

1992

THE PARLIAMENT OF THE COMMONWEALTH  
OF AUSTRALIA  
SENATE

INTERNATIONAL AIR SERVICES COMMISSION BILL 1992  
EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Transport  
and Communications, Senator the Hon. Bob Collins)



## THE INTERNATIONAL AIR SERVICES COMMISSION BILL 1992

### OUTLINE

The object of the International Air Services Commission Bill 1992 (the Bill) is to enhance international air services by fostering :

- (a) increased competition between Australian carriers and greater economic efficiency in the airline industry;
- (b) increased responsiveness by airlines to the needs of consumers, including an increased range of choices and benefits;
- (c) Australian tourism and trade; and
- (d) the maintenance of Australian carriers capable of competing effectively with airlines of foreign countries.

The rights of Australian carriers to operate international scheduled air services to other countries are governed by Australia's bilateral arrangements with those countries. The arrangements typically provide for the designation of international carriers and set out a regime under which the capacity and points which may be served by the designated airlines of each country are determined - including by setting limits on the frequency of flights and the number of passenger seats available on each flight.

To date Australia's only designated airline, Qantas, has been able to utilise all the capacity rights available to Australia under these arrangements. In policy changes announced on 26 February 1992 the Government indicated its intention to introduce competition among Australian carriers in the operation of scheduled international air services through a scheme of multiple designation.

Implementation of this proposal will involve the designation of additional international carriers by the Government and the apportionment of available capacity between designated carriers by an independent commission.

The Bill provides for the establishment of the International Air Services Commission (the Commission). The primary function of the Commission is to make determinations allocating available capacity to Australian carriers. Determinations will identify which designated airlines are selected to operate particular available capacity and set necessary conditions. Determinations will be reviewed after a specified period (usually five years).

In allocating available capacity the Commission will apply criteria to assess "benefit to the public". The Commission must apply any criteria set out in detailed policy statements made by the Minister. Different criteria may be specified for different circumstances - for example special criteria may be applied during an initial start up phase to accelerate the entry of competition.

The Bill enables pre-existing capacity to be brought into the scheme of the Bill. It allows the Minister to declare that the de facto allocations to Qantas in force at commencement of the legislation are to be treated as if made by the Commission. Rights which were used prior to 26 February 1992 are preserved for a 5 year period while any rights allocated between 26 February and commencement of the legislation will, in some cases, only apply for 3 years.

The Bill provides for a register of all available capacity as a clear basis for the Commission and prospective carriers to identify the capacity available for allocation. The Register will be maintained by the Department as the Minister will continue to be responsible for negotiating and administering the bilateral arrangements. Provision is made in the Bill for notification by the Commission of determinations allocating capacity so that the register can be amended as necessary.

The Bill provides slightly different mechanisms for allocating "new" capacity and "shelf" capacity. New capacity is capacity which has not been previously considered by the Commission. The Commission is required to invite applications for the allocation of new capacity. Although the Commission initiates the allocation process, in practice the priority it sets may be influenced by expressions of interest from prospective carriers. If new capacity is not entirely taken up in the allocation process, it becomes shelf capacity. A prospective carrier can subsequently apply at any time to the Commission for an allocation of that capacity.

In dealing with renewals of determinations, the Bill provides that a rebuttable presumption in favour of renewal will usually apply. Under the presumption, the Commission must renew the allocation unless it is satisfied that it would no longer be of benefit to the public.

A variation of a determination will be required to give effect to any transfer of entitlements to another carrier. The conditions of a determination will cover the identity of the party to whom an allocation is made (and who can thus seek the necessary operating approvals), the extent to which code sharing or other joint operations with other carriers are permitted and the extent to which changes of carrier ownership or control are permitted while the determination is in force. Variations to give effect to

transfers must be approved unless the variation would not be of benefit to the public. Transfers of capacity also will be subject to the normal jurisdiction of the Trade Practices Commission, as are other commercial transactions.

The Bill provides for the Commission to vary, suspend or revoke a determination during its term, where that is appropriate by reason of a breach or in certain special circumstances.

A determination of the Commission will not of itself entitle a carrier to engage in international operations. The Bill does not remove the requirement for other approvals to be obtained prior to commencing operations: technical approvals from the Civil Aviation Authority and overseas authorities; designation under the bilateral arrangements; and operating approvals from the Secretary being an international airline licence, timetable and tariff approvals. However, the Bill requires the Secretary to act consistently with a determination of the Commission. The Secretary could not use his powers to depart from an allocation of capacity by the Commission or to allocate available capacity without a determination by the Commission.

