

EXPLANATORY STATEMENT

INTERNATIONAL AIR SERVICES POLICY STATEMENT NO.5

**Issued by the Minister for Transport and Regional Services
The Hon John Anderson MP**

The rights of Australian carriers to operate scheduled international air services to other countries are governed by Australia's bilateral arrangements with those countries. These arrangements typically provide for the designation of international carriers. In addition they set out a system by which capacity and the ports served by the designated airlines of each country are determined. Setting limits on the frequency of flights and the number of passenger seats available on each flight does this.

Since 1992, a policy of multiple designation has applied, providing the opportunity for competition between Australian carriers on international air services to and from Australia.

The *International Air Services Commission Act 1992* (the Act) established the International Air Services Commission (the Commission). The primary function of the Commission is to make determinations allocating available capacity to Australian carriers. Determinations identify which airlines are selected to operate particular available capacity and set necessary conditions. Determinations are reviewed after a specified period (usually 5 years).

The *Aviation Legislation Amendment Act 2002* (AVLA) inserted Part 3A into the Act. This permits the Commission to delegate some of the Commission's powers or functions regarding the allocation of capacity in the operation of international air services to an Australian Public Service employee in the Department of Transport and Regional Services. The circumstances in which the Commission may delegate a power or function are specified in the *International Air Services Commission (Delegation of Powers) Regulations 2003*.

This amendment, together with the Regulations, streamlines the procedures for applications by Australian carriers for a determination granting capacity.

Section 11 of the Act confers power on the Minister to make policy statements about the way in which the Commission is to perform its functions. Under section 6(3) the Commission must comply with those policy statements in performing its functions. Section 7, 8, 23, 24 and 25 also require the Commission to apply criteria set out in the policy statement for assessing the benefit to the public of a particular allocation.

This policy statement took effect when it was signed by the Minister for Transport and Regional Services. It replaced all previous policy statements.

The policy statement:

- rewords some provisions to enable decisions regarding allocations to be made in a more efficient manner;
- makes the use of some terms more consistent; and
- reduces the amount of cross-referencing required to read the statement.

References to the Commission in this instrument include the delegate of the Commission unless expressly excluded.

The policy statement sets out the range of criteria for assessing the benefit to the public of allocations of capacity in various circumstances and provides other guidance to the Commission in performing its functions.

Broadly speaking, the policy statement provides for:

- generally applicable criteria (paragraph 4);
- additional criteria that may be applicable to any assessment of the benefit to the public of an allocation of capacity (paragraph 5);
- particular circumstances in which the Commission is not obliged to apply the full range of criteria set out in paragraphs 4 and 5 (paragraph 6);
- specific criteria applicable during the commencement of carrier operations on a route, in order to encourage competition on it (paragraph 7); and
- specific criteria applicable when renewals of determinations are being considered by the Commission (paragraph 8).

Notes on Paragraphs

Paragraph 1

Provides the citation for the policy statement and notes that it replaces the policy statement made under section 11 of the International Air Services Commission Act 1992 by instrument dated 23 April 1997 (as amended on 9 March 1999).

Paragraph 2

Provides for the interpretation of some of the terms used in the policy statement.

Paragraph 3

Broadly indicates the various matters set out in the policy statement and provides general guidance for the Commission in considering allocations of capacity.

The Commission is required to consider a number of factors, including the extent to which carriers are planning to operate flights cooperatively through code sharing or other joint services arrangements and the provisions of any commercial agreement to which an applicant is party. Although the competition criteria are weighted towards the use of own aircraft to operate capacity, in the long term this should not preclude

new entrants from using code share or other joint services arrangements as a method of entering markets.

The Commission is also expected to consult regularly with the Australian Competition and Consumer Commission (ACCC) and to take account of any determinations, authorisations or other decisions made by the ACCC. In order to ensure that effort is not duplicated, the Commission limits itself, when assessing applications for capacity, to considering the comparative competition benefits and ensuring that the allocation of capacity is of benefit to the public. Subject to this limitation, the Commission can and indeed under the Act must, have regard to commercial agreements for the joint use of capacity for the purposes of assessing public benefit generally and consumer benefits in particular.

Paragraph 4

Sets out the two general criteria that the Commission must address first when assessing whether a proposed allocation of capacity, or the renewal or review of a determination allocating capacity, will be of benefit to the public. The criteria are the use of Australian carrier entitlements and whether a carrier is reasonably capable of obtaining the necessary operating approvals and implementing its proposed services.

Subparagraph 4.2 requires the delegate to refer any application back to the Commissioner where there are doubts as to whether the applicant meets the requirements in subparagraph 4.1(b).

Paragraph 5

Sets out further guidance in the form of additional criteria for assessing the benefit to the public of the proposed allocations. The criteria used at sub paragraph 5.1 reflect the particular benefits that the Australian community can expect from a competitive approach to allocating capacity. These include promotion of tourism (with clear benefits to the Australian economy), increased benefit to Australian consumers through wider choice and lower fares and better access to freight services for Australian importers and exporters. Sub paragraph 5.2 gives the Commission the option of not applying all the criteria in sub paragraph 5.1 if it is satisfied, in all the circumstances, that the important criteria have been met.

The objective of developing a competitive environment for international air services is reflected in the criteria. The advantages of competition flow both from the fresh service options brought by new entrants and the pressure that the existence or real threat of competition brings on incumbent carriers. This brings clear benefits for the community.

Paragraph 6

Allows the Commission to deal more expeditiously with applications for capacity or carrier requests for variations of determinations in particular circumstances. Where capacity under bilateral arrangements is not limited, only the criteria in paragraph 4 are applicable.

