



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination: [2019] IASC 115
Renewal of: [2015] IASC 107
The Route: Chile
The Applicant: Qantas Airways Limited
(Qantas) ABN 16 009 661 901
Public Register: IASC/APP/201918

The Commission makes a fresh determination allocating to Qantas 1,847 seats of capacity per week in each direction on the Chile route. The determination is valid for five years from 15 July 2020.

1 The application

1.1 On 15 July 2015, the International Air Services Commission (the Commission) issued Determination [2015] IASC 107 (the Determination) allocating 1,847 seats of capacity per week in each direction on the Chile route.

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 14 July 2020. In view of this, the Commission sent, on 16 July 2019, a letter to Qantas inviting it to apply for renewal if it wished to renew the Determination.

1.3 Qantas subsequently applied on 31 July 2019 for a renewal of the Determination for a further period of five years from 15 July 2020 and requested to retain the following existing conditions:

- permit the capacity to be used by Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas, which in this case is Jetstar Airways Pty Limited (Jetstar);
- permit the capacity to be used by Qantas to provide joint services with any wholly-owned subsidiary and by any wholly-owned subsidiary of the Qantas Group to provide joint services with Qantas; and
- permit Qantas to provide joint services with LATAM.

1.4 As required by sections 12 and 17 of the Act, the Commission published a notice on 31 July 2019 inviting other applications for capacity. No applications were received. All non-confidential 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 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). Any variation made to an existing allocation of capacity should also not be contrary to any restrictions on capacity contained in a bilateral arrangement (s).

2.2 According to the Register of Available Capacity, there are 1,816 seats per week of passenger capacity in each direction available for allocation to Australian carriers to operate services between Australia and Chile.

2.3 Under the Australia-Chile air services arrangements, Australian designated airlines may enter into cooperative marketing arrangements such as code sharing, blocked space and aircraft leasing, whether as the operating or marketing airline, with an airline(s) of the same party, an airline(s) of the Chile, or with an airline(s) of a third country. Capacity offered by a designated airline, as the marketing airline on services operated by another airline(s), will not be counted against any capacity entitlements of the party designating the marketing airline.

3 Commission's consideration

3.1 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.

3.2 Pursuant to section 11 of the Act, the Minister issued the International Air Services Policy Statement 2018 (Policy Statement) which came into effect on 28 March 2018. 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.

3.3 Under section 14 of the Policy Statement, there is a presumption in favour of making the same allocation of capacity to the carrier seeking the renewal. However, if the Commission is considering whether the capacity allocation is no longer of benefit to the public, the Commission may have regard to the following matters:

- (a) the carrier seeking renewal has failed to service the route effectively; and
- (b) there are other applications for some or all of the capacity; and
- (c) the Commission, having regard to the reasonable capability criterion and any of the additional criteria that it considers relevant, is satisfied that a different allocation of the capacity would be of greater benefit to the public.

3.4 Under the reasonable capability criterion in section 8 of the Policy Statement, the Commission is to assess the extent to which all Australian carriers that are, or would be, permitted to use the capacity are reasonably capable of (a) obtaining any licences, permits or other approvals required to operate on and service the route to which the determination relate; and (b) using the capacity allocated under the determination. The Commission

notes that Qantas and its wholly-owned subsidiary, Jetstar, are established international carriers and are reasonably capable of obtaining the necessary approvals to use the capacity to operate on the route and of using the capacity to be allocated.

3.5 The Commission further notes that there are no other applicants seeking capacity on the route and there is no information to suggest that Qantas has failed to service the route effectively. The Commission, having considered the foregoing circumstances, did not consider it necessary to assess the application against the additional criteria in section 9 of the Policy Statement.

3.6 Further, Qantas sought authority to continue utilising the capacity for code sharing under a blocked space arrangement with LATAM Airlines. The Commission has previously approved the use of the capacity allocation by Qantas for blocked space code sharing with LATAM. It has no reason to believe that there has been a material change in circumstances that would warrant changing the existing condition which permits such use of the capacity for code sharing under a blocked space arrangement. In view of this, the Commission considers it is not necessary to apply section 15 of the Policy Statement to the current application.¹

3.7 For the above reasons, the Commission is satisfied that renewing the capacity allocation and retaining the relevant conditions would be of benefit to the public.

3.8 Subsection 15(1) of the Act allows a determination to include such terms and conditions as the Commission thinks fit. Subsection 19(3) of the Act provides that, in including terms and conditions in the fresh determination, the Commission may make such changes to the terms and conditions included in the original determination sought to be renewed, including adding or deleting terms and conditions, where warranted by changes in circumstances since the original determination was made. 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 legislative requirements and current air services arrangements.

3.9 Nothing in this decision should be taken as indicating either approval or disapproval by the Australian Competition and Consumer Commission (ACCC). This decision is made without prejudicing, in any way, possible future consideration of code share operations by the ACCC.

¹ Section 15 of the Policy Statement is to be applied if the Commission is considering making a different allocation as the original determination (such as making changes to existing conditions). Under section 15, the Commission is to have regard to the reasonable capable criterion in section 8 and any of the additional criteria in section 9 which the Commission considers to be relevant.

4 Determination for renewal of [2015] IASC 107 allocating capacity on the Chile route to Qantas ([2019] IASC 115)

4.1 Pursuant to section 8 of the Act, the Commission allocates to Qantas 1,847 seats per week in each direction on the Chile route, in accordance with the terms of the Australia – Chile air services arrangements.

4.2 The determination is valid for five years from 15 July 2020.

4.3 The determination is subject to the following conditions:

(a) Qantas is required to fully utilise the capacity by no later than 31 October 2020 or such other date as may be approved by the Commission.

(b) The capacity may be utilised by:

- Qantas; or
- Jetstar Airways Pty Limited, as long as it remains a wholly-owned subsidiary of Qantas; or
- such other wholly-owned subsidiary of Qantas that the Commission approves in writing, as long as it remains a wholly-owned subsidiary of Qantas;

(c) 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;

(d) The capacity may be used by Qantas to provide code share services with LATAM in accordance with the blocked space code share agreement between the airlines which was made on 2 April 2003;

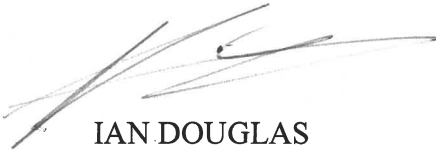
(e) Qantas must apply to the Commission for approval of any proposed variations to the code share agreement between Qantas and LATAM which would change the relevant commercial aspects of the agreement from a blocked space code share arrangement to a free sale, or vice versa, or if Qantas proposes to add third country routes on which the airlines will code share where Australian capacity will be used for services on that route;

(f) Changes in relation to the ownership and control of Qantas and/or its wholly-owned subsidiary are permitted except to the extent that any change:

- results in the designation of Qantas and/or its wholly-owned subsidiary as an Australian carrier under the Australia – Chile 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 and/or its wholly-owned subsidiary or be in a position to exercise effective control of Qantas and/or its wholly-owned subsidiary, without the prior consent of the Commission.

Dated: 16 August 2019



IAN DOUGLAS
Chairperson



JAN HARRIS
Commissioner



KAREN GOSLING
Commissioner