



Australian Government

International Air Services Commission

DRAFT

Determination: [2024] IASC 113d
The Route: Indonesia
The Applicant: Qantas Airways Limited
(ABN 16 009 661 901)

Decision: [2024] IASC 114d
The Route: Indonesia
The Applicant: Virgin Australia International Airlines Pty Ltd
(ABN 63 125 580 823)

Public Register File: IASC/APP/202368

The Commission proposes to make a determination allocating to Qantas Airways Limited 2,320 seats of passenger capacity per week on the Indonesia route, for international passenger services to be operated via or beyond to a point in Australia other than Sydney, Melbourne (including Avalon), Brisbane and Perth. The determination is valid for five years from XX June 2024.

The Commission proposes not to make a determination allocating to Virgin Australia International Airlines Pty Limited 2,464 seats of passenger capacity on the Indonesia route.

1 The applications

1.1 On 17 November 2023, Qantas Airways Limited (Qantas) applied to the International Air Services Commission (the Commission) for an allocation of 2,320 seats of passenger capacity per week on the Indonesia route. The capacity is requested for five years and is proposed to be fully utilised by 15 August 2024. It is planned that Qantas' wholly-owned subsidiary, Jetstar Airways Pty Limited (Jetstar), would launch an additional 10 services per week between Australia and Indonesia, using Airbus A321LR aircraft configured with 232 seats:

- 7 frequencies (1,624 seats equivalent) to service Cairns-Melbourne-Denpasar from 1 May 2024; and
- 3 frequencies (696 seats equivalent) to service Adelaide-Perth-Denpasar from 1 August 2024.

1.2 On 20 November 2023, the Commission invited other applications for the capacity in accordance with section 12 of the *International Air Services Commission Act 1992* (the IASC Act).

1.3 On 12 December 2023, Virgin Australia International Airlines Pty Ltd (Virgin Australia) applied for an allocation of 2,464 seats of passenger capacity on the Indonesia route to operate an additional 14 services per week, using Boeing 737 aircraft configured with 176 seats:

- 7 frequencies (1,232 seats equivalent) to service Adelaide-Perth-Denpasar from 15 May 2024; and
- 7 frequencies (1,232 seats equivalent) to service Gold Coast-Perth-Denpasar from 26 June 2024.

1.4 The capacity is requested for five years and is proposed to be fully utilised by 26 June 2024. On 14 December 2023, Virgin Australia provided the Commission with additional information clarifying its application.

1.5 As the applications from Qantas and Virgin Australia created competing applications for the same available capacity, and there is insufficient capacity for the Commission to make the determinations sought in all of the applications, in accordance with section 13 of the IASC Act, on 15 December 2023, the Commission wrote to Qantas and Virgin Australia inviting both airlines to address the additional public benefit criteria as set out within section 9 of the International Air Services Commission Policy Statement 2018 in support of their respective applications.

1.6 Following receipt of the additional public benefit criteria responses from both airlines on 8 January 2024, in accordance with section 12 of the IASC Act and regulation 7 of the International Air Services Commission Regulations 2018, on 10 January 2024, the Commission published a notice on its website inviting submissions about the two applications. The Commission received a total of six submissions¹.

1.7 On 20 February 2024, Virgin Australia advised the Commission that the airline had sought clarification from the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) on the operation of the additional capacity made available to Australian carriers in line with the Australia-Indonesia bilateral air services arrangements.

1.8 On 28 February 2024, the Commission wrote to the Department pursuant to section 28 of the IASC Act asking for certain information. The Department provided its response to the Commission on 8 March 2024. Following receipt of advice from the Commission on 14 March 2024, Virgin Australia raised additional questions on 18 March 2024 regarding the Australia-Indonesia bilateral air services arrangements. On 20 March 2024, the Commission sought additional advice from the Department, which was received on 21 March 2024. Following further correspondence between the Commission and Virgin Australia on 22 March 2024 and 26 March 2024, as part of its response, the Commission met with representatives from Virgin Australia on 28 March 2024.

1.9 On 2 April 2024, Virgin Australia wrote to the Commission advising of its intention to operate the proposed services under a through flight number and that the sectors between the two points in Australia would be operated as a domestic service, with the departure point from

¹Submissions were received from: (1) Queensland Airports Limited dated 12 January 2024; (2) Transport Workers Union dated 23 January 2024; (3) Flight Attendants Association of Australia dated 24 January 2024; (4) Member of the public W R Watson dated 24 January 2024; (5) the Australian Competition and Consumer Commission dated 24 January 2024; and (6) Perth Airport dated 25 January 2024.

