

EXPLANATORY STATEMENT

INTERNATIONAL AIR SERVICES COMMISSION POLICY STATEMENT 2018

**Issued by the authority of the Deputy Prime Minister and
Minister for Infrastructure and Transport**

The Hon Michael McCormack MP

Australia's bilateral air services arrangements with other countries govern the rights of carriers to operate scheduled international passenger and freight services to those countries. The arrangements establish a system where capacity entitlements and the ports that may be served by carriers of each country are determined. Capacity entitlements usually take the form of limitations on the frequency of flights, number of passenger seats or amount of freight that can be operated.

Before carriers can commence international services to and from Australia, they need to be 'designated' under relevant bilateral air services arrangements. Many bilateral arrangements permit Australia to designate more than one carrier to operate to any given country. This provides an opportunity for competition between Australian carriers on international routes¹.

The *International Air Services Commission Act 1992* (the Act) established the International Air Services Commission (the Commission). The primary function of the Commission is to make determinations allocating available capacity to Australian carriers. These determinations identify that an Australian carrier is permitted to operate on a route, and the number of frequencies, seats or amount of freight allocated to that carrier for that route. Each determination specifies a period for which it is in force, to be reviewed at the end of that period.

The Act permits the Commission to delegate some of its powers and functions to an Australian Public Service employee in the Department of Infrastructure, Regional Development and Cities. The circumstances in which such a delegation may be made are specified in the *International Air Services Commission Regulations 1992* (the Regulations). The Regulations also deal with a number of procedural matters relating to the operation of the Commission.

Section 11 of the Act confers on the Minister for Infrastructure and Transport (the Minister) the power to make policy statements about the way in which the Commission is to perform its functions. In accordance with section 6(3) of the Act, the Commission must comply with any policy statements made by the Minister. The Act also requires the Commission to apply criteria set out in any policy statement for assessing the benefit to the public of a particular allocation of capacity.

Australian carriers and the Commission were consulted in developing this policy statement. The policy statement took effect on the day after it was registered with the Federal Register of Legislation and replaced all previous policy statements. To provide certainty to carriers in transitioning to this policy statement, it includes provisions on how the Commission should handle applications submitted prior to the day it took effect.

¹ The term 'route' is defined in the policy statement as relating 'to the full set of entitlements available to Australian carriers under a particular bilateral arrangement. All combinations of origin, destination, intermediate and beyond points available to Australian carriers under the bilateral arrangement constitute a single route.' This definition also applies herein.

The policy statement sets out the criteria that the Commission is to apply in assessing the benefit to the public of allocations of capacity in various circumstances and provides other guidance to the Commission in performing its functions.

Broadly speaking, the policy statement provides for:

- criteria the Commission is to consider in assessing the benefit to the public – namely the ‘reasonable capability criterion’ and the ‘additional criteria’ (Part 2);
- how the Commission is to assess the benefit to the public when making, renewing or varying a determination allocating available capacity in particular circumstances (Part 3);
- how the Commission is to fix the periods during which determinations are to be in force (Part 4);
- guidance on matters relating to the inclusion of certain conditions in determinations, and the variation or revocation of such conditions (Part 5); and
- guidance on how the Commission should handle applications in transitioning to this policy statement (Part 6).

References to the Commission in the policy statement and in this explanatory statement include the delegate of the Commission unless expressly excluded.

This policy statement consolidates and clarifies several provisions. It avoids duplication and includes better references to certain provisions within the Act. By reducing the amount of cross-referencing required to read the policy statement, it streamlines the Commission’s decision-making process, improves transparency and provides greater certainty for Australian carriers. It has also been modernised to reflect current trends in many of Australia’s bilateral air services arrangements and the aviation environment more broadly.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights has been completed in relation to this policy statement. The Statement of Compatibility concludes that the policy statement is compatible with Australia’s human rights obligations. A copy of the Statement of Compatibility is attached.

Regulation Impact Statement

The Office of Best Practice Regulation has assessed the Department of Infrastructure, Regional Development and Cities’ certification that a Regulation Impact Statement is not required to remake the International Air Services Policy Statement No.5 (as the International Air Services Commission Policy Statement 2018) as being adequate (No.22013).

