



# INTERNATIONAL AIR SERVICES COMMISSION

## DECISION

<b>DECISION:</b>	<b>[2001] IASC 221</b>
<b>SUSPENSION OF</b>	<b>[2000] IASC 114, IASC/DET/9706 AND IASC/DET/9805</b>
<b>THE ROUTE:</b>	<b>JAPAN</b>
<b>THE AIRLINE:</b>	<b>ANSETT INTERNATIONAL LIMITED (ADMINISTRATORS APPOINTED) (ANSETT INTERNATIONAL) (ACN 060 622 460)</b>

### 1 Background

1.1 On 12 September 2001 Voluntary Administrators were appointed to Ansett International. On 14 September 2001, following a decision by the Administrators, all Ansett International's services ceased.

1.2 In a circular to creditors of 13 September, the Administrators advised that "the objectives of the Voluntary Administration process, as set out in the Corporations Act, are to:

- a) maximise the chances of the company, or as much as possible of its business, continuing in existence; or
- b) if it is not possible for the company or its business to continue in existence – result in a better return for the company's creditors and members than would result from an immediate winding up of the company".

1.3 Section 10(1) of the *International Air Services Commission Act 1992* (the Act) provides that the Commission "may, at any time, conduct a review of a determination if it believes that there may be grounds for varying, suspending or revoking the determination."

1.4 With the cessation of flying by Ansett International, the carrier may be in breach of the conditions of its determinations on all routes where it holds allocated capacity. The Commission therefore has a basis on which to institute a review of all Ansett International's determinations in accordance with Section 10(1) of the Act. However, with the possibility that a successor entity may resume operations following a successful sale process, the Commission would not wish to prematurely hasten a review of all of Ansett International's determinations. If the Commission were to revoke Ansett International's determinations in the course of the sale process, this would entirely remove Ansett International's capacity entitlements.

1.5 Should some or all of Ansett International's rights be revoked and reassigned to existing Australian carriers, those rights would not be available to Ansett International or a successor entity. The actual or even potential loss of such rights may fundamentally influence the outcome of the sale process. In the worst case scenario, bidders could be deterred altogether from pursuing the purchase of Ansett International's assets. From a policy perspective, this would be an undesirable outcome as the benefits to the economy from having another significant Australian designated carrier may be lost for a considerable period, if not permanently.

1.6 However, the Commission considered that it was obliged to institute a review of Ansett International's Japan determinations because of the imminence of the slot allocation process and the co-ordination process for slots that will enable access to the new runway B at Narita airport. The opening of this runway in the middle of 2002 provides the first opportunity in many years for Australian carriers to expand services into the most important market in Japan. Japan is one of the major sources of tourists visiting Australia. Access to Tokyo is also highly prized by carriers from many other nations and competition for limited space at the new runway is expected to be intense. From a national interest perspective, it is important that Australian carriers are able to secure the maximum possible rights to expand services at the new runway. A related consideration is the desirability of fostering Australian carrier competition on the route in the longer term.

1.7 Review of Ansett International's Japan determinations provides the Commission with options about the future use of capacity allocated to Ansett International. These range from confirming the capacity in Ansett International's hands or, if Ansett International was found to be in breach of its determinations, varying, suspending or revoking the determinations. If revocation were the outcome, this would provide scope for capacity to be reallocated to another Australian carrier. The Commission's rationale for reviewing the capacity now is to ensure that capacity rests in the hands of Australian carriers that are in a position to secure the maximum number of slots in the slot allocation process and secure appropriate schedules in the co-ordination conference taking place on 10-14 November 2001 and of operating all allocated capacity.

1.8 As a result of representations from the Administrators for Ansett International, the Commission deferred initiating the review process for as long as practicable. The Administrators argued that it was appropriate for the Commission to defer any decisions regarding the allocation of Ansett International's Japan determinations until the sale process had run its course.