Australia to Indonesia being operated as an international service. The airline also advised that it expected to commence the proposed services in time for the Northern Winter 2024-25 scheduling season.

1.10 On 17 May 2024, Qantas wrote to the Commission advising that due to operational requirements, the proposed utilisation date would need to be deferred to 7 November 2024.

1.11 All non-confidential materials received by the Commission are available on the Commission's website (www.iasc.gov.au).

2 Legislative requirements

2.1 Subsection 12(3) of the IASC Act allows any person to apply to the Commission for a determination allocating capacity to enable an Australian carrier to operate international air services. Subsection 7(1) of the IASC Act empowers the Commission to make a determination allocating available capacity. Subsection 7(2) provides that the determination:

- a) must not allocate available capacity unless the Commission is satisfied that the allocation would be of benefit to the public (7)(2)(a); and
- b) must not allocate capacity contrary to any restrictions on capacity contained in a bilateral arrangement, or a combination of bilateral arrangements, permitting the carriage to which the capacity relates (7)(2)(aa); and
- c) if more than one application was made under Division 1 of Part 3 relating to the allocation must make the allocation that the Commission is satisfied, having regard to the applications made, would be of the greatest benefit to the public (7)(2)(b).

2.2 'Capacity' is defined in section 4 as meaning an amount of space (however worked out or described) for the carriage of passengers or freight (or both) by persons designated, nominated or otherwise similarly authorised by Australia, being carriage permitted under a bilateral arrangement, or a combination of bilateral arrangements.

2.3 Available capacity is defined in section 5 of the IASC Act, which relevantly provides that capacity is taken to be 'available capacity' for the purposes of the IASC Act if operational decisions are not in force in relation to that capacity.

2.4 An 'operational decision' is defined in section 4 of the IASC Act as, in relation to particular capacity, a decision (including the granting of any approval) under the *Air Navigation Act 1920*, or the regulations made under that Act, that must be made if an Australian carrier is to be permitted to operate an international airline service using that capacity.

2.5 Subsection 7(3) of the IASC Act provides that in assessing the benefit to the public of an allocation of capacity, the Commission must apply the criteria set out in the policy statement made by the Minister pursuant to section 11 of the IASC Act.

2.6 Pursuant to section 11 of the IASC Act, the Minister issued the International Air Services Commission Policy Statement 2018 (the Policy Statement) which came into effect on 28 March 2018. The Policy Statement sets out the criteria which the Commission is required to apply in assessing the benefit to the public of allocations of capacity.

2.7 The Commission notes that there are two applications for the same available capacity, and there is insufficient capacity for the Commission to make the determinations sought in all of the applications. Subsection 13(2)(b) of the Policy Statement provides that where the Commission proposes to make a determination allocating available capacity, when there are two or more applicants and there is insufficient capacity to meet both applications, the Commission is to assess the benefit to the public of an allocation of capacity under a proposed determination by having regard to a) the reasonable capability criterion in section 8; and b) any of the additional criteria in section 9 that the Commission considers to be relevant.

2.8 Additionally, section 6 of the Policy Statement provides that the Commission is to perform its functions in a way that will achieve the object of the IASC Act, that is, to enhance the welfare of Australians by promoting economic efficiency through competition in the provision of international air services by Australian carriers.

3 Relevant provisions of the bilateral air services arrangements

3.1 Under the Australia-Indonesia bilateral air services arrangements, Australian designated carriers may operate up to 25,000 seats per week of passenger capacity in each direction between Indonesia and the following points in Australia: Sydney, Melbourne (including Avalon), Brisbane and/or Perth. According to the Register of Available Capacity, there are no seats available for any new allocation to and from any of the four major cities (Sydney, Melbourne (including Avalon), Brisbane and Perth).

3.2 There are 2,500 additional seats per week in each direction of passenger capacity to Sydney, Melbourne (including Avalon), Brisbane and Perth available for allocation, with the requirement that such international services operate via or beyond to a point in Australia other than the four major cities. The capacity requires an international service to be in operation in all three points (the departure point, the intermediate point and the arrival point). The purpose of this additional capacity is to encourage international services into Australia's regional international airports, enabling passengers to access the provision of international baggage, customs, immigration and biosecurity clearance at their commencing, mid and final destination.