The Bill provides considerable discretion to the Commission in its procedures but specifies that its proceedings should involve as little formality and technicality as possible and as much expedition as a proper consideration permits. The Bill also provides for the membership of the Commission.

#### **FINANCIAL IMPACT**

The Bill will involve additional expenditure by the Commonwealth to meet the remuneration of Commission members and staffing and administrative costs. It is envisaged that expenditure in the first year of the Commission's operation be in the order of \$2.2 million.

INTERNATIONAL AIR SERVICES COMMISSION BILL 1992

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title

This clause provides for the proposed Act to be cited as the *International Air Services Commission Act 1992*.

Clause 2 - Commencement

This clause provides that the Act commences on 1 July 1992.

Clause 3 - Object of Act

This clause sets the objects of the Act. The stated objects, together with any policy statements issued under clause 11, will guide the Commission in the performance of its functions.

Clause 4 - Interpretation

This clause contains definitions of terms used throughout the Act.

Clause 5 - Available capacity, new capacity and shelf capacity

This clause defines the terms available capacity, new capacity and shelf capacity.

"Available capacity" represents the capacity which the Commission can allocate among carriers. Essentially this represents capacity for which carriers do not already hold operating approvals (subclause 5(1)). However, allowance is also made for the period between a determination by the Commission which allocates capacity to a carrier and the obtaining of operating approvals by that carrier. The effect of Clause 5(2) is that the capacity is not available for allocation during that period.

"Available capacity" can arise in three ways:

- . capacity available to Australian carriers for use at

1 July 1992 and not used (or allocated under the mechanism provided in clause 54)

- . capacity provided for under existing bilateral arrangements but which accrues after 1 July 1992; or
- . capacity negotiated after 1 July 1992.

Clause 5 defines available capacity in terms of new capacity and shelf capacity. The Bill provides slightly different mechanisms in clauses 12 and 13 for allocating "new" capacity and "shelf" capacity. Essentially, new capacity is capacity which has not been previously considered by the Commission. The process of allocation is commenced by the Commission notifying the availability of the capacity. If new capacity is not entirely taken up in the allocation process, it becomes shelf capacity. Any prospective carrier can subsequently apply at any time for that capacity.

## PART 2 - KEY PROVISIONS

### Clause 6 - The International Air Services Commission

Clause 6 establishes the Commission and sets out its broad functions.

The Minister may refer questions on international air operations to the Commission for advice under paragraph 6(2)(c). For example, although there is no express provision in the Bill dealing with international air charter operations, the Minister could ask the Commission for advice and recommendations on charter applications. The Minister could seek general advice (e.g., on the level of charter operations which could be accommodated on a particular group of routes without unduly affecting scheduled services) or he may seek advice on particular matters (e.g., individual charter applications).

Subclause 6(3) provides that in performing its functions the Commission must:

- . comply with policy statements under clause 11; and
- . have regard to Australia's international obligations concerning international air operations

Subclause 6(3) is intended to ensure the Commission avoids making allocations which are inconsistent with Australia's obligations under bilateral arrangements. It is envisaged that the Commission will take into consideration to the extent it considers necessary requirements imposed on designated carriers in bilateral arrangements such as national ownership and control and a carrier's reasonable

ability to meet the technical requirements of overseas authorities. Final responsibility for interpretation and administration of bilateral arrangements remains with the Minister.

#### **Clause 7 - Determinations allocating capacity**

Clause 7 imposes a "benefit to the public" test on the Commission in making a determination allocating available capacity. Criteria for assessing "benefit to the public" may be set out in policy statements made by the Minister under proposed section 11 and binding on the Commission under subclause 6(3).

Under subclause 7(2) if two or more applications are received, the Commission will weigh the relative merits of the applications and allocate the particular capacity in a manner that it considers would be of greatest benefit to the public. The Commission may allocate all the capacity to one suitable applicant or apportion the capacity among suitable applicants to maximise the benefit to the public.

Subclause 7(3) provides that in assessing the benefit to the public of an allocation of capacity the Commission must apply the criteria set out in the policy statements made by the Minister under proposed section 11 - see notes on clause 11.

#### **Clause 8 - Renewal of determinations**

Clause 8 deals with the Commission's power to renew determinations.