1.9 Given the imminence of the slot allocation process, the Commission decided it could not delay the review process until a sale was concluded. The Commission published a notice on 26 September 2001 that it would review Ansett International's Japan determinations. This gave the Administrators as much time as possible to progress the sale process and was intended to give the Commission the best possible information about the prospects of a successor entity being able to take up Ansett International's Japan rights.

1.10 The Commission's notice outlined the then situation in respect of the slot allocation process and timetable. It advised that the Commission was initiating a review of Ansett International's Japan determinations, and invited submissions from interested parties about the matter. The Commission also invited applications from interested parties for some or all of the capacity involved, in light of the possibility of the Commission deciding to revoke the Ansett International determinations.

1.11 The Commission has not yet made any decision to proceed to review any of the determinations Ansett International holds on other routes.

## **2 Submissions received**

2.1 Submissions about the review of Ansett International's determinations were received from:

- the Australian Competition and Consumer Commission (ACCC) on 28 September 2001;
- the Australian Tourist Commission (ATC) on 28 September 2001;
- Qantas on 28 September and 12 October 2001;
- Airfreight International Australia on 1 October 2001 – this is a confidential submission;
- Ansett International (Administrators Appointed) on 24 October 2001. The submission attached confidential material. Representatives of the Administrators also briefed the Commission orally on a confidential basis on a number of occasions; and
- the Victorian Government dated 22 October 2001 – this submission was marked commercial in confidence.

2.2 The ACCC argued that any decisions taken by the Commission should, to the extent possible, provide the opportunity for another Australian carrier, including Ansett International under new ownership, to enter the Japan route, including the Narita market. The ACCC raised a series of concerns about the limited extent of competition that would remain if opportunities were removed for additional Australian carriers to operate on the Japan route. The ACCC urged the Commission to explore outcomes that provide flexibility for other Australian carriers to enter or re-enter the Japan market and subject it to effective competition. It raised options for the Commission to consider involving the use of interim determinations in any allocation to Qantas and the feasibility of conditions relating to the handback or transfer of slots, depending on the Narita slot management process.

2.3 The ATC submitted that, should the Commission revoke Ansett International's determinations, the capacity made available should go to the airline most able to expand

services to Japan at this critical time for the tourism industry. This is likely to be an airline with an established presence in the Japan market. The ATC considered that it is essential the inbound flow of tourists to Australia be maximised.

2.4 Qantas submitted that, following the cessation of operations by Ansett International, the company no longer meets the requirements of paragraph 4 of the Minister's Policy Statement that it be reasonably capable of implementing its proposals and of obtaining the necessary approvals to operate on the route. Qantas considered that the most appropriate course of action would be revocation of Ansett International's determinations. Qantas sought an allocation of additional capacity that would become available should the Commission revoke Ansett International's determinations.

2.5 Qantas' further submission of 12 October stressed that an early decision by the Commission was important to enable Qantas time to develop and implement its Japanese marketing arrangements.

2.6 Airfreight International Australia sought an allocation of capacity to operate freight services in the event the Commission revoked Ansett International's determinations.

2.7 The Administrators sought to provide evidence sufficient to assure the Commission that Ansett International should be permitted to retain its capacity allocations. The Administrators advised that they were in negotiations with several parties for the sale of Ansett International. Each of those parties had indicated their intention to continue to operate the key international routes of Ansett International. This included resumption of services to Osaka and the commencement of services to Narita when the new runway opens. The Administrator attached confidential letters to the Commission from each of the interested parties.

2.8 The Administrators outlined their approaches to the Japanese slot co-ordinator and the Japanese Civil Aviation Bureau regarding slot access. Copies of the Administrators' letters are on the Commission's confidential register.

2.9 The Administrators also explained that they would be looking to a purchaser's ability to operate the airline and to meet the requirements of the Australian Government for the purposes of designation as an Australian international airline. The Administrators noted that the purchaser would acquire the infrastructure, distribution networks, systems and procedures that previously facilitated the successful operations of Ansett International and currently meet all regulatory requirements.

