



Procedures for the review of determinations

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Purpose

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 held by that carrier and reviews initiated by the Commission.

For avoidance of doubt, nothing in this document overrides the requirements of the *International Air Services Commission Act 1992* (the Act), the International Air Services Regulations 2018 (the Regulations), and the International Air Services Commission Policy Statement 2018 (the Policy Statement).

It is recommended that these procedures are read in conjunction with the Act, the Regulations and the Policy Statement. For further details, refer to the Commission's [website](#).

Review of determinations

1. 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

2. A carrier to whom a determination is issued may, at any time, apply to the Commission to vary a determination under section 21 of the Act.

3. Applications must be made in writing, specify the variation being requested and be delivered to the Commission by email to contact@iasc.gov.au or by post - GPO Box 630, Canberra ACT 2601.

Application requirements

4. For applications to vary a determination, to use the capacity for the provision of joint international air services (including code sharing) with another Australian carrier or a foreign airline, applicants are advised to also provide the following information as part of their application:

- identity of the carrier(s) proposed to utilise the capacity;
- whether the arrangement is on a blocked space or free sale basis;
- proposed timing for the commencement of the joint services;
- details of the city pairs to be operated under the arrangement, including which services will be marketed and/or operated by which carrier(s);
- a copy of the proposed commercial arrangement between the carriers and a statement of the anticipated public benefits associated with the arrangement; and
- a statement of claims as to why the carrier(s) proposed to operate the capacity meet the section 8 reasonable capability public benefit criterion in the Policy Statement.

Commission-initiated review

5. 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 fully use the capacity.

6. Before deciding to review a determination, the Commission will inform the carrier to whom the 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 business days within which to respond.¹

7. Having considered the carrier's response, the Commission will decide whether to proceed with a review and will notify the carrier accordingly. Correspondence between the Commission and the carrier during this process will remain confidential.

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

Notice to review a determination

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

10. The Commission will also notify interested parties who have requested to be on the Commission's notification list, by email, of the review and of any submissions as soon as practicable after receipt.

11. No notice will be published if the only effect of a carrier-initiated review would be to reduce the capacity allocated to the carrier.

12. 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. For Commission-initiated reviews, the affected carrier will also be invited to provide a submission in response to the Commission's notice.

13. Any party may make a submission to the Commission about the review of a determination. Further details on how to make a submission are provided through the '[Procedures for making a submission to the Commission](#)' available on the Commission's website.

¹ To give effect to the full 10-business-day period, the Commission will accept a response from the carrier up until 11:59 pm on the 10th business day of the date specified in the correspondence.

Criteria to apply

Carrier-initiated review

14. 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.

15. 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 (section 8) and need not have regard to any other matter.

16. 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; and
- b) is to have regard to the following matters if relevant to the variation:
 - i. the undesirability of approving a transfer that will or is reasonably 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 has 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

17. 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.

18. 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.

19. Under section 16 of the Policy Statement, if the grounds for review relate to a condition that the capacity be fully used 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.

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

21. In all other cases (e.g. an opposing 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.

Draft decision

22. The Commission may decide to issue a draft decision to give applicants and submitters an opportunity to comment before a final decision 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.

23. 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 business days.

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

Pre-decision conference

25. 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.

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 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.

27. 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

28. 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.

Final decision

Carrier-initiated review

29. After conducting a review, the Commission must make a decision under either section 24 or section 25 of the Act.

30. If the application for review is a 'transfer application', 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.

31. A 'transfer application' as defined under section 4 is one where an Australian carrier to whom the determination is allocated:

- seeks to vary the determination to allocate, or has the effect of allocating, the capacity to another Australian carrier; or
- seeks to vary, or has the effect of varying one or more of the types of conditions referred to in paragraph 15(2).

32. 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.

33. 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

34. 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.

35. 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.

36. 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.

37. 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 published on the Commission's website as soon as practicable thereafter.

Information handling

38. 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, a review (whether carrier-initiated or Commission-initiated) are published on the Commission's website.

39. The Secretariat updates the Commission's website as soon as practicable after 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.

40. 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 and/or wet lease 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.

41. The Commission reserves the right to reject confidential information, or to not take the information into account in its deliberations. The Commission may do so if it considers that there are no 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.

Version control

Version	Author	Date	Authorised by	Date
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