

DETERMINATION

RENEWAL OF DETERMINATION A-21 ALLOCATING CAPACITY ON THE ZIMBABWE ROUTE TO QANTAS AIRWAYS LIMITED (ACN 009 661 901)

Determination Number:
IASC/DET/9704

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Date: 7 February 1997

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1. The Determination subject to renewal

1.1. On 22 July 1992, the Minister issued Determination A-21 (the determination) which allocated one frequency per week on the Australia - Zimbabwe route to Qantas Airways Limited ACN 009 661 901 (Qantas). The determination, issued under section 54 of the *International Air Services Commission Act 1992* (the Act) and effective from 1 July 1992, expires on 30 June 1997.

2. The application

2.1. The Act requires the Commission to commence its consideration of the renewal of a determination at least 12 months before that determination is due to expire. In accordance with its procedures, on 20 May 1996, the Commission invited Qantas to express its interest (or otherwise) in renewing the determination. On 24 May 1996, Qantas wrote to the Commission seeking a renewal of the determination. On 21 June 1996, the Commission published a notice inviting submissions from any interested person about the renewal of the determination, and other applications for an allocation of all or part of the capacity that is subject to renewal. The closing date for submissions and other applications was 19 July 1996. Qantas was the only applicant and no other submissions were received.

2.2. All material supplied by the applicant was non-confidential and is filed on the Register of Public Documents. A copy of the Qantas - Zimbabwe Commercial Agreement is filed on the Commission's confidential register.

3. Qantas services to Zimbabwe

3.1. A determination by the Commission has increased Qantas' capacity allocation to two frequencies per week between Australia and Zimbabwe. Qantas operates its capacity as follows:

- Sydney-Perth-Harare-Johannesburg-Perth-Sydney (B747)
- Sydney-Perth- Johannesburg-Harare- Perth-Sydney (B747).

3.2. Since 1989 Air Zimbabwe has purchased seats on Qantas' Australia - Zimbabwe services on a code share basis in accordance with the Qantas - Zimbabwe Commercial Agreement.

3.3. Qantas has a broad ranging commercial agreement with British Airways, the Joint Services Agreement, but that agreement does not apply to this route.

3.4. Qantas has utilised and continues to fully utilise the relevant capacity.

3.5. In response to a request by the Commission for information in the context of this application for renewal, Qantas has provided the Commission with information concerning its operations on the route including the cities served, any operational or regulatory problems encountered (of which according to Qantas there were none) and current published fares.

4. Provisions of relevant Air Services Agreements

4.1. The Australia - Zimbabwe Memorandum of Understanding (MOU) dated 9 February 1990 provides for two services per week in each direction with any aircraft and single designation of Australian carriers.

5. Legislative framework

5.1. The renewal of a determination is made in accordance with the *International Air Services Commission Act 1992*. The legislative framework for considering a renewal of a determination under the Act is set out in Attachment A.

5.2. Under section 11 of the Act, the Minister may make Policy Statements setting out matters relevant to the Commission's performance of its functions. The current Policy Statement (No.2) was issued by the Minister on 27 March 1995 and includes criteria to be applied by the Commission in considering the renewal of a determination.

5.3. The criteria applicable to assessing the renewal of a determination in circumstances where:

- the incumbent carrier is seeking renewal of a determination;
- the capacity is limited under a bilateral arrangement;
- the route is in the start-up phase; and
- there are no other applications for the capacity subject to renewal,

are those set out in Attachment B. Those criteria apply to this application.

6. Commission's consideration of the renewal of the determination

6.1. Under the Policy Statement, there is a rebuttable presumption in favour of the carrier seeking the renewal, except where paragraph 8.1(a) applies.

6.2. Although the route is in the start up phase, the start-up phase allocation criteria set out in paragraph 8.1(a) are not applicable because Qantas is the only applicant.

6.3. The criteria for assessing benefit to the public where the rebuttable presumption in favour of the carrier seeking renewal applies are specified in paragraph 8.2 which states that the Commission should allocate the capacity to the carrier seeking renewal unless the Commission is satisfied that both of the following criteria are met:

- (a) the carrier seeking renewal has failed to service the route effectively;
and
- (b) the use of the capacity in whole or in part by another Australian carrier which has applied for that capacity would better service the public having regard to the criteria set in paragraphs 4 and 5 of the Policy Statement.

