



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination: [2023] IASC 104
Renewal of: [2018] IASC 115
The Route: Cook Islands
The Applicant: Qantas Airways Limited (Qantas)
(ABN 16 009 661 901)
Public Register File: IASC/APP/202303

The Commission makes a fresh determination allocating to Qantas 204 seats of passenger capacity per week in each direction on the Cook Islands route, subject to certain conditions. The capacity may be used by either Qantas or its wholly-owned subsidiary, Jetstar Airways Pty Limited. The determination is valid for five years from 17 August 2023.

1 The application for renewal

1.1 On 17 August 2018, the International Air Services Commission's (the Commission) delegate issued Determination [2018] IASC 115 (the Determination) allocating, in favour of Qantas, 204 seats of capacity per week to operate passenger services on the Australia-Cook Islands route, subject to certain conditions.

1.2 The Determination is subject to certain conditions including permission for the capacity to be utilised by Qantas or its wholly-owned subsidiary, Jetstar Airways Pty Limited (Jetstar).

1.3 Section 17 of the *International Air Services Commission Act 1992* (the Act) requires the Commission to start its consideration of the renewal of a determination at least 12 months before the expiry of the original determination. The Determination is due to expire on 16 August 2023. In view of this, the Commission sent, on 18 August 2022, a letter to Qantas inviting it to apply for renewal if it wished to renew the Determination.

1.4 On 31 January 2023, Qantas applied to the Commission for a renewal of the Determination for a further five-year period from 17 August 2023 and requested the retention of all existing conditions.

1.5 In accordance with sections 12 and 17 of the Act, the Commission published, on 3 February 2023, a notice on its website and subsequently sent a notification by email to stakeholders inviting other applications for capacity on the route. No other applications were received.

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

2 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 According to the Register of Available Capacity, there are 1,420 seats of capacity per week available for allocation to Australian designated airlines to operate passenger services between Australia and the Cook Islands.

2.3 Under the Australia-Cook Islands 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 Cook Islands, 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 Section 8 of the Act provides that the Commission may, at any time while a determination is in force, make a fresh determination allocating the capacity to which the original determination relates. Subsection 8(2) provides in part that the fresh determination 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 Commission Policy Statement 2018 (the Policy Statement), which came into effect on 28 March 2018.

3.3 Section 14 of the Policy Statement applies where the Commission is proposing to make a fresh determination under section 8 of the Act, and is considering whether the allocation of capacity in the original determination is no longer of benefit to the public for the purpose of section 8(2)(a)(i) of the Act. Section 14(2) of the Policy Statement provides that, without limiting the matters to which the Commission may have regard, an allocation is generally no longer of benefit to the public if:

- the carrier has failed to service the route effectively (s 14(2)(a)); and
- there are other applications for some or all of the capacity (s 14(2)(b)); and
- the Commission is satisfied that a different allocation of capacity would be of greater benefit to the public, having regard to the criteria set out in sections 8 and 9 of the Policy Statement (s 14(2)(c)).

3.4 The Commission notes that, under subsection 14(2) of the Policy Statement, an allocation will generally no longer be of benefit to the public where all of the above conditions are satisfied.

3.5 There are no other applications for some or all of the capacity to which the determination in question relates, and therefore the condition in section 14(2)(b) of the Policy Statement is not satisfied. The Commission therefore finds that the proposed allocation does not fall within the class of allocations that are generally no longer of benefit to the public contemplated by subsection 14(2) of the Policy Statement.

3.6 However, subsection 14(2) of the Policy Statement operates ‘without limiting the matters to which the Commission may have regard’. In view of the circumstances pertaining to the COVID-19 pandemic, the Commission has proceeded to consider whether the allocation is no longer of benefit to the public in all the circumstances.

3.7 On 11 March 2020, the World Health Organization declared the outbreak of COVID-19 a pandemic. In response, the Australian Government introduced a range of health, financial and other measures to prevent and minimise the transmission of COVID-19.

3.8 In this context, on 24 March 2020 the Prime Minister announced that the Australian Government was introducing a ‘do not travel’ ban on Australians travelling overseas under the *Biosecurity Act 2015*. On 27 October 2021, the Government announced it would lift the international travel ban for certain categories of travellers from 1 November 2021, subject to certain conditions. On 7 February 2022, the Prime Minister announced that Australian international borders would re-open from 21 February 2022.

