



Australian Government

International Air Services Commission

DETERMINATION

Determination: [2019] IASC 127
The Route: Hong Kong
The Applicant: Pacific Air Express (Australia) Pty Ltd
(Pacific Air Express)
(ACN 074 265 553)
Public Register: IASC/APP/201934

The Commission's delegate makes a determination allocating to Pacific Air Express unrestricted capacity to operate dedicated freight services between points in Australia, other than Sydney, Melbourne, Brisbane and Perth, and Hong Kong. The determination is valid for 99 years from 11 November 2019.

1 The application for renewal

1.1 On 24 October 2019, Pacific Air Express applied to the International Air Services Commission (the Commission) for unrestricted capacity to operate all-cargo services between points in Australia, other than Sydney, Melbourne, Brisbane and Perth, and Hong Kong. In its application, Pacific Air Express proposes to operate three services per week in each direction between Darwin and Hong Kong using a Boeing 757-200 freighter aircraft with 32 tonnes freight capacity.

1.2 In accordance with section 12 of the *International Air Services Commission Act 1992* (the Act), the Commission published, on 25 October 2019, Pacific Air Express' application on the Commission's website inviting other applications for capacity on the Hong Kong route. No other applications were received.

1.4 All non-confidential material supplied by Pacific Air Express is available on the Commission's website (www.iasc.gov.au).

2 Relevant provisions of the 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).

2.2 The Australia-Hong Kong air services arrangements provide that there is no limit to the number of frequencies that may be operated by designated airlines of Australia for all-cargo services between all points in Australia other than Sydney, Melbourne, Brisbane and Perth and Hong Kong.

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 Pacific Air Express is seeking the allocation of unrestricted capacity on the Hong Kong route which the airline plans to use to operate three weekly services between Darwin and Hong Kong using a Boeing 757-200 freighter aircraft.

3.3 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 Pacific Air Express' application. (For purposes of this determination, all references to the Commission include the delegate of the Commission).

3.4 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.

3.5 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

3.6 Under section 11 of the Act, the Minister made 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.

3.7 Section 11 of the Policy Statement provides that where the Commission proposes to make a determination allocating available capacity on a route under section 7 of the Act, and available capacity on the route is not limited under the relevant bilateral arrangement, in assessing the benefit to the public of the allocation of capacity,

the Commission is to have regard to the reasonable capability criterion and need not have regard to any other matter.

3.8 Under the ‘reasonable capability criterion’ in section 8 of the Policy Statement, in assessing the public benefit of an application, the Commission is to have regard to 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 licences, 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 Pacific Air Express is an established carrier operating scheduled international freight services between Australia and certain Pacific nations. Further, since Pacific Air Express is a new provider of scheduled international air service on the Australia-Hong Kong route, the delegate sought advice from the Department of Infrastructure, Transport, Cities and Regional Development (the Department) on whether the carrier is reasonably capable of obtaining the necessary licences, permits or other approvals required to operate on and service the route and of using the capacity allocated on the Hong Kong route. On 6 November 2019, Mr Stephen Borthwick, General Manager of Aviation Industry Policy of the Department, advised that based on current information, Pacific Air Express is reasonably capable of obtaining the relevant licences, permits and other approvals required to operate on the Australia-Hong Kong route and using the capacity sought by the carrier.

3.10 In light of the foregoing, the delegate finds that Pacific Air Express is reasonably capable of obtaining the relevant licences, permits and other approvals required to operate on the Australia-Hong Kong route and using the capacity sought to be allocated under the determination and that allocating the capacity in favour of Pacific Air Express would be of benefit to the public.

3.11 Paragraph 15(2)(a) of the Act requires a determination to specify the period during which it is to be in force. Subsection 15(3) of the Act effectively provides that if the Minister’s Policy Statement sets out how the period of validity of the determination is to be fixed, then the period of validity is as so fixed. In any other case, an interim determination is to be in force for three years while a determination that is not an interim determination is to be in force for five years.

3.12 Subsection 20(2) of the Policy Statement provides that for a determination allocating capacity on a route where capacity is not limited under the relevant bilateral air services arrangement, the period during which the determination is to be in force should be fixed at 99 years. Additionally, section 9 of the International Air Services Commission Regulations 2018 provides that for the purposes of subparagraph 15(2)(c)(ii) of the Act¹, a determination is not required to include a condition that capacity allocated by the determination be fully used if available capacity is not restricted by the bilateral arrangement. In light of this, the Commission’s delegate will

¹ Paragraph 15(2)(c) of the Act relevantly provides that a determination must include a condition that capacity be fully used except so far as the regulations otherwise permit.

set the period of validity of the determination to 99 years and will not include a condition requiring the capacity to be fully used.

4 Determination allocating capacity on the Hong Kong route to Pacific Air Express ([2019] IASC 127)

4.1 In accordance with section 7 of the Act, the Commission's delegate makes a determination in favour of Pacific Air Express, allocating unrestricted capacity to operate dedicated freight services between points in Australia other than Sydney, Melbourne, Brisbane and Perth and Hong Kong in accordance with the Australia – Hong Kong air services arrangements.

4.2 The determination is valid for 99 years from 11 November 2019.

4.3 The determination is subject to the following conditions:

- (a) Only Pacific Air Express is permitted to utilise the capacity.
- (b) Pacific Air Express is not permitted to utilise the capacity to provide code share or joint services with another carrier or any other person unless approved by the Commission.
- (c) Changes in relation to the ownership and control of Pacific Air Express are permitted except to the extent that any change:
 - results in the designation of the airline as an Australian carrier under the Australia – Hong Kong 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 Pacific Air Express or be in a position to exercise effective control of the airline, without the prior consent of the Commission.

Dated: 11 November 2019



Marlene Tucker
Executive Director
Delegate of the IASC Commissioners