6.4. There have been no submissions suggesting that Qantas has not served the route effectively and Qantas has developed the route by expanding services. In the light of those matters and the operational information supplied, the Commission has no reason to conclude that Qantas has not served the route effectively. In any event there is no applicant by another Australian carrier.

6.5. Accordingly, the Commission concludes that the renewal of Determination A-21 allocating capacity on the Australia - Zimbabwe route to Qantas would be of benefit to the public.

7. Other issues

Terms and conditions of the fresh determination

7.1. Under section 19(3) of the Act, the Commission may make such changes (if any) to the terms and conditions included in the original determination as it is satisfied are warranted because of changes in circumstances since the original determination was made.

7.2. Since the original Section 54 Determination was made the Commission has had an opportunity to refine the terms and conditions which should apply to its determinations. In these circumstances the Commission believes that fresh determinations which renew original determinations should contain terms and conditions which are consistent with those applying to determinations currently issued by the Commission.

Period of the fresh determination

7.3. The Commission will grant Qantas a fresh determination for a period of 5 years effective from 1 July 1997.

Utilisation of the capacity

7.4. The Commission will specify that Qantas be required to fully utilise the capacity from 1 July 1997.

7.5. The Commission will specify that:

- the capacity is only to be used by Qantas; and
- Qantas may utilise the capacity to provide services jointly with Air Zimbabwe subject to the limitations specified in this fresh determination.

Ownership and control of the carrier

7.6. The Commission's view is that the determination should include the usual limitations on changes in the ownership and control of Qantas. These are specified below.

The Qantas - Air Zimbabwe Commercial Agreement

7.7. At the time of issuing Determination A-21 Qantas provided services jointly with Air Zimbabwe in accordance with the 30 June 1989 Qantas - Air Zimbabwe Commercial Agreement (the Agreement). The Agreement was assessed and approved conditionally by the Commission when Qantas was granted additional capacity on the Australia - Zimbabwe route on the 28 July 1995 (Determination IASC/DET/9506).

7.8. Qantas has advised the Commission that Annexures I, II and III of the Agreement have been revised and the revised Agreement took effect from 1 February 1997. Qantas has also advised that the core 30 June 1989 Commercial Agreement between the two carriers remains unchanged.

7.9. The Commission has considered the revised Annexures and concludes that the new Annexures are not inconsistent with those previously applying, and accepts the new Agreement with conditions as set out below.

7.10. These conditions the Commission has placed on the Agreement contained in this determination supersede the conditions placed on the previous Qantas - Air Zimbabwe Commercial Agreement contained in Determination IASC/DET/9506.

8. Determination for renewal of Determination A-21 allocating capacity on the Zimbabwe route to Qantas (IASC/DET/9704)

8.1. The Commission finds a renewal of Determination A-21 allocating capacity on the Australia - Zimbabwe route to Qantas would be of benefit to the public.

8.2. The Commission makes a fresh determination in favour of Qantas, allocating one frequency per week in each direction between Australia and Zimbabwe under the Australia - Zimbabwe Air Services Agreement.

8.3. The determination is for 5 years from 1 July 1997.

8.4. The determination is subject to the following conditions:

- Qantas is required to fully utilise the allocated capacity from 1 July 1997;
- only Qantas is permitted to utilise the capacity;

