

# DECISION

<b>DECISION:</b>	<b>IASC/DEC/9830</b>
<b>VARIATION OF:</b>	<b>IASC/DET/9711 AND IASC/DET/9729</b>
<b>THE ROUTE:</b>	<b>PAPUA NEW GUINEA</b>
<b>THE APPLICANT:</b>	<b>FLIGHT WEST AIRLINES PTY. LTD. (ACN 010 718 975)</b>
<b>PUBLIC REGISTER FILE:</b>	<b>IASC/APP/98031</b>

## 1 The application

1.1 On 18 November 1998 Flight West Airlines (Flight West) applied to allow Ansett International Limited (ACN 060 622 460) (Ansett International) to code share on its services on the Papua New Guinea (PNG) route and to hand back 420 seats subject to Ansett International and Flight West gaining approval from the Commission for the proposed code share services. The relevant Determinations Flight West is seeking to have varied are IASC/DET/9711 and IASC/DET/9729 as varied by IASC/DEC/9819.

1.2 On 17 November 1998, an application was received from Ansett International for an allocation of capacity between Australia and Papua New Guinea. Ansett International sought an allocation of 420 seats per week in each direction between Australia and PNG to enable it to code share on all Flight West services on the route. In IASC/DET/9825 the Commission allocated 420 seats to Ansett International on the PNG route and granted approval for Ansett International to code share on Flight West services on the route.

1.3 Flight West recently commenced passenger services between Australia and PNG using F28 and proposes to extend those services from April next year with F100 aircraft. From April Flight West proposes to operate 12 services per week, using F28 and F100 aircraft, between Cairns, Townsville and Brisbane, and Port Moresby and Lae.

1.4 The Commission published a notice inviting submissions from interested parties about the Flight West application. A submission was received from the Queensland Government supporting Flight West's application.

1.5 All non-confidential material supplied by the applicant and submitters is filed on the Register of Public Documents.

## 2 Provisions of relevant Air Services Agreements

2.1 The August 1998 MOU provides for the operation of international air services and designation of multiple Australian carriers. The air services arrangements also provide for the operation of joint services, including code sharing, between designated airlines.

### **3 Legislative framework**

3.1 The legislative framework for varying determinations made under the *International Air Services Commission Act 1992* (the Act) provides that carriers to whom a determination allocates capacity may, at any time, apply to the Commission, under section 21 of the Act, for the determination to be varied. Under section 24(1), the Commission must make a decision either confirming the determination or varying the determination as requested in the application.

3.2 Under section 24(2), the Commission must not make a decision varying the determination in a way that varies, or has the effect of varying, an allocation of capacity unless the Commission is satisfied that the allocation, as so varied, would be of benefit to the public.

3.3 In exercising its powers, the Commission must take account of the objects of the Act as set out in section 3 and of the requirement of section 6(3)(b) that the Commission have regard to Australia's international obligations concerning the operation of international air services.

3.4 Section 6(3)(a) also requires the Commission to comply with policy statements made by the Minister under section 11. The current Policy Statement dated 23 April 1997 includes criteria to be applied by the Commission in assessing the benefit to the public of allocations of capacity and of variations to existing determinations.

3.5 A carrier cannot use allocated capacity by providing services jointly with any other carrier without the prior approval of the Commission. For this purpose, the Commission has previously decided that the provision of services jointly includes, *inter alia*, code sharing, seat exchanges, block space arrangements and revenue pooling. See IASC/DET/9616.

### **4 Commission's assessment**

4.1 The Commission's task is to determine whether the Determination, as varied, would be of benefit to the public. As the Commission noted in IASC/DEC/9723, this means that the Commission should decide whether, following the proposed variation, there would at least be the same level of public benefits as before the variation. If not then the application should be rejected. The Commission does not see this as requiring a finding that the variations themselves result in increased benefits.

4.2 Flight West provided the Commission with a copy of the code share agreement with Ansett International dated 9 December 1998 (the Codeshare Agreement) on a commercial-in-confidence basis. A summary of a draft of the agreement was included in Flight West's application and is on the Commission's Register of Public Documents.

4.3 Flight West proposes to enable Ansett International to code share on up to 50% of its capacity. The code share would be on a free sale basis.

4.4 The Commission has previously recognised that code share arrangements may provide benefits on certain routes, although by their very nature they limit the scope for competition. As the Commission noted in IASC/DET/9508 in relation to the Australia-

Canada route, where independent operations are a realistic alternative they are to be preferred.

4.5 The PNG route has two established operators, Qantas and Air Niugini already code sharing on the route. The proposal will allow Flight West to operate on a more sound economic basis given the additional traffic that is likely to be carried on its services. It will also allow Ansett International to extend its network of services. The code share proposal will allow the airlines together to be more effective competition to the other carriers on the route.

4.6 The code share proposal will not result in any reduction in capacity on the route and sufficient capacity remains on the self to allow for other carriers to enter the market and expand.

4.7 In accordance with the Memorandum of Understanding between the Commission and the Australian Competition and Consumer Commission (ACCC), implemented to minimise duplication between the two bodies, the Commission sought the ACCC's view on the code share proposal.

