



24 October 2012

Ms Marlene Tucker
A/g Executive Director
International Air Services Commission
PO Box 630
CANBERRA ACT 2601

Dear Ms Tucker *Marlene*

Re: Application for capacity allocation – Italy route

I refer to the above matter and to Qantas' letter of 23 October to the Commission, which provides comments in response to Virgin Australia International Airlines Pty Ltd's (Virgin Australia) submission of 5 October. We note that this letter contains Qantas' views on the applicability of the paragraph 7 criteria of the International Air Services Policy Statement No. 5 (Minister's Policy Statement). This issue, which is of particular relevance to our application, was not addressed by Qantas in its substantive submission of 5 October. Accordingly, we have provided these comments in response to Qantas' letter for consideration by the Commission.

While we are of the view that the material contained in our submission of 5 October, of itself, provides clear evidence that the Italy route remains in the start up phase, and therefore subject to the paragraph 7 criteria, we consider that the provision of the following information in relation to Qantas' comments assists in confirming our arguments.

Paragraph 2 of the Minister's Policy Statement defines "commercially sustainable level of capacity" as meaning "the minimum capacity necessary to permit the development of efficient commercially sustainable operations on a route". Notwithstanding that Qantas has sought to place artificial emphasis on individual words within this definition to substantiate its arguments, this definition must be read as a whole. When read as a whole, it is clear that an allocation of capacity will only be of a commercially sustainable level if it is the minimum quantum of capacity necessary to permit the development of efficient and commercially sustainable operations on a particular route. Qantas' statement that, "[t]here is sufficient evidence to demonstrate that the allocation of capacity to Ansett is representative of the minimum level of capacity necessary to develop operations on the Italy route" demonstrates that Qantas' interpretation of this definition is incorrect, as it has failed to take into account the requirement for such an allocation of capacity to permit the development of *efficient and commercially sustainable* operations, rather than simply the development of operations, regardless of whether they are commercially sustainable or not. The interpretation adopted by Qantas is inconsistent with the guidance provided in relation to paragraph 7 in the Explanatory Statement to both the current and previous Minister's Policy Statement that, "[t]he primary consideration is to introduce competition on the route in a commercially sustainable manner."

While our submission of 5 October acknowledges that it is uncertain whether the paragraph 7 criteria applied to code share services (see page 3) before the current Minister's Policy Statement entered into effect in 2004, Ansett's inability to implement code share services on the Italy route utilising the capacity allocated by Determination [2001] IASC 109 renders it

impossible to conclusively determine whether or not the allocation of 75 seats per week was a commercially sustainable level of capacity. As the acquittal of the start up phase on any route has the potential to limit competition, Virgin Australia submits that clear and unequivocal evidence is required to support a conclusion that the Italy route is no longer in the start up phase. To hold otherwise would be inconsistent with the object of the *International Air Services Commission Act 1992* (Cth) (the Act) of "...promoting economic efficiency through competition in the provision of international air services". Against this background, it cannot be held that the start up phase has ended for the Italy route. While we have provided comments on other aspects of Qantas' letter below, this is the primary consideration for the Commission's assessment of the status of the Italy route.

Qantas notes that Ansett had the opportunity to apply for an allocation significantly greater than 75 seats per week when it sought capacity on the Italy route in 2001. Virgin Australia submits that the availability of unallocated code share capacity on a route is entirely irrelevant to considerations of whether a particular quantum of capacity is commercially sustainable or otherwise. There is nothing in the Act, or the current or previous Minister's Policy Statement, that provides that an allocation of capacity will be considered commercially sustainable if capacity remains available for allocation after a determination has been made. In addition, we would highlight that no conclusions regarding the commercial sustainability of an allocation of 75 seats per week of code share capacity can be drawn by comparing the number of flights operated by Singapore Airlines on which Ansett intended to code share and the number of flights Qantas operated with its own aircraft.

Qantas cites Decision [2000] IASC 215 which allocated Ansett 75 seats per week of code share capacity on the United Kingdom route in support of its claims that the route is no longer in the start up phase. However, Ansett was already operating code share services on the route using 350 seats per week of capacity allocated by Determination IASC/DET/9903 at the time it applied for an allocation of an additional 75 seats per week to expand its commercial presence on the route. Therefore, this example has no relevance to notions of commercial sustainability and the start up phase.

While Virgin Australia agrees with Qantas that there is no requirement in the Minister's Policy Statement to implement services utilising capacity allocated by the Commission in order to acquit the start up phase, the definitions of "commercially sustainable level of capacity", "start up phase" and "new entrant", as well as the paragraph 7 criteria, confirm that only an allocation which is efficient and commercially sustainable will be sufficient to end the start up phase on a route. As noted above and in our submission of 5 October, it is impossible to determine whether the 75 seats per week allocated to Ansett to support code share operations with Singapore Airlines was sufficient to facilitate the development of efficient and commercially sustainable operations, as code share services were not implemented.

Virgin Australia notes that the definitions of "code sharing" and "joint international air services" were included in the Act in 2001, to support the functions of the Commission in allocating code share capacity within Australia's air services arrangements. It does not necessarily follow, however, that the start up phase provisions were applicable to applications for allocations of code share capacity made under the previous Minister's Policy Statement, as suggested by Qantas. On the contrary, the absence of any reference to "code share operations" within this document, as well as the fact that the guidance in the Explanatory Memorandum to the previous Minister's Policy Statement regarding entry to markets via code share services was made in reference to the paragraph 5 criteria, not the paragraph 7 criteria, is strong evidence that the start up phase provisions had no application



to code share services before the current Minister's Policy Statement was implemented in 2004.

We would be pleased to provide the Commission with any additional information it may require for the purposes of assessing our application.

Yours sincerely

A handwritten signature in black ink that reads "Jane McKeon".

Jane McKeon
Group Executive
Government and International Relations