

DETERMINATION

DETERMINATION: IASC/DET/9915
THE ROUTE: NEW ZEALAND
THE APPLICANT: ANSETT INTERNATIONAL LIMITED
(ACN 060 622 460)
PUBLIC REGISTER FILE: IASC/APP/99028

1 The application

1.1 On 5 July 1999, an application was received from Ansett International Limited (Ansett International) for an allocation of capacity to enable it to code share on services operated by Air New Zealand (40 seats on each of 14 services per week) and by United Airlines (40 seats on each of seven services per week) between New Zealand and the United States of America.

1.2 Ansett International advises that it will also be commencing code sharing on non-stop services to the USA.

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. Submissions were received from the Ansett Pilots Association (APA) and the Queensland Department of State Development.

1.4 All non-confidential material 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

2.1 The following non-stop weekly services are provided between Australia and the USA:

Qantas Airways

17 B747s Sydney-Los Angeles & vv*

7 B747s Melbourne-Los Angeles & vv*

*American Airlines code shares

United Airlines

7 B747s Sydney-San Francisco-Los Angeles & vv

7 B747s Sydney-San Francisco & vv*

*Air New Zealand code shares

Air New Zealand

7 B747s Sydney-Los Angeles and vv*

*United Airlines code shares

2.2 The following weekly services are currently operated between New Zealand and mainland USA (being linked to trans-Tasman services):

Qantas Airways

9 B747s Auckland-Los Angeles & vv*

*British Airways and American Airlines code share on these services

United Airlines

7 B747s Auckland-Los Angeles & vv*

*Air New Zealand code shares on these services

Air New Zealand

17 B747s and 7 B767s Auckland-Los Angeles & vv*

*United Airlines and Lufthansa code share on some services

3 Air Services Agreements

New Zealand

3.1 Under the Australia – New Zealand Air Services Agreement of 15 July 1961, the Memorandum of Understanding of 1 August 1992 and the Single Aviation Market Arrangements dated 19 September 1996, the airlines of Australia are entitled to operate any level of capacity they choose between the two countries.

3.2 On services beyond New Zealand, Australian carriers which are so designated may utilise the equivalent of 10 B747 services per week in total without route limitations (unconstrained), and an additional two B747 equivalent services per week which may be operated to points beyond New Zealand; being:

- points in the USA and Canada; or
- points in other countries not otherwise served.

3.3 Qantas has been allocated a total of 9.924 B747 equivalent services per week for services beyond New Zealand. The capacity remaining for allocation for services beyond New Zealand is the equivalent of 0.076 B747 services per week in total unconstrained and an additional two B747 equivalent services per week which may be operated beyond New Zealand to the USA and Canada and to points which have not previously been served.

3.4 The Department of Transport and Regional Services advises that 840 seats (the amount of capacity sought by Ansett International) are, in practice, equivalent to 1.9 B747s under the Australia-New Zealand Air Services Agreement.

United States of America

3.5 Under the Australia – USA air services arrangements there are no limitations on the capacity that may be operated by Australian carriers between New Zealand and the USA. In relation to code sharing, the Department of Transport and Regional Services has advised the Commission that, as capacity is not counted against the marketing carrier under those arrangements, no capacity allocation is required for code share services to the USA.

4 Applicants proposal and claims

4.1 Ansett International has identified the USA as a key market for its customers. It has determined that, as a new carrier to the route, the best commercial means of entry is through code sharing. Ansett International proposes code sharing on 21 weekly B747 services via New Zealand to the USA. As part of its broader entry into the USA market, Ansett International will also commence code share operations on 21 weekly B747 non-stop services to the USA.

4.2 In general terms, Ansett International argues that its entry into the USA market (non-stop and via New Zealand) will increase competition on the Pacific route and that the code share arrangements will extend Ansett International's international reach and improve its ability to compete for corporate accounts. A significant flow on of customers to Ansett's domestic network is also expected.

5 Other submissions

5.1 The APA states that it supports Ansett International's application for capacity on the basis that Ansett International is testing this market for future operations by its own aircraft. The APA is concerned at Ansett International's proposed utilisation of the capacity on a code share basis, rather than through own aircraft operations. The APA argues that long term use of a code share on this route would not make Ansett International an effective competitor, and is not in the public interest. Further, the future employment and well being of APA members depends on the future of Ansett International as a vibrant carrier and not a virtual airline.

5.2 The Queensland Department of State Development supports the Ansett International application on the grounds that it will provide Ansett International with a very necessary presence on the Pacific route between Australia and North America.

5.3 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.

5.4 The ACCC considers that it is unlikely that the proposal would lead to a lessening of competition within the meaning of the *Trade Practices Act 1974*, given that there is no reduction in capacity and the entry onto the route of Ansett International will be facilitated. The ACCC notes that its authorisation of the Ansett International – Air New Zealand – Singapore Airlines Alliance Agreement is due to expire on 22 July 2003 and suggests that, if the determination goes beyond that date the Commission might wish to consider imposing conditions in case the Alliance Agreement is terminated or replaced.

6 Commission's assessment

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

6.2 Under paragraph 4 of the Policy Statement, the relevant criteria to be applied in deciding whether or not to allocate capacity, given that there is only one applicant, are whether Ansett International is reasonably capable of obtaining the necessary approvals and of implementing its proposals.