Clause 8 imposes a "benefit to the public" test on the Commission in renewing a determination. Criteria for assessing "benefit to the public" may be set out in policy statements made by the Minister under proposed section 11 and binding on the Commission under subclause 6(3).

In dealing with renewals of determinations, the Bill favours existing carriers to some extent, in that, under paragraph 8(2)(a), the Commission must renew the allocation of capacity to an existing carrier unless it is satisfied that it would no longer be of benefit to the public. An exception is provided in relation to "interim determinations"; which are explained in the notes to clause 15.

#### **Clause 9 - Effect of determinations on the making of operational decisions**

Clause 9 deals with the relationship between determinations and the Secretary's operational decisions.



The Commission's determination does not of itself have the effect of permitting a carrier to commence operations. Before a carrier can operate a scheduled international service to and from Australia it must obtain an international airline licence from the Secretary (of the Department of Transport and Communications) under section 12 of the Air Navigation Act 1920. The carrier must also submit a tariff of charges, a timetable and a security program to the Secretary for approval under Air Navigation Regulations 106A, 106B and 300 respectively. These decisions constitute "operational decisions" as defined in clause 4 of the Bill.

Clause 9 provides the link between these decisions and determinations made by the Commission. The Secretary may not depart from a particular carrier selection or apportionment of capacity by the Commission. However, he may for other reasons have to refuse approvals which would implement the determination - for example, an inadequate security program. It is for this reason that subclause 9(3) is included. In such circumstances the carrier would have to remedy the deficiencies before it received approvals to implement the determination. In the meantime, the Secretary would not be able to allocate the capacity to anyone else.

Subclause 9(1) provides that the Secretary must not make an operational decision in relation to available capacity that is inconsistent with a determination relating to the allocation of that capacity.

Subclause 9(2) makes it clear that the Secretary cannot make a de facto allocation of available capacity by making operational decisions before the Commission considers allocating the capacity.

Paragraph 9(2)(a) in effect safeguards the jurisdiction of the Commission by providing that the Secretary must not make operational decisions in respect of particular capacity after the commencement of the Act unless there is a determination in force in respect to that capacity.

Paragraph 9(2)(b) clarifies that the Act does not apply to international charter operations. These will continue to be approved by the Secretary under the Air Navigation Act 1920. As indicated in the notes under clause 6, the Commission may be involved in provision of advice relating to charter operations.

Subclause 9(3) provides that nothing in this Act obliges the Secretary to make an operational decision implementing a determination.

#### Clause 10 - Review of determinations

Clause 10 provides for the review of determinations by the Commission. (This relates to a review of the terms of a determination during its term, as opposed to renewal at the end of the term). The term "review" relates to the consideration of a variation, suspension or revocation of the determination in defined circumstances, rather than to a reconsideration on appeal of the merits of the original determination. The Commission may conduct a review in two situations:

- . where a carrier allocated capacity under the determination seeks a variation; and
- . where there may be grounds for varying suspending or revoking the determination by reason of a breach or other special circumstances set out in proposed section 23(2).

Subclause 10(1) provides that the Commission may, at any time, review a determination if it believes that there may be grounds for varying, suspending or revoking the determination. This should be read in conjunction with proposed section 23 - "Decisions on review for cause". Clause 23 sets out the circumstances in which the Commission can vary, suspend or revoke a determination.

Subclause 10(2) provides that the Commission must review a determination on application for a variation under proposed section 21. Only a carrier allocated capacity under the determination can make such an application.

Subclause 10(2) should also be read in conjunction with proposed sections 24 and 25, which relate to decisions on applications for variation.

#### Clause 11 - Policy Statements

Clause 11 confers power on the Minister to make policy statements about the way the Commission is to perform its functions. The policy statements are binding on the Commission under clause 6(3).

The power is intended to be broad enough to allow the Minister to set different criteria or processes to apply in different circumstances, subject to the framework set in the legislation. An example is that special criteria may be applied to an initial "start-up" phase to accelerate the entry of competition.

The policy statements must not deal with the making of a particular determination or decision by the Commission.

In the areas of the Commission's operations not covered by any policy statement, the Commission would have a broad

discretion, exercisable in accordance with the broad criteria set by the legislation and in the context of the stated objects of the legislation.

Subclause 10(3) provides that Ministerial policy statements are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. Under section 46A disallowable instruments have the same status as regulations ie they must be gazetted, after being made they must be laid before each House of Parliament within 15 sitting days of that House and they are disallowable by either House of Parliament within a period of 15 days from tabling.

