

DECISION

APPLICATION BY ANSETT INTERNATIONAL LTD (ACN 060 622 460) TO CODE SHARE WITH ALL NIPPON AIRWAYS ON THE JAPAN ROUTE

Decision Number:
IASC/DEC/9902

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Date: 22 March 1999

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1. The application

1.1. On 1 February 1999 Ansett International Ltd ACN 060 622 460 (Ansett International) applied to the Commission for a variation of Determinations IASC/DET/9706 and IASC/DET/9805 (the Determinations) allocating capacity on the Japan route to Ansett International.

1.2. Ansett International is seeking a variation of the Determinations to permit it to provide services jointly with All Nippon Airways (ANA), a designated airline of Japan, between Australia and Osaka. Under the proposal ANA would purchase up to 210 code share seats on each of the daily Ansett International operated flights.

1.3. On 9 February 1999, the Commission published a notice inviting submissions from any interested persons about the Ansett International application by 23 February 1999. Submissions were received from the Australian Competition and Consumer Commission (ACCC), Tropic Isle Retail Stores Pty Ltd (Tropic Isle), and the Queensland Government.

1.4. On 3 March 1999 the Commission issued a draft decision. A submission was subsequently received from Tropic Isle expressing disagreement with the draft decision.

1.5. All non-confidential material, including a summary of the proposed code share agreement supplied by the applicant, is filed on the Register of Public Documents. Confidential material supplied by the applicant is filed on the Commission's confidential register.

2. Current services to Japan

2.1. Current services between Australia and Japan are listed in the following table. As indicated in the notes below, some services are operated on a code share basis.

Airline and aircraft type	Weekly Frequency	Route
JAL		
B747	7	Tokyo-Sydney & v.v..
B747	7	Osaka-Brisbane-Sydney-Osaka (Note 1)
B747	7	Tokyo-Brisbane-Tokyo (Note 2)
Qantas		
B747	7	Sydney-Tokyo-Sydney
B747SP	5	Sydney-Cairns-Nagoya & v.v.
B747	2	
B747	7	Brisbane-Cairns-Tokyo & v.v. (Note 3)
B767	3	Perth-Tokyo-Perth
Ansett International		
B747	7	Sydney-Osaka-Brisbane-Sydney
All Nippon Airways		
B767	6	Osaka-Brisbane-Sydney-Osaka (Note 4)

(1) Qantas code shares on these services. (2) Qantas code share on these services. (3) JAL code shares 191 seats per flight on the services between Cairns and Tokyo. (4) To be withdrawn from 28 March 1999.

3. Characteristics of the Australia - Japan route

3.1. In the year ended 30 October 1998 traffic on the Australia - Japan route totalled approximately 1,841,300 passenger movements. Of these passenger movements 83% were passengers with a destination of either Australia or Japan travelling directly between the countries (direct traffic). A total of 7% of movements involved passengers travelling indirectly between the two countries (indirect traffic). The remaining 10% of the movements involved passengers travelling directly between Australia and Japan to and from countries beyond Japan or Australia (beyond traffic).

3.2. Details of the passenger movements on the route between the years ended 30 October 1995 and 30 October 1998 are summarised below.

Table 1: Australia - Japan Passenger Movements for years ended 30 October 1995 to 30 October 1998

Traffic category	Year ended October				Compound annual growth rate 95-98
	1995	1996	1997	1998	
Direct traffic (Annual % change)	1,489,100	1,585,400 (+6.5%)	1,618,400 (+2.1%)	1,529,700 (-5.5%)	(83.1%) 0.9%
Indirect traffic (Annual % change)	152,800	154,800 (+1.3%)	132,000 (-14.7%)	136,800 (+3.6%)	(7.4%) -3.6%
Beyond traffic (Annual % change)	115,200	136,500 (+18.5%)	151,500 (+11.0%)	174,800 (+15.4%)	(9.5%) 14.9%
Total traffic (Annual % change)	1,757,100	1,876,700 (+6.8%)	1,901,900 (+1.3%)	1,841,300 (-3.2%)	(100.0%) 1.6%

Note: Data in this table have been derived from information supplied by the Australian Bureau of Statistics and includes both scheduled and charter traffic. Figures may not add to totals due to rounding.

