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APPLICATIONS FOR AUTHORISATION

Comment on Conditions

Grant David

COMMENT ON PROPOSED CONDITIONS

Background

1 The Applicants indicated in the Alliance Proposal that they would be prepared to enter into a number of conditions. The Commission in the draft determination sought comment on the likely effectiveness of the conditions suggested by the Applicants and "on any other conditions that might be appropriate".

2 The Applicants, in their submission of 20 June, have offered more detailed conditions, which, they claim, would facilitate new entry for the Tasman and domestic routes and establish a capacity floor and price cap on some services.

Conditions are problematic generally

3 The statute seems relatively straight-forward. Very briefly, the Commerce Act provides:

3.1 authorisation for a restrictive trade practice (such as the Alliance Proposal) may be granted subject to such conditions not inconsistent with the Act … as the Commission thinks fit: section 61(2);

3.2 in granting authorisation for a business acquisition (such as the Equity Proposal) the Commission may accept a written undertaking given by the applicant to dispose of the assets or shares specified in the undertaking: section 69A(1); and

3.3 no other type of undertaking – in particular, a behavioural undertaking – shall be acceptable in the case of a business acquisition: section 69A(2).

4 In practice, however, conditions are problematic in a number of respects. Not only must the Commission consider the substance of the particular condition and its effect (both pro and anti-competitive) in relevant markets, but it must also address a number of legal and other considerations, namely:

4.1 whether the subject matter of the particular condition is appropriately dealt with under Part V of the Commerce Act, or is more properly a matter for Part IV, or industry-specific legislation;

4.2 whether the condition will be cumbersome or costly for the Commission to administer;

4.3 whether the condition may prove ineffectual or unenforceable in practice;

4.4 whether the condition itself may give rise to competition concerns.

5 It is for these reasons that conditions, as opposed to undertakings to divest assets or shares, have seldom been resorted to by the Commission.

Conditions are not undertakings

6 As we have already indicated, legally, the Applicants' approach of "pooling" the Alliance Proposal and the Equity Proposal raises further difficulties in this case.

7 The Commission at paragraph 84.4 of the draft determination notes correctly that:

> *None of the suggested conditions amount to structural undertakings.*

8 But, importantly, process (as well as subject matter) distinguishes a condition from an undertaking.

9 An undertaking is a promise proffered by the applicant as part of the application (or application as amended). The Commission has consistently taken the view that, as such, it is the responsibility of the applicant to define the parameters of the undertaking. In particular, the Commission itself will not engage in a dialogue with the applicant as to how much divestiture may be enough to tip the balance for it to grant authorisation for the proposed acquisition.

10 Enforcing an undertaking is a straight forward matter for the Commission – either the applicant will have divested the relevant assets or shares within the prescribed time, or it will not have. Failure to divest in accordance with an undertaking can result in the Court making a divestiture order pursuant to section 85(1)(d). More seriously, it will have the automatic effect of removing the protection of the authorisation as the relevant acquisition will have not been implemented "in accordance with" the authorisation. Such removal of course leaves the acquisition exposed to action not just by the Commission but also by third parties.

11 In contrast, conditions are imposed by the Commission itself, not the applicant. Further, if conditions are offered by the applicant for contemplation by the Commission, or proposed by the Commission without being offered by the applicant, the Commission should provide sufficient time to the applicant and interested parties to make submissions at the Conference which the Commission must hold as to the likely efficacy of the conditions.

12 As was observed in the draft determination, the Commission in *NZ Kiwifruit Exporters Association*, Decision 221 had opined on when it could impose

conditions, acknowledging that its discretion seemed to be wide. The Commission said:

> *Their enforceability is also important particularly if used to 'tip the balance' in favour of authorisation.*

13 Enforceability is important because the consequences of failure to comply with a condition are not so immediate or severe as failure to comply with an undertaking. Section 65(1)(c) provides that the Commission may at any time revoke or amend an authorisation of a restrictive trade practice if satisfied that a condition upon which the authorisation has been granted has not been complied with. Before it does so, however, the Commission must comply with the procedural requirements of section 65(2). The Commission must give notice; and the parties be given a reasonable opportunity to make submissions, or, presumably to remedy the non-compliance.

14 The contrast with an undertaking is stark. Put simply, breach of an undertaking of itself vitiates the authorisation of an acquisition and exposes the parties, inter alia, to divestiture.

15 All this suggests that the Commission must attach considerably less weight to a condition than it would to an undertaking.

The Australian practice is very different

16 Crucially, the law and practice in relation to undertakings and conditions under the Australian Trade Practices Act 1974, and their enforceability, is very different than under the Commerce Act.