3.9 With the imposition of travel restrictions in March 2020, the Qantas Group suspended the scheduled international flights of both Qantas and Jetstar in 2020-2021. In assessing the current Qantas application for the renewal of its capacity allocation of 204 seats per week in each direction of passenger capacity on the Cook Islands route, the Commission considered whether Qantas has failed to service the route effectively.

3.10 The Commission considers that the temporary suspension of the Qantas and Jetstar services between Australia and the Cook Islands in 2020-2021 was in response to the COVID-19 travel restrictions. Prior to March 2020, there was no information to suggest that Qantas had failed to service the Australia-Cook Islands route effectively.

3.11 In light of this, the Commission finds that the temporary suspension of the Qantas Group’s services in these circumstances does not mean that it has failed to service the route effectively. Moreover, the Commission notes that Jetstar resumed services between points in Australia and the Cook Islands in May 2022.

3.12 The Commission has also considered the ‘reasonable capability criterion’ in section 8 of the Policy Statement, i.e. 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.

3.13 The Commission notes that Qantas and its wholly-owned subsidiary, Jetstar, are established carriers that currently operate services between Australia and the Cook Islands. The Commission therefore finds that the carriers are reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated on the Australia-Cook Islands route.

3.14 There is no other information before the Commission that it considers to be relevant or material to its assessment of Qantas' application. Based on its findings above, the Commission is not satisfied that the allocation of capacity in the original determination is no longer of benefit to the public for the purposes of section 8(2)(a)(i) of the Act. Therefore, the Commission is required to make the same allocation of capacity as the original determination (see section 8(2)(a) of the Act).

3.15 The Commission will continue to monitor the utilisation of capacity by the Qantas Group on this route.

3.16 Qantas also requested to retain all existing conditions. Under section 19 of the Act, the Commission "must include the same terms and conditions as the original determination to which it relates" (s 19(1)(c)), but "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" (subsection 19(3)). The Commission has decided to continue permitting the use of the capacity for code sharing with the airlines listed in item 4 below subject to conditions as stated.

3.17 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.

4 Determination allocating capacity on the Cook Islands route to Qantas Airways Limited ([2023] IASC 104)

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Qantas Airways Limited, allocating 204 seats of capacity per week in each direction on the Cook Islands route in accordance with the Australia – Cook Islands air services arrangements.

4.2 The determination is valid for five years from 17 August 2023.

4.3 The determination is subject to the following conditions:

- (a) Qantas Airways Limited is required to fully utilise the capacity from no later than the date when the determination comes into effect or such other date approved by the Commission.

- (b) The capacity may be utilised by:
- Qantas Airways Limited; or
 - Jetstar Airways Pty Limited as long as it remains a wholly-owned subsidiary of Qantas; or
 - such other wholly-owned subsidiary of Qantas Airways Limited that the Commission approves in writing, as long as it remains a wholly-owned subsidiary of Qantas Airways Limited.
- (c) Neither Qantas Airways Limited nor its wholly-owned subsidiary is permitted to use the capacity to provide services jointly with another Australian carrier or any other person unless approved by the Commission.
- (d) The capacity may be used by Qantas Airways Limited to provide code share or joint services with any wholly-owned subsidiary of Qantas Airways Limited and by any wholly owned subsidiary of Qantas Airways Limited to provide code share or joint services with Qantas Airways Limited.
- (e) To the extent that the capacity is used to provide code share or joint services on the route, the airlines must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of the booking. Nothing in this determination exempts the airlines from complying with the Australian Consumer Law.
- (f) Changes in relation to the ownership and control of Qantas Airways Limited and/or its wholly-owned subsidiary are permitted except to the extent that any change:
- results in the designation of the airline as an Australian carrier under the Australia — Cook Islands 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 Airways Limited and/or its wholly-owned subsidiary or be in a position to exercise effective control of Qantas Airways Limited and/or its wholly-owned subsidiary, without the prior consent of the Commission.

Dated: 24 February 2023



Genevieve Butler
Chairperson



Jane McKeon
Commissioner