



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

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| Determination: | [2021] IASC 101 |
| Renewal of: | [2012] IASC 102 |
| The Route: | Japan |
| The Applicant: | Qantas Airways Limited (ABN 16 009 661 901) (Qantas) |
| Public Register File: | IASC/APP/202103 |

The Commission makes a fresh determination allocating to Qantas unlimited capacity to operate passenger services between points in Australia and points in Japan, other than Tokyo-Haneda. The capacity may be used by either Qantas or its wholly-owned subsidiary, Jetstar Airways Pty Limited, subject to certain conditions. The determination is valid for 99 years from 23 February 2022.

1 The application for renewal

1.1 On 23 February 2012, the International Air Services Commission (the Commission) issued Determination [2012] IASC 102 (the Determination) allocating, in favour of Qantas, unlimited passenger capacity on the Japan route in accordance with the terms of the Australia-Japan air services arrangements. The Determination permits Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas to use the capacity and for the use of the capacity for code share services by Qantas and the Australian wholly-owned subsidiary of Qantas.

1.2 The Determination has been varied at various times to include the following conditions:

- Jetstar Airways is permitted to use the capacity for code share services with Japan Airlines until 31 December 2012 – [2012] IASC 203;
- Jetstar Airways is permitted to use the capacity for code share services with Japan Airlines until 30 June 2017 – [2012] IASC 220;
- Following changes to the Australia-Japan air services arrangements, the Determination was varied to remove restrictions on the number of frequencies that may be operated by Australian carriers between points in Australia and

Tokyo-Narita – [2013] IASC 226;

- The Determination was varied to permit Jetstar to use the capacity for code share services with Japan Airlines for the duration of the Determination until 22 February 2022 – [2017] IASC 217;
- Qantas is permitted to use the capacity for the provision of code share services with LATAM – [2018] IASC 235;
- Qantas is permitted to use the capacity for the provision of code share services with Fiji Airways – [2018] IASC 237;
- Jetstar Airways is permitted to use the capacity for code share services with Finnair – [2019] IASC 202.

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 22 February 2022. In view of this, the Commission sent, on 15 February 2021, a letter to Qantas inviting it to apply for renewal if it wished to renew the determination.

1.4 On 22 February 2021, Qantas applied to the Commission for a renewal of the Determination and also requested for the retention of all existing conditions.

1.5 In accordance with sections 12 and 17 of the Act, the Commission published, on 22 February 2021, Qantas' application on the Commission's website inviting other applications for capacity on the Japan 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). 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 In accordance with the Australia-Japan air services agreement, there are unlimited frequencies and slots to exercise third and fourth freedom traffic rights for both passenger and/ or all-cargo services between any points in Australia and any points in Japan, with the exception of Tokyo-Haneda.

2.3 Additionally, designated airlines of Australia may enter into code sharing services with a designated airline(s) of Australia, a designated airline(s) of Japan or with a designated airline(s) of a third party, subject to approvals of the aeronautical

authorities of both countries. The capacity exercised by the marketing airline(s) will be counted against the capacity entitlements of the airline(s) operating the aircraft.

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 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 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.

3.5 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 has proceeded to consider whether the allocation is no longer of benefit to the public in all the circumstances.

3.6 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.

3.7 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.

3.8 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 Group continues to ‘review and update our international schedule in response to the evolving COVID-19 pandemic’ and that the airline is “now planning to restart regular international passenger flights to most destinations from 31 October 2021 in line with the expected timeframe for Australia’s COVID-19 vaccine rollout to be effectively complete”.

3.9 In assessing the current Qantas application for the renewal of its capacity allocation of unlimited passenger capacity on the Japan route (other than Tokyo-Haneda), 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 Japan:

| Carriers | Frequencies/ city-pairs/ aircraft used |
|-----------------|---|
| Jetstar Airways | 5-7 services per week: Cairns-Narita, B787-800 4-7 services per week: Gold Coast-Narita, B787-800 4-7 services per week: Cairns-Kansai, B787-800 |
| Qantas | 5-7 services per week: Brisbane-Narita, A330-300 5-7 services per week: Melbourne-Narita, A330-300 daily service: Sydney-Haneda, B747-400 3-4 services per week: Sydney-Kansai, A330-200/300 |

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

3.11 The Commission considers that the current temporary suspension of Qantas flights between Australia and Japan 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 will be able to resume operating regular flights between Australia and Japan. For these reasons, the Commission finds that the temporary suspension of Qantas’ services in these circumstances does not mean that it has failed to service the route effectively.

