

# DETERMINATION

**DETERMINATION:** IASC/DET/9913  
**THE ROUTE:** THAILAND  
**THE APPLICANT:** ANSETT INTERNATIONAL LIMITED  
(ACN 060 622 460)  
**PUBLIC REGISTER FILES:** IASC/APP/99016

## 1. The application

1.1. On 17 March 1999, Ansett International Limited (Ansett International) wrote to the Commission seeking an allocation of capacity on the Thailand route.

1.2. Ansett International is seeking an allocation of 25 code share services per week outbound from Australia on the Thailand route on flights to be operated by Singapore Airlines, and 10 code share services inbound to Australia. The code share services would be operated pursuant to the Alliance Agreement with Singapore Airlines and Air New Zealand dated 17 December 1997 (the Alliance Agreement). This was authorised by the Australian Competition and Consumer Commission (ACCC). The proposed services are to operate in accordance with the code share agreement between Ansett International and Singapore Airlines of 2 September 1998, a copy of which has previously been lodged with the Commission, as extended.

1.3. The Commission published a notice inviting other applications for all or any part of the capacity and submissions from interested parties about the Ansett International application. No applications or submissions were received.

1.4. On 14 April 1999 the Commission issued a draft determination (IASC/DDET/9901) proposing to make the allocation sought by Ansett International. Submissions were lodged by Qantas Airways Limited (Qantas) and Ansett International. The Department of Transport and Regional Services (the Department) also provided advice on aspects of the relevant air services arrangements.

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

## 2. Current services to Thailand

2.1. Four airlines offer direct services between Australia and Thailand. These are Qantas (13 flights per week), Thai International (15 flights), British Airways (7 flights) and Olympic Airways (2 flights). These airlines accounted for 84% of total origin/destination traffic in the year ended 31 December 1998.

2.2. Indirect flights are provided by Cathay Pacific, Garuda, Malaysia Airlines and Singapore Airlines.

### **3. Provisions of relevant Air Services Agreements**

3.1. The Australia - Thailand Air Services Agreement of 26 February 1960 (ASA) and the Memorandum of Understanding (MOU) of 24 February 1998 provide for designated carriers to operate services in accordance with agreed capacity entitlements.

3.2. The MOU also provides that the designated airlines of each country, while operating along agreed routes, may enter into code sharing arrangements as the non-operating airline with any airline of a third country. There are, however, limitations specified in the MOU on the number of services which may be used in such code shares. Currently there are 9 weekly third party code share services available on the register for immediate utilisation. An additional 5 services are able to be utilised from March 2000, and a further 7 services from March 2001.

3.3. Under the MOU, in addition to the above weekly code share services, any capacity (not being code share or cargo capacity) which is not being operated may be converted into available additional code share services on the basis of one unused B747 equivalent service weekly in each direction equals one code share frequency in each direction. There are currently 17 B747 services of convertible capacity available for immediate utilisation, with a further 5 B747 services which can be utilised from March 2000.

3.4. A question has arisen in this case concerning whether the MOU permits different allocations of capacity in different directions on the route. This is particularly relevant because Ansett International is seeking an allocation of 25 services from Australia to Thailand (outbound) and 10 services from Thailand to Australia (inbound).

3.5. In a submission on the draft determination, Qantas stated:

“While it is possible for an allocation of capacity to be used in one direction only, it is an altogether different proposition to assume that if it is allocated for use in one direction, the capacity in the return direction is available for future use, potentially by another carrier. Thailand has specifically ruled out this possibility in the past.”

3.6. Ansett International responded by pointing out that, before lodging its application it had been advised by the Department that “the MOU permitted different allocations of capacity in different directions on the route”.

3.7. The Commission must determine this preliminary point before considering the merits of the Ansett International application. If different allocations of capacity in

different directions were not able to be allocated on the route then the Commission could not consider the Ansett International application.

3.8 The role of the Commission is to consider applications for available “capacity”. That term is defined in the Act to mean “an amount (however calculated or described) of space... that persons designated, nominated or otherwise similarly authorised by Australia are permitted under a bilateral arrangement to carry by air”. The ASA and the MOU are “bilateral arrangements” within the meaning of the Act.

3.9 The Secretary of the Department is required, by section 49 of the Act, to cause a register of all available capacity to be prepared and kept up to date. Although the register provides guidance to the Commission it is not conclusive because the term “available capacity” is defined by the Act to mean capacity for which operational decisions, to be made by the Secretary of the Department, are not in force. This is a question of fact but nothing turns on it in this case.

3.10 Equally, views which may have been expressed in the course of negotiations are also not conclusive. It is only the plain words of the MOU which must govern its interpretation.

