PUBLIC VERSION

SUBMISSION TO THE PRODUCTIVITY COMMISSION REGARDING THE AUSTRALIAN AND NEW ZEALAND COMPETITION AND CONSUMER PROTECTION REGIMES

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CONTENTS

QANTAS SUBMISSION TO THE PRODUCTIVITY COMMISSION

1 EXECUTIVE SUMMARY

- Qantas believes that the Government's request that the Productivity Commission examine how greater cooperation, coordination and integration of the competition and consumer protection regimes in Australia and New Zealand can occur, provides a unique opportunity to recommend changes which will facilitate the Governments' goal of achieving a "single economic market".

- In making this submission, Qantas is drawing upon its recent experience of seeking approval for its proposed alliance with Air New Zealand in both Australia and New Zealand. The on-going application of two distinct competition regimes, with the attendant duplication of administrative processes and divergence in interpretation, does not meet the goals of CER. Instead, it creates unnecessary costs, complexities and barriers for businesses seeking to operate across Australasia.

- Whilst Qantas acknowledges that a number of steps have been taken towards harmonisation of the legal tests in the *Trade Practices Act 1974* (**TPA**) and the *Commerce Act 1986* (**CA**) there is still a significant need and opportunity to foster closer economic relations by:

  - ***Integrating the competition laws of Australia and New Zealand***, so that identical laws apply in both countries and trans-Tasman. This will enable courts in both Australia and New Zealand to have regard to each others' decisions and reduce the likelihood of divergent interpretations.

  - ***Recognising that "public benefit" means a net benefit to Australasia***, so that in the context of a trans-Tasman authorisation or merger clearance, the concept of "public benefit" in the integrated competition laws of Australia and New Zealand means a net benefit to Australasia.

  - ***Establishing a single trans-Tasman regulator*** which would incorporate both the ACCC and the NZCC, to administer competition law in Australia and New Zealand.

- Qantas submits that such steps towards a true CER can be achieved with minimal cost whilst delivering significant economic benefits to the Australasian region.

2 INTRODUCTION

2.1 THE CASE FOR CHANGE

Australia and New Zealand are vitally important to each other as trading and investment partners. It is essential that Governments and businesses in both countries acknowledge the significance of this relationship and take steps to ensure that any impediments to the growth and development of even closer relations are removed. Qantas sees the Productivity Commission's review of the Australian and New Zealand competition and consumer protection regimes as a significant step in the process. The TPA and the CA have helped, and continue to help, shape economic activity in Australia and New Zealand. As the Dawson review recently noted, "*(c)ompetitive markets make an important contribution to increasing efficiency and productivity in the economy, thereby improving the welfare of Australians*".[1]

However, the application of two similar but distinct competition regimes in Australia and New Zealand creates an environment in which businesses on both sides of the Tasman can be involved in unnecessarily cumbersome, lengthy, uncertain and expensive duplicative regulatory processes. As the Chairman of Qantas noted in a recent address: "*why can't we have common regulatory standards which protect the interests of consumers and investors, particularly in the area of competition policy?*"[2]

[1] "Review of the Competition Provisions of the Trade Practices Act" January 2003 at p.5

[2] Jackson, M. 2004, "It's time for the Tasman Economic Area (TEA)", address by Qantas Chairman to the Trans-Tasman Business Circle, 12 May 2004

Moves have been made recently to achieve harmonisation of the legal tests in the TPA and the CA. However, in relation to proposed transactions which involve both countries, the benefits of harmonising the substantive test are substantially undermined without integration of the competition approval processes, including:

- the laws;
- interpretation and implementation of the tests;
- standardisation of forms;
- elimination of duplication of regulatory investigation procedures;
- consistency of timeframes for dealing with applications;
- conference procedures; and
- appeal processes.

2.2 QANTAS IN CONTEXT

A substantial portion of Qantas' business is conducted in, and between, Australia and New Zealand. As part of its network, Qantas offers trans-Tasman services between Auckland, Wellington and Christchurch and Sydney, Melbourne and Brisbane. Qantas also operates daily flights between Auckland and Los Angeles.

Since April/May 2001, Qantas has conducted operations in domestic New Zealand. At present, Qantas operates on six city pairs in domestic New Zealand: Auckland-Wellington, Auckland-Christchurch, Auckland-Queenstown, Christchurch-Rotorua, Christchurch-Wellington and Christchurch-Queenstown.

2.3 INTERNATIONAL PERSPECTIVE

Qantas believes that international carriers view Australia and New Zealand as part of one Australasian aviation market.

Both Australia and New Zealand are destinations at the end of "long haul" routes, many of which cannot be served non-stop. In addition, neither Australia nor New Zealand have natural geographic "hub" airports, unlike in Asia, North America, Europe and more recently in the Middle East.[3] Instead, the Australasian routes contain many short haul services with a significant proportion of point-to-point traffic.

The Australian and New Zealand Governments have also granted rights for a large number of third country airlines to operate between Australia and New Zealand. As such, it is relatively easy for international airlines to offer trans-Tasman services. The direct consequence of this is the creation of a trans-Tasman aviation environment in which not only Qantas, Virgin/Pacific Blue and Air New Zealand operate, but also a significant number of well-resourced, international airlines, including Emirates, Thai Airways International and Malaysia Airlines. In addition, a number of other airlines, including Singapore Airlines, United Airlines and Cathay Pacific have the right to commence trans-Tasman services at any time. A significant number of these airlines are either government owned, controlled or subsidised.