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 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-Japan 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” (s 19(3)). The Commission 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.

3.17 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 Japan route to Qantas ([2021] IASC 101)

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Qantas, allocating unlimited capacity between points in Australia and points in Japan (except Tokyo-Haneda) in accordance with the terms of the Australia – Japan air services arrangements, subject to the conditions below.

- 4.2 The determination is valid for 99 years from 23 February 2022.
- 4.3 The determination is subject to the following conditions:
- (a) Qantas is required to utilise the capacity from no later than 27 March 2022 or such other date 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) Neither Qantas nor its wholly-owned subsidiary that is permitted to use the capacity is authorised to provide code share or joint services with any other carrier or person unless approved by the Commission, as per paragraphs (e) to (n) below.
 - (d) 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.

Jetstar-Japan Airlines Code share

- (e) Jetstar may use the capacity to provide code share services with Japan Airlines (as marketing carrier) until 22 February 2027, in accordance with the code share agreement between Jetstar and Japan Airlines made on 9 February 2007 and the air services arrangements between Australia and Japan.
- (f) The permission of the use of capacity for the provision of code share services by Jetstar and Japan Airlines is limited to the following city pair routes, all involving secondary gateways at one or both ends of the route: Cairns-Tokyo (Narita) vv; Cairns-Osaka (Kansai) vv; and Gold Coast-Tokyo (Narita). This condition is consistent with the Commission's decision in [2017] IASC 217.
- (g) In providing code share (or joint) services, Jetstar and Japan Airlines may not jointly price and market their services, or share or pool revenues/profits on the route, unless such practices are authorised by the ACCC or otherwise by the Australian Competition Tribunal, in the event of review by the Tribunal.
- (h) Qantas or Jetstar must submit prior to the next Commission review of the code share arrangements, a report on the number of code share seats sold by Japan Airlines on Jetstar-operated services and Jetstar's yields per revenue passenger kilometre for all passenger classes on these services.

Qantas- LATAM code share

- (i) Qantas is permitted to use the capacity to provide code share services with LATAM (as marketing carrier) in accordance with the code share agreement between Qantas and LATAM made on 01 August 2014 and the air services arrangements between Australia and Japan.
- (j) In providing code share (or joint) services, the Qantas and LATAM may not jointly price and market their services, or share or pool revenues/profits on the route, unless such practices are authorised by the ACCC or otherwise by the Australian Competition Tribunal, in the event of review by the Tribunal.

Qantas-Fiji Airways Code share

- (k) Qantas is permitted to use the capacity to provide code share services with Fiji Airways (as marketing carrier) in accordance with the code share agreement between Qantas and Fiji Airways made on 26 November 2002 and the air services arrangements between Australia and Japan.
- (l) In providing code share (or joint) services, the Qantas and Fiji Airways may not jointly price and market their services, or share or pool revenues/profits on the route, unless such practices are authorised by the ACCC or otherwise by the Australian Competition Tribunal, in the event of review by the Tribunal.

Jetstar-Finnair Code share

- (m) 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 of 15 May 2017 and the air services arrangements between Australia and Japan.
- (n) In providing code share (or joint) services, the Qantas and Fiji Airways may not jointly price and market their services, or share or pool revenues/profits on the route, unless such practices are authorised by the ACCC or otherwise by the Australian Competition Tribunal, in the event of review by the Tribunal.

General conditions relating to code share services

- (o) To the extent that the capacity is used to provide code share or joint services on the route, the concerned 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.
- (p) The Qantas Group must apply to the Commission for approval of any proposed variations to the code share agreements listed above, which would change the relevant commercial aspects of the agreement(s) – for example, from a free sale code share arrangement to a 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.

Conditions about ownership and control

- (q) 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 the airline as an Australian carrier under the Australia – Japan 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: 23 March 2021



IAN DOUGLAS
Chairperson



KAREN GOSLING
Commissioner