2.10 The Victorian Government's brief submission was supportive of an outcome that secured scope for future competition.

2.11 All non-confidential material supplied by submitters is filed on the Register of Public Documents. All confidential material supplied by submitters is filed on the Commission's confidential register.

### **3 Commission's assessment**

3.1 Section 23(1) of the Act requires the Commission, having conducted a review pursuant to s.10(1), to make a decision confirming, varying, suspending or revoking a determination. Section 23(2) provides that the Commission may make a decision to vary, suspend or revoke a determination only if it is satisfied that:

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

3.2 The general criteria against which the benefits to the public are assessed by the Commission in the circumstances of this review are set out in paragraph 4 of the Minister's Policy Statement.

3.3 The first issue for the Commission to decide is whether Ansett International is or will inevitably be in breach of any or all of its Japan determinations, or no longer intends to fully use its capacity. If so, it has the discretion to revoke, suspend or vary the determinations.

3.4 The Commission finds that Ansett International is, or inevitably will be, in breach of all three determinations the subject of this review. In relation to Determination [2000] IASC 114, the Commission notes that Ansett International is not required to exercise this capacity until slots become available for operations at the new runway at Narita airport. Further, Ansett International retains its designation as an Australian international airline for the purposes of the Australia – Japan Air Services Agreement. However, based on advice from the Administrators about the nature of the sale process (ie. that the assets of Ansett International are to be sold rather than the corporate entity), the Commission concludes that it is inevitable that Ansett International, as originally incorporated, will not be in a position to operate its capacity. Accordingly, it is inevitable that Ansett International will be in breach of the conditions of this determination.

3.5 The circumstances are different in relation to Determinations IASC/DET/9706 and IASC/DET/9805. Ansett International had been operating the capacity allocated under these determinations but has ceased to do so. The carrier is therefore in breach of the condition of the determinations that it must fully utilise the allocated capacity.

3.6 Having found that Ansett International is in breach of its determinations, Section 23(2) of the Act requires the Commission to conclude that the determinations be revoked, varied or suspended.

3.7 In assessing which conclusion to arrive at, the Commission's view is that it should give emphasis to providing every reasonable opportunity for a successor entity to resume operations subject to the Commission's approval of the transfer of the relevant capacity. Resumption of services would carry benefits to Australia through increased competition on the route. The Japan market is one in which there is very limited competition. This is a situation about which the Commission has expressed concern on a number of other occasions. Several of the submissions to the Commission argue in favour of preserving competition in the Japan market if possible.

3.8 If the Commission found that a return to services by a successor to Ansett International was not reasonably likely, then a preferable course from a national interest perspective would be to revoke the determinations and reallocate the capacity. This would provide the opportunity for another carrier to secure additional access to Narita B. While this would reduce future competition benefits, the additional capacity available on the route would provide scope for increasing tourism to Australia.

3.9 Revocation at the present time could jeopardise the chances of a successful sale outcome for Ansett International's business assets. This in turn may have flow on consequences for public benefits on other routes which a successor entity might otherwise seek to re-enter in future.

3.10 The Commission has considered all of the advice and information available to it. It considers that an Ansett International entity will not resume services. However, the Commission is reasonably confident that the business assets of Ansett International are likely to be sold successfully to a new entity and that the Administrators of Ansett International will seek the Commission's approval to transfer Ansett International's entitlements to that new entity.

3.11 In the interim, pending the conclusion of the sale process, the Commission is satisfied that the Australian national interest can be protected in the slot allocation process. The Commission is reasonably confident that the Japanese authorities will allocate slots to Ansett International and that Ansett International will be able to participate effectively in the slot allocation and co-ordination conference notwithstanding its administration status.

3.12 The Commission recognises that there is a risk that a sale of the Ansett International business will not be achieved, or that the assignee will not prove capable of obtaining the approvals necessary to operate and of implementing services. However, the Commission is satisfied that the Japanese authorities would facilitate the transfer of slots Ansett International may hold to another Australian entity. In this case, the same aggregate level of access to Narita may be retained for Australian carriers.

