

INTERNATIONAL AIR SERVICES COMMISSION

3. PROCEDURES FOR THE REVIEW OF DETERMINATIONS

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.
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 the 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.
3. For avoidance of doubt, nothing in this document overrides the requirements of the Act, the regulations or the International Air Services Policy Statement 2018 (the Policy Statement).

Review of determinations

4. The Act empowers the Commission to conduct a review of a determination under section 10 in the following circumstances:
 - when a carrier applies to the Commission for variation of the determination – 'carrier-initiated review';
 - when the Commission believes there may be grounds for varying, suspending or revoking a determination – 'Commission-initiated review'.

Carrier-initiated review

5. A carrier to whom a determination is issued may, at any time, apply to the Commission to vary the determination under section 21 of the Act.
6. The Act requires the application for variation to:
 - be in writing;
 - specify the variation being requested;
 - be delivered at the Commission's address specified in the regulations (the regulations prescribe delivery of the application either by post or by email); and

- comply with the requirements of form and content referred to in the regulations (note there are no additional requirements on form and content prescribed by the regulations).

7. If the application for variation involves the use of capacity by a carrier other than the carrier to whom capacity is allocated (including the use of the capacity in whole or in part by a wholly-owned subsidiary), the application is required to identify the carrier proposed to utilise the capacity. This will enable the Commission to assess whether the carrier proposed to utilise the capacity fulfils the sections 8 and/or 9 criteria of the Policy Statement.

Commission-initiated review

8. 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. Section 23 of the Act lists these grounds, as follows:

- (a) a term or condition of the determination has been breached; or
- (b) due to a change of circumstances, a breach of a term or condition will occur; or
- (c) the relevant Australian carrier no longer intends to use the capacity.

9. 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 10 working days within which to respond.

10. Having considered the carrier's response, the Commission will decide whether to proceed with a review and will notify the carrier accordingly.

11. If the Commission has decided to conduct a review, it will publish on its website a notice of its decision to review the determination.

Notice to review a determination

12. When the Commission has received an application to vary a determination or has decided to review a determination, the Commission, by notice, will invite submissions 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.

13. The Commission will publish the carrier's application to vary the determination or a notice to review (if it is a Commission-initiated review) on its website (www.iasc.gov.au). In addition to the website notification, the Commission will notify interested parties, by email, of the review and of any submissions as soon as practicable after receipt. Any interested party will be added to the Commission's notification list on request.

14. Any person may make a submission to the Commission about the review of a determination. A person who wishes to make a submission should refer to the Commission's 'Procedures for Submitters' which may be obtained from the Commission's website (www.iasc.gov.au) or the Secretariat.

Criteria to apply

Carrier-initiated review

15. For an application for variation initiated by a carrier, Division 3 of the Act will be applied. The public benefit criteria in sections 8 and 9 of the Policy Statement may be applied, as necessary. However, if the only effect of the variation is to reduce capacity held by the carrier, the Commission is required to vary the determination as requested.

16. Under section 17 of the Policy Statement, if no submission is received opposing the variation (other than a transfer application), the Commission is to have regard to the reasonable capability criterion and need not have regard to any other matter.

17. Section 18 of the Policy Statement deals with 'transfer applications'. In assessing whether the proposed variation would not be of benefit to the public, the Commission:

- (a) is to have regard to the reasonable capability criterion;
- (b) is to have regard to the following matters if relevant to the variation:
 - (i) the undesirability of approving a transfer that will or likely to permit or encourage any form of speculative activity including trading in capacity allocations for commercial benefit;
 - (ii) the undesirability, other than in exceptional cases, of approving a transfer made by a carrier that never exercised an allocation or has only exercised an allocation for a period of less than 6 months;
- (c) and may have regard to any of the additional criteria in section 9 that it considers relevant.

Commission-initiated review

18. 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 either has been, or inevitably will be, breached; or
- the carrier no longer intends to fully use the capacity.

19. 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.