In assessing benefit to the public for the purposes of proposed sections 7, 8, 23, 24 and 25, the Commission is specifically bound to apply any criterion set out in policy statements made under section 11.

### **PART 3 - ALLOCATION OF AVAILABLE CAPACITY**

#### **Division 1 - Determinations allocating capacity**

##### **Clause 12 - Applications relating to new capacity**

Clause 12 deals with applications for new capacity (as opposed to shelf capacity - see notes on clause 5). The process of allocating new capacity is initiated by publication of a notice inviting applications from all prospective carriers or submissions from all interested parties.

Provision is made for the Commission to identify what it considers are likely to be particularly important matters in its consideration. This is not intended to prejudge issues which may arise, but to allow some focus to be brought to the process at an early stage, with a view to prompt and efficient resolution.

Clause 12 should be read in conjunction with clause 14, which deals with the formalities of applications and clause 52, which deals with the formalities for publication of notices.

##### **Clause 13 - Applications relating to shelf capacity**

Clause 13 deals with applications for shelf capacity (as opposed to new capacity - see notes on clause 5).

Available capacity becomes shelf capacity if the Commission considers its allocation but does not proceed to make a determination. This will arise where no suitable applicant comes forward. Consideration of an allocation of shelf

capacity is initiated when an application is made, rather than on the Commission's initiative. In other respects, the process is similar to the process for allocating new capacity.

#### Clause 14 - Requirements of applications

Clause 14 deals with the formalities of an application for available capacity.

Subclause 14(1) provides the basic requirements for applications.

Subclause 14(2) provides that the regulations may impose requirements as to the form and content of such applications.

Subclause 14(3) provides that the Commission may reject an application without considering it further if it does not comply. The Commission may equally decide to proceed with such an application, particularly where there is only a minor departure from formal requirements.

#### Clause 15 - Content of determinations

Clause 15 provides that the Commission may include such terms and conditions in a determination as it thinks fit. The determination must:

- . Specify the period in which it is to apply. Clause 15 provides that the normal term for a determination is 5 years. A different period can be set where the Ministerial policy statements provide. Special provisions apply to interim determinations.
- . Specify the period within which the capacity must be fully utilised (the "use it or lose it" principle).
- . Identify the particular carriers entitled to operate the capacity (and hence need to obtain operating approvals from the Secretary).
- . Identify any extent to which joint operating arrangements such as code sharing are permitted, and
- . Identify the extent to which changes in the ownership and control of a carrier are permitted while the determination is in force.

Clause 15 also allows the Commission to state in a determination that it is an interim determination (paragraph 15(2)(b)). The implications of such a statement are as follows:

- . the interim determination usually has a period of only 3 years (paragraph 15(3)(b)(i))
- . the provisions which favour the incumbent at renewal do not apply (paragraph 8(2)(a)(ii))
- . the Commission starts consideration of a fresh allocation (to apply from the end of the term of the interim determination) as soon as practicable (clause 18).

The provisions are intended to allow for a situation where capacity is allocated to one carrier, but only on an interim basis, so that other prospective carriers who may wish to use the capacity but are not in a position to take up the capacity for some time, can also be considered.

If the final allocation is to be made to a carrier other than the holder of the interim allocation, the provisions in clause 18 allow that to be resolved early in the term of the interim determination, so that the new carrier has adequate time to take the steps necessary for commencement. If no new carrier applies in the process under clause 18, the determination is no longer to be treated as an interim determination.

#### **Clause 16 - Notification of determinations**

Clause 16 stipulates that the Commission must publish notice of its determinations and reasons.

#### **Division 2 - Renewal of determinations**

##### **Clause 17 - Consideration of renewals**

Clause 17 sets out the procedural requirements on the Commission for considering renewals of determinations. It allows for the Commission's consideration of a renewal to be completed well in advance of expiry of the determination so that the parties have time to organise their affairs.

Subclause 17(1) provides that the Commission must start its consideration of the renewal of a determination at least 12 months before the expiry of the determination.

Subclause 17(2) provides that before starting its consideration, the Commission must, by notice, invite submissions about the renewal.

Subclause 17(3) provides that any person may make submissions to the Commission about the renewal.