17 First, and very obviously, there is no statutory prohibition on the ACCC accepting behavioural undertakings in relation to acquisitions and there have been a number of instances where the ACCC has accepted behavioural undertakings in relation to an acquisition (see, for example, the section 87B undertakings accepted by the ACCC from Pioneer Gunns Limited when it acquired North Forestry Products Limited, Westpac Banking Corporation when it acquired Bank of Melbourne Limited, British American Tobacco PLC, B.A.T. Australia Pty Limited and Rothmans Holdings Limited when they merged and Pioneer International Limited, Caltex Australia Limited and Ampol Limited when they merged).

18 Indeed, a number of the "conditions" being proposed by the Applicants seem to follow the form of undertakings accepted and published by the ACCC in relation to Australian domestic airline mergers (see, Ansett Holding Limited when it acquired Hazelton Airlines, and Qantas when it entered into an arrangement with Impulse Airlines).

19 Second, the ACCC commonly accepts detailed section 87B undertakings before it grants informal clearance to acquisitions, or before it authorises other restrictive trade practices. The ACCC has a well-established process in this regard; since 1995 it has published a detailed guide to its practice and policy as to the use of enforceable undertakings; and maintains a transparent register of all extant undertakings on its website.

20 The Commission has none of this. Thus, the fact that the ACCC may accept a form of undertaking, and attach weight to it, should not be relevant to the Commission's consideration of the same form of wording being proposed as a condition.

Summary of legal limitations

21 To summarise the legal limitations on when the Commission **may** impose conditions (and accept undertakings):

21.1 any undertaking can relate only to the Equity Proposal;

21.2 any undertaking can only be to divest specified assets or shares within a specified time;

21.3 any undertaking must be defined by the Applicants themselves in respect of the Equity Proposal and cannot be "negotiated" with the Commission;

21.4 any condition can relate only to the Alliance Proposal;

21.5 the Commission seemingly has a wide discretion to impose conditions, but their enforceability is an important consideration;

21.6 any condition must be imposed by the Commission itself – having proper regard to procedural fairness to other interested parties – not simply offered by the Applicants;

21.7 conditions are less readily enforceable than undertakings and therefore less effective in mitigating competition effects;

21.8 the fact that the ACCC may accept a particular form of undertaking, and attach weight to it, is irrelevant in the New Zealand context.

Enforceability is not the only criterion

22 Turning now to when the Commission **should** impose conditions, paragraph 893 of the draft determination observes that:

- *enforcement of conditions can be difficult and of necessity will only occur after a breach;*

- *they require frequent monitoring; and*

- *by their nature, they are inflexible and unresponsive to market changes.*

23 Those factors go mostly to enforceability, which must be a primary criterion.

24 But, a more important criterion is whether the subject matter of the particular condition is properly a matter to be dealt within terms of the Commerce Act. If detailed behavioural constraints are required to mitigate the effects of the Alliance Proposal – or any restrictive trade practice - on an on-going basis, this should only be done by way of a regime that ensures adequate participation by all interested parties and is properly resourced. That requires specific legislation – such as the Dairy Industry Restructuring Act.

25 It is not the function – or within the powers – of the Commission to de facto legislate by imposing extensive conditions that it cannot be sure of enforcing. The Australian law and established practice may be very different in this regard.

26 Further, the Commission must have regard to whether the proposed condition would, or could in practice, create new competition concerns in the same or other markets. For example, the Commission should be reluctant to impose any condition which itself gives rise to a cross-subsidy or creates a barrier to entry.

The proposed conditions should be rejected

27 In Schedule A we have analysed each of the conditions offered by the Applicants in terms of the following criteria:

27.1 Whether the matter addressed by the condition would be more appropriately regulated by way of specific legislation;

27.2 Whether ongoing resource commitment from the Commission would be required;

27.3 Whether the condition would be enforceable in practice;

27.4 The extent to which the condition actually ameliorates the concerns identified by the Commission; and

27.5 Whether the condition itself creates new competition concerns.

28 As will be apparent from our analysis, few, if any of the proposed conditions are satisfactory when measured against those criteria. Thus, they should not be accepted by the Commission. If they are, no weight should be attached to them.

What conditions have the Commission imposed previously?

29 Finally, the precedent potential of this decision cannot be ignored. The Applicants have proposed a total of 40 conditions that would be intrusive, expensive, difficult to enforce and, in some cases, anti-competitive in their own right.

30 To accept such conditions would be a radical departure from the Commission's own previous practice. Put bluntly, it has not been the New Zealand way.