3.3. In the year ended 30 April 1998, non-Australian residents comprised 93% of the passenger traffic with origin/destination Japan. Visitors to Australia did so mainly for a holiday (84%).

3.4. While the Japan international market as a whole remains at best stagnant, predominantly as a result of domestic economic factors, the Osaka route is performing strongly. Over the year ended 30 October 1998 traffic on the Osaka – Australia route grew by 14.5% compared to the previous year. Although the Commission expected that international travel from the Osaka region would slow in the current scheduling period, there is no evidence to date, to suggest that this has occurred.

3.5. Despite the growth in demand on the Osaka route airline performance has continued to be affected by a significant imbalance between capacity and demand following substantial increases in capacity on the route in 1997. Traffic from the Osaka region is predominantly tourist traffic, which tends to be low yielding. Higher passenger loads and growth do not necessarily correlate with economically sustainable operations when low yields are prevailing.

4. Provisions of relevant Air Services Agreements

4.1. The Memorandum of Understanding of 9 December 1992 (1992 MOU) and the Australia - Japan Air Services Agreement of 19 January 1956 provide for the multiple designation of Australian carriers. The 1992 MOU also enables the designated airlines of both countries to operate joint passenger, freight and/or mixed services between Japan and Australia subject to the conclusion of a commercial agreement or agreements between the designated airlines of the two countries which have been approved by the respective aeronautical authorities.

4.2. A further Memorandum of Understanding was agreed on 20 December 1996 (1996 MOU) which increased the total capacity entitlement of each country to 77.0 units per week from 30 March 1997, increasing to 79.0 units from 26 October 1997. One unit equates to the capacity of one B767-200.

4.3. Qantas currently has an allocation of 60.0 units of capacity and Ansett International 14.0 units, leaving 5.0 units unallocated. On the Japanese side JAL is utilising 42.0 units and ANA 7.2 units, leaving 29.8 units unutilised.

4.4. The 1996 MOU also restricts the portion of the total capacity entitlement that may be used by each country between Australia and Kansai airport at Osaka to 21.2 units and 14 frequencies per week. That entitlement is nearly fully utilised by both countries. Qantas is currently using 7.0 units/7 frequencies under a code share with JAL and Ansett International 14.0 units/7 frequencies operating in its own right. JAL is utilising 14.0 units/7 frequencies and ANA 7.2 units/6 frequencies.

4.5. The Department of Transport and Regional Services has advised in relation to the Ansett International proposal that each code share flight, regardless of the number of seats involved, utilises one B767-200 unit of capacity and one frequency. This means that after allowing for code sharing by ANA, Ansett International will require seven units of capacity and seven Kansai frequencies to operate its code share proposal.

5. Applicant's proposal and claims

5.1. Ansett International is seeking a variation of the Determinations to enable it to operate services jointly with ANA between Australia and Osaka commencing from 28 March 1999. Under the proposal, following withdrawal of its six B767 flights per week between Australia and Osaka, ANA would have an obligation to purchase 175 seats on each of seven Ansett International operated B747 flights and an option to take up to a further 35 seats on each flight.

5.2. Ansett International states that it is seeking the variation because without an improvement in yields or passenger numbers, regardless of recent reductions in Qantas operated capacity, it would probably have to scale back frequency and capacity on the Australia - Osaka route in order to make operations commercially viable, if not withdraw from the route altogether.

5.3. Ansett International states that the proposed code share will provide it with the opportunity to retain its daily B747 service and improve the commercial viability of those operations.

6. Other submissions

6.1. Submissions were received from the Queensland Government, the ACCC and Tropic Isle.

Queensland Government

6.2. The Queensland Government supports the application. It considers that the proposed code share would enable the retention of an Ansett International daily service on the route for the benefit of Australian tourism. It argues that the code share would also ensure that Ansett International was strategically placed to develop the route with All Nippon Airways when the Japan market recovered.