2.4 DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

The Australasian routes (encompassing the domestic Australian, New Zealand and trans-Tasman routes) are the natural base of operations for Qantas. Indeed, Qantas views the Australasian market as its "home" market. This view is supported by:

1. The Single Aviation Market (and subsequently, the "Open Skies") agreements between Australia and New Zealand in 1996 and 2000 respectively. These developments have removed significant legal and regulatory barriers to Australasian airlines providing services on trans-Tasman, domestic Australian and New Zealand routes.

2. The geographic location of the two countries and their respective population bases means that each offers limited scope for an airline to extract economies of traffic density. This means it is

[3] An Emirates press release dated 3 July 2004 states "…the new service will provide travellers with a convenient one-stop connection between Australia and destinations in Europe, Africa and the US, via the airline's Dubai hub."

not only natural, but also imperative for Qantas to view business in both countries as part of its home base.

Qantas is one of the few Australian companies which has a true trans-Tasman operation (as compared to Australian and/or New Zealand operations) and is well placed to comment on the impact of the differences between Australian and New Zealand competition and consumer protection regimes given its recent experience in seeking approval for its proposed alliance with Air New Zealand.

3 THE PROPOSED QANTAS/AIR NEW ZEALAND ALLIANCE

3.1 BACKGROUND

In December 2002 Qantas and Air NZ applied[4] to the ACCC for authorisation of a strategic alliance to conduct joint operations of flights into, within and out of New Zealand and for Qantas to purchase up to a 22.5% voting equity interest in Air NZ.

At the same time, Qantas and Air New Zealand filed similar applications[5] with the New Zealand Commerce Commission (**NZCC**).

A table setting out key events of both applications is set out in **Annexure A** to this Submission. Whilst it is only possible to focus on "key" events in a table, the format materially dilutes the complexity of the dual regulatory approval process, and may give the false impression that both processes were reasonably harmonised. This was not the real experience. There were significant logistical and co-ordination issues involved in undertaking all required steps, meeting statutory timelines and responding to multiple, complex information requests simultaneously from the ACCC and the NZCC. In most instances the dual process involved significant duplication of resources and effort from both regulators and Qantas, Air NZ and other participants in responding to the dual requests. Qantas believes this unnecessary drain on resources could be significantly eliminated by creating an integrated competition law which is applied by a single Australia-New Zealand competition authority.

3.2 AUTHORISATION PROCESSES

Two Different Regimes

As the Commission will be aware, to seek authorisation for conduct that involves Australia, New Zealand and the trans-Tasman, businesses must utilise two separate processes that are administered by different regulators under different legislation, policy and timelines. Furthermore, applicants who wish to seek a review of the regulators' determinations face two separate and quite different appeal processes.

An application for a "review" of an ACCC final determination can be made to the Australian Competition Tribunal (**Tribunal**) by an applicant or other person with a "sufficient interest" in the matter: s.101 of the TPA. The Tribunal has all the powers of the ACCC in determining such applications and its function is to review, by way of rehearing, the decision of the ACCC. That is, the hearing before the Tribunal is a hearing "de novo". The Tribunal must make its own findings of fact and reach its own conclusions and it is open to the parties to put material before the Tribunal which was not before the ACCC. The ACCC's function in such hearings is to assist the Tribunal.[6] Any further appeals from the Tribunal's decision are on a question of law only.

In contrast, in New Zealand the applicant and any other person that attended any NZCC pre-decision conference is entitled to appeal an NZCC final determination to the New Zealand High Court. While this is an "appeal on the record", the procedure for the appeal, under Part X of the High Court Rules, is very much within the discretion of the presiding judge. Often updating evidence, both factual and expert, is admitted. However, in the recent appeal the Court was required to consider a number of admissibility challenges, which involved complex factual and legal issues. The New Zealand appeal

[4] Pursuant to section ss. 88(1) and 88(9) of the Trade Practices Act

[5] Pursuant to ss.58 and 67 of the Commerce Act

[6] Qantas notes that the *Trade Practices Legislation Amendment Bill* 2004 (Cth), which is currently before the Australian House of Representatives, proposes that merger authorisations (only) be performed by the Tribunal at first instance, without any right of appeal.

is on questions of fact and law, both at the High Court, where the Court is constituted by one High Court judge and at least one lay member[7], and on further appeal to the Court of Appeal.[8]

Time and Cost

Qantas has first hand experience of the unnecessary time and cost incurred by business in obtaining competition approval to conduct business in both Australia and New Zealand. The on-going application of two distinct competition regimes has had the following practical consequences:

1. a duplication of legal advisers (ie Australian and New Zealand advisers for both Qantas and Air NZ);
2. a duplication or in some cases a significant increase in the number of economic, econometric and accounting experts (utilised by Qantas/Air NZ, third parties and the regulators);
3. a duplication of legal applications and economic submissions (prepared for both the ACCC and the NZCC);
4. a duplication, or in many cases a doubling, of the requests for information from and meetings with the regulators;
5. on rejection, the necessity of running two appeals in relation to the same matter – requiring the briefing of separate counsel and expert witnesses and the preparation of two sets of witness statements and reports for the Tribunal and New Zealand High Court respectively (arising from the different procedures in each jurisdiction); and
6. a doubling of the management time and costs involved in progressing the authorisation and appeal processes.