### **Clause 18 - Renewal of interim determinations**

Clause 18 sets out special procedures to be followed after the making of an interim determination. The notes on clause 15 explain the nature of interim determinations. Clause 18 provides for:

- an inquiry into renewal of the interim determination as soon as practicable. This involves a decision by the Commission about which carrier should be allocated the capacity at the end of the term of the interim determination.
- publication of a notice inviting applications for allocation of the capacity, as if it was new capacity (subclause 18(2)).
- the consequences if no applications are made by carriers other than the holder of the interim allocation. In this case, the determination ceases to attract the consequences of an interim determination - the normal term applies (usually 5 years) and the normal considerations apply to renewal.

### **Clause 19 - Content of determinations**

Clause 19 provides for the specific matters to be set out in determinations upon renewal. These reflect the same sorts of matters covered in an initial determination.

Subclause 19(3) provides that in including terms and conditions in the determination, the Commission may make such changes to the terms and conditions included in the original determination (including adding or deleting terms and conditions) as it is satisfied are warranted because of changes in circumstances since the original determination was made. Otherwise, paragraph 19(1)(c) requires the same terms and conditions to be applied as in the original determination.

### **Clause 20 - Notification of renewals**

Clause 20 provides for publication of the Commission's renewed determinations and its reasons.

### **Division 3 - Review of determinations**

#### **Clause 21 - Applications for variation of determinations**

Clause 21 provides for a carrier to whom a determination allocates capacity to seek variation of the terms of that

determination. It also deals with the procedural requirements of applications for variations of determinations.

#### **Clause 22 - Submissions about reviews**

Clause 22 stipulates that, before a review is conducted, the Commission must invite submissions and that any person may make such submissions. The notes on clause 10 explain the circumstances in which the Commission reviews its determinations during their term.

#### **Clause 23 - Decisions on review for cause**

Clause 23 sets out the grounds for which the Commission can review a determination for cause.

Subclause 23(2) provides that the Commission may only vary, suspend or revoke the determination if it is satisfied that:

- a term or condition of the determination has been breached; or
- due to a change in circumstances, it is inevitable that a breach of such a term or condition will occur; or
- an Australian carrier no longer intends to use fully capacity allocated to it.

Subclause 23(3) provides that the Commission must not vary an allocation of capacity unless the Commission is satisfied that the allocation, as so varied, would be of benefit to the public.

#### **Clause 24 - Decisions on applications for variation**

Clause 24 deals with review of determinations where carriers request a variation of a term other than a transfer condition.

Subclause 24(2) provides that 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.

#### **Clause 25 - Decisions of transfer applications**

Clause 25 deals with decisions on transfer applications. "Transfer application" is defined in clause 4 to cover an application to vary a determination where the effect would

be to transfer an allocation to another carrier. It also covers admitting another carrier to joint use of the allocation, (e.g., by code-sharing) unless that is already permitted under the terms of the determination (see paragraph 15(2)(e)). It also covers changes in ownership and control beyond those permitted in the determination (see paragraph 15(2)(f)).

The intention is that carriers should be able to make commercial arrangements to transfer or share rights, provided that an arrangement does not work against the objects of the legislation. This is reflected in subclause 25(2) which provides in effect that the Commission will normally approve transfer applications unless it is satisfied that the allocation, as varied, would not be of benefit to the public.

#### **Clause 26 - Assessments of public benefit**

Clause 26 provides that in assessing the benefit to the public of a varied allocation of capacity for the purposes of proposed sections 24 and 25, the Commission must apply the criteria set out for that purpose in the policy statements made by the Minister under proposed section 11.

#### **Clause 27 - Notification of decisions**

Clause 27 provides that as soon as practicable after making a decision on a review of a determination, the Commission will publish the decision and its reasons.

### **PART 4 - THE COMMISSION'S PROCEDURE**

#### **Division 1 - General**

#### **Clause 28 - Commission to act informally etc.**

To prevent the Commission's processes becoming mired in lengthy, legalistic procedures, clause 28 states as a clear objective for the Commission that its proceedings must involve as little formality and technicality as possible and as much expedition as a proper consideration permits. Consequently, the Commission may decide a matter without holding a hearing, is not bound by the rules of evidence, and may inform itself on anything relevant to a matter in any way it thinks fit.

#### **Clause 29 - Absence of member from Commission**

Clause 29 provides that if, while the Commission is considering a matter before it, a member:



(a) ceases to be such a member; or

(b) for any other reason is unable to take any further part in the Commission's consideration of the matter;

the Commission's consideration of the matter is not to be affected in any way by the member's absence or by any change in the Commission's membership as a result of that absence.

