

INTERNATIONAL AIR SERVICES COMMISSION

PROCEDURES FOR HANDLING APPLICATIONS FOR CAPACITY AFTER THE START-UP PHASE

Introduction

1. These procedures are intended to assist anyone wishing to apply for available capacity on a route after the “start-up” phase has concluded, or wanting to make a submission about an application that has been made in the event of competing applications for available capacity. The procedures are shown in summary form in the attached diagram. The Commission may publish revised procedures from time to time.
2. The start-up phase for a route is defined formally under paragraph 2.1 of the Minister’s policy statement. The policy statement guides the Commission (or its delegate) in its role and sets out criteria to be applied in assessing benefit to the public of allocations of capacity to Australian carriers. In essence, the start-up phase ends once the Commission (or its delegate) has made a determination allocating a commercially sustainable level of capacity on a particular route to an initial new entrant, where an incumbent Australian airline already operates, in accordance with paragraph 7 of the Minister’s policy statement. The start-up phase is not reinstated even if the initial new entrant has later ceased to operate on the route.
3. Applicants should read these procedures in conjunction with the *International Air Services Commission Act 1992* (the Act), regulations made pursuant to the Act, and the Minister’s policy statement (made under section 11 of the Act). These documents may be downloaded from the Commission’s website at www.iasc.gov.au, or obtained from the Commission’s secretariat at the address below.
4. The Commission has delegated most of its powers to its Executive Director and Senior Adviser, who are employees of the Department of Infrastructure, Transport, Regional Development and Local Government. The regulations and the Minister’s policy statement specify the circumstances in which delegations may be exercised and when matters must be or may be referred back to the Commission by the delegate. Applications for capacity after the start-up phase may be dealt with by the Commission or by the delegate, depending on the circumstances of each case. Broadly speaking, the Commission would handle contested applications, including where submissions were received from interested parties, and applications from prospective new airlines. The delegate could be expected to deal with the majority of uncontested applications from established carriers. The delegate will be responsible for the advertising of applications for capacity, and for consulting with the commission about whether a matter is to be handled by the Commission or the delegate.
5. Paragraphs 4, 5 and 6 of the Minister’s policy statement relate to the allocation criteria to be applied by the Commission (or its delegate) after the start-up phase. Further details about these criteria and the circumstances in which they may be applied are set out below.

Invitation for applications and submissions

6. Interested parties may apply for available capacity at any time. On receipt of an application, the Commission publishes details of the application on its website. This is usually within 2-3 days of receipt of an application. The Commission's notice invites other applications for the capacity. The Commission also notifies an extensive list of interested parties by email of applications, as soon as possible after receipt. Any interested party will be added to the Commission's notification list on request. Parties on the notification list also receive advice of all determinations and decisions made by the Commission. Interested parties may also request notification of submissions in relation to particular applications.

7. Parties wishing to make an application for capacity in response to the advertisement of the original application must do so within the time frame specified by the Commission in its published notice. The Commission's normal practice is to allow five working days for applicants to express an intention to apply for some or all of the same capacity and a further five working days within which to make an application. However, applicants, in expressing an intention to apply, may seek additional time in which to make an application. The Commission is likely to agree to an extension if a reasonable case is made, particularly if there are significant issues involved. The original applicant will be notified if the Commission grants such an extension.

8. If one or more competing applications are received in response to its advertisement, the Commission will call for submissions from interested parties about the applications. Submitters would have five working days in which to express an intention to submit and a further five working days within which to make a submission. As part of this process, each applicant will also have the opportunity to make a submission about the application of the others. The Commission would normally require applicants to address in such submissions the additional public benefit criteria in paragraph 5 of the Minister's policy statement, if they have not already done so in their original application. All applicants must address the criteria in paragraph 4 of the Minister's policy statement as a matter of course, and would be expected to have done so in their original application. Paragraph 4 relates to the ability of the applicant to obtain the approvals necessary to operate and to implement its proposals.

Requirements for applications and submissions

9. The Act (section 14) requires applications for capacity to be in writing (this may be by email) and to be delivered to the Commission's address. Applications should contain the following information:

the route to be served;

capacity sought;

aircraft types to be operated and their seating capacity

proposed timing of introduction of the capacity and when capacity is expected to be fully utilised;

the duration of the determination sought

whether approval is sought to use the capacity to provide services jointly with another carrier and, if so, details of the proposed arrangement between the carriers and a statement of the anticipated public benefits associated with such an arrangement; and

claims as to why the carrier considers it meets the relevant criteria of the Minister's policy statement.