3.3 The Commission has previously allocated 25,000 seats per week to Australian carriers as follows: Virgin Australia has been allocated 4,924 seats, and Qantas has been allocated a total of 20,076 seats, including permission for its wholly-owned subsidiary Jetstar to utilise the capacity. The Commission has also allocated to Qantas 2,148 seats for the exercise of beyond traffic rights with 12 frequencies per week, seven of which may be used beyond Indonesia from Denpasar, subject to certain conditions.

4 Commission's assessment against section 8 of the Policy Statement

4.1 In assessing the benefit to the public of an allocation of capacity, sections 8 and 13 of the Policy Statement require the Commission to assess 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.

4.2 The Commission notes that the competing applications in question relate to the 2,500 additional seats per week in each direction of passenger capacity to Sydney, Melbourne

(including Avalon), Brisbane and Perth available for allocation, with the requirement that such services operate via or beyond to a point in Australia other than Sydney, Melbourne (including Avalon), Brisbane and Perth.

4.3 As noted in 3.2, according to the Register of Available Capacity, there are no seats available for any new allocation to and from any of the four major cities (Sydney, Melbourne (including Avalon), Brisbane and Perth).

4.4 On 21 December 2023, the Commission sought clarifying advice from the Department pursuant to section 28 of the IASC Act, regarding any restrictions on the operation of the capacity under the relevant bilateral air service arrangements. On 8 January 2024, the Department advised that services to be operated under the bilateral arrangements are to be conducted as an international service, arriving and departing at an international terminal at all three points.

4.5 On 20 March 2024, the Commission sought additional advice from the Department, to confirm whether the sequencing of the sectors comprising the services as proposed by each applicant is consistent with the provisions of the Australia-Indonesia bilateral air services arrangements. On 21 March 2024, the Department confirmed that the proposed sequencing would be permissible under the Australia-Indonesia bilateral air services arrangements.

Qantas Group

4.6 In its submission addressing the additional public benefit criteria, Qantas stated that the proposed Jetstar services will be operated under a through flight number, from/to international terminals at all three points – the departure point, the intermediate point and the arrival point.

4.7 The Commission notes that Qantas and its wholly-owned subsidiary Jetstar are currently designated as Australian international airlines under the Australia-Indonesia air services agreement and that they each hold an International Airline Licence which allows for operations between Australia and Indonesia. The Commission also notes that Qantas and Jetstar are established international carriers currently operating on the Australia-Indonesia route and therefore are reasonably capable of obtaining the necessary approvals and of implementing the proposed operations.

4.8 In light of this, the Commission finds, consistent with the Department's advice of 21 March 2024 and therefore the Australia-Indonesia bilateral air services arrangements, that Qantas and Jetstar are reasonably capable of obtaining any licences, permits or other approvals required to operate on and service the route, and of using the capacity that may be allocated under the determination.

Virgin Australia

4.9 The Commission notes that Virgin Australia is currently designated as an Australian international airline under the Australia-Indonesia air services agreement and that it holds an International Airline Licence which allows for operations between Australia and Indonesia. The Commission also notes that Virgin Australia is an established international carrier currently operating on the Australia-Indonesia route.

4.10 As previously noted, on 2 April 2024, Virgin Australia advised the Commission of its intention to operate the proposed services under a through flight number and that it intends to

operate the sectors between the two points in Australia as a domestic service (Gold Coast – Perth (v.v.) and Adelaide – Perth (v.v.)), with the departure point from Australia to Indonesia (v.v.) being operated as an international service.

4.11 Following receipt of this information, pursuant to section 28 of the IASC Act, the Commission wrote to the Department on 4 April 2024 requesting advice on whether it considers that:

- a) Virgin Australia is reasonably capable of obtaining the designation, licensing and operational approvals necessary to operate scheduled passenger services on the route to which the determination relates; and
- b) Virgin Australia’s planned operations are allowed under the Australia-Indonesia bilateral air services arrangements.

4.12 On 6 June 2024, the Department advised the Commission that “the capacity entitlements outlined in the Australia-Indonesia air services arrangements relate to an international airline service, and not domestic airline services”. The Department advised that the use of the additional capacity requires an international service to be in operation in all three points (the departure point, the intermediate point and the arrival points). The Department advised the Commission it considers that Virgin Australia’s proposed operations, that is to clear all passengers and cargo through customs, immigration and biosecurity in Perth and operate the sectors within Australia (between Adelaide/Gold Coast and Perth) from the domestic terminals, would not trigger the additional capacity entitlements or be allowed under the Australia-Indonesia bilateral air services arrangements.