## **Division 2 - Hearings**

### **Clause 30 - Application of Division**

Clause 30 provides that this Division applies to any hearing held by the Commission in the course of its proceedings. As set out in Division 1, the Commission is not required to hold hearings in its considerations.

### **Clause 31 - Evidence on oath etc.**

Clause 31 provides that the Commission may take evidence at the hearing on oath or affirmation, and any member may administer an oath or affirmation for that purpose.

### **Clause 32 - Representation**

Clause 32 permits a party to proceedings before the Commission to be represented by another person if the Commission permits. Consequently, the clause allows legal representation of parties where necessary but signals an intention that legal representation should be the exception rather than the norm. This is consistent with proposed section 28 which specifies that the Commission's proceedings must involve as little formality as possible.

### **Clause 33 - Hearings to be in public except in special circumstances**

Clause 33 provides that hearings of the Commission will be conducted in public subject to the proviso that the Commission has power to conduct hearings in private or prohibit publication or disclosure of evidence (whether oral or documentary) where commercially confidential information might be disclosed or it is otherwise in the public interest.

Subclause 33(3) provides that a person must not knowingly or recklessly contravene a direction of the Commission prohibiting publication or disclosure.

Penalty: \$5000.

**Clause 34 - Summons to give evidence**

Clause 34 provides that the Commission may summon a person to appear at the hearing to give evidence or produce documents.

**Clause 35 - Failure of witness to appear**

Clause 35 provides that a person summoned to appear as a witness before the Commission must not, without reasonable excuse:

- . fail to attend as required by the summons; or
- . fail to appear and report from day to day unless excused or released from further attendance by a member of the Commission.

Penalty: \$3000.

**Clause 36 - False information**

Clause 36 provides that a person appearing as a witness before the Commission must not knowingly provide false or misleading information to the Commission.

Penalty: Imprisonment for 12 months.

The substantial penalty reflects the considerable commercial value which may attach to determinations and the serious consequences if the Commission's decisions are influenced by false or misleading evidence.

**Clause 37 - Refusal to provide information etc.**

Clause 37 provides that a person summoned to appear as a witness before the Commission must not, without reasonable excuse, refuse or fail:

- . to answer a question or provide information as required by a member of the Commission; or
- . to produce a document as required by a summons served under proposed section 34.

Penalty: \$5000.

**Clause 38 - Allowances to witnesses**

Clause 38 provides that a person summoned to appear as a witness before the Commission is entitled to be paid allowances for travelling and other expenses as prescribed:

- . if the witness was summoned on the application of a party to the proceedings - by that party; or
- . in any other case - by the Commonwealth;

#### **PART 5 - MEMBERSHIP OF THE COMMISSION**

##### **Clause 39 - Constitution of Commission**

Clause 39 provides that the Commission consists of:

- . a Chairperson; and
- . 2 other members.

##### **Clause 40 - Appointment of members**

Subclause 40(1) provides that the members of the Commission are to be appointed by the Governor-General.

Subclause 40(2) provides that a member may be appointed on a full-time or part-time basis.

Subclause 40(3) provides that a member holds office on such terms and conditions (if any) in respect of matters not provided for by this Act as the Minister determines.

##### **Clause 41 - Qualification of members**

Clause 41 provides that the Governor-General must not appoint a person to the Commission unless satisfied that the person is suitably qualified for appointment because of substantial experience or expertise in the fields of:

- . law;
- . commerce;
- . business;
- . economics;
- . public administration.

##### **Clause 42 - Term of appointment**

Subclause 42(1) provides that members are to be appointed for specified periods, not exceeding 5 years.

Subclause 42(2) provides that a member is eligible for re-appointment.

#### Clause 43 - Remuneration and allowances

Subclause 43(1) provides that members of the Commission are to be paid such remuneration as is determined by the Remuneration Tribunal.

Subclause 43(2) provides that the members are to be paid such allowances as are prescribed.

Subclause 43(3) provides that this section has effect subject to the Remuneration Tribunal Act 1973.

#### Clause 44 - Leave of absence

Subclause 44 provides for the leave entitlements of members.

#### Clause 45 - Resignation

Clause 45 provides that a member may resign from office by written notice to the Governor-General.

#### Clause 46 - Termination of appointment

Subclause 46(1) provides that the Governor-General may terminate the appointment of a member for misbehaviour or physical or mental disability.