10. In the case of competing applications, as noted above, the Commission may ask any or all applicants and submitters for additional information, particularly to address the criteria in paragraph 5 of the Minister's policy statement. Applicants are given the opportunity to respond to submissions by other applicants and/or submitters. Generally, the initial proponent for services will have the final right of reply to applications and submissions from others. However, the Commission will endeavour to ensure that all applicants have provided all information that the Commission considers relevant to its decision making.

New operators

11. For a prospective new Australian operator, the Commission is likely to require substantially more information to support an application than it would from an established operator. Detailed information underpinning the applicant's proposal is used by the Commission to assess an intending new operator's application against the requirements of the public benefit criteria set out in paragraph 4 of the policy statement. These requirements relate to whether the applicant is likely to be (a) reasonably capable of obtaining the approvals necessary to operate, and (b) of implementing its proposals. The Commission will pay particular attention to the financial accounts and forecasts relating to the proposed operations, as these are critical to an assessment of the likely viability of services.

12. The information set out in Attachment A outlines the information which is likely to be required by the Commission. Related guidelines, specific to the Commission's approach to assessing financial viability, are contained in Attachment B. The Commission normally requires that the applicant has satisfactory funding arrangements in place, or failing this that the applicant provides evidence of sufficient funding to cover costs for the first three months of operations, assuming that no revenue is earned. In limited circumstances, the Commission will consider giving approval to applications for capacity on a subject to finance basis. As the guidelines in Attachment B make clear, the key prerequisite for consideration of proposals on a subject to finance basis will be that the applicant must present a strong and credible business plan, including a convincing explanation of firm plans to secure finance.

13. Prospective new entrants should discuss information requirements with the secretariat, preferably prior to making their initial application for an allocation of capacity.
14. Intending new carriers will need to seek and obtain various approvals from the Department of Infrastructure, Transport, Regional Development and Local Government (the Department) and from the Civil Aviation Safety Authority (CASA), prior to being able to operate international air services. Prospective operators are advised to contact both the Department and CASA promptly, if they have not already done so prior to applying to the Commission. Upon receiving an application from a new entrant, the Commission will write to the Department seeking its advice as to whether the prospective operator is likely to be reasonably capable of obtaining the approvals necessary to operate. Generally, these approvals will relate only to approvals by Australian authorities. The Department's advice assists the Commission to assess whether a prospective operator meets all of the paragraph 4 requirements. While the Department cannot grant an international airline license to an operator until it holds an allocation of capacity from the Commission, applicants can work towards satisfying the requirements of the Department (and CASA) in parallel with dealing with the Commission.
15. Once a new carrier has satisfied the Commission in relation to paragraph 4 for one route, and has operated allocated capacity successfully for a period, the Commission is generally likely to accept that the operator will satisfy the paragraph 4 requirements for operations on other routes, without again requiring such detailed information about the carrier's capabilities. Exceptions to this may be in circumstances where entry to a new route involves a substantial expansion to the carrier's existing level of operations.

Publication of applications and submissions

16. An important operating principle for the Commission is to make its decision-making processes as open and transparent as possible. As part of this approach, applications for, and submissions about, an allocation are normally placed on the Commission's "Register of Public Documents" for that case. As the name implies, the register is publicly accessible. It allows interested parties to request all public documents relating to a particular proposal. As noted earlier, interested parties are also notified promptly of applications as they are received and added to the register. The register is held at the Commission for viewing by any person. Particular documents on the register will be emailed or posted to interested parties on request. The Commission's website contains up to date details about current and recent cases.
17. The Commission understands that there may be information provided by applicants or submitters that they do not wish to be made public. The Commission accepts that information that is of a commercially sensitive nature should be treated confidentially. The Commission places such information on its confidential register, provided a suitable case for confidential treatment is made. This might include, for example, detailed business plans or joint service agreements between airlines. The Commission requires applicants and submitters to make clear in a publicly available

submission or letter that confidential information has been supplied, and to outline the nature of that information.

18. The Commission reserves the right to reject claims for confidentiality of information, or to not take the information into account in its deliberations. The Commission might do either of these things if it disagrees with the applicant that the information is confidential, or where relying on such information in the Commission's deliberations would be unfair to other affected parties, which would not have the opportunity to respond to it.

Criteria to apply to applications

19. In all cases involving applications after the start-up phase, the Commission refers initially to paragraph 6 of the policy statement, which sets out the criteria applicable in particular circumstances. The Commission is required by paragraph 6 to apply only the paragraph 4 criteria in circumstances where:

there is only one applicant; or

there is more than one applicant but sufficient capacity to satisfy all applicants and there are no submissions about or opposing the allocation; or

capacity is not limited under the bilateral agreement.

