



**Australian Competition & Consumer Commission**

Our Ref: C2002/1774  
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11 February 2003

Mr Aldo Nicotra  
Blake Dawson Waldron  
Locked Bag N6  
PO Grosvenor Place  
Sydney NSW 2000

Mr Michael Gray  
Freehills  
GPO Box 4227  
Sydney NSW 2001

Dear Mr Nicotra and Mr Gray

**Trade Practices Act 1974**  
**Applications for authorisation A30220-2 and A90862-3**  
**lodged by Qantas and Air New Zealand**

The Commission is currently giving consideration to the form of its deliberations and the structure of its determinations when responding to the above applications.

It is noted in this context that while Qantas and Air New Zealand have submitted five separate applications for authorisation to the Commission, only one submission (of 9 December 2002) has been provided in support of the applications, and each application refers to that submission when citing grounds for granting of authorisation.

It is also noted that the submission does not distinguish between the conduct covered by the five individual authorisation applications for the purposes of addressing public benefits and anti-competitive detriment. Indeed the submission packages together the Strategic Alliance Proposal and the Equity Proposal so that the proposals aggregated together are referred to by both the terms "Transactions" and "Alliance" for the purposes of public benefit analysis. For example at the top of page 77 of the submission it is stated that:

*"This section describes the public benefits which will result from the Transactions."*

where it is apparent that the public benefits there described are claimed to result from the Strategic Alliance Proposal and the Equity Proposal considered together.

It is further noted that the Transactions as defined at page 1 of the supporting submission appear not to embrace the conduct covered by authorisation applications (A90862-3) associated with the Cooperation Agreement between Qantas, Air New Zealand and Air Pacific. Moreover no specific mention has been made in the supporting submission of the Cooperation Agreement or the associated authorisation applications.



The supporting submission relies heavily on the outcome of quantitative modelling presented in the NECG Report and summarised at paragraph 13.5 of the supporting submission. That summary presents estimates in dollar terms of public benefits, detriments and net benefits arising from the “Transactions”.

There is no indication in the supporting submission that particular parts of the submission are relevant to particular authorisation applications. It seems that the drafter of the submission intended the submission to be read as supporting all authorisation applications.

There is an issue for the Commission whether, in assessing each authorisation application separately, the Commission would need to be able to separately identify the extent of claimed benefits accruing from the NECG Report specifically attributable to the share acquisition on the one hand and to the strategic alliance on the other hand. As you are aware there are subtle differences in the tests for different types of conduct.

In terms of the applications submitted in this matter:

- Applications A30221 and A90863 involve a test which broadly involves determining whether the conduct at question would result or be likely to result in a benefit to the public and whether that benefit would outweigh the detriment to the public from any lessening of competition resulting from the conduct (s.90(6) of the TPA);
- Applications A30220 and A90862 involve a test which broadly involves determining whether the conduct at question would result in such a benefit to the public that the conduct should be allowed to take place (s.90(8) of the TPA); and
- Application A30222 involves a test which broadly involves determining whether the acquisition of shares will in all the circumstances result or be likely to result in such a benefit to the public that the acquisition should be allowed to proceed (s.90(9) of the TPA).

As we read the supporting submission it would be difficult for the Commission to extract particular information from the submission in order to apply that information in the separate assessment for each application.

Under these circumstances the Commission seeks confirmation from Qantas and Air New Zealand that the whole of the supporting submission and, in particular, the figures supplied as estimates of benefits and detriment in paragraph 13.5 of the supporting submission (or as subsequently amended), are intended to be used by the Commission for the purposes of applying the respective tests for authorisation for each of the five applications.

Prima facie the package of benefit and detriment information in the supporting submission would seem usable in this way if the conduct covered by the five applications was also a package and would not be likely to be implemented in part. That is, it would seem relevant, for example, to use benefits flowing from the strategic alliance in assessing the equity

proposal, if the equity proposal would not proceed in the absence of the strategic alliance, and vice versa.

In view of the importance of your response to the Commission's consideration of this matter I would appreciate your urgent response, preferably by no later than 19 February 2003.

If you have any queries in this matter would you please contact Greg Outzen on 02 6243 1227. A copy of this letter will be placed on the Commission's Public Register.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. Palisi', with a horizontal line extending to the right.

Paul Palisi  
A/g General Manager  
Adjudication Branch

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TO: Mr Aldo Nicotra, BDW  
Mr Michael Gray, Freehills  
Mr Brett Johnson, Qantas

ORGANISATION:  
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9322 4000  
9691 3339

FROM: Greg Outzen  
TEL: 02 6243 1227  
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