ACCC

6.3. The ACCC notes that Ansett International would operate the services and ANA would code share, thereby maintaining an Australian carrier operating on the route. It also submits that the code share would place Ansett International /ANA on the same competitive footing as Qantas/JAL on the route. The ACCC expresses some concerns about whether passengers are informed of the identity of the operating carrier where code share arrangements apply. This is a general concern rather than one specifically directed at Ansett International.

Tropic Isle

6.4. Tropic Isle submits that the application should be rejected and that Ansett International should be “allowed to withdraw from the route altogether as outlined in their application”. In making its submission Tropic Isle informs the Commission that:

- it is the largest retail operation in the Whitsunday Islands; and
- a large part of its business involves servicing Japanese tourists.

Tropic Isle also submits that any change in air service arrangements between Australia and Japan could have a profound effect on Tropic Isle’s profitability and the employment security of its staff.

6.5. In support of its submission Tropic Isle raises the following issues:

- Tropic Isle will be applying for any available capacity between Australia and Osaka, if there is sufficient capacity to allow five frequencies per week of B767-300 aircraft;
- the claim by Ansett International that the route is only marginally profitable is questionable and an examination of recently published figures for Ansett International shows that load factors are still running at healthy levels;
- the code share with ANA may affect the number of tourists received into the Whitsunday region and result in a reduction in tourist numbers because of the displacement of Ansett International seats to ANA which is a minor carrier by comparison into the Whitsundays. Additionally there is no incentive for Ansett International to fill vacant seats purchased by ANA; and
- the real basis for the application is to lay the ground work for the membership of Ansett and ANA into the Star Alliance.

7. Draft decision

7.1. On 3 March 1998, the Commission issued Draft Decision IASC/DDEC/9901 proposing to approve the Ansett International application. Comments were invited on the Draft Decision by 16 March 1999. A submission was received from Tropic Isle.

7.2. Tropic Isle considers that the decision as drafted will have a negative effect on Japanese tourism in the Whitsunday region and that the draft decision should be examined in conjunction with the recent Qantas/JAL code share approval.

7.3. Tropic Isle also states that the Draft Decision enables ANA to compete effectively and helps to ensure its commercial sustainability. In Tropic Isle’s view this is not the purpose of the Policy Statement and a situation now exists whereby an overseas carrier is advantaged at the expense of Australian aviation assets. Tropic Isle asserts that the

Commission needs to examine the benefit of the code share approval after taking into account that the decision will also have a positive effect on an overseas carrier.

7.4. Tropic Isle also suggests that in the light of the continued losses attributed to Ansett International, “it is difficult to consider that the Commission should not legitimately question if commercially sustainable operations will ever be reached”.

8. Legislative framework

8.1. The legislative framework for varying determinations made under the *International Air Services Commission Act 1992* (the Act) is set out in Attachment A.

8.2. 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.

8.3. 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.

8.4. 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.

8.5. 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.

9. Commission's assessment

9.1. A carrier cannot use allocated capacity by providing services jointly with any other carrier without the prior approval of the Commission. The Act, as amended with effect from 25 January 1999, defines “joint international air services” as including, but not limited to, code sharing, blocked space arrangements, joint pricing, revenue and cost sharing, revenue and cost pooling, or the sale of capacity to another airline.

9.2. The Commission will normally determine whether or not an application to code share should be approved utilising the public benefit criteria contained in paragraph 5 of the Policy Statement. This is consistent with the objects set out in section 3 of the Act.

9.3. The Commission’s task is to determine whether the Determinations, as varied, would be of benefit to the public. This means that the Commission should decide

whether, following the proposed variations, there would at least be the same level of public benefits as before the variations. 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.

9.4. However, the Commission must make its assessment having regard to the practical realities of the market in which the applicant is operating and the state of the market at the time that it is making its decision.

9.5. This means that in this case the Commission must compare the position as it exists without approval of this application with the position if the application were approved. There are two relevant factors operating here:

- ANA has decided to discontinue own aircraft services; and
- Ansett International has informed the Commission that without improvement in yields or passenger numbers, Ansett is likely to either scale back services or withdraw from the route altogether.