3.11 The question, therefore, is whether, interpreting the plain words, the relevant bilateral arrangements permit different allocations of capacity in different directions on this route.

3.12 The ASA is silent on the issue, but the MOU states:

“The Delegations mutually determined that the following capacity (sic) entitlements will apply for the operation of passenger services in each direction on the specified routes for the designated airline or airlines of each Contracting Party”

3.13 The Commission notes the use of the words “*in each direction*” rather than terms such as “round trip” which would have been more appropriate had the intended outcome been that suggested by Qantas.

3.14 The Commission takes the view that the MOU is an international instrument conferring mutual rights and entitlements. There is no reason to interpret it in an unduly narrow fashion. In the Commission’s view the plain words of the MOU permit different allocations of capacity in different directions on this route.

3.15 Although not determinative of the matter, the Commission also notes that the Register of Available Capacity uses the words “in each direction”. Furthermore, the Department has advised that, if capacity is allocated as sought by Ansett International, the Register will show the unallocated inbound services as available.

## 4. Draft Determination

4.1 Qantas made a submission on the draft determination, which raised a number of important issues. In summary, Qantas submitted that the allocation requested by Ansett International amounted to an inappropriate use of scarce capacity on an important route where there has been difficulty in the past in obtaining additional capacity when Australia needed it. Qantas suggested a number of alternatives which might provide Ansett International with capacity on the route while reducing the adverse consequences Qantas envisaged.

4.2 Qantas submitted that:

- The allocation would not be an effective use of Australian capacity because Ansett International would be utilising capacity measured in full B747 services to carry only about 10 passengers per service.
- If the allocation were made it would effectively block any other Australian carrier offering new code share services to or via Thailand until March 2000, and then only utilising full B747 services.
- Regardless of the bilateral position, the allocation would, as a practical matter, render 15 services inbound to Australia unusable.

4.3 Qantas made a number of suggestions to remove or reduce the impact of the concerns it had raised. The first suggestion, aimed at removing Qantas' concerns, was that, as Ansett International is a member of the Star Alliance (as is Thai International), Ansett should code share with Thai International rather than with Singapore Airlines. This was because, under the MOU, a code share with Thai International would not count as a use of Australian capacity.

4.4 Qantas also suggested the following:

- Allocate to Ansett International 25 code shared frequencies on a round trip basis in the knowledge that 15 of these would be used only one way. This is described as a "bilaterally correct interpretation" but one which represents an "extremely wasteful use of scarce resources".
- Allocate to Ansett International only such service entitlements as it is able to use by code sharing on a round trip basis. This option would effectively mean only allocating ten code share frequencies.

4.5 Ansett responded to the Qantas submission, stating that:

- Thailand is a priority market to which its major customers require access.

- As a start up airline it is commercially sensible for it to develop a number of major markets in conjunction with alliance partners.
- Singapore Airlines provides access to the United Kingdom, Europe and a number of Asian destinations to which Ansett International does not operate directly.
- Entry to the Thailand route will enhance competition and further assist in establishing Ansett International as a viable international carrier in the region.
- The services via Singapore offer more attractive travel options from Melbourne and Sydney, especially for business travellers.

## 5. Commission's assessment

5.1. Allocations of capacity are made by the Commission in accordance with the *International Air Services Commission Act 1992* (the Act), and the Policy Statement (No 3 of 23 April 1997, as amended on 9 March 1999) which was issued under section 11 of Act.

5.2. Under the Policy Statement, the relevant criteria to be applied in deciding whether or not to allocate capacity, given that there is only one applicant and no other submissions, is whether Ansett International is reasonably capable of obtaining the necessary approvals and whether it is reasonably capable of implementing its proposals.

5.3. The Commission may also apply the criteria specified in paragraph 5 of the Policy Statement if submissions are received about or opposing the allocation of capacity.

5.4. Ansett International is an established international carrier which has the technical and financial resources to implement its proposal and is already marketing code share services on Singapore Airlines flights to Singapore. The Commission therefore concludes that Ansett International is reasonably capable of obtaining the necessary approvals and of implementing its proposal.

5.5. The issues raised by Qantas essentially deal with the question of whether it is in the public interest to make the allocation which Ansett International has sought. It is appropriate for the Commission to consider the specific matters raised by Qantas before considering whether it is necessary to undertake a full assessment of the Ansett International application under paragraph 5 of the Policy Statement.

5.6. The first question for the Commission is whether it is in the public interest to allocate all of the capacity available for code shares with airlines of countries other than Australia and Thailand where the capacity, expressed in B747 services, is to be used to carry only about 10 passengers per service.

