 In light of the above, the Commission has decided to allocate unlimited passenger and freight capacity on the New Zealand route to Qantas for a period of 10 years. The capacity may also be used by an Australian carrier which is a wholly-owned subsidiary of Qantas.

3.11 In relation to the Qantas' request to allow the capacity to be used in joint services with other airlines, paragraph 6.3 of the Policy Statement provides that, subject to paragraph 6.4, where a carrier requests a variation of a determination to allow it flexibility in operating its capacity, including to use the Australian capacity in a code share arrangement with a foreign carrier, and no submission is received about the application, only the criteria in paragraph 4 of the Policy Statement are applicable.

3.12 Paragraph 6.4 states that the Commission may apply the criteria in paragraph 5

where submissions are received, provided those criteria were considered when the original application for allocation of capacity was made, or in the circumstances set out in paragraph 3.6 of the Policy Statement.

3.13 Under paragraph 3.6, 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).

3.14 New Zealand is Australia's largest origin/destination aviation market with 4.7 million passenger movements for the year ending June 2013¹. Currently Air New Zealand, Qantas, Virgin Australia, Jetstar, Emirates, China Airlines (of Taiwan) and LATAM operate own aircraft services across the Tasman. There are also a large number of airlines marketing code share services on the operating carriers.

3.15 The Commission notes that the ACCC, on 27 March 2013, authorised the alliance between Qantas and Emirates, subject to certain conditions (ACCC authorisation numbers A91332 and A91333). The authorisation covers the conduct of Qantas and those of its related bodies corporate in which Qantas holds more than 50% (such as Jetstar) and Emirates and its subsidiaries. In granting authorisation, the ACCC concluded that the Qantas-Emirates alliance was likely to result in public benefits through enhanced products and service offerings and improved operating efficiency. While the ACCC considered that the alliance was likely to result in detriments through its effect on competition in regions where Qantas and Emirates currently compete, in most regions the ACCC identified competitive constraints which meant that these detriments were likely to be minimal.

3.16 On the Trans-Tasman route, the ACCC expressed concern that Qantas and Emirates will have the ability and incentive to reduce or limit growth in capacity in order to raise airfares. To address this concern, the ACCC imposed a condition requiring the airlines to maintain at least their pre-alliance aggregate capacity on the set of four overlap routes (Sydney-Auckland, Melbourne-Auckland, Brisbane-Auckland and Sydney-Christchurch) for the term of the authorisation subject to a review to consider whether increases in minimum required capacity are warranted.

3.17 Qantas already has approval in its existing determination, as varied, to provide joint services with Emirates, China Eastern, British Airways, LAN Chile (now LATAM), American Airlines, Air Tahiti Nui, and Japan Airlines. The Commission has also permitted Qantas' wholly-owned subsidiary, Jetstar, to provide joint services with Qantas and Emirates.

3.18 In relation to Qantas' request to allow it to code share with China Southern and

¹ Source: Bureau of Infrastructure, Transport and Regional Economics

Jetstar to code share with American Airlines, the Commission did not identify any serious concerns that these proposed code share arrangements may not be of benefit to the public. The Commission considers it unlikely that China Southern or American Airlines would operate their own services between Australia and New Zealand and therefore unlikely for the airlines to be in competition on this route absent the code share arrangements.

3.19 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 in a determination stating the extent to which the carrier may use that capacity in joint services with another carrier.

3.20 The Commission has decided to authorise the use of the capacity by Qantas in joint services with China Southern Airlines and for Jetstar to utilise the capacity in joint services with American Airlines. With regard to existing joint services authorisations, the Commission has also decided to continue to permit these existing code share arrangements. The Commission further notes that LAN Chile has merged with TAM Airlines to become LATAM and this change will be reflected in the new determination.

3.21 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 ([2014] IASC 102) allocating capacity on the New Zealand route to Qantas

4.1 In accordance with section 7 of the Act, the Commission makes a determination in favour of Qantas allocating unlimited passenger and freight capacity on the New Zealand route, in accordance with the Australia-New Zealand air services arrangements.