31 If it were to become the New Zealand way, the Commission must: first make that general policy decision; promulgate that decision; determine its procedures (after appropriate consultation as it has recently done with its new Merger Guidelines); and provide for a transparent and readily accessible register that shows what conditions have been imposed in which circumstances on whom.

32 Section 25 imposes an express clear statutory obligation on the Commission to disseminate information with respect to the carrying out of its functions and exercise of its powers under the Act. The Commission should not depart radically from its previous practice without first explaining why and how, and what now may be expected.

33 Indeed, even the Commission's previous practice has not been readily discernible. There is no "register of conditions". It took us considerable effort, and close familiarity – much of it as counsel in the relevant matters – to compile one.

34 We set out in Schedule B a summary of the conditions imposed in *all* the Commission's previous authorisations of restrictive trade practices.

35 In the great majority of those cases, authorisation was granted without conditions. In those few cases where conditions have been imposed, the condition involves a simple, immediate act by the parties - in most cases, to have been carried out before the authorisation itself became effective.

36 No such act, to date, has involved on-going resource commitment by the Commission, or has had the potential to create new competition concerns in other markets.

37 The only case where extensive conditions, requiring ongoing involvement by the Commission have been contemplated, has not yet been finally determined. In that case, involving the Pohokura joint venture, the imposition of the conditions proposed by the Commission has been strongly resisted by the applicants.

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21 August 2003

SCHEDULE A
ANALYSIS OF CONDITIONS OFFERED BY THE APPLICANTS

Clause Number	Text of the Condition	Would the condition be better suited to legislation?	Does the condition require ongoing resource commitment from the Commerce Commission?	Is the condition enforceable?	To what extent does the condition ameliorate competition concerns?	To what extent does the condition create new competition concerns?
1, 3 and 4	The Operating Carriers offer a condition to alter Alliance schedules on Tasman Routes to provide New Entrants to Tasman Routes access to such Facilities & Services at Auckland, Sydney and Christchurch airports (and such other airports as the Commission may identify) as may be reasonably required for the New Entrants (in aggregate) to establish and operate a reasonable level of services on the Tasman Routes. For the purposes of this condition, a reasonable level of service will be a five aircraft schedule on Tasman Routes. The Facilities & Services will be provided on the following terms: (a) at an equivalent rate and on similar conditions to those offered by the Operating Carrier at the relevant airport to other airlines with similar requirements (but disregarding terms attributable to global alliance membership and reciprocity); or (b) where the facility or service is not provided by an Operating Carrier to another airline at the relevant airport, on reasonable commercial terms. The Facilities & Services in this condition do not include Facilities & Services that: (a) are not controlled by an Operating Carrier; or (b) are not used by the Operating Carriers to provide services on Tasman Routes Domestic New Zealand Routes; (c) are required by the New Entrants to operate schedules which do not distribute flights through the day and to airports on a similar basis to those provided by the Operating Carriers; (d) would require the Operating Carriers to alter more than 25% of the Alliance's schedules on the Tasman Routes; or (e) are available to the New Entrants on similar commercial terms from the airport or other third parties.	Yes – would involve significant prescription by Commission. Should be consultation process to identify "reasonable requirements".	Ongoing scrutiny of rates and conditions required. Presumably involves Commission in ongoing adjudication between competing New Entrants.	Would be easy to discriminate qualitatively against New Entrants in practice.	Only provides for "controlled" entry.	Controlled entry may deter entry by other would-be entrants. Gives New Entrants a "borrow/build" option at Auckland, Sydney and Christchurch, discouraging entry through other airports (e.g. Whenuapai).

Clause Number	Text of the Condition	Would the condition be better suited to legislation?	Does the condition require ongoing resource commitment from the Commerce Commission?	Is the condition enforceable?	To what extent does the condition ameliorate competition concerns?	To what extent does the condition create new competition concerns?
2,3 and 4	The Operating Carriers offer a condition to alter Alliance schedules on Domestic New Zealand Routes to provide New Entrants to Domestic New Zealand Routes access to such Facilities & Services as may be reasonably required for the New Entrants (in aggregate) to establish and operate a reasonable level of services on Domestic New Zealand Routes. For the purpose of this condition, a reasonable level of services will be a level up to or equivalent to the five B737 aircraft schedule operated by Qantas in Domestic New Zealand during April 2003. The Facilities & Services will be provided on the following terms: (a) at an equivalent rate and on similar conditions to those offered by the Operating Carrier at the relevant airport to other airlines with similar requirements (but disregarding terms attributable to global alliance membership and reciprocity); or (b) where the facility or service is not provided by an Operating Carrier to another airline at the relevant airport, on reasonable commercial terms. The Facilities & Services in this condition do not include Facilities & Services that: (a) are not controlled by an Operating Carrier; or (b) are not used by the Operating Carriers to provide services on Tasman Routes Domestic New Zealand Routes; (c) are required by the New Entrants to operate schedules which do not distribute flights through the day and to airports on a similar basis to those provided by the Operating Carriers; (d) would require the Operating Carriers to alter more than 25% of the Alliance's schedules on the Tasman Routes; or (e) are available to the New Entrants on similar commercial terms from the airport or other third parties.	As above.	As above. Also, need to consider comparability of service provided by the 5 B737s	As above.	As above.	Controlled entry may deter entry by later would-be entrants.