The Commission must compare the situation where Ansett International operates with the code share against what the Commission assesses would be the likely situation if the proposal were not approved.

9.6. Although the task of the Commission is to determine the overall effect of the proposal in terms of public benefit, it is convenient to set out the Commission's consideration of public benefit using the structure of paragraph 5 of the Policy Statement. In practice, each element of public benefit impacts on the others and cannot be neatly compartmentalised.

9.7. Tropic Isle has contended that that the Ansett International application should be examined in conjunction with the recent Qantas/JAL code share approval as "The net result of these two decisions is of great importance and goes against the criteria 5 as set out in the Policy Statement".

9.8. As the Commission explains at para 9.5, the assessment it must make is an assessment comparing the future with the code share against the future without it. This necessarily involves the Commission having regard to the realities of the relevant route, including the position of competitors and potential competitors.

Public benefits

Tourism Benefits

*The extent to which proposals will promote tourism to and within Australia.
The Commission should have regard to:*

- *the level of promotion, market development and investment proposed by each of the applicants; and*

- *route service possibilities to and from points beyond the Australian gateway(s) or beyond the foreign gateway(s).*

9.9. Ansett International states in support of its application that:

- (i) The code share would not result in an adverse effect on tourism levels as even though there is a reduction of 1400 seats on the route per week, capacity is still well above current and forecast demand.
- (ii) As a result of maintaining an operational presence in the market, Ansett International will be well placed to generate additional tourism benefits when the market recovers.
- (iii) Ansett International and ANA will each continue independently to actively promote Australia in the Japanese market place.
- (iv) Ansett International's domestic network can service additional Japanese travellers in Australia and ANA's domestic Japan services will assist Japanese tourists through the Osaka gateway.

9.10. The Queensland Government states that the proposed code share will enable Ansett to retain a daily service on the Osaka route for the benefit of Australian tourism.

9.11. Tropic Isle claimed in its initial submission that the code share, if approved, may substantially alter the number of tourists received into the Whitsunday region on the basis that ANA only account for around 7% of Japanese tourists to the Whitsundays and there is no incentive for Ansett International to fill vacant seats purchased by ANA.

9.12. Tropic Isle subsequently stated in its submission responding to the Draft Decision that that decision will have a negative effect on Japanese tourism in the Whitsunday region. No additional material was provided in support of this contention.

9.13. The Commission accepts that there would be a negative impact on tourism if following the code share (and ANA's withdrawal from the market as an operating carrier) tourism demand exceeded airline capacity. This would not happen on current trends and in any event it appears likely that ANA will cease operating on the route with its own aircraft regardless of whether the code share is approved.

9.14. Additionally, if the code share were not approved and ANA no longer had a marketing or operating presence on the Osaka route, ANA could be expected to cease promotion of Australia as a tourist destination.

9.15. The Commission also considers that there would be a serious negative impact on tourism if the code share with ANA were not approved and Ansett International was consequently forced to reduce the frequency of its services, or withdraw altogether. It is possible that another Australian carrier could take up capacity becoming available under such circumstances, and Tropic Isle has indicated such an intention. However, an assessment of the tourism impact of such a development would need to weigh the

likelihood of a new start up airline commencing viable operations and lags in commencing services against the negative impact (if any) of approving the proposed code share.

9.16. Ansett International has claimed that the code share will allow it to maintain an operational presence on the route which will allow it to generate additional tourism benefits when the market recovers. The Commission considers that while there could be such tourism benefits when the market recovers, they are more likely to arise from facilitating the resumption of full services by ANA.

9.17. Tropic Isle claims that the code share may substantially alter the number of tourists received into the Whitsunday region because ANA only accounts for a small portion of Japanese tourists to the Whitsundays. This claim may have some validity if potential Ansett International passengers could not be accommodated because of the sale of seats to ANA. However, this seems unlikely. The code share would also appear to provide an opportunity to promote the Whitsundays to ANA passengers flying on Ansett International operated aircraft.

9.18. Tropic Isle also claims that there is no incentive for Ansett International to fill vacant seats purchased by ANA. While this may or may not be true, there is every incentive for ANA to fill the seats that it has paid for.