3.13 The Commission therefore concludes that it should suspend Ansett International's Japan determinations pending developments. The suspension of the determinations is necessarily an interim process. The Commission will actively monitor the sale process and the purchaser's progress towards obtaining the necessary approvals. If an issue emerges which would remove any reasonable prospect of resumption of operations, the Commission would move quickly to revoke the determinations.

3.14 The Commission's view is that Ansett International will retain the privileges that attach to the allocation of the capacity while the suspension is in force – the only restriction is that Ansett International will be unable to exercise the capacity while the determinations are suspended. The Commission would like to see an appropriate successor entity resume operations as soon as practicable.

3.15 The Commission notes that IASC/DET/9706 expires in February 2002. Prior to being placed in administration, Ansett International had indicated its desire for the determination to be renewed. The Commission will address the question of renewal, if appropriate, once the situation regarding future operations of the capacity are clearer.

3.16 The Commission concludes with some remarks about the need to ensure maximum Australian carrier access to the second runway at Narita from a national interest perspective. The Commission believes that there is a primary consideration given to the importance of Narita to Australian tourism.

3.17 The Commission notes that it has previously granted Qantas a variation to existing determinations which, together with additional capacity allocated to Qantas, provides it with scope to exercise 8.4 B767-200 equivalent services per week at the new runway at Narita. The Commission also decided on 1 November 2001 to allocate to Qantas an additional 2.4 B767-200 equivalent services per week able to be operated to Narita. These means that Qantas holds capacity entitlement sufficient for it to operate nine B767-300 services per week at Narita B, although it has bid for slots for 14 services per week. The Commission notes that, prior to Ansett International being placed in administration, Qantas had additional capacity sufficient for it to operate only one B767-300 service per week to Narita B.

3.18 Ansett International's determination [2000] IASC 114 enables the operation of seven B767-300 services per week to Narita. It would also have the flexibility to use capacity from IASC/DET/9706 to operate additional B767-300 services at Narita, although this would be at the cost of reduced Osaka operations. This means that Ansett International has sufficient capacity to sustain its bid for slots sufficient to operate nine weekly B767-300 services to Narita.

3.19 Taken together, this means that Qantas and Ansett International between them now hold allocations to underpin slots for a total of at least 16 B767-300 services per week to Narita runway B. Assuming both carriers are able to secure these slots, this is a good outcome from a national interest perspective. A substantial level of services is likely to be achieved at Narita B, and scope preserved for competition by two Australian carriers on the Tokyo route. Overall this should deliver greater public benefits to Australia, compared with having only one Australian operator.

3.20 As noted above, the Commission is confident that if Ansett International obtains slots in the slot allocation and schedule co-ordination process but it, or a successor entity, subsequently proves unable to operate, those slots will be transferable to an established Australian carrier. With this safeguard, the national interest in ensuring maximum access to Narita is protected. Advice dated 3 October 2001 from the Department of Transport and Regional Services, which is on the Commission's public

register, provides the basis for the Commission's position. Likewise, if the slot allocations sought by Qantas are secured and doubts remain about the operation of capacity to Narita B by a successor to Ansett International, then the Commission would expect to assign Ansett International's capacity to Qantas to secure maximum services for Australia.

3.21 In the light of the Commission's findings above, no additional capacity currently is available for allocation to other carriers and the applications by Qantas and Airfreight International Australia are deferred pending the slot allocation process and further developments with respect to the sale of Ansett International's assets.

#### **4 Decision [2001] IASC 221**

4.1 In accordance with Section 24 of the Act the Commission:

- suspends Determinations IASC/DET/9706, IASC/DET/9805 and [2000] IASC 114 and otherwise adjourns the review pending results of the slot allocation process and further developments with respect to the sale of Ansett International's assets.

Dated: 12 November 2001

Ross Jones  
Chairman

Stephen Lonergan  
Member

Michael Lawriwsky  
Member