An indication of the scale of only one half of this process can be obtained from the transcript of the Qantas and Air NZ appeal before the New Zealand High Court in July 2004: "*The record now comprises the information before the Commission (NZCC). The first 73 volumes total 16,315 pages, to which are added the electronic data files, the spreadsheets, the econometric models and the unwritten knowledge and expertise of the Commission*".[9]

Set out below is a **confidential** summary of the costs incurred to date by Qantas in seeking approval of the proposed alliance with Air New Zealand:

Australian Solicitors	CONFIDENTIAL
Australian Barristers	CONFIDENTIAL
New Zealand Solicitors (Including corporate work)	CONFIDENTIAL
New Zealand Barrister	CONFIDENTIAL
Experts (combined for both jurisdictions)	CONFIDENTIAL

The above does not include the internal Qantas executive time involved in the management of the applications, In this regard, the Qantas General Counsel spent approximately 50% of his time for almost two years on this project and a Qantas competition lawyer spent approximately six person-months on the project. In addition, considerable operating management time was required in meeting with advisers, responding to data requests from the ACCC and NZCC (while similar requiring different information) and preparing written statements.

The duplication required in running two similar but distinct authorisation and appeal processes not only increases the scale, and attendant costs, of the authorisation process. It also extends the time frame necessary for regulators to make decisions in relation to transactions that are, in general, already complex in relation to often dynamic industries.

The use of two processes also improves the prospect that third parties can successfully escalate the cost and time involved in seeking authorisations. For example, in the course of the pre-determination

[7] CA, s 77.

[8] *Commerce Commission v Southern Cross Medical Society* (2001) 10 TCLR 269. Note the comments of Justice Keith, at p.300 para 102-103, to the effect that it is also possible for the Court of Appeal to appoint and economic adviser to provide specialist assistance.

[9] New Zealand High Court transcript, Day 16 (28/07/04), p1390, lines 30-34.

conference before the NZCC a significant number of third parties appeared, many with their own legal representation and in some cases their own economic experts. This occurred notwithstanding the "public interest" charter of the regulator and the fact the NZCC employed its own legal counsel and panel of expert economists.

Uncertainty

The use of two separate authorisation processes means businesses such as Qantas ultimately face two regulators (and then two appellate authorities) with effective veto rights in relation to proposed trans-Tasman conduct. That is, both regulators (or appellate authorities) must grant an authorisation before the conduct can proceed. Qantas has recently been faced with the situation where it had to determine whether it should apply to the Australian Competition Tribunal for a review of the ACCC's decision before it knew the outcome of the NZCC's determination. These concerns would have been brought into even starker relief if only one of either the ACCC or the NZCC had approved the Alliance. The same issue will arise if only one of either the Tribunal or the New Zealand High Court grants its approval.

Such uncertainty and cost is not conducive to a productive, dynamic single economic market.

The uncertainty associated with the current authorisation regimes is further enhanced by the different interpretation of what is, at least on its face, a similar test for authorisation under the Australian and New Zealand legislation. This problem of divergent approaches is, in turn, exacerbated by the uncertainty that surrounds the degree of any information-sharing between the ACCC and the NZCC. Each of these concerns is addressed in greater detail below.

3.3 APPLYING THE "PUBLIC BENEFIT" TEST – DIVERGENT APPROACHES

The Legal Test

Under the TPA, the ACCC can grant immunities or authorisations in relation to anti-competitive contracts, arrangements or understandings, or exclusive dealing conduct. Similarly, it can authorise corporations to effect a merger that may adversely affect competition in a market in Australia.

The tests to be applied by the ACCC in these situations are set out in ss. 90(6), (8) and (9) of the TPA. Though the wording of the sub-sections is slightly different, current authority suggests that the tests are, in effect, the same.[10] That is, the ACCC should grant an authorisation if it determines there are benefits to the public that outweigh any anti-competitive detriment associated with the conduct. In applying this test the ACCC compares the position that would eventuate if an authorisation were granted (the "future with") against the position if it were not (the "future without") in order to see whether a net public benefit will result.[11]

Under s. 58 of the CA, the NZCC can authorise collaborative arrangements between competitors where the public benefits associated with the conduct outweigh any competitive detriment. Under s. 67(3)(b), the Commission must authorise the transaction if it results in such a benefit to the public that it should be permitted. In practice, the tests are effectively the same as those under the TPA.[12]

Total Welfare: The NZCC Approach

Though the tests in each jurisdiction appear to be similar, Qantas' recent experience is that they are applied quite differently under the two regimes, particularly in relation to the concept of "public benefits". Significantly, s.3A of the CA specifically prescribes that the NZCC **shall** have regard to any efficiencies in an authorisation assessment. In addition, the NZCC defined "public benefits" in its 1997 *Guidelines to the Analysis of Public Benefits and Detriments*, and in so doing noted that "(t)he assessment of benefits will focus particularly on efficiency gains. These include economies of scale

[10] *Re Media Council of Australia (No 2)* (1987) ATPR 40-774 at 48,419. Note, however, the reservations expressed by Hely J in *Re Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 as to the persuasiveness of the *Re Media Council* line of authority that the tests are the same.

[11] See ACCC Merger Guidelines paragraph 6.29

[12] See: Commerce Commission Decision No. 267, *Kiwi Co-operative Dairies Limited and Moa-Nui Co-operative Dairies Limited,* 9 April 1992, para 82; Decision No 511, paras 61 and 62

and scope, better utilisation of capacity and cost savings. Efficiencies can also include social and intangible benefits, if these can be shown to be socially efficient".[13]

Given the context outlined above, the NZCC applied a "total surplus test" to its assessment of the public benefits arising from the Qantas/Air NZ Proposed Arrangements. That is, it considered the impact the Proposed Arrangements were likely to have on total welfare (that is, consumer plus producer welfare) in New Zealand relative to a scenario without the Proposed Arrangements.

Consumer Welfare: The ACCC Approach

In contrast to New Zealand, in Australia the phrase "public benefit" is not defined in the TPA, though s.90(9A) sets out certain factors the ACCC must take into account.