NOTES ON PARTS

Part 1—Preliminary

Part 1 of the policy statement provides the name and object of the instrument. It provides that the policy statement commences on the day after it is registered with the Federal Register of Legislation, thereby repealing the International Air Services Policy Statement No.5 as advised in the schedule to the policy statement. Provisions relating to transitional arrangements are set out in Part 6 of the policy statement.

Part 1 also advises the authority of the instrument as section 11 of the Act, and provides for the interpretation of certain expressions and terms used throughout the policy statement.

Part 2—Criteria for assessing benefit to the public

The Act requires the Commission to assess the benefit to the public of allocations of capacity when deciding whether to make, renew or vary a determination. Part 2 of the policy statement sets out the criteria the Commission is to have regard to in assessing the benefit to the public.

There are two main sets of criteria that the Commission is to have regard to in assessing the benefit to the public: the reasonable capability criterion and the additional criteria. When and how the Commission is to, or may, have regard to the criteria is set out in Part 3 of the policy statement.

The policy statement makes clear that the criteria apply equally in assessing the benefit to the public of allocations to be exercised through own aircraft operations, code share arrangements and other joint international air services.

Reasonable capability criterion

The reasonable capability criterion forms the basis of almost all assessments conducted by the Commission. Satisfying the criterion reassures the Commission that a proposed allocation of capacity will be able to be used by a carrier, fostering healthy competition.

The criterion applies to all Australian carriers that are, or would be, permitted to use the capacity allocated under a particular determination. This includes carriers that are entitled to use the allocated capacity because of a condition imposed by the Commission under paragraph 15(2)(ea) of the Act, such as a wholly-owned subsidiary of the carrier making the application.

In having regard to the reasonable capability criterion, the Commission is to consider the extent to which the carrier(s) is reasonably capable of obtaining any licences, permits or approvals required to operate on the route to which the determination relates. This includes, for example, an international airline licence granted under section 12 of the *Air Navigation Act 1920*. The Commission is also to consider the extent to which the carrier(s) is reasonably capable of implementing the proposed services and using the allocated capacity.

Additional criteria

The additional criteria set out further guidance to the Commission for assessing the benefit to the public of a proposed allocation of capacity. The additional criteria are intended to support the Commission's pre-eminent consideration of fostering, encouraging and supporting an environment conducive to healthy competition between Australian and foreign carriers in the provision of international air services.

The additional criteria reflect the particular benefits that the Australian community can expect from a competitive approach to allocating capacity among carriers. The advantages of competition flow both from the fresh service options brought by new entrants and the pressure that real or potential competition brings on incumbent carriers.

In circumstances where the additional criteria apply, the Commission has discretion to have regard to any criterion that it considers to be relevant to the assessment at hand. In having regard to the additional criteria, the Commission may take into account the likely benefit (or detriment) to the Australian public of the proposed service with regard to, among other things:

- the number of carriers operating on the route in question and the existing distribution of capacity among Australian carriers;

- the likely impact on consumers, including in relation to airfares, choice of product and product differentiation, as well as stimulation of innovation;
- the desirability of own aircraft operations over code share or other joint international air services; and
- any commercial arrangements that may be in place between carriers.

The additional criteria provide that the Commission may, where relevant, consider information obtained from Australian Government agencies or statutory authorities. The Commission may consider any determinations, decisions or notifications made by the Australian Competition and Consumer Commission, the Australian Competition Tribunal or their comparable international counterpart, as well as by a foreign aeronautical authority in relation to a carrier using entitlements under a bilateral arrangement.

The Commission may also consider impacts to tourism and trade, as well as any other matters it deems appropriate in the circumstances.

Other criteria

Part 3 of the policy statement sets out other criteria that are not covered by the reasonable capability criterion or the additional criteria. The purpose of the other criteria is to provide specific guidance to the Commission when making decisions in particular circumstances. These circumstances include, for example, transfer applications as set out in paragraph 18(2)(b) and variations on review for cause as set out in subsection 16(2) of the policy statement.

