

INTERNATIONAL AIR SERVICES COMMISSION

PROCEDURES FOR HANDLING A REVIEW OF A DETERMINATION

Introduction

1. These procedures are intended to assist interested parties in the processes associated with reviews of determinations. The procedures cover reviews initiated by a carrier in relation to a determination it holds, and reviews initiated by the Commission. 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). The Minister's policy statement guides the Commission in its role and sets out criteria to be applied by the Commission in assessing benefit to the public in various circumstances, including reviews of determinations. These documents may be downloaded from the Commission's website at www.iasc.gov.au, or obtained from the Commission secretariat at the address below.

Decision to conduct a review of a determination

Carrier-initiated review

3. The Commission must conduct a review of a determination if the carrier holding the determination applies to the Commission for the determination to be varied. Sections 10, 21, 22, 24, 25, 26 and 27 of the Act and paragraphs 3, 4, 5 of the policy statement apply.

Commission-initiated review

4. The Commission may, at any time, conduct a review of a determination if it believes that there may be grounds for varying, suspending or revoking the determination. Sections 10, 22, 23 and 27 of the Act and paragraphs 3, 4, 5, 6 and 10 of the policy statement apply.
5. Before deciding to review a determination the Commission will inform the carrier to whom capacity has been allocated of the matters of concern to the Commission and invite the carrier to show cause as to why a review should not be carried out. The carrier will generally be given two weeks in which to respond.
6. Having considered the carrier's response, the Commission will decide whether to proceed with a review and will notify the carrier accordingly.

Invitation for applications and submissions

7. The Commission will publish on its website, a notice of its intent to review the determination (if initiating the review), or that an application to vary a determination has been received. The notice will invite submissions by a carrier about the review. No notice will be published if the only effect of a carrier-requested variation would be to reduce the capacity allocated to the carrier.

8. For a review initiated by the Commission, the Commission may concurrently invite applications for the capacity concerned, against the possibility that the outcome of the review will be revocation of the determination.

9. 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 prompt advice of all determinations and decisions made by the Commission.

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

Requirements for applications and submissions

11. The Act 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 act to:

- confirm, vary, suspend or revoke a determination (in the case of a Commission initiated review); and
- vary the determination as requested, or confirm the original determination (in the case of a carrier-initiated review).

12. 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. Further details about the criteria to be applied in different circumstances are set out below.

13. Applicants, or the carrier involved in a Commission-initiated review, are provided with the opportunity to respond to submissions by other applicants and/or submitters. Generally, the incumbent carrier will have the final right of reply to submissions from

others, where the Commission is likely to rely on information in those submissions in making a determination or decision. Where there are two or more competing applications for capacity (Commission-initiated review), the Commission will endeavour to ensure that all applicants have provided all information that they consider is relevant to the Commission's decision making.

New operators

14. A prospective new operator may use the opportunity of a review to seek an allocation of capacity. For such operators, 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.

15. 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.

16. Intending new operators 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. 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.

17. 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 to this may be if there is a substantial increase in the scale of operations involving a new route.

Publication of applications and submissions

18. 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 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.

19. 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 to outline the nature of that information.

20. The Commission reserves the right to reject confidential information, or to not take the information into account in its deliberations. The Commission might do this if it considers that there are not suitable grounds on which to classify the information as confidential, or where relying on the information in its deliberations would be unfair to interested parties, which would not have the opportunity to respond to it.

Criteria to apply

Carrier-initiated review

21. Section 24 of the Act requires the Commission, having conducted its review, to confirm the determination (ie. reject the variation application) or vary the determination in a way that gives effect to the variation requested. The Commission cannot vary the determination in a way that the carrier has not sought, unless it first obtains the carrier's agreement. In relation to transfer applications (section 24 of the Act), the Commission must make a decision varying the determination as requested. However, in both situations, the Commission must not make the variation unless it is satisfied that the variation would be of benefit to the public.

22. Paragraph 4 of the policy statement applies in all cases. The Commission may also apply the paragraph 5 criteria. This most likely to occur where there are opposing submissions, or the Commission considers that approval of the proposal may lead to a lessening of public benefit. The Commission will also apply paragraph 10 of the policy statement in relation to transfer applications.

Commission-initiated review

23. The Commission may, having conduct its review, confirm, vary suspend or revoke the determination. Section 23(2) of the Act sets out the circumstances in which the Commission may vary, suspend or revoke the determination. Essentially the Commission needs to be satisfied that:

- a term or condition of the determination has been, or inevitably will be, breached; or
- the carrier no longer intends to fully use the capacity.

24. The Commission will make a judgement about whether the carrier has or will breach a determination based on the circumstances in the particular case, including taking account of any advice from the carrier and any submissions received.

25. Where there are other applications for the capacity in anticipation that the Commission may revoke a determination, the Commission will consider these only after making a decision to revoke a determination. Where the Commission decides to suspend a determination, applications will remain current until the Commission resumes its review and be considered if the Commission then decides to revoke the determination. Such applications will be assessed against the paragraph 4 criteria and, depending on the circumstances of the case, also the paragraph 5 criteria.

Draft decision

26. The Commission may decide to issue a draft decision to give applicants and submitters an opportunity to comment before a final determination is issued. Typical circumstances in which a draft determination might be issued include where:

- the Commission proposes not to grant a variation as sought;
- there are opposing submissions to a variation application which raise substantial issues of concern; and
- the Commission proposes to revoke, suspend or vary a determination following a Commission-initiated review.

27. Draft decisions include the reasons for the Commission's conclusions. Applicants and submitters will be informed of the draft decision by published notice and by email. The notifications will indicate the time period for comments on the Commission's draft decision. This will generally be two weeks.

28. In other circumstances, the Commission will move directly to a final decision.

Pre-decision conference

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

30. 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 decision. 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.

31. 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

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

The decision

33. Upon making its decision, the Commission will circulate it promptly to applicants and submitters and to other parties on the Commission's notification list.

Further information

34. For further information about these guidelines, the contact details for the Commission's secretariat are:

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GPO Box 630
CANBERRA ACT 2601

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International Air Services Commission

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