

INTERNATIONAL AIR SERVICES COMMISSION

4. PROCEDURES FOR THE RENEWAL OF DETERMINATIONS

Introduction

1. These procedures are intended to assist anyone seeking a renewal of a determination by the Commission. The procedures are shown in summary form in the attached diagram. The Commission may publish revised procedures from time to time. For avoidance of doubt, nothing in this document overrides the requirements of 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 Policy Statement). The current Policy Statement was issued on 20 March 2018 and came into force and effect on 28 March 2018.

2. Applicants should read these procedures in conjunction with the Act, the regulations and the Policy Statement. 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 some of its powers to its Executive Director and Senior Adviser, who are employees of the Department of Infrastructure, Transport, Regional Development and Communications (the Department). The Act and the regulations 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 deals with 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 publication 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.

Invitation for applications and submissions

5. 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 wishes to seek a renewal, it will apply for a fresh determination allocating the capacity. The Commission will then publish on its website the renewal application. 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 carrier either applies to revoke the determination or allows its expiry date to lapse.

6. Should the renewal application propose changes to the terms and conditions included in the determination (which is sought to be renewed), the Commission will treat the proposed changes as variations to the determination being renewed and invite submissions about the proposed variations.

7. In addition to the website notification, the Commission notifies interested parties by email of applications and related submissions as soon as practicable 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. Paragraph 12(2)(b) of the Act requires that the Commission's notice inviting other applications must specify the period within which the applications are required to be made. Parties wishing to make an application must do so within the timeframe specified by the Commission in its published notice. The Commission's normal practice is to allow a total of 10 working days within which another person may submit an application¹. The Commission will not make a decision in relation to the renewal application for a period of 10 working days beginning on the day a public notice is given inviting other applications.

9. If one or more competing applications are received, the Commission will call for submissions from interested parties about the applications. A further period of 10 working days will be given 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 section 9 criteria in the Policy Statement, if they have not already done so in their original application. All applicants must address the section 8 criterion as a matter of course, and would be expected to have done so in their original application.

10. Any person wishing to make a submission on a matter before the Commission should refer to the Commission's 'Procedures for Submitters' which may be obtained from the Commission's website or the Secretariat.

¹ To give effect to the full 10-working-day period, the Commission will accept other applications up until 11:59 pm on the 10th working day of the consultation period.

Requirements for applications and submissions

11. Section 14 of the Act requires applications for capacity to be in writing, sent to the Commission within the period specified in the notice and delivered by post, email, facsimile or by hand to the Commission's address specified in the regulations. Applications (and submissions) should include the reasons why the Commission should or should not renew a specified determination.

12. 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 section 9 of the 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 relevant to the Commission's decision making.

New operators

13. 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 to meet the requirements of the public benefit criteria set out in section 8 of the Policy Statement. These requirements relate to assessing whether the applicant is likely to be reasonably capable of (a) obtaining the necessary approvals to operate on and service the route and (b) using the capacity sought. 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.

14. 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 application.

15. Intending new operators will need to seek and obtain various approvals from 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 section 8 requirements. While the Department cannot license 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.

16. Once a new carrier has satisfied the Commission in relation to section 8 for one route, and has been allocated capacity, the Commission is likely to accept that the operator will satisfy the section 8 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

17. 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 non-confidential submissions about, an allocation are published on the Commission's website. The Secretariat updates the 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. Additionally, the Secretariat notifies, by email, interested parties as soon as updates to the website are made.

18. The Commission understands that there may be information provided by applicants or submitters which they do not wish to be made public. 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.

19. 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

20. A number of different criteria may apply to the renewal of determinations. The criteria to be applied depend on whether the determination is a full (five-year or 99-year) determination or an interim (three-year) one and if capacity and route rights are unrestricted. The criteria for renewal of full determinations reflect a rebuttable presumption in favour of the incumbent.

21. For full determinations, the Commission must make the same allocation of capacity as the original determination unless the Commission is satisfied that that same amount of allocation is no longer of benefit to the public (section 8 of the Act).

22. An allocation is generally no longer of benefit to the public if
- (a) the carrier seeking renewal has failed to service the route effectively; and
 - (b) there are other applications for some or all of the capacity; and
 - (c) the Commission, having regard to the reasonable capability criterion and any of the additional criteria that it considers relevant, is satisfied that a different allocation of the capacity would be of greater benefit to the public.
23. When making a different allocation of capacity, the Commission is to have regard to the reasonable capability criterion (in section 8) and any of the additional criteria that it considers relevant (under section 9).
24. A carrier seeking to renew an interim determination does not have a presumption in its favour of being given the same allocation of capacity. The Commission will apply the relevant criteria under sections 11, 12 or 13 of the Policy Statement.

Draft determination

25. 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 proposed to be attached to a determination may not be anticipated by the applicant. In other circumstances, the Commission will move directly to a final determination.
26. 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 email and public notice. The notifications will indicate the timeframe for comments on the Commission's draft determination. This will generally be 10 working days.

Pre-determination conference about draft determinations

27. 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.
28. 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.

29. 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

30. 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

31. 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

32. 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
Email: iasc@infrastructure.gov.au
Internet site: www.iasc.gov.au

International Air Services Commission

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ATTACHMENT A

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:

- (1) 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.
- (2) 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).
- (3) information about funding sources (see attachment B for further details)
- (4) detailed company information including
 - Registered company name, Australian Company Number (ACN) and Australian Business Number (ABN)
 - Registered company name, ACN and ABN 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

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.

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.

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.