20. Under section 16 of the Policy Statement, if the grounds for review relate to a condition that the capacity be fully used [under paragraph 15(2)(c) of the Act], in

assessing whether the variation would be of benefit to the public, the Commission may have regard to the following and need not have regard to any other matter:

- (a) whether at the time of the review, there is an application from another carrier for an allocation of capacity on the route and the unused portion of the allocated capacity under review prevents the making of a determination as applied for by the other carrier;
- (b) whether there is seasonal variation in demand on the route in question;
- (c) whether the carrier was prevented from fully using the capacity by circumstances that could not reasonably have been foreseen;
- (d) any other matter that the Commission considers to be relevant.

21. If no submission is received opposing the variation, the Commission is to have regard to the reasonable capability criterion and need not have regard to any other matter.

22. In all other cases (e.g a submission is received), the Commission is to have regard to the reasonable capability criterion and may have regard to any of the additional criteria that it considers relevant.

Publication of submissions

23. 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 published on the Commission's website. The Secretariat updates the Commission's website (www.iasc.gov.au) as soon as an application for review is received or a notice is issued by the Commission to conduct a review of a determination. Submissions received concerning a review are also included on the website. Additionally, the Secretariat notifies interested parties by email as soon as updates to the website are made.

24. The Commission understands there may be information provided by applicants or submitters which they do not wish to be made public. The Commission does not publish such information on its website, provided a suitable case for confidential treatment is made. The Commission accepts that information which is of a 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.

25. 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.

Draft decision

25. The Commission may decide to issue a draft decision to give applicants and submitters an opportunity to comment before a final determination is issued. Draft decisions will include the reasons for the Commission's conclusions. Typical circumstances in which a draft decision 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; or
- the Commission proposes to revoke, suspend or vary a determination following a Commission-initiated review.

26. Applicants and submitters will be informed of the draft decision by published notice and by email. The notifications will indicate the timeframe for comments on the Commission's draft decision. This will generally be 10 working days.

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

Pre-decision conference

28. 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.

29. 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.

30. 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

31. 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

Carrier-initiated review

32. After conducting a review, the Commission must make a decision under either section 24 or section 25 of the Act. If the application for review is a ‘transfer application’ as defined under section 4, section 25 requires the Commission to make a decision varying the determination in a way that gives effect to the variation requested. However, the Commission must not vary the determination if it is satisfied that the determination, as so varied, would not be of benefit to the public.

33. A ‘transfer application’ is one where an Australian carrier to whom the determination is allocated:

- a. seeks to vary the determination to allocate, or has the effect of allocating, the capacity to another Australian carrier; or
- b. seeks to vary, or has the effect of varying one or more of the following types of conditions:
 - condition referred to in paragraph 15(2)(d) about the use of the capacity by the carrier or carriers to whom the capacity is allocated;
 - condition referred to in 15(2)(e) about joint services with another carrier or any other person; and
 - condition referred to in paragraph 15(2)(f) about changes in the ownership or control of the carrier to whom the capacity is allocated.

Examples of transfer applications include permission to use the capacity for code sharing with another carrier or a variation to allow another Australian carrier (such as a wholly-owned subsidiary of the carrier) to use the capacity. The Commission must not approve a transfer application if it considers that the allocation, as so varied, would not be of benefit to the public for the purpose of section 25(2) of the Act.

34. For an application, other than a transfer application, the Commission must make a decision under section 24. Section 24 of the Act requires the Commission, having conducted its review, to confirm the determination (i.e. 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. However, the Commission must not make the variation unless it is satisfied that the variation would be of benefit to the public.

Commission-initiated review

35. Having conducted a review under subsection 10(2) of the Act, the Commission may confirm, vary, suspend or revoke the determination. The Commission’s decision will be made under section 23 of the Act.

36. The Commission must not vary an allocation of capacity unless it is satisfied that the allocation, as so varied, would be of benefit to the public.

37. Where the Commission decides to suspend a determination, the capacity will not be made available for allocation to other Australian carriers until such time as the capacity is voluntarily returned or the determination allocating the capacity is revoked.

38. Upon making its decision, the Commission will promptly advise applicants and submitters, as well as other parties on the Commission's notification list. The decision will be placed on the Register of Public Documents and published on the Commission's website.

Further information

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

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December 2021