

INTERNATIONAL AIR SERVICES COMMISSION

PROCEDURES FOR HANDLING THE RENEWAL OF DETERMINATIONS

Introduction

1. These procedures are intended to assist anyone seeking a renewal of a determination by the Commission, or wanting to make a submission about a renewal application. The procedures are shown in summary form in the attached diagram. The Commission may publish revised procedures from time to time.
2. 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.
3. The Commission has delegated most of its powers to its Executive Director and senior advisor, who are employees of the Department of Infrastructure, Transport, Regional Development and Local Government. The regulations and the Ministers' policy statement specify the circumstances in which delegations may be exercised and when matters must or may be referred back to the Commission by the delegate. Broadly speaking, the Commission 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 renewal and for consulting with the Commission whether a matter is to be handled by the Commission or the delegate.

Decision to consider renewal of a determination

4. 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. The renewed determination comes into force immediately after the original determination expires. The Commission must start its consideration of the renewal of a full (five year) determination at least 12 months before the end of the period during which the determination is in force. For interim (three year) determinations, the Commission must start its consideration of the renewal as soon as practicable after the determination is made. The grounds on which the Commission may renew a determination are set out in the Act and the policy statement.
5. The provisions relevant to the consideration of a renewal of a determination are sections 8, 12, 14, 17, 18, 19 and 20 of the Act and paragraphs 8.1, 8.2 and 8.3 of the policy statement. A detailed description of the relevant criteria is set out below.

Invitation for applications and submissions

6. Before starting its consideration of the renewal of a determination, the Commission will invite the incumbent carrier to advise in writing whether it wishes to seek a renewal of a determination. If the carrier does seek renewal, the Commission will then publish on its website, notice of its intent to consider the renewal of the determination. The notice will invite applications for an allocation of all or part of the capacity that is subject to renewal. If the incumbent carrier advises that it does not want to renew a determination, the Commission will generally revoke the determination.

7. In addition to the website notification, the Commission notifies interested parties by email of applications and related submissions 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.

8. Parties wishing to make an 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 the capacity in question, or for submitters to express an intention to make a submission. Generally, a further five working days will be allowed within which to make an application or submission. However, applicants or submitters may seek additional time in which to make an application or submission. The Commission is likely to agree to an extension if a reasonable case is made, particularly if an application is to be lodged or there are significant issues involved. The incumbent carrier will be notified if the Commission grants such an extension.

9. If one of more competing applications are received, 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 have the opportunity to make a submission about the application of the other/s. The Commission would normally require applicants to address in such submissions the paragraph 5 public benefit criteria in the Minister's policy statement, if they have not already done so in their original application. All applicants must address the paragraph 4 criteria as a matter of course, and would be expected to have done so in their original application.

Requirements for applications and submissions

10. The Act (s.14) requires applications and submissions to be in writing (this may be by email) and delivered to the Commission's address. Applications and submissions should include the reasons why the Commission should or should not renew a specified determination.

11. In the case of competing applications, the Commission may ask any or all applicants and submitters for additional information, particularly if the Commission decides to consider a matter against the additional public benefit criteria set out 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 submissions from others. However, the Commission will endeavour to ensure that all applicants have provided all information that the Commission considers is relevant to the Commission's decision making.

New operators

12. A prospective new operator may accept the invitation for applications for the capacity that is subject to renewal. For a prospective new 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 whether an intending new operator is likely meet the requirements of the public benefit criteria set out in paragraph 4 of the policy statement. These requirements relate to assessing 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 arrangements relating to the proposed operations, as these are critical to an assessment of the likely viability of services.

13. The information set out in Attachment A outlines the information which is likely to be required by the Commission. Closely related guidelines, specific to the Commission's approach to assessing financial viability, are contained in Attachment B. Prospective new entrants should discuss information requirements with the secretariat, preferably prior to making their initial submission.

14. Intending new operators will need to seek and obtain various approvals from the Department of Infrastructure, Transport, Regional Development and Local Government 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. The department's advice assists the Commission to assess whether a prospective operator meets all of the paragraph 4 requirements. While the department cannot licence an operator until it holds an allocation of capacity from the Commission, operators 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 been allocated capacity, the Commission is 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. The exception may be in circumstances where entry to a new route involves a major expansion over 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 determination. As the name implies, the register is publicly accessible. It allows interested parties to see all documents relating to a particular proposal. As noted earlier, interested parties are also notified promptly of applications and submissions about 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, faxed or posted to interested parties on request.

17. The Commission understands that there may be information provided by applicants or submitters which they do not wish to be made public. The Commission places such information on its confidential register, provided a suitable case for confidential treatment is made. The Commission accepts that information which is of commercially sensitive nature should be treated confidentially. This might include, for example, detailed business plans or code share 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 outline the nature of that information.

18. The Commission reserves the right to reject confidential 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 the information in the Commission's deliberations would be unfair to interest parties, which would not have the opportunity to respond to it.

Criteria to apply to applications

Renewal of full determinations

19. A number of different criteria may apply to the renewal of determinations. The particular criteria depend on whether the determination is a full (five year) determination or an interim (three year) one, and whether or not the route is in the start-up phase. The criteria for renewal of full determinations reflect a rebuttable presumption in favour of the incumbent.

20. For full determinations, the criteria in paragraphs 8.1 and 8.2 are the starting point. When the route is in the start-up phase, the criteria in paragraph 7 apply in relation that part of the capacity that is reasonably necessary to support a level of services which permit the development of efficient, commercially sustainable operations. The criteria in paragraph 8.2 (that is, paragraph 4 only) of the policy statement apply to the balance of the capacity.

21. When the start-up phase is over, the criteria are whether the airline seeking renewal has failed to service the route effectively; and whether use of the capacity in whole or part by another Australian airline which has applied for that capacity would better serve the public having regard to the criteria in paragraphs 4 and 5 and the procedures in paragraph 6.

Renewal of interim determinations

22. The criteria for renewal of interim determinations do not provide a rebuttable presumption in favour of the incumbent. During the start-up phase, the criteria in paragraph 7 of the policy statement apply. Depending on the circumstances, this may involve the paragraph 5 criteria, as well as the paragraph 4 criteria. After the start-up phase, the criteria in paragraph 4 and 5 apply.

Draft determination

23. 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 would be likely to occur where there were competing applications, and possibly where conditions to be attached to a determination may not be anticipated by the applicant.

24. Draft determinations include the reasons for 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 Commission's draft determination. This will generally be 10 working days.

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

Pre-determination conference about draft determinations

26. 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.

27. 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 the conference is not intended as a forum for the introduction of new information, new information may only be introduced with the consent of the Commission.

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

Hearings

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

The fresh determination

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

Further information

31. For further information about these guidelines, 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

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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:

- 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)
- 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 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 aviation activities of the applicant company, or any associated company.

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.

Figure 1: PROCEDURES FOR THE RENEWAL OF DETERMINATIONS