5.7. The Commission has previously expressed concerns about inefficient use of valuable Australian capacity in this manner: see *Re Qantas to the Netherlands (IASC/DET/9725)*. The Commission has similar concerns in the case. Added to those concerns is an appreciation of the difficulties which Australia has previously faced when attempting to negotiate additional capacity on this route.

5.8. The Commission is also concerned that, in order to provide the capacity sought by Ansett International, it is necessary to convert 16 B747 services of own aircraft or 'prime' capacity. These services, each of which has a potential to carry around 400 passengers, will be used by Ansett International, after conversion, to carry an estimated 10 passengers per service.

5.9. However, the Commission needs to balance those considerations against the fact that Ansett International is just commencing on the route. The anticipated usage of around 10 seats per service is unlikely to be the final position if Ansett International can successfully establish itself on the route. Further, no other Australian carrier has sought capacity. Although Qantas has referred generally to the fact that it is "evaluating future opportunities" it was not an applicant for the capacity and has put forward no concrete alternative proposals for it. Finally, the Policy Statement makes it clear that use of Australian capacity is to be taken as a benefit to the public.

5.10. The second consideration is whether, if the Commission were to reject this application, Ansett International could put forward a proposal to code share with Thai International which might better serve Australia's public interest. Although this course has some attraction, the Commission would not reject a code share application simply on the basis that a code share with some other airline might be available.

5.11. Furthermore, the Commission has concluded that it is not an appropriate course for the Commission to take in this case for two additional reasons. Ansett International has satisfied the Commission that this application is part of a broader strategy which Ansett International is pursuing with Singapore Airlines designed to give it a stronger overall international route network. Also, having regard to timetables and frequencies, the Commission accepts that the code share with Singapore Airlines is more likely to allow Ansett International to offer attractive services to Bangkok from Melbourne and Sydney.

5.12. Finally, there is the issue of the disproportionate inbound and outbound allocations. Having determined that, as a matter of interpretation, the MOU permits such allocations, the Commission must now consider whether it is appropriate to actually make an allocation on that basis.

5.13. As the Commission noted in the draft determination, it would not normally allocate different amounts of capacity in each direction on a route, unless there were sound reasons for doing so, because this would, for practical purposes, significantly diminish the utility of the remaining capacity.

5.14. In this case Ansett International has satisfied the Commission that there are operational reasons for it seeking the allocations it has applied for. Singapore will be a collection and distribution point for Ansett International passengers travelling to and from Bangkok. The lesser number of inbound services is a function of connection times between Singapore and Australia. The Commission considers this constitutes a sound reason.

5.15. Qantas submitted that Ansett should either be allocated 25 services in each direction or 10 services on the basis that this in the number it will operate on a round trip basis. The Commission does not see that either suggestion would advance the position.

5.16. There remains the question whether the Commission should subject the application to a full public benefit assessment under paragraph 5 of the Policy Statement. In this case the important public interest considerations have been drawn to the Commission's attention by Qantas. There were no other submissions and the Commission is satisfied that a full assessment under paragraph 5 would not alter the outcome.

5.17. On balance the Commission concludes that it should make the allocation which Ansett International seeks, but that it should make the allocation on an interim basis. This will allow the Commission to monitor Ansett International's progress in developing the route and to have regard to demand and any proposals by competing Australian carriers as part of the renewal assessment of this allocation.

5.18. 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.

5.19. As noted earlier, Ansett International proposes to use the requested capacity in services jointly with Singapore Airlines pursuant to the Alliance Agreement dated 17 December 1997, as authorised under to the Trade Practices Act, and in accordance with the code share agreement dated 2 September 1998 (as extended by a supplied attachment).

5.20. The Commission has previously assessed and approved this code share agreement in these terms in Determination IASC/DET/9820 which allocated capacity to Ansett International on the Singapore route. The nature of the market on the Thailand route, with several carriers and a reasonable level of competition, is such that the Commission considers that the public benefits previously identified in relation to this code share are also applicable to this route. The Ansett International proposal will also enable Ansett International to enter the market and add to competition.

5.21. It follows that the Commission should also approve the proposed code share with Singapore Airlines, subject to certain conditions referred to below.

5.22. The Commission also considers that given the relative shortage of available prime capacity on the route, it would be appropriate to allocate the requested capacity to Ansett International in such a way that, as additional code share capacity becomes available over time, it is substituted for converted B747 services. Under the current MOU the result would be as follows:

- from the date of this determination until March 2000, the 25 outbound services would be derived from 9 code share frequencies and 16 converted B747 services, and the 10 inbound services from 9 code share frequencies and one converted B747 service;
- from March 2000 until March 2001, the 25 outbound services would be derived from 14 code share frequencies and 11 converted B747 services, and the 10 inbound services from 10 code share frequencies; and
- from March 2001 onwards, the 25 outbound services would be derived from 21 code share frequencies and 4 converted B747 services, and the 10 inbound services from 10 code share frequencies.