20. Cases in this category will generally be handled by the delegate, unless the carrier is new to a route and/or the delegate has doubts about the ability of the applicant to satisfy the paragraph 4 criteria, in which case the matter will be referred back to the Commission. The additional criteria for assessing benefit to the public in paragraph 5 of the policy statement will be applied in addition to paragraph 4 where there is more than one applicant and the amount of available capacity is less than the total amount applied for, including where submissions are received about one or more of the applications involved.

The Commission may also apply the paragraph 5 criteria if it considers that a proposal raises competition concerns, including where there is only one applicant – for example, where a carrier is seeking to use the capacity in joint services with another airline.

21. The Commission would deal with cases in these categories.

Draft determinations

22. The Commission may decide to issue a draft determination to give applicants and submitters an opportunity to comment before a final determination is issued. This is likely to occur where there are competing or opposed applications, and possibly where conditions to be attached to a determination may not be anticipated by the applicant.

23. Draft determinations include the Commission's reasons for reaching its decision and terms and conditions proposed to be included in the determination. Applicants and submitters will be informed of the draft determination by published notice and by email. The notifications will indicate the time period for comments on the draft determination this will generally be 10 working days.

24. In other circumstances, the Commission will move directly to a final determination.

Pre-determination conference about draft determinations

25. The Commission may conduct a pre-determination conference at which any applicant or submitter may address the Commission on matters arising from a draft determination. Applicants or submitters seeking a conference should indicate this promptly in response to the issue of the draft determination.

26. Conferences are intended as an opportunity to address the Commission on information submitted to the Commission which the applicant or submitter believes may not have been fully addressed by the Commission in the draft determination. As conferences are not intended as a forum for the introduction of new information, new information may only be introduced with the consent of the Commission.

27. Legal counsel or other advisers may attend to assist parties, but may not represent them without the Commission's prior consent, which will only be granted in exceptional circumstances.

Hearings

28. The Commission may hold a hearing for the purpose of considering any matter before it. Hearings are formal processes and will only rarely be employed by the Commission. Sections 30-38 of the Act detail arrangements for hearings.

Final determination

29. Upon making a final determination, the Commission will circulate it promptly to applicants and submitters and to other parties on the Commission's notification list.

Further information

30. For further information, the contact details for the Commission's secretariat are:

Executive Director
International Air Services Commission
GPO Box 630
CANBERRA ACT 2601

Telephone: 02 6267 1100
Facsimile: 02 6267 1111

Email: iasc@infrastructure.gov.au
Internet site: www.iasc.gov.au

International Air Services Commission
March 2009

ADDITIONAL INFORMATION SOUGHT FROM PROSPECTIVE NEW CARRIERS

The Commission requests a copy of the applicant's business plan as it relates to the route/s proposed to be operated. The plan should include:

detailed company information including

- registered company name and Australian Company Number (ACN)
- registered company name and ACN of any parent or subsidiary companies of the applicant company
- for each director of the applicant company – full name, residential address, citizenship, country of permanent residency and a profile of relevant experience and expertise
- details of ownership structure sufficient to demonstrate substantial ownership and effective control are vested in the hands of Australian nationals
- key financial and operational office holders including a profile of relevant experience and expertise
- an organisational chart for the company
- Memorandum and articles of association
- a description of any current or past aviation activities of the applicant company, or any associated company.

details of the aircraft to be utilised, ownership of the aircraft, the arrangements for the aircraft to be available, and the operational basis, ie. wet lease (in which case details of the operator would be required), dry lease, or owned-aircraft operations.

balance sheets, profit and loss statements and cash flow statements for the period up to commencement and projected for two years from the commencement of services

- the cash flow statements should set out details about operating revenue (from passenger, freight and mail etc as appropriate) and all associated expenses (such as employee costs, fuel and oil, maintenance and repair costs, aeronautical charges, insurance, sales and marketing, leasing costs etc)

information about funding sources (see attachment B for further details)

ASSESSING FINANCIAL VIABILITY

Financial viability test

- 1) The viability test will normally apply only to a carrier which is not operating services as a designated Australian international airline. The Commission will retain the discretion, however, to apply the test to operating carriers in respect of new routes involving a significant change in the scale of operations.
- 2) The Commission will assess whether the applicant's business plan has been accepted by the external capital markets as a basis for sophisticated equity or debt funding. The Commission's primary focus in the first instance will be to examine the nature and quality of the funding arrangements and the profile of the relevant capital market participants. Documentation to be reviewed by the Commission will be determined after discussion with the applicant, but it would be expected to include loan/subscription/underwriting documentation, the applicant's business plan and profiles of relevant funding parties/underwriters. If the Commission's view is that the external capital markets accept the applicant's proposal, then the Commission will regard the applicant as being reasonably capable of implementing its proposals. No further test will be applied.
- 3) If the Commission is not satisfied about the quality of the applicant's financing arrangements, it will apply a three month zero revenue test. The Commission will ask the applicant to provide evidence that it has sufficient funding to cover start-up and all subsequent costs for a period of three months from the commencement of operations, assuming no revenue is earned during that period.

