



INTERNATIONAL AIR SERVICES COMMISSION

DECISION

DECISION NO: [2002] IASC 202
NON-RENEWAL OF: DETERMINATION IASC/DET/9706
THE ROUTE: JAPAN
THE APPLICANT: ANSETT INTERNATIONAL LIMITED
(ADMINISTRATORS APPOINTED)
(ACN 060 622 460)
(ANSETT INTERNATIONAL)
PUBLIC REGISTER FILE: IASC/APP/200124

1 The application for renewal

1.1 On 14 February 1997, the Commission issued Determination IASC/DET/9706 which, as varied by Decision IASC/DEC/9902, allocates four B767-200 equivalent units of capacity per week to Ansett International on the Japan route (the Determination). The Determination expires on 13 February 2002.

1.2 On 27 August 2001, Ansett International wrote to the Commission seeking renewal of the Determination. The Commission published a notice inviting other applications for an allocation of all or part of the capacity subject to renewal and submissions from any interested person about the renewal of the determination. No other applications or submissions were received.

1.3 Following Ansett International being placed into voluntary administration on 12 September 2001 and the cessation of operations, the Commission conducted a review of Ansett International's Japan determinations, including IASC/DET/9706. In Decision [2001] IASC 221 of 12 November 2001, the Commission suspended Ansett's Japan determinations, including IASC/DET/9706. The Commission otherwise adjourned its review pending results of the allocation process for slots at Tokyo's Narita B runway and further developments with regard to the sale of Ansett International's assets. In doing so, the Commission noted that IASC/DET/9706 was to expire in February 2002 and that it would address the question of renewal, if appropriate, once the situation regarding future operations of the capacity were clearer.

1.4 In view of the changed circumstances since the Commission advertised the request for renewal, Ansett International (administrators appointed) and Qantas were invited to make submissions about the Commission's consideration of the renewal. Both parties had previously made detailed submissions in the context of the review of all of Ansett International's Japan determinations. Qantas had applied formally for additional capacity in the review context, owing to the possibility of the Commission revoking Ansett International's determinations and the relevant capacity becoming available for

reallocation. The Commission's request to Qantas was made to provide the airline with the opportunity to amend its application for capacity in the circumstances of this review and in light of changed operational and market circumstances since the Commission's decision to suspend Ansett International's Japan determinations.

1.5 Qantas and the administrators for Ansett International made submissions on 4 and 5 February 2002 respectively. The Queensland Government made an unsolicited submission on 5 February 2002.

1.6 Certain material supplied by the administrators, and all material supplied by Qantas and the Queensland Government, is filed on the Commission's Register of Public Documents. Confidential material supplied by the administrators is filed on the Commission's Confidential Register.

1.7 The Commission did not invite a further submission from AirFreight International Australia, which had made a submission seeking capacity in the review process, because the carrier was clearly not able to meet the requirements necessary to commence operations with the capacity within a reasonable time frame. However, the airline's application remains current in the context of the Commission's presently suspended review of Ansett International's Japan determinations.

2 Summary of submissions received

2.1 Qantas submitted that the Determination should not be renewed. Qantas advised that it wished to maintain but modify its application for additional capacity made in the context of the review of Ansett's Japan determinations. Qantas proposed that it be allocated the four weekly B767-200 equivalent units from the Determination upon its expiry, and a further 0.4 units of Ansett International's suspended Japan capacity. This, combined with four units of Japan capacity Qantas would otherwise not be exercising, would give it sufficient capacity to add a daily B767-300 service to Narita. These services would commence during the 2002 Northern Summer scheduling period, subject to obtaining slots for Narita runway B.

2.2 Most of the administrators' submission was confidential and is unable to be summarised here. The confidentiality was necessary, because much of the detail of the prospective sale of Ansett International and the prospective purchaser's business plans were still being negotiated and developed. This was accepted by the Commission, which took account of the full submission in its consideration of the renewal application.

2.3 In the public summary of its submission, the administrators submitted that the Determination should be renewed, but on an interim basis. The aim in this approach was to retain Ansett International's capacity while negotiations for the sale continued, as well as providing the Commission and other parties with reasonable flexibility about use of the capacity in the future.

2.4 The administrators argued that:

- Ansett International had effectively serviced routes to Japan, although operations were currently suspended
- substantial progress had been made towards completing a sale of Ansett International which the administrators believe would meet the requirements for designation as an Australian carrier
- the prospective purchasers are developing plans for the use of the capacity
- the prospective purchasers are reasonably capable of obtaining the necessary approvals and of operating services
- renewing the Determination would provide an opportunity to maintain competition and provide benefits for the tourism industry, consumers, the Australian economy and the aviation industry.