When assessing the "public benefits" associated with the Proposed Arrangements the ACCC adopts a much narrower approach than that applied by the NZCC. Instead of a total welfare test, the ACCC applies a form of the consumer welfare standard. That is, benefits to consumers (in the form of lower prices) are included in an assessment of public benefits, while benefits to the Applicants, such as lower costs or economies of scale, are largely discounted as private benefits.

This consumer welfare standard is reflected in the ACCC draft determination in relation to the Proposed Arrangements, which noted:

> *"While the Commission is of the view that benefits to a particular group or segment of the community may be regarded as benefits to the public, consideration needs to be given as to whether the community has an interest in that group being benefited and whether that benefit is at the expense of others – for example, consumers through higher prices. Where benefits are not passed on to consumers, they are likely to be accorded a lower weight by the Commission".*[14]

This is despite indications from the Tribunal in the past that the test for public benefits should be interpreted very broadly.[15]

"Quantification" of Benefits and Detriment

Qantas' recent experience of seeking authorisation in both Australia and New Zealand has illustrated the additional complexities that can be created when regulators diverge in their application of the law. One example involves the practice within New Zealand to quantify benefits and detriments. This practice arose from the decision of Justice Richardson (later President) of the New Zealand Court of Appeal in the "*AMPS-A*" case[16] where he stated that there is "*a responsibility on a regulatory body to attempt so far as possible to quantify detriments and benefits…*". This has established "quantification", in terms of $NZ value (using methods such as highly technical econometric modelling) as a critical part of the New Zealand authorisation test.[17] This concept does not apply with the same weight in Australia where the ACCC adopts much more of a subjective qualitative approach to its consideration of detriments and benefits in authorisation applications.

As a result, Qantas was faced with a situation where the public benefits and detriments associated with the transaction needed to be quantified in one jurisdiction but not in another. This occurred despite the statutory wording of the relevant tests being similar. This difference in approach resulted in Qantas needing to take a consistent approach in both applications – thus quantifying detriments and benefits – which exacerbated the significant costs already associated with conducting two separate authorisation processes.

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[13] NZCC Determination 511, para 1188, p.278

[14] ACCC draft determination, para.10.42, p.109. These comments were repeated in similar terms in the ACCC Final Determination (Nos A30220, A30221, A30222, A89062 and A89063) (**ACCC Determination**), para 13.65, p.146

[15] *Re Queensland Cooperative Milling Association Ltd: Re Defiance Holdings Ltd* (1976) 8 ALR 481 at 510

[16] *Telecom Corporation of New Zealand Limited v Commerce Commission* [1992] 3 NZLR 429 at 447

[17] Refer *NZCC Guidelines on the Analysis of Public Benefits and Detriments* (withdrawn but still applied by the NZCC), section 9.

3.4 ACCC/NZCC INFORMATION SHARING

Throughout the approval processes Qantas found it difficult to determine the degree to which the NZCC and ACCC shared information. It was also unclear where information *was* shared, what, if any, weight was attached to material originally presented to the other regulator. For example:

- The ACCC sought formal confirmation from Qantas and Air NZ permitting it to pass confidential information on to the NZCC, but no reciprocal approval was sought by the NZCC;

- Qantas and Air NZ copied their substantive responses to questions raised by the ACCC and presentation slides from meetings with the ACCC to the NZCC, and vice versa. Given the high degree of duplication between third party submissions, Qantas and Air NZ also prepared a single joint response to all third party submissions received by both regulators;

- The ACCC nevertheless independently sought and received information concerning Qantas and Air NZ's operations in domestic New Zealand;

- After the ACCC final determination (Nos A30220, A30221, A30222, A89062 and A89063) was issued on 9 September 2003, the NZCC issued a press release in which the NZCC stated: [18]

  "…Ms Rebstock said both agencies have managed their processes independently from each other and each agency makes its own decision.

  'For efficiency, we have shared some relevant information, but only relating to markets where there is a common interest. The processes are independent of each other,' said Ms Rebstock."

- Qantas sought to comment on the ACCC Determination to the NZCC, prior to the NZCC issuing its final determination. The NZCC's response included the following[19]:

  "*The Commission has proceeded independently in respect to the applications to it. Any decision of the ACCC is made by it, on the information before it, under the applicable Australian legislation and in relation to markets in and connected to Australia. In consequence that decision does not inform or influence such decisions as the New Zealand Commerce Commission may make.*

  Both this Commission and the ACCC have received evidence, information, submission, and expert opinions which have much in common with each other. However the opinion of the ACCC as expressed in its final decision is not an opinion which the New Zealand Commerce Commission would take into account in reaching its own decision. Neither is this Commission concerned to reconcile its findings on any issues with those which the ACCC may have made."

These comments were made notwithstanding the fact that the NZCC and the ACCC coordinated the timing of issue of their draft determinations, discussed coordination of timing of their respective conferences and the ACCC sent a staff member to observe the NZCC conference who appeared to have sat in on staff discussions during the conference.

In summary, while Qantas and Air NZ took steps to consolidate their applications as far as possible to allow closer integration between the regulators, the perspectives of each regulator as to its obligations in respect of its independent jurisdiction were ultimately inconsistent with the philosophy behind information sharing and cooperation between regulators.

In the end result, the final Determinations issued by the ACCC and the NZCC contained findings of fact and law that appeared to be factually and/or conceptually inconsistent. For example:

1. in relation to the effect of the transaction on travel distribution services, the ACCC considered that a broad market existed for all "travel distribution services", conversely the NZCC did not find that there were any issues in retail distribution and only considered a narrow market for "wholesale travel distribution services"[20];

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[18] NZCC Media Release, 9 September 2003, "*Air New Zealand and Qantas: Commission confirms end of September for final determinations."*

[19] Email from NZCC to Applicants, 8 October 2003.