Part 3—How the Commission is to assess benefit to the public

Part 3 of the policy statement sets out how the Commission is to assess the benefit to the public of allocations of capacity. The type of decision being made and the circumstances of a particular application will determine the extent to which the Commission applies, or chooses to apply, the criteria set out in Part 2 of the policy statement.

The provisions of Part 3 apply equally in assessing the benefit to the public of allocations to be exercised through own aircraft operations, code share arrangements and other joint international air services, noting the desirability of fostering own aircraft operations by Australian carriers over code share or other joint international air services.

There are broadly three types of decision that the Commission can make under the Act:

- making a determination allocating available capacity (see section 7 and Division 1 of Part 3 of the Act) in circumstances where:
 - available capacity is not limited;
 - there are one or more applicants; and
 - other cases including where there are two or more applicants and insufficient available capacity;
- renewing a determination by making a fresh determination (see section 8 and Division 2 of Part 3 of the Act); and
- varying a determination (see section 10 and Division 3 of Part 3 of the Act).

The Act requires that in all cases before the Commission can make a determination allocating available capacity or renew a determination, it must first invite applications from any person for a determination allocating the capacity. Similarly, the Act requires the Commission to invite

submissions from any person before deciding whether to vary a determination. Together, these provisions help ensure that the Commission has all necessary views and information from interested stakeholders at hand when making decisions.

Determinations allocating capacity

Division 2 of the policy statement sets out the criteria applicable where the Commission is proposing to make a determination that allocates available capacity under section 7 of the Act.

Circumstances where capacity available under the relevant bilateral air services arrangement is not limited

In accordance with section 11 of the policy statement, the Commission is to have regard to the reasonable capability criterion and need not have regard to any other matter in situations where there is unlimited available capacity under the relevant bilateral arrangement.

In such a case, the Commission would apply the reasonable capability criterion but would not be expected to apply the additional criteria. This is because there are no limitations on its ability to foster a competitive environment on the route in question and there are no barriers to entry for other carriers.

Example 1: Available capacity is not limited

A carrier applies for an allocation of passenger capacity to operate to a country where there are no limitations on the frequency of flights or number of seats that may be operated under the terms of the relevant bilateral arrangement.

When making a determination in this case, the Commission is to have regard to the reasonable capability criterion but need not have regard to any other matter.

Circumstances where there are one or more applicants and capacity available under the relevant bilateral air services arrangement is sufficient

Where there is sufficient, but not unlimited, available capacity under the relevant bilateral arrangement to accommodate all applications and the Commission does not receive any submissions opposing the allocation of capacity, the Commission is to have regard to the reasonable capability criterion and need not have regard to any other matter, as per subsection 12(2) of the policy statement.

In such a case, the Commission would not be expected to apply the additional criteria. This is because there is sufficient capacity in the market for additional competition on the route in question and no interested stakeholders have raised concerns that the proposed allocation is not in the public interest.

Example 2: Available capacity is sufficient and there are no opposing submissions

A carrier applies for an allocation of freight capacity to operate to a country where there are limitations on the amount of freight that may be carried under the terms of the relevant bilateral arrangement. The allocation of capacity sought by the carrier does not exceed the amount of capacity available under the bilateral arrangement and no opposing submissions are received by the Commission.

When making a determination in this case, the Commission is to have regard to the reasonable capability criterion but need not have regard to any other matter.

In cases where there is sufficient, but not unlimited, available capacity under the relevant bilateral arrangement to accommodate all applications and the Commission receives one or more opposing submissions, it is to have regard to the reasonable capability criterion and may have regard to any of the additional criteria that it considers to be relevant, as per subsection 12(3) of the policy statement.

Although such scenarios are highly unlikely, it is nonetheless appropriate that the Commission, after carefully considering the merits of any submissions, has discretion about whether it is appropriate to apply the additional criteria in order to assess the benefit to the public.

Example 3: Available capacity is sufficient but there is an opposing submission

A carrier applies for an allocation of passenger capacity to operate to a country where there are limitations on the number of seats that may be operated under the terms of the relevant bilateral arrangement. The carrier intends for a wholly-owned subsidiary to operate some of the capacity. While the allocation of capacity sought by the carrier does not exceed the amount of capacity available under the bilateral arrangement, the Commission receives a submission opposing the allocation.