The applicant will need to provide details adequate to enable the Commission to make a confident assessment of the applicant's claims. Generally, the Commission would expect that an applicant would have already prepared the necessary information as part of the development of its business plan. Accordingly, substantial additional work should not be needed to meet the Commission's requirements.

Guidelines for approval of applications on a subject to finance basis

The Commission has decided that in limited circumstances, it will consider applications from prospective new carriers where the applicant seeks an allocation of capacity on a subject-to finance basis.

The Commission notes its obligation under the Minister's policy statement to allocate capacity only to carriers which it considers reasonably capable of implementing its proposals and of receiving the approvals necessary to operate. These revised procedures are consistent with that obligation.

The key prerequisite for consideration of proposals on a subject to finance basis will be that the applicant must present a strong and credible business plan in support of its application. This must include a convincing explanation of the applicant's firm plans to secure finance where this has not already been achieved. The applicant must also demonstrate that in all other respects it is reasonably capable of receiving the approvals necessary to operate, such as designation and licensing as an Australian international airline and the necessary operational authority from the Civil Aviation Safety Authority. The application and business plan and any other supporting information provided must together satisfy the Commission that the applicant is reasonably capable of implementing its proposals.

The Commission will not precisely prescribe the circumstances in which subject to finance applications would be considered, as not all situations can be foreseen. However, they would most likely involve applications for allocations of capacity under air services arrangements which provide for the designation of multiple Australian carriers, together with a generous amount of capacity available for allocation. The ability to designate multiple carriers combined with the availability of ample capacity would serve to ensure that allocations of capacity to a new carrier on a subject to finance basis would be unlikely to inhibit the reasonable ambitions of qualified carriers seeking capacity.

A subject to finance application would be unlikely to succeed in a contested situation on a route with constrained capacity with either an established carrier or another prospective new international carrier with demonstrated backing. The Commission would generally anticipate deciding such a case without needing to consider proposals against the more detailed paragraph 5 criteria set out in the Minister's policy statement.

Applications for all-cargo capacity or for passenger capacity on a subject to finance basis may be considered. However, because of the Commission's concern to protect the interests of consumers, a prospective passenger carrier would need to demonstrate that it had adequate consumer protection measures in place in the event of financial failure. The Commission would also make it a condition of determinations in favour of such a carrier that pre-sale of tickets to the public would be permitted only once the carrier had demonstrated to the Commission's satisfaction that the planned financial backing proposed in the application had been contractually committed to within an acceptable time frame, or had been received.

In making subject-to-finance allocations, the Commission would also limit the scope for carriers to hold capacity unused for lengthy periods. The Commission would generally impose a requirement that the carrier must fully utilise the allocated capacity within six months from the date of the determination. Given this, the Commission expects that a prospective applicant would not apply for capacity until it was in a strong position to demonstrate the commercial and operational credibility of its proposals. The Commission would most likely require a successful applicant to report regularly to the Commission on its progress towards commencing operations. Requests for an extension of time to utilise the capacity would generally be countenanced only in exceptional circumstances, such as unforeseen issues outside the control of the applicant.

The Minister's policy statement requires the Commission to specify a period of three, five or ten years for determinations, depending on whether capacity and routes are unrestricted. In making allocations on a subject to finance basis the Commission would envisage continuing its usual practice of making three-year interim determinations for new carriers. However, where a carrier applies in writing requesting that a determination be for a lesser period, the policy statement allows the Commission to specify a lesser period. The Commission would generally expect to look favourably upon such requests.

These guidelines should be treated only as a general indication as to the Commission's likely approach to considering applications on a subject to finance basis. They are intended to be flexible and not prescriptive. The Commission would take account of the circumstances of the case before deciding whether or not to make a subject-to-finance determination. It reserves the right to make determinations on whatever basis it considers appropriate consistent with the requirements of the *International Air Services Commission Act 1992* and the Minister's policy statement.

March 2009