[20] Compare ACCC Determination, para 10.74 with NZCC Determination 511, para 313.

2. the ACCC essentially found that the transaction might result in a restriction in the practice of undercutting travel agents through sale of tickets on the internet, conversely, the NZCC considered that the transaction could drive travel wholesalers out of business, in part due to direct selling[21];

3. in relation to the effect of the transaction on freight markets, the ACCC found a broad product market for air freight services existed, including dedicated freighter aircraft, conversely the NZCC found a narrow market existed for "belly-hold freight services"[22];

4. the ACCC did not consider that there were issues in relation to international freight services[23], while conversely the NZCC considered that the transaction would give rise to a substantial lessening of competition in the international belly-hold freight market[24].

These findings affected markets in Australia and New Zealand in which both Air NZ and Qantas operate and/or over which both regulators have jurisdiction (for example, the definition of the trans-Tasman freight markets) and create real commercial uncertainty and regulatory risk when the economic policy approaches of the ACCC and NZCC substantially differ.

3.5 NZCC APPLICATION FORM AND CONFERENCE

The New Zealand authorisation process differs from the Australian process in the form of application and in its conference process.

The application form for clearance or authorisation of a business acquisition and for a restrictive trade practice is set by the NZCC and, in comparison to the TPA form, is prescriptive in the information which is required to be provided.

In addition, the New Zealand regime provides for a public conference to be held with the NZCC and all interested parties, prior to the NZCC issuing its final determination, either at the NZCC's own instigation or on request by the applicants, and in practice conferences tend to be held if the matter is of general public interest. In the case of the Qantas/Air NZ proposed alliance, the NZCC determined to hold such a conference, which took place in Wellington for six days between 18 August 2003 and 25 August 2003. At this conference the NZCC heard testimony from representatives of the Applicants, economic experts and interested third parties.

In contrast, s.90A of the TPA provides that the ACCC can, at the notification of any "interested person", convene a "pre-decision conference". This conference is effectively private and only members of the ACCC and "interested persons" (which includes the applicants) can attend. It is usually scheduled for a maximum of three hours (hardly sufficient to raise substantive issues). Furthermore, the Commission representative can terminate the conference at any time, when he or she is of the opinion that a reasonable opportunity has been given for the expression of views: s.90A(9)(c). Qantas and Air NZ declined to request a "pre-decision conference as it was clear that the ACCC had made its decision and that a 2-3 hour conference would not affect the outcome.

3.6 GOVERNMENT POLICY AND NATIONAL INTEREST

Under s.26 of the CA, the NZCC must have regard to the economic policies of government as expressed to it in writing, and any such statement must be published by the NZCC.

In contrast, in Australia there is no formal, transparent means for the Federal Government to express its views regarding conduct or mergers that may be of national significance, either from a policy perspective or as a matter of national interest. For example, at various times throughout the regulatory process, John Anderson, Deputy Prime Minister and Minister for Transport and Regional Services, expressed support for the national interest benefits associated with Qantas/Air NZ proposed alliance, such as in the Australian Financial Review on 27 November 2002[25]:

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[21] Compare ACCC Determination, para 12.253 (and ACCC draft determination) with NZCC Determination 511, para 879; compare to para 313.

[22] Compare ACCC Determination, para 12.190 and table at 12.4 ("Others" includes freighter capacity) with NZCC Determination 511, para 293-294.

[23] "International" services are freight services other than Tasman services, as the term is used in the NZCC Determination.

[24] Compare ACCC Determination, para 12.190 with NZCC Determination 511, paras 865, 868.

[25] Jason Koutsoukis & Jane Boyle "Anderson pushes Qantas deal" *Australian Financial Review*, 27.11.02

"I believe that Australia needs to think carefully about how we make certain that, as many international airlines … disappear over the new few years, Australia still has a flag carrier and a strong flag carrier at the end of it. …. We have to look at the reality of the international aviation market and the enormous pressures that are emerging as rationalisation proceeds.

Frankly, when it comes to [Qantas'] place as an international carrier, an economy the size of Australia can only afford one international carrier of stature and we want to ensure that we still have one in a decade's time, when I predict there will be fewer international carriers.

Important as the consumer interest is, what I'm worried about is that we don't only look at the consumers' interests."

However, short of lodging a submission and thereby risk becoming a "party", there were no explicit means by which the Australian Government could formally express such a view in the context of the ACCC authorisation process. The consequence was that the ACCC was able to state it "*(did) not find a significant national interest benefit arising from the Proposed Arrangements*".[26]

4 QANTAS PROPOSALS FOR CHANGE

4.1 A SINGLE COMPETITION REGIME

In announcing the implementation of this Productivity Commission study, the Australian Treasurer referred to it as "*another step towards achieving the long term goal of a single economic market in the two countries (Australia and New Zealand)*".[27] In keeping with this ultimate goal, Qantas submits that:

1. The competition laws of Australia and New Zealand should be integrated, so that identical laws apply in both countries. In addition, it is critical that these laws are interpreted and applied consistently. Judicial recognition must be given to decisions made in either country to address the problem of divergent interpretations. Otherwise, even if the substantive law is harmonised, case law and judicial interpretation means that differences could arise.