Where there is only one applicant or where the amount of available capacity is equal to or exceeds the total amount applied for, the Commission only needs to apply the general criteria set out in paragraph 4.

Subparagraph 6.3 allows the Commission to deal expeditiously with uncontested requests for minor variations to determinations (such as changes in seating configurations, aircraft type or points to be served, which may include minor increases in capacity) by satisfying itself that the proposed variation does not adversely affect the application of the criteria in paragraph 4.

If requests for minor variations are contested, the Commission may apply the additional criteria in paragraph 5, whether or not they were considered in the original application. The quantitative interpretation of a “minor increase” in capacity is left to the Commission’s discretion. Negotiated capacity is expressed in so many different ways in bilateral agreements that it would be impossible to set out what a “minor” level of capacity is in a consistent manner. It is expected, however, that a “minor” increase in capacity would not generally exceed 1 B747 equivalent frequency per week.

In some circumstances, a carrier awarded capacity may wish that capacity allocated to it be used by a different member of the same group of companies, such as a wholly owned subsidiary or a parent Australian carrier. Paragraph 6.5 clarifies that when the Commission deals with requests for variations of determinations to allow allocated capacity to be used by different members of the same corporate group, the general criteria in paragraph 4 are applicable to any such member.

Paragraph 7

Paragraph 7 provides specific guidance to the Commission and criteria to be applied in considering allocations of capacity during the “Start up” phase on a route. The primary consideration is to introduce competition on the route in a commercially sustainable manner. Subject to specific prerequisites set out in subparagraph 7(1)(a) to (d), the start up phase criteria are weighted in favour of allocation to the new entrant.

Subparagraph 7.1 makes it clear that the start up phase criteria apply to new entrants proposing passenger or dedicated freight services. The start up phase criteria apply until a new entrant has a level of capacity appropriate to the development of an efficient, commercially sustainable level of operation of the type proposed by the new entrant. In determining a commercially sustainable level of operations for freight, the Government expects that the Commission will take into account the fact that freight capacity is provided on both dedicated freight flights and combination passenger/freight flights.

Subparagraph 7.2 specifies that, where separate capacity has been negotiated for the operation of dedicated freight services, then the start up criteria will apply twice: once in relation to the capacity negotiated specifically for the operation of dedicated freight services and once in relation to the remainder of capacity. The start-up phase provisions in relation to the remainder of the capacity will only apply to passenger services.

Subparagraph 7.3 specifies that, for the purposes of applying the allocation criteria For the start up phase, a subsidiary or holding company of, or an Australian carrier having other substantial connection with an incumbent Australian carrier will not be regarded as a new entrant.

Subparagraph 7.4 clarifies the situation where more than one new entrant is competing for capacity on that route. In such circumstances, the commission is to apply the start up phase criteria to allocate to one new entrant the level of capacity referred to in subparagraph 7.1. Where there is more than one new entrant applicant, the Commission is required to make its selection on the basis of greatest public benefit having regard to the general criteria set out in paragraphs 4 and 5.

If, after allocating capacity to a new entrant, available capacity remains on the route, subparagraph 7.5 makes it clear that the claims of other new entrants, the incumbent and if applicable, the selected new entrant for further capacity will also be assessed on the basis of the general criteria and applicable additional criteria set out in paragraphs 4 and 5.

Paragraph 8

Paragraph 8 provides a specific guidance for the Commission and criteria to be applied in considering allocations when determinations fall due for renewal. In the renewal phase, the criteria are weighted toward the renewal of allocations to incumbent operators, provided that the start up phase on the route has been acquitted and that each incumbent has serviced the route effectively.

Sub paragraph 8.1 applies to the renewal of determinations, other than interim determinations. During the start up on the route, the start up phase criteria are applied, but only in relation to the level of capacity necessary for the development of efficient, commercially sustainable operations. Otherwise the criteria are weighted in favour of renewals to the incumbent.

Subparagraph 8.1(b) specifically provides, however, for a change to an allocation where the incumbent has not serviced the route effectively and where the use of some or all of the capacity by another Australian carrier would better serve the public benefit.

Subparagraph 8.2 sets the criteria for assessing the benefit to the public when the Commission considers renewal of interim determinations. The criteria reflect those applying in relation to initial allocations of available capacity by the Commission under paragraphs 4, 5, 6, and 7. There will be no presumption in favour of the incumbent at renewal of an interim determination.

Paragraph 9

Section 15(2)(c)(i) of the Act allows the Commission to make determinations that provide a specified period for commencement of operations on a route by a carrier. Paragraph 9 provides guidance to the Commission in setting a period for the purpose doing so. It is intended to strike a balance between the need to allow a reasonable

period for financing, planning and commencing operations against the objective of early commencement of services.

Paragraph 10

Section 25 of the Act provides for the Commission to make decisions on transfer applications by carriers. In broad terms, a transfer application is an application by the carrier to whom capacity is allocated to allow another carrier to use that capacity or to share in its use.

Subparagraph 10.1 provides guidance to the Commission in considering transfer applications with the aim of guarding against the speculative activity that could result if carriers are allowed to transfer capacity without having used it for a reasonable period. Subparagraph 10.2 sets an indicative period of 6 months.

Paragraph 11

Section 15(3) of the Act provides that the policy statement made by the Minister can set out the period for which determinations can be fixed. In this policy statement, the period has been fixed depending on the relevant bilateral arrangement. Where capacity or route rights have been restricted in the arrangement, the period of the determination will be 3 years for an interim determination and 5 years for a determination that is not interim. In cases where the capacity and route rights have been left unrestricted the periods are 3 and 10 years respectively.