The Commission will allocate the capacity in this manner and will request the Department to take this into account when amending the Register of Available Capacity.

5.23. The allocated capacity would be able to be operated not only between Australia and Thailand, but also on fifth freedom sectors on the route in accordance with the Australia – Thailand air services arrangements, and as allowed by the air services arrangements of other countries.

## **6. Role of the ACCC**

6.1. The Policy Statement and its associated Explanatory Memorandum make clear that the ACCC retains primary responsibility for competition policy matters. 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.

## **7. Other issues**

### **Utilisation of the capacity**

7.1. Ansett International originally proposed to commence utilisation of 25 outbound services and 10 inbound services from 17 May 1999. The Commission will specify that Ansett International must commence utilising and fully utilise the above capacity within 30 days of the date of this determination, or from such other date approved by the Commission.

7.2. As the Commission noted in para 5.8 above, conversion of 16 B747 services of prime capacity is required to provide the number of code share services sought by Ansett International. In order to monitor utilisation the Commission will require Ansett International to advise the Commission from time to time of the number of seats utilised each week on the Thailand route under the code share agreement

7.3. The Commission will require Ansett International, in the event that the air services arrangements between Thailand and Australia are amended to express code share capacity in units other than services, to return any capacity excess to its requirements.

### **Other issues**

7.4. The Commission normally imposes conditions on approvals for code share agreements to require the applicant to price and sell its services on the route independently and not to share or pool revenue. The Commission will include these conditions except to the extent that such practices may be permitted under the ACCC authorisation of the Alliance Agreement.

7.5. The Commission normally specifies that the applicant must take all reasonable steps to ensure that passengers are informed, at the time of booking, of the carrier actually operating the flight. The Commission will do so in this case.

7.6. The Commission will make a determination for three years from the date of the determination.

7.7. The Commission's view is that this determination should include the usual limitations on changes in the ownership and control of Ansett International. These are specified below.

## **8. Determination allocating capacity on the Thailand route to Ansett International (IASC/DET/9913)**

8.1. The Commission finds that an allocation of capacity to Ansett International on the Thailand route as sought would be of benefit to the public.

8.2. The Commission makes an interim determination in favour of Ansett International, allocating 25 services per week outbound from Australia on the Thailand route, and 10 services inbound on that route, in accordance with the Australia – Thailand Air Service Agreement. The allocated capacity will be used under a code share arrangement with an airline of a third country.

8.3. The interim determination is for three years from the date of the determination.

8.4. The interim determination is subject to the following conditions:

- Ansett International is required to fully utilise the capacity from within 30 days of the date of this determination, or from such other date approved by the Commission;
- only Ansett International is permitted to utilise the capacity;
- the capacity may be used by Ansett International to provide joint services with Singapore Airlines pursuant to the Alliance Agreement dated 17 December 1997 as authorised under the *Trade Practices Act* and in accordance with:
  - the Code Share Agreement dated 2 September 1998 between Ansett International and Singapore Airlines as extended or as amended with respect to Appendix A;
  - the Code Share Agreement as otherwise amended, with the prior consent of the Commission; or
  - any new joint service agreement between Ansett International and Singapore Airlines for operations on the Australia-Thailand route, whether or not it replaces the existing agreement, with the prior approval of the Commission;

subject to the following conditions:

- Ansett International must price and sell its services on the route independently of Singapore Airlines and not share or pool revenue except to the extent authorised under the *Trade Practices Act*; and

- Ansett International must take all reasonable steps to ensure that passengers are informed, at the time of booking, of the carrier actually operating the flight;
- for so long as the Commission requires, Ansett International will provide within 30 days of the end of each calendar quarter, a report on the number of the seats the subject of this determination sold by Ansett International in that quarter;
- if the air services arrangements between Australia and Thailand are amended to express code share capacity in units other services, Ansett International is required to return any capacity excess to its requirements;
- changes in relation to the ownership and control of Ansett International are permitted except to the extent that any change:
  - results in the designation of the airline as an Australian carrier under the Australia – Thailand 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 Ansett International or be in a position to exercise effective control of Ansett International, without the prior consent of the Commission; and
- changes in relation to the management, status or location of operations and Head Office of Ansett International 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 – Thailand Air Services Agreement.

Dated: 17 May 1999

Russell Miller  
Chairman

Michael Lawriwsky  
Member

Stephen Lonergan  
Member