   This suggestion complies with one of the guiding principles listed in the Australia/New Zealand Memorandum of Understanding on Coordination of Business Law (**MOU**), namely, "*the desirability of ensuring for each particular situation, that a business should only have to comply with one set of rules, and have certainty as to the application of those rules in the other jurisdiction*".[28]

2. The competition laws in both Australia and New Zealand should be amended so that, in the context of a trans-Tasman authorisation or merger clearance, the term "public benefit" is defined as a net benefit to Australasia in aggregate. This will allow the public benefits associated with any proposed trans-Tasman conduct to be assessed more accurately and completely. After all, if the ultimate goal is to have a "single economic market", if the region is better off, as represented by the combination of both countries, then why shouldn't such transactions be authorised?

   Currently, if a regulator examines a proposed transaction and finds a substantial benefit accruing to Australians, which materially exceeds any net detriment accruing to New Zealand (or vice versa), the transaction will not be authorised. By way of illustration, under the Qantas/Air NZ proposed alliance an enhanced tourism benefit was claimed to arise from greater coordination between Qantas Holidays and its counterpart at Air NZ. However, each regulator was concerned only with whether there was a net increase in tourist benefits in each country and not with whether the proposed alliance could deliver a net increase in tourists to the region.

3. A single trans-Tasman regulator (for example, the New Zealand and Australia Competition Commission (**NZACC**)) should be established, incorporating both the ACCC and the NZCC, to

[26] ACCC Determination, para 13.275, p.185

[27] Costello, P. 2004 *Another Step Towards a Single Economic Market*, Media Release No. 057, 29 June 2004

[28] Productivity Commission 2004, *Australian and New Zealand competition and consumer protection regimes: Issues Paper*, July 2004 (**PC Issues Paper**) p.21

administer competition law in Australia and New Zealand.[29] The regulator would be accountable to both Governments.

In Qantas' view, this proposal would not result in any loss of sovereignty for either country, with trans-Tasman regulatory or enforcement issues being addressed by the NZACC head office and country-specific issues being addressed by the relevant country offices. Furthermore, it has a number of clear benefits, which include:

(a) A single regulator overseeing Australasian competition will remove the current, duplicative administrative burdens faced by the ACCC and NZCC and produce a more efficient utilisation of scarce government resources.
(b) A single regulator will help reduce problems associated with differences in interpretation of the law, such as in relation to the notion of "public benefits". A single regulator will also mean consistent regulatory guidelines and publications will be issued across Australia and New Zealand, increasing certainty and facilitating trans-Tasman business.[30]
(c) A single regulator will mean one authorisation process in relation to trans-Tasman conduct or mergers. As a result, parties will be able to significantly reduce duplication in compliance and legal costs, which are often attributable to issues of form rather than substance. It may also lead to the facilitation of trans-Tasman business between companies that would otherwise decide against such investment given the current regulatory inefficiencies.
(d) A single regulator will be able to ensure undertakings given by businesses are equally recognised in both jurisdictions (see **section 5.1** below for further analysis).

4. A single process for appeals from decisions of the regulator should be introduced, preferably to a trans-Tasman competition tribunal comprising expert and judicial members from both Australia and New Zealand.

4.2 ESTABLISHING A TRANS-TASMAN WORKING GROUP

Qantas acknowledges that creating a single competition regime, as proposed above, is a project that will require considerable consultation and input from business, the legal community and the Government in both Australia and New Zealand.

With this in mind, Qantas sees benefit in the creation of a trans-Tasman working group consisting of in-house counsel, expert competition lawyers, economists and business representatives involved in industries with a trans-Tasman presence. The function of the working group would be to identify, and make recommendations for, practical options for change, with a view to the ultimate goal of a single competition regime. The establishment of such a working group has the potential to facilitate enhanced cooperation between the business community and the regulators to achieve outcomes in line with the respective goals of enhancing economic efficiencies while preventing anti-competitive conduct.

4.3 UNIFORM APPROACH TO "PUBLIC BENEFITS"

At a minimum, Qantas submits that a single approach needs to be adopted as between the ACCC and NZCC when these regulators consider "public benefits" in the authorisation process. Qantas suggests that the most appropriate standard to adopt is the NZCC "total surplus" or total welfare test, which covers all aspects of national welfare without engaging in an arbitrary weighting process as between consumer and producer benefits.

When efficiencies arise in mergers it is often difficult to calculate precisely the timeframe and the manner in which these efficiencies will be passed through to consumers. In addition, efficiencies may be passed through to consumers via competitive processes in the form of improved products or services as well as lower prices[31]. As Qantas' CEO observed to the NZCC at the conference: "*It is impossible, in my mind, to conceive of a situation in practice where the combined pricing decisions of*

[29] The existence of "Food Standards Australia New Zealand" (and the implementation of one joint food standard setting system) and the development of the "Joint Therapeutic Good Agency" illustrates that integrated trans-Tasman entities are a viable proposition: PC Issues Paper at p.26.

[30] In commenting on the creation of the Australian Energy Regulator (**AER**), ACCC Commissioner Ed Willett recently noted that consistency in regulation can lead to reductions in regulatory costs and barriers to entry for businesses: see Willett, E. "The benefits of a single Australian Energy Regulator", 16.08.04.

[31] *Re Queensland Cooperative Milling Association Ltd: Re Defiance Holdings Ltd* (1976) 8 ALR 481 at 510

Virgin Blue and Fifth Freedom carriers, Emirates being one, will fail to act as a material constraint on the pricing of the alliance."[32] In Qantas' view, placing too much emphasis on the timing and manner of the "pass through" of efficiency gains to customers in the form of "lower prices" skews assessment of authorisations against conduct that may ultimately be efficiency-enhancing from an overall perspective.

