

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

INTERNATIONAL AIR SERVICES COMMISSION AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Transport,
the Honourable Laurie Brereton MP)

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OUTLINE

This Bill amends the *International Air Services Commission Act 1992* (the Act). The Act established the International Air Services Commission (the Commission). The primary function of the Commission is to make determinations allocating available capacity amongst Australian carriers under Australia's multiple designation policy. One of the aims of the Act was to specify that Commission proceedings and procedures for allocating capacity should involve as little formality and technicality as possible and as much expedition as proper consideration permits.

The Bill recognises the commercial significance of greater certainty, timeliness and flexibility. It ensures that capacity not previously within the scope of the Act will become available for consideration and allocation by the Commission, provides for streamlined procedures for dealing with certain applications for capacity, clarifies the operation of certain provisions and corrects minor inconsistencies and typographic errors.

The Bill brings capacity under certain special air services arrangements within the scope of the Act where the foreign party to the arrangement, such as Taiwan, is not recognised by Australia as an independent State. This requires amendments to be made to definitions of 'Australian carrier', 'bilateral arrangement', 'capacity' and 'another country' in section 4 of the Principal Act and the addition of section 54A in relation to declarations which may be made concerning capacity which is in existence under such arrangements prior to being brought under the Act.

In allocating available capacity, the Commission invites applications and submissions and applies criteria to assess "benefit to the public". The Commission must apply criteria set out in detailed policy statements made by the Minister. Different criteria may be specified for different circumstances. In dealing with applications over the two years since the Commission's establishment, it has become apparent that there are limited circumstances in which it is unduly burdensome, time-consuming and costly to require the Commission to invite submissions and apply the criteria contained in the policy statement. This may arise, for example, where a carrier wishes only to return to the "shelf" capacity previously allocated to it. In this situation, the Bill provides for expedited procedures to reduce the time that other carriers may have to wait to then be able to apply for the available capacity under the usual procedures.

It is also clear from the Commission's experience to date that in a range of other circumstances, such as for uncontested applications or when bilateral arrangements permit more liberal carrier operations, consideration of applications could be streamlined by requiring less exhaustive criteria to be applied without detracting from the public interest. The Bill provides greater transparency in identifying circumstances where the policy statement is likely to specify that different criteria should be applied.

To maximise benefits for Australian carriers, which may already be enjoyed by foreign carriers, from immediate use of capacity as it comes available under bilateral arrangements or where flexibility exists under those arrangements, the Bill also allows operational decisions to be made by the Secretary in circumstances which may be prescribed by regulations. Such benefits may arise, for example, in relation to matters such as minor changes in seating configuration and freight-carrying capacity, methods for calculating extra capacity entitlements and substitution of different types of aircraft and the flexibility to meet particular demands for international air services related to, or associated with, services the subject of existing operational decisions.

Other amendments are proposed:

- to allow more flexibility in the use of capacity by different members of a corporate group;
- to clarify that the Commission can deal with two or more matters concerning particular capacity in the same determination;
- to provide for "new" capacity to become "shelf" capacity when there are no applicants;
- to specify that any two members can constitute a quorum and consequential amendments permitting the Commission to operate with 2 of the 3 members present;
- to require that the Chairperson of the Commission disclose any conflict of interest;
- to reduce the cost and administrative burden of publishing the full text of determinations in public notices; and
- to ensure the correct use of various terminology for the purposes of the Act.

FINANCIAL IMPACT STATEMENT

None of the amendments included in the proposed Bill will involve additional expenditure over that currently required by the Commonwealth to meet the remuneration of Commission members and administrative and related costs, currently in the order of \$980,000 per annum. It is envisaged that any additional time and cost involved in considering applications in relation to capacity brought under the Act will be offset by provisions to make decision-making more streamlined in particular circumstances and Commission procedures simpler and less onerous.

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NOTES ON CLAUSES

Clause 1 - Short title etc.

This clause provides for the proposed Act to be cited as the *International Air Services Commission Amendment Act 1994* amending the *International Air Services Commission Act 1992* (the Principal Act).

Clause 2 - Commencement

This clause provides that the Act commences on the day on which it receives the Royal Assent.

