



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2021] IASC 110
Renewal of:	[2017] IASC 108
The Route:	Thailand
The Applicant:	Qantas Airways Limited (Qantas) (ABN 16 009 661 901)
Public Register File:	IASC/APP/202119

The Commission's delegate makes a fresh determination allocating to Qantas 35.6 B747 equivalent units and 26 third country code share frequencies of passenger capacity per week in each direction on the Thailand route. The determination is valid for five years from 1 July 2022.

1 The application for renewal

1.1 On 7 June 2017, the International Air Services Commission (the Commission) issued Determination [2017] IASC 108 (the Determination) allocating, in favour of Qantas 35.6 B747 equivalent units and 26 third country code share frequencies of passenger capacity per week on the Thailand route. The original Determination permits Qantas to use the capacity to provide code share services with Bangkok Airways, British Airways, Emirates, Finnair, Jet Airways and Jetstar Asia. Additionally, the capacity may be used by Jetstar to provide code share services with Finnair.

1.2 On 31 August 2017, the Determination was varied to permit the use of capacity on the Thailand route for code sharing between Qantas and El Al Airlines (El Al) under Decision [2017] IASC 214. Furthermore, on 28 November 2019, the Determination was also varied to permit the use of capacity on the Thailand route for code sharing between Qantas and Societe Air France (Air France) and KLM Royal Dutch Airlines (KLM) under Decision [2019] IASC 207.

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 30 June 2022. In view of this, the Commission sent, on 1 June 2021, a letter to Qantas inviting it to apply for renewal if it wished to renew the Determination.

1.4 On 18 June 2021, Qantas applied to the Commission for a renewal of the Determination and also requested for the retention of all existing conditions.

1.5 As required by sections 12 and 17 of the Act, the Commission published, on 18 June 2021 a notice on its website and subsequently sent a notification by email to stakeholders inviting submissions about the application. No submissions 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

Capacity entitlements

2.1 Under the Australia-Thailand air services arrangements, Australian designated carriers may operate up to 45 B747-equivalent units per week of passenger capacity on the Thailand route; 35.6 B747-equivalent units per week of passenger capacity have been allocated to Qantas, which the airline is now seeking to renew.

2.2 According to the Register of Available Capacity, there are 9.4 B747 equivalent units per week of passenger capacity available for allocation. In the event that the Australian designated airlines wish to operate capacity which would result in the total capacity available to all airlines of Australia being exceeded by an amount of 0.3 B747-400 equivalent or less, the aeronautical authorities will permit such minor variations.

2.3 An Australian designated airline may enter into code-sharing arrangements with another Australian designated airline, as a non-operating airline, and the capacity utilised will only be counted against the operating airline.

Third Party Code Share

2.4 An Australian designated airline may also enter into code share arrangements, as a non-operating airline, with any third country airlines. There are currently seven services per week available for third party code share arrangements. In addition to the seven weekly frequencies available for allocation, any designated airlines (of Australia or Thailand) are entitled to utilise any unused passenger capacity allocated to that airline for third country code sharing. It is understood that one unused B747 equivalent service per week in each direction is translated as one third country code share frequency per week in each direction. In such cases, one code share service is counted against the designated airline under its own entitlement as one frequency of capacity. Currently, Qantas is seeking to renew its allocation of 26 third country code share frequencies per week.

2.5 Any Australian designated airline may enter into code share arrangements, as the operating airline, with any airline(s) of a third country on any number of frequencies within its capacity entitlements.

3 Delegate's consideration

3.1 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 Qantas' application. (For the purposes of this determination, all references to the Commission include the delegate of the Commission.)

3.2 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.

3.3 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.

3.4 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)).

3.5 The Commission notes that, under section 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. 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's delegate 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 section 14(2) of the Policy Statement.

3.6 However, section 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's delegate 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 Organisation declared the outbreak of COVID-19 (coronavirus) a pandemic. In response the Australian Government

introduced a range of health, financial and other measures to minimise the number of people becoming infected or sick with COVID-19.

3.8 In this context, on 24 March 2020 the Prime Minister announced that the Government was introducing a ‘do not travel’ ban on Australians travelling overseas under the Biosecurity Act 2015. This ban is intended to limit travellers returning to Australia with coronavirus and to reduce the risks of spreading the coronavirus to other countries. The Prime Minister’s media statement indicated that the prohibition was aligned with the Government’s decision to raise the Smartraveller Travel Advice to Level 4 – “Do not go overseas. A travel ban is in place.” At this time, the ban on overseas travel remains in place in Australia.

3.9 With the imposition of travel restrictions in March 2020, the Qantas Group suspended the scheduled international flights of both Qantas and Jetstar. Qantas has announced on its website that the “The Federal Government has revised its anticipated timeline for the completion of Australia's vaccine rollout to end-2021 and its timeline for significantly reopening our international borders to mid-2022. In light of these two dates, we’ve adjusted our planned international flights from end-October to late December 2021.”