4.8 The ACCC has stated that it is unlikely that the proposed code share operations would substantially lessen competition within the meaning of the *Trade Practices Act 1974* given that the two airlines will price and sell their capacity independently, there is no reduction in overall capacity and it enables the entry of another airline onto the route.

4.9 The Commission therefore concludes that it should approve the code share subject to certain conditions referred to below.

## **5 Role of the ACCC**

5.1 Notwithstanding the view expressed in paragraph 4.6 above, nothing in the Commission's decision should be taken as indicating either approval or disapproval by the ACCC. The Commission's decision is made without prejudicing, in any way, possible future consideration by the ACCC of the code share agreement or operations under it.

## **6 Other Issues**

6.1 The Commission will specify in the relevant determinations that Flight West may code share with Ansett International in accordance with the code share agreement between Flight West and Ansett International dated 9 December 1998.

6.2 When approving joint services, the Commission normally includes conditions in determinations approving code shares that the Australian carrier must price and sell its services on the route independently and that it must not share or pool revenues. The Commission will include such conditions in the determinations.

6.3 Flight West has the following Determinations:

- IASC/DET/9711 as amended by IASC/DEC/9819 allocated 680 seats to Flight West from 14 March 1997; and

- IASC/DET/9729 as amended by IASC/DEC/9819 allocated 160 seats from 4 August 1997.

6.4 These Determinations were made within six months of each other. In order to simplify the checking, amendment and renewal processes the Commission will consolidate Flight West's two determinations into one by reducing IASC/DET/9711 to nil and increasing IASC/DET/9729 to 420 seats.

## 7 Decision (IASC/DEC/9830)

7.1 The Commission notes that it has already made an allocation of capacity to Ansett International in IASC/DET/9825 and granted it approval to code share on Flight West's services as requested by Ansett International and Flight West.

7.2 In accordance with section 24 of the Act, the Commission varies Determination IASC/DET/9711 as amended by IASC/DEC/9819 by reducing the capacity allocated from 680 seats per week to nil.

7.3 In accordance with section 24 of the Act, the Commission varies Determinations IASC/DET/9729 as requested by Flight West by:

*changing* the allocated capacity from 160 seats to 420 seats and

*replacing* the following condition contained in the determination:

- "Flight West is not permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person without the approval of the Commission;"

with the following condition:

- "the capacity may be used by Flight West to provide services jointly with Ansett International in accordance with:
  - the Codeshare Agreement between Flight West and Ansett International dated 9 December 1998, as extended from time to time in accordance with its terms or varied except in relation to the number of seats to be utilised by Ansett International on each Flight West flight;
  - variations to the Codeshare Agreement in relation to the number of seats to be utilised by Ansett International on each Flight West flight, subject to the prior approval of the Commission; or
  - any new joint service agreement between Flight West and Ansett International for operations on the Australia-PNG route, whether or not it replaces the existing agreement, with the prior approval of the Commission;

subject to the following conditions:

- Flight West must price and sell its services on the route independently of Ansett International; and
- Flight West must not share or pool revenues with Ansett International;”.

7.4 The determination, as varied in accordance with this Decision, is set out in Attachment A

Dated: 21 December 1998

Russell V Miller  
Chairman

Michael L Lawriwsky  
Member

Stephen Lonergan  
Member

## **A. Determination IASC/DET/9729 as amended by Decisions IASC/DEC/9819 and IASC/DEC/9830**

9.1 The Commission finds that an allocation of capacity on the Australia - Papua New Guinea route to Flight West as sought would be of benefit to the public.

9.2 The Commission makes a determination in favour of Flight West, allocating 420 seats per week in each direction between Australia and Papua New Guinea under the Australia – Papua New Guinea Air Services Agreement.

9.3 The determination is for five years from the date of the determination.

9.4 The determination is subject to the following conditions:

- Flight West is required to fully utilise the capacity from 1 May 1999 or from such other date approved by the Commission;
- only Flight West is permitted to utilise the capacity;
- the capacity may be used by Flight West to provide services jointly with Ansett International in accordance with:
  - the Codeshare Agreement between Ansett International and Flight West dated 9 December 1998, as extended from time to time in accordance with its terms or varied except in relation to the number of seats to be utilised by Ansett International on each Flight West flight;
  - variations to the Codeshare Agreement in relation to the number of seats to be utilised by Ansett International on each Flight West flight, subject to the prior approval of the Commission; or
  - any new joint service agreement between Ansett International and Flight West for operations on the Australia-PNG route, whether or not it replaces the existing agreement, with the prior approval of the Commission;

subject to the following conditions:

- Flight West must price and sell its services on the route independently of Ansett International; and
- Flight West must not share or pool revenues with Ansett International;
- changes in relation to the ownership and control of Flight West are permitted except to the extent that any change:
  - results in the designation of the airline as an Australian carrier under the Australia - Papua New Guinea Air Services Agreement being withdrawn; or

- has the effect that another Australian carrier, or a person (or group of persons) having substantial ownership or effective control of another Australian carrier, would take substantial ownership of Flight West or be in a position to exercise effective control of Flight West, without the prior consent of the Commission, and
- changes in relation to the management, status or location of operations and Head Office of Flight West are permitted except to the extent that any change would result in the airline ceasing to be an airline designated by the Australian Government for the purposes of the Australia - Papua New Guinea Air Services Agreement.