2.5 The Queensland Government argued for renewal of the determination. It considered that this would guarantee competition on the Japan/Australia route. This was seen as particularly important from an inbound tourism perspective. Competition would foster an increased awareness of the destination, and provide a range of air fares and choice of carrier. In the Japanese market, where traffic flows can be directed by the wholesale trade to a particular airline, the presence of two Australian airlines would enlarge the catchment area for Japanese visitors to Australia. Revocation of this capacity now would seriously jeopardise the reintroduction of Ansett International services on the Australia/Japan route, in turn compromising the public benefits which would accrue from the introduction of services by a second Australian carrier.

3 Commission's consideration

3.1 Since Ansett International was placed into voluntary administration on 12 September 2001, the Commission has shown considerable flexibility by allowing Ansett International to retain unused capacity on all of its routes, including on the Japan route, pending further developments with the sale of Ansett International's assets. The Commission would have preferred that a sale of Ansett International had been concluded in advance of it addressing the issue of renewal of IASC/DET/9706, as this may have removed some uncertainties for the Commission in its consideration of the issues. This has not proved to be the case, although negotiations with potential buyers are understood to be well advanced.

3.2 The imminent expiry of IASC/DET/9706 makes it essential that the Commission consider the applicant's request for renewal prior to close of business on 13 February 2002. The Commission may only renew a determination while it is in force (Section 8(1) of the *International Air Services Commission Act 1992* – the Act - refers). With the imminent expiry of the Determination, the Commission is obliged to consider the question of renewal at this time, in circumstances where negotiations for the sale of

Ansett International are continuing and therefore additional uncertainty remains about future operations.

3.3 The criteria for the Commission to consider in a renewal situation differ in important ways from those relevant to the review situation. Under the Minister's Policy Statement (No. 3), of 23 April 1997, as amended on 9 March 1999, there is a rebuttable presumption in favour of the carrier seeking the renewal. However, under paragraph 8.2 of the Policy Statement, the Commission can reallocate some or all of the capacity if it is satisfied that the carrier has failed to service the route effectively and another carrier has sought the capacity and would better serve the public.

3.4 The circumstances of this case are different from those previously involved in requests for renewal of determinations. Most renewal requests considered by the Commission have involved an established operator which has been and is using the relevant capacity, and there are no other applicants seeking the capacity. On occasions, the Commission has renewed capacity that is not being used, because there is an undertaking by the carrier to resume operations within a reasonable time and the carrier had already obtained Commission approval to suspend use of the capacity. Further, in those circumstances, there has not been another carrier seeking to use the capacity. However, in the current case, the holder of the capacity is not using the capacity because of its commercial failure. In this case there is also another, established, carrier that wishes to use the capacity.

3.5 The Commission's first task is to decide whether the carrier has failed to service the route effectively, in accordance with paragraph 8.2(a) of the Minister's Policy Statement. There is no guidance material in the Policy Statement nor its accompanying explanatory notes to assist the Commission as to the meaning of "serviced the route effectively".

3.6 As a general proposition, the Commission would expect a carrier to have fully exercised its capacity for the full term of the determination, unless the Commission had permitted otherwise. As suggested above, on a number of occasions on a number of routes involving both Qantas and Ansett International the Commission has allowed carriers to retain capacity they have not been using. There are various circumstances where this has been permitted, usually associated with a temporary downturn in traffic.

3.7 In this particular case, Ansett International terminated daily B747 services without notice to its passengers, the Japanese authorities or many other affected parties. At the time, Ansett International was the only airline providing direct services between Australia and Osaka. Many parties would have been affected in an ongoing way by the withdrawal of the Ansett International services. These include Ansett International's code share partner All Nippon Airways (which has withdrawn from the Australian market as a result), the tourism and travel industries (such as travel wholesalers and agents, accommodation providers, bus and rental car companies), and other businesses involved in the Australia - Osaka market through trade in products and services.

3.8 In the circumstances, the Commission does not accept the administrators' contention that Ansett International has serviced the route effectively simply because

services were maintained for four and a half of the five years of the Determination. Further, the intention to resume services on the route is not a factor that the Commission can legitimately take into account in this assessment, as the test is a retrospective one.

3.9 Section 8.2(b) of the Minister's Policy Statement requires the Commission to consider "whether use of the capacity in whole or in part by another Australian carrier which has applied for that capacity would better serve the public", having regard to the criteria in paragraphs 4 and 5 of the Policy Statement.

3.10 In this case, there is an application from Qantas to use the full four weekly units of capacity. As noted above, Qantas' intention is to combine these four units with four units it already holds and an additional 0.4 units sought from the Commission so as to add a daily B767-300 service between Tokyo and Australia. This requires 8.4 units of weekly B767-200 equivalent capacity. The services are proposed to be operated to and from runway B at Narita Airport, commencing during the middle of the Northern Summer timetable period (June or July 2002). These services would be in addition to the daily service to/from Narita B already proposed by Qantas and for which it has capacity from the Commission and slots from the Japanese authorities. Qantas would require an allocation of new slots from the Japanese authorities to enable it to operate the additional services.