3.10 In assessing the current Qantas application for the renewal of its capacity allocation of 35.6 B747-equivalent units and 26 third country code share frequencies of passenger capacity per week on the Thailand route, the Commission considered whether Qantas has failed to service the route effectively. Until travel restrictions linked to the COVID-19 pandemic were imposed by the Australian Government in March 2020, the Qantas Group operated the following services between Australia and Thailand:

Carriers	Frequencies/city-pairs/aircraft used
Jetstar Airways	3 services per week/Melbourne-Bangkok/B787 2-4 services per week/Melbourne-Phuket/B787 3 services per week/Sydney-Phuket/B787
Qantas	7 services per week/Sydney-Bangkok/A330-300

3.11 Prior to March 2020, there was no information to suggest that the Qantas Group has failed to service the Australia-Thailand route effectively.

3.12 The Commission considers that the current temporary suspension of Qantas/Jetstar flights between Australia and Thailand is in response to the Australian Government COVID-19 restrictions. Moreover, the Commission considers that it is highly likely that there will be an ongoing impact on international air services for some time, but that once the Government-imposed travel restrictions are lifted, it is likely that Qantas/Jetstar will be able to resume operating regular flights between Australia and Thailand. For these reasons, the Commission’s delegate 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.

3.13 The Commission's delegate 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.

3.14 The Commission's delegate notes that Qantas and its wholly-owned subsidiary, Jetstar, are established carriers which, under normal circumstances, operate scheduled international services on various routes and finds that the carriers are reasonably capable of obtaining the necessary regulatory approvals and of using the capacity allocated on the Australia-Thailand route.

3.15 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's delegate 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).

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

3.17 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" (s 19(3)). The Commission's delegate has decided to permit the use of the capacity for code sharing with the airlines listed in Item 4 below subject to conditions as stated.

3.18 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 Thailand route to Qantas ([2021] IASC 110)

4.1 In accordance with section 8 of the Act, the Commission's delegate makes a determination in favour of Qantas, allocating 35.6 B747 equivalent units and 26 third country code share frequencies per week of passenger capacity in each direction on the Thailand route under the Australia - Thailand air services arrangements.

4.2 The determination is valid for five years from 1 July 2022.

4.3 The determination is subject to the following conditions:

- (a) Qantas is required to fully utilise the capacity from no later than 30 September 2022 or such other date approved by the Commission;
- (b) the capacity may be utilised by:
 - Qantas; or
 - Jetstar Airways Pty Ltd, 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) 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 unless approved by the Commission;
- (d) subject to the preceding condition, the capacity may be used by Qantas to provide joint services with any wholly-owned subsidiary of Qantas and by any wholly owned subsidiary of Qantas to provide joint services with Qantas;
- (e) additionally, the capacity may be used by Qantas to provide code share services with:
 - Air France accordance with the code share agreement between Qantas and Air France dated 23 May 2018, as amended;
 - Bangkok Airways in accordance with the code share agreement between Qantas and Bangkok Airways dated 3 March 2014, as amended;
 - British Airways in accordance with the code share agreement between Qantas and British Airways dated 19 November 2013, as amended;
 - El Al in accordance with the code share agreement between Qantas and El Al dated 5 June 2017, as amended;
 - Emirates Airways in accordance with the code share agreement between Qantas and Emirates dated 21 January 2013, as amended;
 - Finnair in accordance with the code share agreement between Qantas and Finnair dated 23 December 2010, amended;
 - Jet Airways in accordance with the code share agreement between Qantas and Jet Airways dated 5 September 2016, as amended;

- Jetstar Asia in accordance with the code share agreement between Qantas and Jetstar Asia dated 9 September 2013, as amended;
 - KLM in accordance with the code share agreement between Qantas and KLM dated 8 October 2018, as amended;
- (f) the capacity may be used by Jetstar to provide code share services with Finnair in accordance with the code share agreement between Jetstar and Finnair dated 15 May 2017, as amended;
- (g) Qantas must apply to the Commission for approval of the use of the capacity if there are variations to any of the code share arrangements listed above, which would change the relevant commercial aspects of the code share arrangements from a free sale to block space, or vice versa, or if Qantas/Jetstar proposes to add third country routes on which the airlines will code share where Australian capacity will be used for services on that route;
- (h) to the extent that the capacity is used to provide joint or code share 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; and
- (i) changes in relation to the ownership and control of the airlines authorised to use the capacity are permitted except to the extent that any change:
- o results in the designation of the airline(s) as an Australian carrier under the Australia — Thailand air services arrangements being withdrawn; or
 - o 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 the wholly-owned subsidiary) or be in a position to exercise effective control of Qantas (or the wholly-owned subsidiary), without the prior consent of the Commission.

Dated: 23 July 2021



Marlene Tucker
Executive Director