4.13 Further, the Department advised that based on Virgin Australia’s proposed operations, it considers that the airline would not be reasonably capable of obtaining the necessary operational approvals to operate these services.

4.14 Paragraph 7(2)(aa) of the IASC Act provides that the Commission must not allocate available capacity contrary to any restrictions on capacity contained in a bilateral arrangement(s).

4.15 Having considered the information received by the Commission from the Department on 6 June 2024 that Virgin Australia’s proposed operations would not trigger the additional capacity entitlements or be allowed under the Australia-Indonesia bilateral air services arrangements, the Commission must not make a determination allocating the capacity in the manner requested by Virgin Australia.

4.16 Further, consistent with the advice received from the Department on 6 June 2024, the Commission is not satisfied that based on Virgin Australia’s proposed operations, the airline would be a) reasonably capable of obtaining the necessary operational approvals to operate the proposed services, and b) reasonably capable of using the proposed capacity allocation under the determination.

4.17 Accordingly, the Commission has concluded that Virgin Australia does not fully satisfy the criteria under section 8. The Commission notes that this finding does not impact upon Virgin Australia’s existing operations on the Indonesia route, or its ability to utilise existing capacity allocations issued by the Commission in favour of Virgin Australia.

4.18 The Commission does not consider that its assessment of the benefit to the public of an allocation of capacity under a proposed determination would be assisted by having regard to any of the additional criteria in section 9 (including responses received from Qantas and Virgin Australia addressing the additional criteria and submissions received from interested parties), as only one applicant has fully satisfied the reasonable capability criteria under section 8.

4.19 The Commission, therefore, has decided to allocate the capacity as requested by Qantas.

4.20 Subsection 15(1) of the IASC Act empowers the Commission to include such terms and conditions as it thinks fit. Section 15 also provides for certain conditions to be included in a determination. In light of this, the Commission has decided to issue this determination subject to the conditions set out in Item 5 below.

4.21 Paragraph 15(2)(a) of the IASC Act requires a determination to specify the period during which it is to be in force. Subsection 15(3) of the IASC Act effectively provides that if the Minister's Policy Statement sets out how the period of validity of the determination is to be fixed, then the period of validity is as so fixed. In any other case, an interim determination is to be in force for three years while a determination that is not an interim determination is to be in force for five years.

4.22 Section 20 of the Policy Statement sets out how the Commission is to fix the period during which a determination is to be in force. The Commission considers that Qantas' application is within the scope of subsection 20(4) and has decided that this determination is to be in force for a period of five years.

5 Determination allocating capacity on the Indonesia route to Qantas Airways Limited ([2024] IASC 113d)

5.1 In accordance with section 7 of the Act, the Commission proposes to make a Determination in favour of Qantas Airways Limited, allocating 2,320 seats of capacity per week to operate passenger services on the Indonesia route in accordance with the Australia – Indonesia air services arrangements.

5.2 The Determination is valid for five years from XX June 2024.

5.3 The Determination is subject to the following conditions:

- (a) Qantas Airways Limited is required to fully utilise the capacity from no later than 7 November 2024 or such other date approved by the Commission.
- (b) The capacity must be operated via or beyond to a point in Australia other than Sydney, Melbourne (including Avalon), Brisbane and Perth.
- (c) 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 Airways Limited; 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.
- (d) Neither Qantas Airways Limited nor another Australian carrier which is a wholly-owned subsidiary of Qantas Airways Limited is permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person unless approved by the Commission.
- (e) To the extent that the capacity is used to provide 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 Australian Consumer Law.
- (f) Changes in relation to the ownership and control of Qantas Airways Limited and/or its wholly-owned subsidiary Jetstar Airways Pty Limited are permitted except to the extent that any change:
- results in the designation of the airline(s) as an Australian carrier under the Australia – Indonesia 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 (or the wholly-owned subsidiary) or be in a position to exercise effective control of Qantas Airways Limited (or the wholly-owned subsidiary), without the prior consent of the Commission.

Dated: XXXX

Genevieve Butler
Chairperson

Jane McKeon
Commissioner

6 Decision ([2024] IASC 114d)

6.1 In accordance with section 7 of the Act, the Commission proposes not to make a determination in the manner requested by Virgin Australia International Airlines Pty Ltd.

Dated: XXXX

Genevieve Butler
Chairperson

Jane McKeon
Commissioner