In making this suggestion, Qantas directs the Productivity Commission to an information paper produced by the Industry Commission in 1996 entitled *Merger Regulation: A Review of the Draft Merger Guidelines administered by the Australian Competition and Consumer Commission*. In particular, Qantas notes the following (pp68-69):

> *"Under the current interpretation, the efficiency gains from anti-competitive mergers appears to be taken into account only when the ACCC can be assured by the applicant that these benefits are to be passed on to consumers through lower prices. In other words, benefits to consumers are included in the authorisation assessment as public benefits, while benefits to the producers themselves through lower costs are largely discounted as private, and hence non-public benefits. This approach appears to provide greater weight to consumers than to producers in the assessment of public benefits under the authorisation process. Such an outcome also runs counter to the basic objective of Part IV of the Act of promoting efficient or optimal resource allocation."*

Qantas submits that the concerns expressed above in 1996 still remain valid.

Qantas also suggests the appropriate, uniform standard for public benefit/detriment analysis should involve less emphasis on the issue of "quantification" than has been the practice to date in New Zealand. In Qantas' experience, a focus on quantification means that significant benefits that cannot readily be quantified, such as national interest considerations or improved global competitiveness, inevitably receive little or no weight in the regulator's assessment, despite being important benefits in their own right. The quantification requirement also compels applicants to engage in costly economic modelling, at times using economic models of limited utility, which can have a tendency to distort (and possibly replace) important empirical and intuitive analysis.

4.4 ON-GOING MONITORING OF COMPETITION REGIMES

Regardless of whether any (or all) of the proposals for change outlined above are implemented, Qantas strongly suggests the Productivity Commission consider the possible introduction of systems which will monitor the practical operation of competition law and policy in both jurisdictions. Even in the event the substantive law and institutional structures are harmonised, Qantas notes that case law and judicial interpretation means that change can occur.

On-going monitoring of the Australasian competition regimes, be it by the ACCC, the NZCC or some other body, would help ensure such differences are identified and addressed at an early stage.

5 COMPETITION AND CONSUMER PROTECTION LEGISLATION – OTHER MATTERS

5.1 UNDERTAKINGS

Section 69A of the CA provides that only structural, as opposed to behavioural, undertakings may be accepted by the NZCC in relation to applications for authorisation of business acquisitions under s. 67. Conversely, in an application for authorisation of a restrictive trade practice under s. 58 the NZCC may accept "such conditions not inconsistent with the Act and for such a period as the Commission sees fit" (s. 61(2)).

The TPA contains a more general provision at s.87B, namely that the ACCC may accept a written undertaking in connection with a matter in relation to which the ACCC has power under the TPA. The ACCC has indicated that it is "*likely to look most favourably on proposed undertakings which address structural issues in the relevant market(s)*". Furthermore, the ACCC "*is not likely to favour behavioural*

[32] Conference Transcript, Day 1, page 86.

undertakings, such as price, output, quality and/or service guarantees and obligations".[33] However, despite such indications, the ACCC has previously accepted undertakings of a behavioural nature.[34]

The existence of two separate regimes for undertakings in Australasia raises serious concerns for trans-Tasman businesses, namely that undertakings given to the ACCC in relation to alleged potential breaches of the TPA in Australia are not automatically applicable under the CA in New Zealand (and vice versa).

For example, in 2002 following an industry review by the ACCC, Qantas offered s.87B undertakings to the ACCC in relation to the introduction of "all inclusive" pricing for airfares (that is, pricing that included all taxes, fees and charges). However, these undertakings were of no effect in regulating the same pricing conduct in New Zealand. The NZCC subsequently informed Qantas that it was investigating advertising in the airline industry. Qantas and Air New Zealand requested meetings with the NZCC to understand its concern and consider whether an undertaking could be provided in New Zealand to address the NZCC's concerns. The NZCC declined the offer and now both Qantas and Air New Zealand are facing substantial costs in defending separate prosecutions brought by the NZCC in New Zealand.

Qantas submits that, at the very least:

1. a consistent approach to the form and content of acceptable undertakings be agreed as between the trans-Tasman regulators and applied in both jurisdictions; and

2. where undertakings are offered and accepted by either one of those regulators, these should be equally recognised and enforced in both jurisdictions.

5.2 "CEASE AND DESIST" ORDERS

Under section 74A of the CA, if the NZCC assesses that it is necessary to act urgently to prevent a particular person or consumers from suffering further serious loss or damage, or in the general interests of the public, it may seek a "Cease and Desist Order", or apply to the High Court for an injunction. A person or business that breaches a Cease and Desist Order is liable to a penalty of up to $500,000.

While the ACCC can apply to the Federal Court of Australia for an injunction preventing a corporation or individual from engaging in anti-competitive conduct, it has no similar power to that conferred on the NZCC by s74A of the CA.

It is Qantas' submission that the Australian approach, which places the burden of proof on the ACCC, is the preferable option as it ensures transparency in a process that may ultimately lead to significant commercial loss.

24 August 2004
Qantas Airway Limited

[33] ACCC, *Section 87B of the Trade Practices Act*, (1999) at p.9

[34] The ACCC accepted an undertaking in relation to price in respect of the proposed Qantas/Impulse Airlines merger in May 2001. See http://www.accc.gov.au/content/index.phtml/itemId/331571/fromItemId/6029 for a copy of the undertaking.