9.19. The Commission takes the view that the proposal is unlikely to deliver any enduring tourism benefits in the form of reduced prices on the route, although Ansett International has assured the Commission that the airlines will price and market their services separately.

9.20. The Commission's conclusion, in terms of tourism benefit, is that the level of public benefit if the code share were approved, is greater than if it were rejected.

Consumer Benefits

The extent to which proposals will maximise benefits to Australian consumers. The Commission should have regard to:

- *the degree of choice (including, for example, choice of airport(s), seat availability, range of product);*
- *efficiencies achieved as reflected in lower tariffs and improved standard of services;*
- *the stimulation of innovation on the part of incumbent carriers; and*
- *route service possibilities to and from points beyond the Australian gateway(s) or beyond the foreign gateway(s).*

9.21. Ansett International claims that the increased financial viability of the route as a result of the code share will enable it to maintain a daily service for its Australian passengers. Without the code share, services may have to be reduced or even

withdrawn. The Commission accepts this claim. Ansett International also claims that as a consequence of the code share it will replace its B747-300 aircraft on the route with B747-400 aircraft, resulting in improved service standards for its customers.

9.22. The Commission's conclusion, in terms of consumer benefit, is that the level of public benefit if the code share were approved, is greater than if it were rejected.

Trade Benefits

The extent to which proposals will promote international trade. The Commission should have regard to:

- *the availability of frequent, low cost, reliable freight services for Australian exporters and importers.*

9.23. Ansett International states that the level of freight services available to Australian importers and exporters will be maintained under the proposed arrangement.

9.24. As ANA is, in any event, withdrawing own aircraft services, the Commission concludes that there is no material trade benefit or detriment.

Competition Benefits

The extent to which proposals will contribute to the development of a competitive environment for the provision of international air services. The Commission should have regard to:

- *the need to develop strong Australian carriers capable of competing effectively with one another and the airlines of foreign countries;*
- *the number of Australian carriers using capacity on a particular route and the existing distribution of capacity.*
- *the extent to which applications are proposing to provide capacity on aircraft they will operate themselves as, in the long term, operation of capacity on own aircraft is likely to result in more competitive outcomes;*
- *the provisions of any commercial agreement between an applicant and another airline affecting services on the route but only to the extent of determining comparative competition benefit between competing proposals;*
- *any determinations made by the Australian Competition and Consumer Commission or the Australian Competition Tribunal in relation to a carrier operating or proposing to operate on all or part of the route; and*

- *any decisions on notifications made by the Australian Competition and Consumer Commission in relation to a carrier operating or proposing to operate on all or part of the route.*

9.25. As the Commission acknowledged in IASC/DEC/9801, the ACCC is the organisation with primary responsibility for addressing anti-competitive activity. However, the Act makes it clear that fostering competition between international airlines is an important aspect of public benefit and is a matter for this Commission. Furthermore, the nature and the extent of competition impacts directly on consumer, tourism, trade and industry benefits, as well as being an important issue in its own right under the Minister's Policy Statement.

9.26. In accordance with the Memorandum of Understanding between the Commission and the ACCC, implemented to minimise duplication between the two bodies, the Commission sought the ACCC's view on the code share proposal. The ACCC stated that the proposal will maintain an Australian carrier operating on the route and place Ansett International /ANA on the same competitive footing as the Qantas/JAL code share operation on the route.

9.27. As required by the Policy Statement, the Commission has considered whether there are any decisions of the ACCC or the Australian Competition Tribunal in relation to Ansett International and ANA. There are no such decisions.

9.28. As stated by the Commission in paragraph 8.30 of IASC/DEC/9801, it is for the ACCC, and not this Commission, to determine whether any commercial arrangements breach the *Trade Practices Act 1974*. It is for this Commission to assess whether commercial arrangements between airlines are likely to increase or reduce public benefit in terms of the *International Air Services Commission Act 1992*.

9.29. One of the Commission's primary obligations under the Act is to consider the extent to which any proposal would contribute to the development of a competitive environment for the provision of international air services. This obligation is reinforced by section 15(2)(e) of the Act.