3.11 In reaching its Decision [2001] IASC 221, the Commission gave considerable importance to the objective of securing substantial Australian carrier access to Narita runway B, as it understood that slots were likely to be in high demand and were expected to be fully allocated by the time the runway opened in April 2002. The opening of the new runway provides the first opportunity for many years for international airlines to expand frequencies at Tokyo. In allowing Ansett International to retain its Japan capacity in the review, the Commission relied on advice from the Department of Transport and Regional Services that it was likely that runway B slots would be transferable from Ansett International to Qantas, in the event that Ansett International was allocated slots but subsequently was unable to exercise them.

3.12 More recent advice from the Department indicates that unused runway B slots would in fact be returned to a general pool for reallocation, rather than be reallocated on a country-by-country basis as is the case with runway A slots. This advice means that there would be no certainty that any unused Ansett International runway B slots would be transferable to Qantas in the future. The application from Qantas in the review context assumes greater significance against this background. Approving the Qantas application would enhance the opportunity to secure increased Australian carrier access to Tokyo and thus enable a high level of services to be maintained, even if Ansett International was subsequently unable to operate its proposed daily B767-300 service to Narita.

3.13 The Commission understands from the Department of Transport and Regional Services that the Japanese authorities are likely to finalise slot allocations for Narita runway B by mid-February 2002. This suggests that the Commission needs to act quickly in assessing and deciding upon the Qantas proposal, if it wishes to give Qantas the maximum opportunity to secure additional slots at Narita B. The advice provided by

the Department, and from Qantas itself, suggests that there would be a good chance of Qantas obtaining additional slots in the current allocation process, independent of any decisions about Ansett International's existing slots.

3.14 The Commission considers that Qantas meets the paragraph 4 criteria of the Minister's Policy Statement; namely that it is reasonably capable of obtaining the necessary approvals and of implementing its proposals. The only uncertainty relates to the issue of securing slot access, but the prospects for Qantas appear to be good, provided those slots are sought immediately.

3.15 In relation to the paragraph 5 criteria, the Commission considers that the Qantas proposal carries clear benefits against all criteria, with the exception of the competition criteria. The addition of another daily B767-300 service by Qantas would make the competitive position for Ansett International, should it resume services, more difficult. The Commission has outlined in previous decisions its concerns about Qantas' relative capacity share in the Japan market, particularly Tokyo. However, in the present circumstances of continuing uncertainty about the future operations of Ansett International, and the lack of surety about transferability of runway B slots between Australian carriers, the importance of securing additional Australian capacity at Tokyo is heightened. The Commission therefore concludes that allocation of the capacity to Qantas would better serve the public than if the capacity was retained by Ansett International.

3.16 The Commission will therefore not renew Determination IASC/DET/9706. It will allocate the four units of weekly B767-200 capacity to Qantas, on an interim basis pending the carrier obtaining slots from the Japanese authorities. The allocation is the subject of a separate Commission determination.

3.17 In reaching this decision, the Commission notes the concern of the administrators that such a decision may prejudice the likelihood of a sale of Ansett International. The Commission has indicated in reviewing Ansett International's Japan determinations that it would like to see the return of a substantial Australian carrier to international routes. This can only be of benefit to the public.

3.18 Had the Determination not been on the point of expiry, the Commission would have considered the Determination as part of its wider review of Ansett International's other determinations now underway. The Commission notes that the loss of four units of capacity is a relatively small proportion of Ansett International's total capacity allocations and would not greatly affect its future ability to serve Japan. Ansett International still retains rights sufficient to operate daily services to Narita and also to Osaka, albeit in the latter case with a smaller aircraft type than the B747 previously used by Ansett International.

3.19 The Commission also emphasises that no inference should be drawn from this Decision about the outcome of the Commission's review of Ansett International's other determinations currently underway. The Commission will review those determinations on the merits of the evidence before it at that time and on the basis of the criteria applicable in the review process.

4 Decision for the non-renewal of Determination IASC/DET/9706 allocating capacity on the Japan route to Ansett International ([2002] IASC 202)

4.1 The Commission finds a renewal of the Determination, allocating four B767-200 equivalent units of capacity per week on the Australia - Japan route to Ansett International, is not of benefit to the public.

4.2 The Commission finds that allocation of the capacity to Qantas would be of greater benefit to the public and will issue an interim determination in favour of Qantas, allocating four B767-200 equivalent units of capacity per week in each direction between Australia and Japan under the Australia - Japan Air Services Agreement on and from the expiry of the Determination.

Dated: 12 February 2002

Ross Jones
Chairman

Stephen Lonergan
Member

Michael Lawriwsky
Member