ANNEXURE A:
CHRONOLOGY OF KEY EVENTS

Australian process		New Zealand process	
		19 Nov 2002	First briefing of the NZCC
22 Nov 2002	First briefing of ACCC		
25 Nov 2002	Transaction documents executed	25 Nov 2002	Transaction documents executed
9 Dec 2002	Applications for authorisation filed with ACCC (including associated economic modelling)	9 Dec 2002	Applications for authorisation filed with NZCC (including associated economic modelling)
Jan 2003		21 Jan 2003	Meeting between NZCC and representatives of the Applicants and economic experts to discuss economic modelling
		23 Jan 2003	NZCC request for additional information
3 Feb 2003	Meeting between ACCC and representatives of the Applicants and NECG to discuss economic modelling	4 Feb 2003	NZCC request for information concerning the economic modelling
		14 Feb 2003	Third party submissions filed
19 Feb 2003	Third party submissions due	28 Feb 2003	Applicants received further substantive list of questions from NZCC
3 Mar 2003	Applicants provide a response to ACCC's requests for information issued on 6 Jan, 22 Jan, 29 Jan and 10 Feb 2003	Mar 2003	
5 Mar 2003	Revised economic models and summary of net benefits supplied to the ACCC by the Applicants	6 Mar 2003	Revised economic models and summary of net benefits supplied to the NZCC by the Applicants
		6, 10 and 12 Mar 2003	Additional questions received from NZCC
		12 Mar 2003	Applicants file response to third party submissions, response to NZCC questions of 28 February, and proposed undertakings
14 Mar 2003	Response to third party submissions lodged with the ACCC by the Applicants	13-14 Mar 2003	Meetings between the NZCC and the Applicants, jointly and individually
17 Mar 2003	Updated "Executive Summary" lodged with the ACCC by the	17 Mar 2003	Updated "Executive Summary" lodged with the NZCC by the

Australian process		New Zealand process	
	Applicants		Applicants
		17 Mar 2003	Qantas meeting with NZCC to discuss tourism benefits
		26 March 2003	Further questions from NZCC
Apr 2003		1 Apr 2003	Statutory 60 working day period for consideration of business acquisition expired – extended by agreement with Applicants.
		4 Apr 2003	Further request for information from NZCC
10 Apr 2003	ACCC issued draft determination proposing to deny authorisation	10 Apr 2003	NZCC issued draft determination proposing to deny authorisation
9 May 2003	Applicants' submission regarding the draft determination filed with the ACCC	16 May 2003	Applicants' economists' meeting with NZCC economists on modelling issues
Jun 2003		20 Jun 2003	Applicants and third parties file responses to NZCC draft determination
Jul 2003		8 Jul 2003	Meeting between Air NZ and NZCC
17 Jul 2003	Meeting between the ACCC and the Applicants	18 Jul 2003	Applicants and third parties file cross-submissions
		28-30 Jul 2003	Applicants file further expert support for their submissions in response to draft determination
Aug 2003		6-7 Aug 2003	Applicants file responses to further questions from NZCC
		18-25 Aug 2003	6 day NZCC pre-determination conference is held in Wellington NZCC confirms final determination will be issued in late September
1 Sept 2003	Further submissions lodged with the ACCC by the Applicants	26-27 Aug, 1-3, 15-16, 24, 29 Sept 2003	Further information requests received from NZCC
9 Sept 2003	ACCC issues final determination in which authorisation is denied		

Australian process		New Zealand process	
		22 Sept 2003	NZCC announces extension of time for final decision to 24 October 2003
29 Sept 2003	Applicants apply to Australian Competition Tribunal for a review of the ACCC's determination and file a statement of facts, contentions and issues		
Oct 2003		23 Oct 2003	NZCC issued its final determination in which authorisation was denied
Nov 2003		20 Nov 2003	The Applicants applied to the New Zealand High Court for a review of that determination
Dec 2003		12 Dec 2003	First hearing in the New Zealand High Court. Gullivers Pacific, Infratil and Virgin Blue represented in addition to NZCC
22 Dec 2003	ACCC files index of documents relied upon in the ACCC final determination		
23 Dec 2003	Applicants file first amended statement of facts, contentions and issues with the Tribunal		
Feb 2004		Feb 2004	Applicants received the NZCC's Record
8 – 15 Mar 2004	Applicants file lay witness statements	Mar 2004	
26 Mar 2004	Applicants file further and better particulars to the first amended statement of facts, contentions and issues		
26-29 Mar 2004	Summons to produce documents issued to Applicants by the ACCC		
5 –6 Apr 2004	ACCC and Gullivers (an intervener) file lay witness statements	Apr 2004	
8 – 16 Apr 2004	Applicants file supplementary lay witness statements and statements in reply		
16 Apr 2004	Applicants file expert witness statements Further summonses to produce documents issued to Applicants by the ACCC and Gullivers	16 Apr 2004	Applicants file expert evidence on economic modelling issues

Australian process		New Zealand process	
20 Apr 2004	Applicants file supplementary expert statements	30 Apr 2004	Applicants file lay and expert witness affidavits relating to updating evidence
3 – 4 May 2004	ACCC and Gullivers file expert witness statements	3 May 2004	Hearing on further particulars requested and discovery issues
3 – 28 May 2004	Tribunal hearing [4 weeks]		
		6 - 7 May 2004	Economic experts meet to attempt to isolate points of agreement and disagreement
		14 May 2004	Hearing on issues of non-party discovery
		14, 17 May 2004	Hearing on admissibility of expert economic modelling evidence
		31 May 2004	Applicants provide discovery of updating documents
Jun 2004		4 Jun 2004	Hearing on admissibility of updating expert evidence
		4 Jun 2004	Affidavits in reply to updating evidence filed
		11 Jun 2004	Applicants file substantive submissions in advance
		29 Jun 2004	Reply submissions filed
Jul 2004		5 Jul – 2 Aug 2004	New Zealand High Court hearing