6.3 Ansett International is an established international carrier and is already marketing code share services on Air New Zealand flights to New Zealand. The Commission concludes that Ansett International is able to implement its proposals and is capable of obtaining the necessary approvals. Accordingly, the Commission finds that the allocation to Ansett International of the equivalent of 1.9 B747 services of capacity per week in each direction beyond New Zealand would be of benefit to the public.

6.4 A carrier cannot use allocated capacity by providing joint international air services 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.

6.5 Ansett International proposes to use the capacity through code sharing on services beyond New Zealand operated by Air New Zealand and United Airlines. Ansett International has not yet provided the Commission with copies of the agreements with Air

New Zealand and United Airlines in relation to the code share services, as these are still to be finalised. However, the key elements of the proposed agreements have been outlined in Ansett International's submission.

6.6 In considering Ansett's code share proposal, the Commission notes the concerns of the APA about the exercise of Australian capacity on a code share basis. In broad terms, the Commission has a preference for the use of Australian capacity on an own aircraft basis, because public benefits are generally likely to be greater than those associated with code share operations. However, each case must be considered on its individual merits. Code sharing can provide opportunities for a new entrant to commence operations on a new route without excessive cost, as is the case here. Over time Ansett International may build its presence on the route to a point where it can offer own aircraft services. The Commission also concurs with the ACCC's view that there is unlikely to be a lessening of competition by virtue of these proposals, and that the entry of a second Australian carrier is facilitated. The Commission concludes that approval of the code share proposal would be of benefit to the public.

6.7 Accordingly, the Commission approves the capacity allocated to Ansett International in this determination being used under code share agreements on services operated by Air New Zealand and United Airlines beyond New Zealand, subject to the conditions set out below.

7 Other issues

7.1 The Commission notes that Ansett International originally proposed to fully utilise the capacity from 31 August 1999, but has subsequently advised its intention to do so from late September 1999. The Commission will require Ansett International to fully utilise the capacity from 30 September 1999, or such other date approved by the Commission.

7.2 Ansett International has sought a determination for five years from the date of the determination. The Commission will make such a determination.

7.3 The Commission normally imposes a condition on approvals of code share agreements that requires 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 Ansett International's 17 December 1997 Alliance Agreement with Air New Zealand. The Commission notes that the proposed code share agreement with Air New Zealand will expire on 31 January 2003, which is prior to the expiry of the ACCC's authorisation of the Alliance Agreement.

7.4 In approving code share proposals, the Commission usually 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.

7.5 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 Role of the ACCC

8.1 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 decisions should be taken as indicating either approval or disapproval by the ACCC. The Commission's decisions are made without prejudicing, in any way, possible future consideration by the ACCC of the Ansett International/Air New Zealand and Ansett International/United Airlines code share agreements, or operations under them.

9 Determination allocating capacity on the New Zealand route to Ansett International (IASC/DET/9915)

9.1 The Commission finds that an allocation of capacity to Ansett International on the route between New Zealand and the USA under the Australia – New Zealand air services arrangements, as sought, would be of benefit to the public.

9.2 The Commission makes a determination in favour of Ansett International, allocating the equivalent of 1.9 B747 services per week in each direction beyond New Zealand under the Australia – New Zealand air services arrangements.

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

9.4 The determination is subject to the following conditions:

- Ansett International is required to fully utilise the capacity from no later than 30 September 1999 or from such other date approved by the Commission;
- only Ansett International is permitted to utilise the capacity;
- Ansett International may use the capacity to provide services jointly with Air New Zealand pursuant to the Alliance Agreement with Air New Zealand dated 17 December 1997 as authorised under the *Trade Practices Act*, the code share agreement between Ansett International and Air New Zealand, dated 31 January 1997, and in accordance with:
 - the proposed code share agreement between Ansett International and Air New Zealand relating to services beyond New Zealand to the USA, as may be amended with the prior approval of the Commission; and

- subject to copies of the signed code share agreement between Ansett International and Air New Zealand relating to services beyond New Zealand to the USA being forwarded to the Commission prior to the commencement of operations, and such agreement being consistent with the proposal outlined in Ansett International’s application of 5 July 1999.
- Ansett International may use the capacity to provide services jointly with United Airlines in accordance with:
 - the proposed codeshare agreement between Ansett International and United Airlines relating to services beyond New Zealand to the USA, as may be amended with the prior approval of the Commission; and
 - subject to copies of the signed code share agreement between Ansett International and United Airlines relating to services beyond New Zealand to the USA being forwarded to the Commission prior to the commencement of operations, and such agreement being consistent with the proposal outlined in Ansett International’s application of 5 July 1999.
- to the extent that the capacity is used to provide services jointly with United Airlines or Air New Zealand:
 - Ansett International must price and sell its services on the route independently and must not pool revenues with Air New Zealand or United Airlines, except to the extent that it is authorised to do so with Air New Zealand 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 operating the flight.
- 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 – New Zealand 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 – New Zealand Air Services Agreement.

Dated: 23 August 1999

Russell Miller
Chairman

Michael Lawriwsky
Member

Stephen Lonergan
Member