Clause 3 - Interpretation

This clause amends, substitutes and inserts a number of definitions in section 4 of the Principal Act for the terms 'Australian carrier', 'bilateral arrangement', 'capacity', 'another country', 'reduce' and 'wholly-owned subsidiary'.

Clause 4 - Available capacity, new capacity and shelf capacity

This clause amends section 5 of the Principal Act.

Sub-clause (a) ensures that where operational decisions are made under the new sub-section 9(2A) the relevant capacity will remain available for allocation by the Commission if and when it is able to do so.

Sub-clauses (b) and (c) ensure that, by the addition of subsection 5(3), where there are no applicants for available capacity in response to an invitation from the Commission, or where any applications received were withdrawn, once a statement to that effect is recorded in the minutes of a meeting of the Commission, the relevant capacity will become "shelf" capacity rather than, as at present, remaining "new" capacity which the Commission would be required to readvertise.

Clause 5 - The International Air Services Commission

This clause amends section 6 of the Principal Act.

Sub-clause (a) inserts subsection 6(2A) in the Principal Act which clarifies that the Commission may deal with more than one matter at the same time in relation to particular capacity, such as deciding whether an allocation of capacity to an applicant should be renewed and whether unallocated capacity available under the relevant bilateral arrangement should be allocated to the same applicant.

Sub-clause (b) inserts the word "applicable" before the word "policy" in paragraph 6(3)(a) of the Principal Act to clarify that there may be circumstances when the Commission will not be required to apply the policy statements or all of the criteria set out in the policy statements.

Clause 6 - Determinations allocating capacity

This clause amends section 7 of the Principal Act to make the correct reference, to Division 1 of Part 3, concerning applications for making of determinations under section 7.

Clause 7 - Effect of determinations on the making of operational decisions

This clause amends section 9 of the Principal Act.

Sub-clause (a) omits the word "available" from subsection 9(1) of the Principal Act because the capacity to which an operational decision relates is, by reason of subsection 5(2) of that Act, taken not to be available capacity once the Commission has made a determination allocating the capacity.

Sub-clauses (b) and (c) permit circumstances in which operational decisions may be made to be prescribed by regulations. This may include circumstances where, for example, the Commission has not yet had occasion to allocate the capacity or where capacity is incidental to that being operated under existing operational decisions.

Sub-clause (d) ensures that an operational decision made in such circumstances is not taken to be an operational decision for the purposes of subsection 5(1) of the Principal Act so that the Commission may still allocate capacity which is available capacity at a later date.

Clause 8 - Policy statements

This clause amends section 11 of the Principal Act by substituting a new subsection 11(3).

This provides further examples of where the policy statement may set out different criteria to be applied in different circumstances, such as where applications are uncontested, or contested on limited grounds, or where there is no limit on capacity under bilateral arrangements.

Clause 9 - Content of determinations

This clause inserts paragraph (2)(ea) and subsections (2A) and (2B) in section 15 of the Principal Act and makes a consequential amendment to paragraph (2)(d) of that section.

Sub-clause (a) amends paragraph 15(2)(d). The effect of the amendment is to allow use of capacity by a member or members of a corporate group, other than the one or more Australian carriers to whom the capacity is allocated, to the extent permitted by a condition which may be included under the new paragraph 15(2)(ea).

Sub-clause (b) inserts paragraph 15(2)(ea) to allow the Commission to include a condition in a determination allocating capacity to permit the use of some or all of the capacity by certain members of a corporate group.

Sub-clause (c) inserts subsections 15(2A) and 15(2B). Subsection 15(2A) would allow the Commission to impose the same or different conditions on various members of that corporate group. Subsection 15(2B) ensures that conditions regarding changes in ownership and control must be imposed on all members of the corporate group if they are to be permitted to continue to use capacity allocated to a particular Australian carrier.

Clause 10 - Notification of determinations

This clause repeals section 16 of the Principal Act and substitutes a new section which requires the Commission to publish notices stating that a determination has been made and where copies of the determination and reasons may be obtained. The provision would not make it necessary for the notice to set out the full determination and reasons but only for copies of the determination and reasons to be made available to the public.

Clause 11 - Notification of renewals

This clause repeals section 20 of the Principal Act and substitutes a new section which requires the Commission to publish notices stating that a determination involving a renewal has been made and where copies of the determination and reasons may be obtained. The provision would not make it necessary for the notice to set out the full determination and reasons but only for copies of the determination and reasons to be made available to the public.