When making a determination in this case, the Commission is to have regard to the reasonable capability criterion, including in relation to the wholly-owned subsidiary. The Commission may also have regard to any of the additional criteria that it considers to be relevant.

All other cases, including where there are two or more applicants and capacity available under the relevant bilateral air services arrangement is insufficient

In all other cases, including where there are two or more applicants and insufficient capacity available under the relevant bilateral arrangement, the Commission is to have regard to the reasonable capability criterion and to relevant additional criteria, as per section 13 of the policy statement.

It is appropriate that the Commission has access to the full range of considerations available to it when making decisions in such complex situations, and that it takes account of views and information available from interested stakeholders.

Example 4: There are two applicants but available capacity is insufficient

Two carriers apply for allocations of passenger capacity to operate to a country where there are limitations on the frequency of flights that may be operated under the terms of the relevant bilateral arrangement. One carrier intends to operate its own aircraft on the route in question while the other intends to exercise its allocation under a code share arrangement. The total amount of capacity sought by the carriers exceeds the amount of capacity available under the bilateral arrangement.

When making determinations in this case, the Commission is to have regard to the reasonable capability criterion. The Commission is also to have regard to any of the additional criteria that it considers to be relevant. The criteria apply equally in assessing the benefit to the public of allocations to be exercised through own aircraft operations and code share arrangements, notwithstanding the desirability of fostering own aircraft operations by carriers over code share or other joint international air services.

Renewal of determinations

Division 3 of the policy statement sets out the criteria applicable where the Commission is considering renewing a determination that allocates capacity under section 8 of the Act.

Paragraph 8(2)(a) of the Act provides a presumption in favour of renewing a determination of the incumbent carrier. However, the Commission may decline to renew the incumbent carrier's determination if it is satisfied that the determination is no longer of benefit to the public.

In deciding whether a determination is no longer of benefit to the public, the Commission is to have regard to the matters set out in section 14 of the policy statement. That is, the carrier seeking renewal has failed to service the route effectively, there are other applications for some or all of the capacity, and the Commission – having considered the reasonable capability criterion and any of the additional criteria that it considers to be relevant – is satisfied that a different allocation of the capacity would be of greater benefit to the public. This threshold is deliberately higher than in other circumstances to provide greater commercial certainty to the incumbent carrier and encourage them to service the route in question effectively under their existing determination.

If the Commission declines to renew a determination, it may decide to make a different allocation of capacity. In doing so, the Commission is to have regard to the reasonable capability criterion and to any of the additional criteria it considers to be relevant. This ensures that the Commission has access to the full range of considerations available to it when making decisions in such complex situations.

Example 5: Presumption in favour of renewing an incumbent's determination

A carrier seeks to renew a determination for an allocation of passenger capacity. While there is an application from another carrier for capacity on the same route, there is sufficient available capacity to be allocated to all applicants.

As the Commission is satisfied that the incumbent carrier has serviced the route effectively and there is benefit to the public of making the same allocation of capacity, there is a presumption in favour of renewing the incumbent's original determination for an allocation of capacity. The Commission treats the other carrier's application as a separate application and will apply the relevant criteria.

Example 6: A different allocation of capacity would be of greater benefit to the public

A carrier seeks to renew a determination for an allocation of passenger capacity. Another carrier applies for some of the capacity which is the subject of the renewal application. The total amount of capacity sought by the carriers exceeds the amount of capacity available under the bilateral arrangement.

The Commission is concerned that the incumbent carrier has failed to service the route effectively. It applies the reasonable capability criterion and relevant additional criteria, and is satisfied that a different allocation of capacity would be of greater benefit to the public. The presumption in favour of renewing the incumbent's original determination does not apply and the Commission makes a different allocation of capacity to the incumbent carrier. It treats the other carrier's application as a separate application and applies the relevant criteria.

Review of determinations

Division 4 of the policy statement sets out the criteria applicable where the Commission is considering whether to vary a determination in a way that varies, or has the effect of varying, an allocation of capacity. This may occur following a review for cause initiated by the Commission under section 10 of the Act, or upon receipt by the Commission of an application from a carrier for variation or transfer of a determination.