4.2 The determination is for ten years from the date of issue of this instrument.

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

- Qantas is required to apply to have Determination [2006] IASC 109 and all decisions varying the determination revoked within 10 working days of the date of this determination;
- 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 prior approval of the Commission;

- 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;
- the capacity may be used by Qantas to provide services jointly with Emirates in accordance with the code share agreement between Qantas and Emirates dated 21 January 2013, as amended, or any subsequent code share agreement between Qantas and Emirates, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- the capacity may be used by Qantas to provide services jointly with China Eastern Airlines in accordance with the code share agreement between Qantas and China Eastern Airlines dated 9 July 2008, as amended, or any subsequent code share agreement between Qantas and China Eastern Airlines, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- the capacity may be used by Qantas to provide services jointly with British Airways in accordance with the code share agreement between Qantas and British Airways dated 19 November 2013, as amended, or any subsequent code share agreement between Qantas and British Airways, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- the capacity may be used by Qantas to provide services jointly with the LATAM Airlines Group in accordance with the code share agreement between Qantas and LAN Chile dated 2 April 2003, as amended by an Amendment Agreement between Qantas and LATAM Airlines Group effective from 1 October 2013, or any subsequent code share agreement between Qantas and the LATAM Airlines Group, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- the capacity may be used by Qantas to provide services jointly with American Airlines in accordance with the code share agreement between Qantas and American Airlines dated 6 May 2011, as amended, or any subsequent code share agreement between Qantas and American Airlines, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- the capacity may be used by Qantas to provide services jointly with Air Tahiti Nui in accordance with the code share agreement between Qantas and Air Tahiti Nui dated 12 May 2000, as amended, or any subsequent code share agreement between Qantas and Air Tahiti Nui, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- the capacity may be used by Qantas to provide services jointly with China Southern Airlines in accordance with the code share agreement between Qantas and China Southern Airlines dated 10 February 2014, or any subsequent code share agreement between Qantas and China Southern

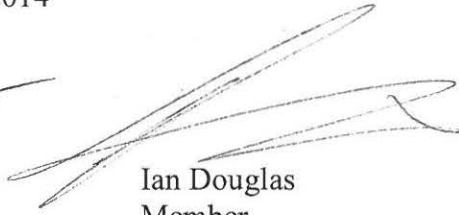
Airlines, whether or not it replaces the existing agreement, with the prior approval of the Commission;

- the capacity may be used by Qantas to provide services jointly with Japan Airlines in accordance with the code share agreement between Qantas and Japan Airlines dated 1 June 2009, or any subsequent code share agreement between Qantas and Japan Airlines, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- the capacity may be used by Jetstar to provide services jointly with Emirates in accordance with the code share agreement between Jetstar and Emirates dated 11 February 2014 or any subsequent code share agreement between Jetstar and Emirates, whether or not it replaces the existing agreement, with the prior approval of the Commission; or
- the capacity may be used by Jetstar to provide services jointly with American Airlines in accordance with the code share agreement between Jetstar and American Airlines dated 1 October 2010, as amended, or any subsequent code share agreement between Jetstar and American Airlines, whether or not it replaces the existing agreement, with the prior approval of the Commission;
- in providing joint services, the airlines may not jointly price and market their services, or share or pool revenues/profits on the route, unless such practices are authorised under the *Competition and Consumer Act 2012* or otherwise authorised by the Australian Competition Tribunal, in the event of review by the Tribunal;
- to the extent that the capacity is used to provide joint services on the route, the airlines 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 the airlines 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 – New Zealand 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.

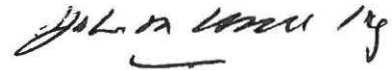
Dated: 14 March 2014



Jill Walker
Chairwoman



Ian Douglas
Member



John King
Member