9.30. It is the Commission's view, as previously stated at paragraph 8.35 in IASC/DEC/9801, that:

- close linkages exist between fostering a competitive environment and achieving the public benefits to which the Act refers;
- competition plays an important role in determining whether public benefits in terms of consumer, tourism, trade and industry benefits accrue from a commercial agreement for the joint use of capacity;
- the Commission is required by section 15(2)(e) of the Act to include in its determinations a condition stating the extent (if any) to which carriers may use allocated capacity by providing international air services jointly with another Australian carrier or any other person; and

- the criteria by which the Commission should determine any such conditions are those public benefit criteria to which the Act and Policy Statement make reference.

9.31. Ansett International claims in relation to competition benefits that:

- Ansett International and ANA will independently price and sell passenger and cargo capacity on the Australia – Osaka route;
- because of its purchase of 175 sets on each Ansett International flight, ANA will maintain a strong presence on the route and continue to be a strong competitor;
- the improved financial position of Ansett International’s operations will assist it to compete effectively as an international operator; and
- the arrangement will provide a solid basis on which Ansett International can build when market conditions improve thereby contributing to the development of strong Australian carriers.

9.32. The Commission notes that Ansett International and ANA together currently account for 20% of the direct capacity between Australia and Japan compared to the 35% and 45% of JAL and Qantas respectively.

9.33. The combined market share of Ansett International and ANA is more pronounced on the Osaka route where there are four carriers. Together they currently hold 60% of the capacity to and from Osaka, which will decline to 51% following the withdrawal of ANA operated services from 28 March 1998.

9.34. A particular concern in relation to code share arrangements is that the carriers involved might not price or sell their capacity independently, or might pool revenue. As the Commission stated in Decision IASC/DEC/9608, the Commission would be unlikely to approve a code share agreement where either of those factors were present (absent ACCC authorisation) as the Commission believes that this would inhibit competition. Ansett International has assured the Commission that the carriers will not pool revenue and that the code share participants will price and sell their capacity independently. The Commission has noted provisions to this effect in the proposed code share agreement.

9.35. Tropic Isle claims that if the Draft Decision were confirmed, it would enable a Japanese carrier (ANA) to compete effectively and submitted that this would be contrary to the purpose of the Policy Statement. The Commission’s view is that if ANA were to be able to compete effectively, overall competition would be improved on the route as long as ANA was not the dominant carrier.

9.36. The Commission considers that approval of the proposal will make Ansett International a stronger carrier, capable of competing more effectively with other carriers on the route. In addition, approval of the code share will provide the opportunity for ANA to continue to be a competitor, albeit on a reduced basis.

9.37. The Commission concludes that rejection of the code share would be likely to reduce competition.

Industry Structure

The extent to which proposals will impact positively on the Australian aviation industry.

9.38. Ansett International has claimed in relation to benefits for the Australian aviation industry that the code share arrangement will materially assist in maintaining Ansett International as a strong carrier on the route able to compete effectively with other carriers.

9.39. Tropic Isle has questioned Ansett International's claims that profitability on the route is only marginal, absent the code sharing proposal. Tropic Isle states that recently published load factors for Ansett International on the route for August 1998 and September 1998 averaging 76% and 62% are at healthy levels and that Ansett International was prepared to enter the market on the strength of lower yields and passenger numbers in 1993.

9.40. Tropic Isle claims that if the Draft Decision were confirmed it would enable a Japanese carrier (ANA) to compete effectively and helps to ensure its commercial sustainability. It is claimed that this is not consistent with the Policy Statement. Although proposals which strengthen a foreign carrier *at the expense of* the Australian aviation industry would be contrary to this criterion, there is no evidence that this is the case with the present application.

9.41. Tropic Isle submitted that, on the basis of continued losses incurred by Ansett International, the Commission should question if commercially sustainable operations will ever be achieved.

9.42. The Commission is satisfied that the Osaka route has been under pressure with load factors and yields at levels which have caused other carriers in the market to review their position. This pressure is reflected in confidential financial performance figures supplied to the Commission by Ansett International. The withdrawal of Qantas and ANA as operating carriers from the Osaka and Tokyo routes is also indicative of this market environment. The Commission notes in this respect published load factors for Ansett International for the four months prior to August 1998 which showed load factors averaging 49% during the peak Northern Winter scheduling period.

