



Australian Government

International Air Services Commission

RENEWAL DETERMINATION

Determination:	[2022] IASC 107
Renewal of:	[2017] IASC 102
The Route:	South Africa
The Applicant:	Qantas Airways Limited (Qantas) (ABN 16 009 661 901)
Public Register File:	IASC/APP/202207

The Commission makes a fresh determination allocating to Qantas seven frequencies capacity to operate passenger services between Australia and South Africa, subject to certain conditions. The determination is valid for five years from 17 December 2022.

1 The application for renewal

1.1 On 10 February 2017, the International Air Services Commission (the Commission) issued Renewal Determination [2017] IASC 102 (the Determination) allocating, in favour of Qantas, seven frequencies per week in each direction on the South Africa route in accordance with the terms of the Australia-South Africa air services arrangements. The determination is valid for five years from 17 December 2017. Additionally, 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 to provide services jointly by Qantas and the Australian wholly-owned subsidiary of Qantas.

1.2 The Determination was varied by [2017] IASC 216 permitting Qantas to use the capacity for code share services with El Al Israel Airlines (El Al) in accordance with the Australia-South Africa air services arrangements.

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 December 2022. In view of this, the Commission sent, on 10 December 2021, a letter to Qantas inviting it to apply for renewal if it wished to renew the determination.

1.4 On 17 December 2021, Qantas applied to the Commission for a renewal of the Determination and also requested the retention of all existing conditions. The Commission sought further information from Qantas. Upon receiving further information from the airline on 28 January 2022 the Commission published, in accordance with sections 12 and 17 of the Act, Qantas' application on the Commission's website inviting other applications for capacity on the South Africa route. No other applications or submissions were received.

1.5 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 Under the Australia-South Africa air services arrangements, Australian designated carriers may operate up to 21 services each way per week with any aircraft type to and from Johannesburg, Cape Town and/or Durban. Qantas has been allocated seven weekly frequencies (the current subject of the application for renewal), which leaves 14 weekly frequencies still available for allocation.

2.3 To and from points other than Johannesburg, Cape Town and/or Durban, any designated Australian carriers may determine the frequency or service, capacity and aircraft type in operating a combination of passenger and cargo services.

2.4 Australian designated carriers may enter into cooperative marketing arrangements such as blocked space, code sharing or aircraft leasing, whether as the operating or marketing airline, with a designated airline of South Africa and an airline of a third country.

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. Subsection 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. 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.

3.5 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.

3.6 On 11 March 2020, the World Health Organization 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 was 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.” On 27 October 2021, the Government announced it would lift the international travel ban for certain categories of travellers from 01 November 2021, subject to certain conditions.¹ On 7 February 2022,

¹ <https://www.pm.gov.au/media/interview-david-koch-and-natalie-barr-sunrise-0>

the Prime Minister announced that Australian international borders would re-open from 21 February 2022.²

3.8 With the imposition of travel restrictions in March 2020, the Qantas Group suspended the scheduled international flights of both Qantas and Jetstar. With the lifting of the international travel ban from 01 November 2021, Qantas re-commenced its commercial scheduled services to certain international destinations.³ In December 2021, Qantas restarted its services between Sydney and Johannesburg.

3.9 In assessing the current Qantas application for the renewal of its capacity allocation of seven frequencies passenger capacity on the South Africa 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, Qantas operated between five and seven weekly services on the Sydney-Johannesburg route.

3.10 Prior to March 2020, there was no information to suggest that Qantas has failed to service the Australia-South Africa route effectively. Furthermore, Qantas informed the Commission that it is now operating three frequencies per week between Sydney and Johannesburg and it plans to fully utilise all seven weekly frequencies (operating daily service) in the Northern Winter 2022-23 scheduling season.

3.11 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.

3.12 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-South Africa route.

3.13 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).

3.14 The Commission will continue to monitor the utilisation of capacity by the

² <https://www.pm.gov.au/media/reopening-tourists-and-other-international-travellers-secure-our-economic-recovery>

³ <https://www.qantasnewsroom.com.au/media-releases/qantas-brings-forward-international-flights-to-1-november>

Qantas Group on this route.

3.15 Qantas also requested to retain all existing conditions including the authorisation for the use of the capacity for the provision of code share services between Qantas and El Al. As per the previous Commission's decision in [2017] IASC 216, the current Commission considers that allowing El Al to code share on Qantas-operated services between Australia and South Africa will provide more travel options to the public. As El Al is unlikely to be in competition with Qantas between Australia and South Africa, their proposed code share is unlikely to have a detrimental impact on competition. Additionally, under the code share arrangement, Qantas-operated flights between Australia and Johannesburg will allow passengers to connect from Johannesburg to Tel Aviv.

3.16 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)). Based on the information before it, the Commission has decided to retain the existing conditions including the permission to use the capacity for code sharing between Qantas and El Al.

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 South Africa route to Qantas ([2022] IASC 1077)

4.1 In accordance with section 8 of the Act, the Commission makes a determination in favour of Qantas, allocating seven frequencies per week in each direction on the South Africa route in accordance with the terms of the Australia – South Africa air services arrangements, subject to the conditions below.

4.2 The determination is valid for five years from 17 December 2022.

4.3 The determination is subject to the following conditions:

- (a) Qantas is required to 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; 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 (d) to (g) below.
- (d) As approved by the Commission, the capacity may be used by Qantas to provide code share or joint services with any wholly-owned subsidiary of the Qantas Group and by any wholly owned subsidiary of the Qantas Group to provide code share or joint services with Qantas.
- (e) Additionally, Qantas may use the capacity to provide code share services with El Al Israel Airlines in accordance with the code share agreement between Qantas and El Al dated 5 June 2017 and the air services arrangements between Australia and South Africa between.
- (f) 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.
- (g) Qantas must apply to the Commission for approval of any proposed variations to the code share agreement between Qantas and El Al which would change the relevant commercial aspects of the agreement from a free sale code share arrangement to a block space, or vice versa, or if Qantas proposes to add third country routes on which the airlines will code share where Australian capacity entitlements will be used for services on that route.

Conditions about ownership and control

- (h) 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 – South Africa 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: 28 February 2022



GENEVIEVE BUTLER
Chairperson



JANE MCKEON
Commissioner