Variations on review for cause

Subsection 16(2) of the policy statement deals with situations where the Commission has initiated a review, and the reason for the review relates to a condition that allocated capacity be fully used within a determined period (paragraph 15(2)(c) of the Act refers). When making a decision in this case, the Commission is to have regard to the criteria set out in paragraphs 24(3)(a)-(d) of the policy statement. Those criteria allow the Commission to consider particular matters in relation to a carrier's utilisation of an allocation of capacity, such as whether there is seasonal variation in demand on a particular route.

If the Commission has initiated a review under section 10 of the Act for any other reason, and the Commission does not receive any adverse submissions, the Commission is to have regard to the reasonable capability criterion and need not have regard to any other matter in making its decision, as per subsection 16(3) of the policy statement.

Where the Commission has initiated the review and an adverse submission is received, the Commission is to have regard to the reasonable capability criterion and may have regard to relevant additional criteria, as per subsection 16(4) of the policy statement. This ensures that the Commission takes account of information available from all interested stakeholders when making such decisions.

Example 7: Variation following a review initiated by the Commission

The Commission has decided to initiate a review of a carrier's determination. It does so on the grounds that the carrier has not fully used its allocation of passenger capacity on a particular route within the period specified in the determination. At no point did the carrier seek to extend the period within which the capacity is to be fully used.

When considering whether to vary a determination in this case, the Commission may have regard to the criteria set out in paragraphs 24(3)(a)-(d) of the policy statement and need not have regard to any other matter.

Variations on application

In situations where a carrier has applied to vary a determination, such as to increase its allocation of capacity, and the Commission does not receive any adverse submissions, the Commission is to have regard to the reasonable capability criterion and need not have regard to any other matter, as per subsection 17(2) of the policy statement. This reduces the administrative burden on carriers, particularly where an application to vary a determination is minor or technical in nature and has no direct impact on the allocation of capacity itself.

In all other cases where the carrier has applied for a variation, including situations where an adverse submission is received about an application to vary a determination, the Commission is to have regard to the reasonable capability criterion and may have regard to relevant additional criteria, as per subsection 17(3) of the policy statement. This ensures that the Commission takes account of information available from all interested stakeholders when making decisions on variation requests.

Example 8: Variation requested by a carrier

A carrier applies to vary a determination to increase its allocation of passenger capacity. The Commission receives a submission from a second carrier outlining its intention to apply for an allocation of capacity on the same route. The Commission invites the second carrier to apply for an

allocation of capacity. There is insufficient capacity available under the relevant bilateral arrangement to accommodate all requests.

When considering whether to vary the first carrier's determination in this case, the Commission is to have regard to the reasonable capability criterion and to any of the additional criteria it considers to be relevant. The Commission will concurrently assess the second carrier's application for an allocation of capacity in line with section 13 of the policy statement.

Transfer applications

Section 18 of the policy statement deals with transfer applications, as defined in section 4 of the Act. In this case, the Commission is to have regard to the reasonable capability criterion and to relevant matters set out in paragraph 18(2)(b) of the policy statement. The Commission may also have regard to relevant additional criteria.

Part 4—Duration and types of determinations

Part 4 of the policy statement sets out how the Commission is to fix the periods during which determinations are to be in force, and in what circumstances the Commission should make interim determinations.

Subsection 20(2) of the policy statement provides for determinations that would allocate capacity on a route where capacity is not limited under the relevant bilateral arrangement. The policy statement provides that the period during which such determinations are to be in force should be fixed by the Commission at 99 years. This reduces the administrative burden on carriers on routes where there are no barriers to entry and capacity allocations are unlikely to be contested.

Subsection 20(3) of the policy statement advises on cases where a carrier requests, in its application for an allocation of capacity, a specific period during which the relevant determination is to be in force. The Commission should fix the period as requested by the carrier, provided the period is less than three years for interim determinations or less than five years if the determination is not an interim one. These periods are considered sufficient to provide commercial certainty to carriers while ensuring there is continued benefit to the public through periodic review.