Clause 12 - Submissions about reviews

This clause inserts a new subsection 22(1A) in the Principal Act which would not require the Commission to invite submissions where certain variations (other than transfer applications) requested by a carrier would have the effect only of reducing the capacity allocated to the carrier.

Clause 13 - Decisions on applications for variation

This clause amends section 24 of the Principal Act.

Sub-clause (a) makes subsection 24(1) of the Principal Act subject to the whole of that section including the new subsection 24(3).

Sub-clause (b) makes subsection 24(2), which provides for application of public benefit criteria, subject to the new subsection 24(3) and ensures appropriate terminology because it is the determination and not the application which is varied.

Sub-clause (c) adds subsection 24(3) which provides that the Commission must vary the determination as requested in an application where the only effect of a variation requested by a carrier to which capacity was allocated would be to reduce the capacity allocated to that carrier.

Clause 14 - Notification of decisions

This clause repeals section 27 of the Principal Act and substitutes a new section which requires the Commission to publish notices stating that a decision on a review of a determination has been made and where copies of the decision and reasons may be obtained. The provision would not make it necessary for the notice to set out the full decision and reasons but only for copies of the decision and reasons to be made available to the public.

Clause 15 - Meetings of Commission

This clause inserts a new section 27A in Division 1 of Part 4 of the Principal Act which clarifies a number of matters consequential upon amendments permitting the Commission to operate with 2 of the 3 members present. It makes explicit the usual matters relating to meetings and hearings of the Commission, presiding members, majority voting and the keeping of minutes of meetings.

As all 3 members may not always be available to consider an application, particularly if a decision needs to be made at short notice, the new section allows any two members to form a quorum. In the event that the two members are unable to agree in relation to a particular question, the requirement for a majority vote ensures that no decision can be made in relation to that question until the third member is available to take part in proceedings.

Clause 16 - Repeal of section

This clause repeals section 29 of the Principal Act which related to absence of a member once the Commission had begun considering a matter before it. Amendments which would permit the Commission to operate with 2 of the 3 members present are not affected by repeal of this section.

Clause 17 - Commission may hold hearings

This clause repeals section 30 of the Principal Act and substitutes a new section.

This makes it explicit that the Commission may hold hearings and also applies to the situation where 2 members form a quorum. Subsection (2) of proposed section 30 also makes it clear that the hearing can deal with more than one matter.

Clause 18 - Summons to give evidence

This clause amends section 34 of the Principal Act to make it clear that a member of the Commission may issue a summons. This would follow a decision taken at a meeting or hearing of the Commission, which may be constituted by any 2 members.

Clause 19 - Constitution of Commission

This clause amends section 39 of the Principal Act by adding a new subsection (2) to ensure that the performance of a function or the exercise of a power by the Commission is not affected by a vacancy in the membership of the Commission.

Clause 20 - Disclosure of interests

This clause repeals section 47 of the Principal Act and substitutes a new section.

This would ensure that a member, including the Chairperson, would be required to disclose any conflict of interest to the other members as well as to any parties to the proceedings. The repealed provision did not cast this obligation on the Chairperson. Moreover, if any member becomes aware that another member has a conflict of interest, the member becoming aware of such an interest must so inform the member with the interest and must disclose the interest if the member with the interest does not do so.

**Clause 21 - Secretary to notify Commission of making etc.
of operational decisions**

This clause repeals section 50 of the Principal Act and substitutes a new section. The amendments reverse the order of paragraphs 50(a) and (b) to provide a more logical structure, correct an inconsistency by deleting the word 'available' (because the effect of subsection 5(2) is that capacity is no longer available capacity once the Commission has made a determination) and make certain clarifications and grammatical changes in relation to the requirement for the Secretary to give written notice of operational decisions when they are made or not made.

Claus 22 - Pre-existing capacity under special bilateral arrangement

This clause inserts section 54A in the Principal Act.

This ensures that the Minister may make declarations, as was done in relation to capacity brought under the Principal Act when it was first enacted, in relation to capacity in existence before being brought under the Act by these amendments. This relates to capacity under a special bilateral arrangement where the foreign party to the arrangement, such as Taiwan, is not recognised by Australia as an independent State.



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