Subclause 46(2) provides that the Governor-General may terminate the appointment of a member if the member:

- . becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or
- . is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- . fails, without reasonable excuse, to comply with his or her obligations under proposed section 47.

#### Clause 47 - Disclosure of interests

Subclause 47(1) provides that if a member has or acquires any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions in relation to proceedings conducted by the Commission:

- . the member must disclose the interests to the Chairperson and to any parties to the proceedings; and
- . except with the consent of the Chairperson and the parties (if any), the member must not take part in the proceedings.

Subclause 47(2) provides that if the Chairperson:

- . becomes aware that another member has, in relation to the proceedings, an interest of a kind referred to in proposed subsection (1); and
- . considers that the member should not take part, or should not continue to take part in the proceedings;

the Chairperson must direct the member accordingly.

#### **Clause 48 - Acting appointments**

Subclause 48(1) provides for acting appointments as chairperson or member. Acting appointments may be general (ie to apply to all vacancies in an office) or may relate to a specific period of vacancy only.

### **PART 6 - MISCELLANEOUS**

#### **Clause 49 - Register of available capacity**

The Bill provides for a register of all available capacity as a basis for determining what capacity is available for allocation. The Register will be maintained by the Department of Transport and Communication since the Minister will continue to be responsible for negotiating and administering bilateral arrangements. The Secretary has no discretion as to what capacity is placed on the register.

Subclause 49(1) provides that the Secretary must cause a register of all available capacity to be prepared and kept up to date.

The register must record whether the capacity is new capacity or shelf capacity.

Subclause 49(3) provides that the Secretary must take all reasonable steps to ensure that the register is available for inspection by any person without charge.

**Clause 50 - Secretary to notify Commission of making etc of operational decisions**

Clause 50 provides for the Secretary to notify the Commission of his decisions on applications for operational approvals which relate to capacity allocated by the Commission.

**Clause 51 - Protection of members etc**

Subclause 51(1) provides that a member has, in the performance of his or her duties, the same protection and immunities as a Justice of the High Court.

Subclause 51(2) provides that a legal practitioner or other person appearing before the Commission has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

Subclause 51(3) provides that a person summoned to attend before or appearing before the Commission as a witness has the same protection, and is, in addition to the penalties provided by this Act, subject to the same liabilities, as a witness in proceedings in the High Court.

**Clause 52 - Publication of notices**

Clause 52 provides that notices given under proposed sections 12(1), 13(2), 16, 17(2), 18(3), 20, 22(1) or 27 must be published:

- . in the way provided for in the regulations; or
- . if the regulations do not so provide - in the way the Commission thinks appropriate.

**Clause 53 - Annual report**

Subclause 53(1) provides that the Commission must as soon as practicable after the end of each financial year, prepare and give to the Minister a report of its operations during the financial year.

Subclause 53(2) provides for each report to be laid before Parliament.

**Clause 54 - Pre-existing capacity**

In the absence of clause 54, the Commission's jurisdiction in relation to allocations, renewals and reviews would

apply only to capacity which is available capacity at commencement of the Act or capacity which becomes available after commencement. Clause 54 allows that jurisdiction to be extended to capacity which had already been made available to a carrier at commencement of the Act.

Subclause 54(2) provides for the Minister to issue an instrument which identifies the pre-existing capacity to be brought under the Act and sets out relevant terms for that capacity. The Act then applies to that pre-existing capacity as if the Commission had made a determination in those terms, taking effect from 1 July 1992. Provisions relating to renewal, variation etc will then apply.

In respect of capacity which was in use at 26 February 1992 (when the introduction of competition among Australian carriers was announced), the determination operates for 5 years from 1 July 1992 and is subject to normal provisions relating to renewal under proposed section 8.

In respect of any other capacity made available to a carrier before commencement of the Act, the Minister may specify that the determination is to be an interim determination only. The determination will then operate only for 3 years and the special provisions outlined in the notes to clause 15 will apply

Subclause 54(6) provides that the instrument is to be disallowable.

#### Clause 55 - Regulations

Subclause 55(1) provides that the Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

- . required or permitted by this Act to be prescribed; or
- . necessary or convenient to be prescribed for carrying out or giving effect to this Act

Subclause 55(2) provides that in particular the Governor-General may make regulations providing for procedures to be followed by the Commission in performing its functions, including time limits within which such procedures must be completed.



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