9.43. On balance the Commission concludes that, approval of the proposal would be likely to impact positively on the Australian aviation industry by strengthening the position of Ansett International.

Conclusion

9.44. The Commission concludes that it should approve the Ansett International proposal.

10. Role of the ACCC

10.1. 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.

11. Other issues

The code share agreement

11.1. On 1 February 1999 Ansett International provided the Commission, on a confidential basis, with a summary of the code share agreement between Ansett International and ANA covering the route between Australia and Osaka. On 2 March 1999 Ansett International provided the Commission with a copy of the signed code share agreement, minus exhibits. Ansett International has undertaken to supply the Commission with a copy of the full finalised code share agreement, including exhibits, as soon as possible.

11.2. The Commission would expect to receive a copy of the complete finalised code share agreement prior to the commencement of code share services for its approval and will include a condition in its decision to this effect.

11.3. Consistent with its normal procedures in relation to joint services, the Commission will include conditions to ensure that the airlines:

- do not pool revenues;
- price and sell their services on the route independently; and
- advise passengers at the time of ticket reservation of the carrier who will actually be operating the flight.

11.4. In commenting on the Ansett International application the ACCC noted the need to assess the extent to which airlines are complying with code share conditions. This is a matter that is relevant to all airlines involved in joint services and not to this case in particular. The Commission is examining this matter separately.

Excess capacity

11.5. The Commission notes that, if this Draft Decision is confirmed, Ansett International will not be utilising 7 of its 14 allocated B767-200 units of capacity per week. The Commission would expect Ansett International to hand back the excess capacity unless it proposes to use the capacity to other Japanese destinations.

12. Decision (IASC/DEC/9902)

12.1. The Commission, in accordance with section 24(3) of the Act, varies Determinations IASC/DET/9706 and IASC/DET/9805 thereby *permitting* Ansett International to operate services jointly with All Nippon Airways from the date of this decision as follows:

- capacity on each flight operated under these determinations by Ansett International on the Australia – Osaka route may be used by Ansett International to provide services jointly with All Nippon Airways in accordance with:
 - the code share agreement, a copy of which was provided to the Commission on 2 March 1999, subject to the following conditions:
 - a copy of the complete code share agreement, including exhibits, must be forwarded to the Commission prior to the commencement of code share services for the Commission's approval and subject to such additional conditions as the Commission may require; and
 - variations to the number of code share seats or services require the prior approval of the Commission;
- to the extent that the capacity is used to provide services jointly with All Nippon Airways
 - Ansett International must price and sell its services on the route independently;
 - Ansett International must not share or pool revenues; and
 - Ansett International must take all reasonable steps to ensure that passengers are informed at the time of seat reservation, of the carrier actually operating the flight.

Dated: 22 March 1999

Russell Miller
Chairman

Michael Lawriwsky
Member

Stephen Lonergan
Member

A. Legislative framework

1. Under section 21 of the *International Air Services Commission Act 1992* (the Act) an Australian carrier to whom a determination allocates capacity may at any time apply to the Commission for the determination to be varied.
2. Section 10(2) of the Act requires the Commission to conduct a review of a determination if the Australian carrier to whom the determination allocates capacity applies to the Commission under section 21 for the determination to be varied. Before conducting a review under section 10 the Commission must, by notice, invite submissions about the review of the determination (subsection 22(1)).
3. Section 24 of the Act relates to decisions on applications for variations. Under subsection 24(1), subject to this section, the Commission must, having conducted a review to decide an application for a determination to be varied, make a decision:
 - (a) confirming the determination; or
 - (b) varying the determination in a way that gives effect to the variation requested in the application.
4. Section 24(2) of the Act states the Commission must not make a decision varying the determination in a way that varies, or has 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.
5. 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.
6. Section 6(3)(a) also requires the Commission to comply with policy statements made by the Minister under section 11.
7. The section 11 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.