Subsection 20(4) of the policy statement provides guidance to the Commission when fixing periods for all other situations. The period of validity for a determination made by the Commission should be fixed at three years for interim determinations or five years if the determination is not an interim one. Similarly, these periods are considered sufficient to provide commercial certainty to carriers while ensuring there is continued benefit to the public through periodic review.

As general guidance, section 21 of the policy statement advises that the Commission should make interim determinations only in exceptional circumstances.

Part 5—Inclusion, variation and revocation of conditions in determinations

Part 5 of the policy statement sets out matters relating to the inclusion of conditions in determinations, and the variation or revocation of such conditions.

Section 23 of the policy statement deals with additional conditions the Commission should include in a determination if it intends to include a condition that allows joint international air services. The purpose of the condition is to ensure that Australian carriers take reasonable steps to ensure that passengers are informed, at the time of booking a flight, that one or more other carriers may operate

the flight. Such a condition upholds a provision that features in many of Australia's bilateral Air Services Agreements.

Subparagraph 15(2)(c)(i) of the Act allows the Commission to specify a period for commencement of operations on a route by a carrier. Section 24 of the policy statement provides guidance on how the Commission should impose such a condition, and how the Commission should proceed if it has undertaken a review of a determination on the grounds that an Australian carrier has not complied with such a condition.

These provisions are intended to strike a balance between the need to allow a reasonable period for a carrier to finance, plan and commence operations on a particular route against the Act's requirement that an allocation of capacity be 'fully used' and the Commission's pre-eminent objective of fostering a competitive environment.

Part 6—Application and transitional provisions

Part 6 of the policy statement provides guidance to the Commission on how it is to treat applications in transitioning to this policy statement. To provide carriers with commercial certainty and to reduce administrative burden, all applications received by the Commission before this policy statement took effect (whether they be for a determination allocating capacity, renewal of a determination or variation of a determination) will be assessed against the International Air Services Policy Statement No.5.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

International Air Services Commission Policy Statement 2018

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

Australia's bilateral air services arrangements with other countries govern the rights of international airlines to operate scheduled international passenger and freight services to those countries. They establish a system where capacity entitlements and the ports that may be served by international airlines of each country are determined.

Before carriers can commence international services to and from Australia, they need to be 'designated' under relevant bilateral air services arrangements. Many bilateral arrangements permit Australia to designate more than one carrier to operate to any given country. This provides an opportunity for competition between Australian carriers on international routes.

The *International Air Services Commission Act 1992* (the Act) established the International Air Services Commission (the Commission). The primary function of the Commission is to make determinations allocating available capacity to Australian international airlines. These determinations identify that an Australian international airline is permitted to operate on a route, and the number of frequencies, seats or amount of freight allocated to that carrier for that route.

Section 11 of the Act confers on the Minister for Infrastructure and Transport (the Minister) the power to make policy statements about the way in which the Commission is to perform its functions.

The purpose of this Disallowable Legislative Instrument is to set out the range of criteria that the Commission is to apply when assessing applications from Australian international airlines for allocations of capacity, to maximise the benefit to the public from such allocations. It facilitates the Commission's preeminent objective to foster, encourage and support an environment that is conducive to healthy competition among airlines.

This Disallowable Legislative Instrument reflects current trends in many of Australia's bilateral air services arrangements and the aviation environment more broadly. It streamlines the Commission's decision-making process, improves transparency and provides greater certainty for Australian carriers.

Broadly speaking, this Disallowable Legislative Instrument provides for:

- criteria the Commission is to consider in assessing the benefit to the public – namely the 'reasonable capability criterion' and the 'additional criteria';
- how the Commission is to assess the benefit to the public when making, renewing or varying a determination allocating available capacity in particular circumstances;

- how the Commission is to fix the periods during which determinations are to be in force;
- guidance on matters relating to the inclusion of certain conditions in determinations, and the variation or revocation of such conditions; and
- guidance on how the Commission should handle applications in transitioning to this policy statement.

Australian carriers and the Commission were consulted in developing this Disallowable Legislative Instrument.

Human rights implications

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.