- subject to Qantas filing with the Commission a copy of the executed revisions to the Agreement, Qantas may use the capacity to provide services jointly with Air Zimbabwe in accordance with:
 - the Commercial Agreement between Qantas and Air Zimbabwe made on 30 June 1989 (as revised with effect from 1 February 1997), as extended from time to time in accordance with its terms, or as varied except in relation to section 3.1 of Annexure I; or
 - variations to the Qantas - Air Zimbabwe Commercial Agreement which relate to section 3.1 of Annexure I, subject to the prior approval of the Commission; or
 - any new joint service arrangements between Qantas and Air Zimbabwe for operations on the Australia - Zimbabwe route whether or not it replaces the existing Agreement, with the prior approval of the Commission;

and in any case, in accordance with this determination,

- to the extent that the capacity is used to provide joint services with Air Zimbabwe:
 - Qantas must price and sell its services on the routes independently;
 - Qantas must not pool revenues with Air Zimbabwe.
- 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 - Zimbabwe Air Services Agreement 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, and
- changes in relation to the management, status or location of operations and Head Office of Qantas are permitted except to the extent that any change would result in the airline ceasing to be an airline designated by the Australian Government for the purposes of the Australia - Zimbabwe Air Services Agreement.

Dated: 7 February 1997

James K Bain
Chairman

Brian L Johns
Member

Russell V Miller
Member

A. Legislative framework

1. Under subsection 17(1) of the Act, the Commission must start its consideration of the renewal of a determination at least 12 months before the end of the period during which the determination is in force.
2. Under subsection 17(2) of the Act, before starting its consideration, the Commission must, by notice, invite submissions about the renewal.
3. Under subsection 17(3), any person may make submissions to the Commission about the renewal.
4. Under subsection 8(1), the Commission may, at any time while a determination is in force, make a fresh determination allocating capacity to which the original determination relates.
5. Under subsection 8(2), the fresh determination:
 - (a) must make the same allocation of capacity as the original determination unless:
 - (i) the Commission is satisfied that that allocation is no longer of benefit to the public; or
 - (ii) the original determination is an interim determination; and
 - (b) comes into force immediately after the end of the period during which the original determination was in force.
6. Under subsection 8(3), if the fresh determination does not make the same allocation of capacity as the original determination, it must not make a different allocation of capacity unless the Commission is satisfied that that allocation would be of benefit to the public.
7. 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 dated 27 March 1995 made under section 11 of the Act. The criteria applicable to assessing benefit to the public for the purposes of renewal of determinations are those contained in paragraph 8 of the Policy Statement.
8. Subsection 19(1) of the Act relates to the contents of determinations made under section 8 of the Act. Subsection 19(2) specifies the period during which the determination is to be in force.

9. Under subsection 19(3), in including terms and conditions in the determination, the Commission may make such changes (if any) to the terms and conditions included in the original determination (including adding or deleting terms and conditions) as it is satisfied are warranted because of changes in circumstances since the original determination was made.
10. Section 20 relates to notifications of determinations.

B. Relevant criteria under paragraphs 6 and 8 of the Policy Statement

Paragraph 6.1 requirements

6. CRITERIA APPLICABLE IN PARTICULAR CIRCUMSTANCES

Capacity not limited

6.1 In circumstances where capacity is not limited under a bilateral arrangement, only the criteria in paragraph 4 are applicable.

Paragraph 8 requirements

8. RENEWAL OF DETERMINATIONS

8.1 Subject to paragraph 6.1, the criteria for assessing the benefit to the public for the purposes of renewal of determinations, other than interim determinations, are as set out below.

(a) During the start-up phase on the route:

- the start-up phase allocation criteria set out in paragraph 7 apply in relation to that part of the capacity which is reasonably necessary for a level of scheduled international passenger services necessary to permit the development of efficient, commercially sustainable operations; and
- the criteria set out in paragraph 8.2 reflecting a rebuttable presumption in favour of the carrier seeking renewal apply to the balance of the capacity.

(b) After the start-up phase on the route, the criteria set out in paragraph 8.2 reflecting a rebuttable presumption in favour of the carrier seeking renewal apply.

8.2 Where the rebuttable presumption in favour of the carrier seeking renewal applies, the criteria for assessing benefit to the public are:

- (a) whether the carrier seeking renewal has failed to service the route effectively; and
- (b) whether use of the capacity in whole or in part by another Australian carrier which has applied for that capacity would better serve the public having regard to the criteria set out in paragraph 4 and paragraph 5,

and the Commission should allocate the capacity to the carrier seeking renewal unless both of those criteria are met, in which case all or part of the capacity can be reallocated.