Clause Number	Text of the Condition	Would the condition be better suited to legislation?	Does the condition require ongoing resource commitment from the Commerce Commission?	Is the condition enforceable?	To what extent does the condition ameliorate competition concerns?	To what extent does the condition create new competition concerns?
5, 6 and 7	Where Facilities & Services were utilised by Operating Carriers but must be made available to a New Entrant by an airport or other third party, the Operating Carriers will use all reasonable endeavours to assist a New Entrant to obtain those Facilities & Services on terms similar to those previously obtained by the Operating Carriers. Where the Operating Carriers and a New Entrant disagree about the application of this condition or are unable to agree on terms, the dispute will be referred to the Independent Third Party. This condition, and the provisions of any Facilities & Services under it will terminate upon the first to occur of the expiry of the authorisation granted by the Commission or five years from the Effective Date.	Yes – implies that airport or other third party will be compelled to contract with New Entrant. At the least, will result in interference with airport/third party's ability to contract.	Yes – Commission will be required to adjudicate disputes between Applicants and New Entrants as well as New Entrants and airport/third party.	Will be difficult to ensure comparability.	Only provides for controlled entry.	Will seriously distort markets for goods, or services provided by airport/third party.
8,9, 10 and 13	From the date that a New Entrant commences Trans-Tasman services into each of Brisbane, Melbourne and Sydney Air New Zealand offers a condition that, within three months of being advised, Freedom will only operate Trans-Tasman services into Brisbane, Melbourne and Sydney that operate from secondary airports in New Zealand (that is airports other than Auckland, Wellington or Christchurch). This condition will terminate: (a) three years after the Effective Date; or (b) on a City Pair by City Pair basis upon a New Entrant or New Entrants achieving 50% of the Alliance capacity on that City Pair.	Yes – Commerce Act is to "promote" competition, not regulate it.	Yes – ongoing scrutiny of flight schedules required.	Could be easily evaded – for example, by establishing a new operator for those routes.	Only provides for artificially regulated "competition".	Will distort other markets.
11 and 13	From the date a New Entrant commences Trans-Tasman Services, Air New Zealand offers a condition that Freedom will not grow its Tasman schedules by more than one aircraft each calendar year. This condition will terminate three years after the Effective Date	Commerce Act is to promote competition, not regulate it.	Yes – ongoing scrutiny of schedules.	Limits "aircraft" but not frequency.	Only provides for artificially regulated "competition".	Will distort other markets.
12 and 13	Air New Zealand offers a condition that Freedom will not operate on Domestic New Zealand Routes. This condition will terminate: (a) three years after the Effective Date; or (b) on a City Pair by City Pair basis upon a New Entrant or New Entrants achieving 50% of the Alliance capacity on that City Pair.	Commerce Act is to promote competition, not regulate it.	Yes – ongoing scrutiny of schedules.	Yes	Only provides for artificially regulated "competition".	Will distort other markets.

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14, 15 and 16	The Operating Carriers offer a condition to lease up to four B737-300 aircraft to one New Entrant for operations on Tasman and/or Domestic New Zealand Routes. The leases will be subject to receipt of six months notice (to allow the Operating Carriers to implement the leases) and will be provided on the following terms: (a) the aircraft will be in an all economy configuration; (b) the aircraft will be leased at market rates (based on those then paid by Freedom (to be verified by the Independent third Party)); (c) the term of the lease would be up to three years; (d) the leases will be subject to the provision of normal financial security; (f) the lease would include aircraft maintenance provided by the Applicants; and (g) the Operating Carriers would be willing to include in the lease technical and/or cabin crews for the period required for the New Entrant to train their own staff (the technical and cabin crew could be withdrawn with six months notice). This condition will terminate three years after the Effective Date.	Comparable to divestment undertaking under Commerce Act.	Commission will be required to adjudicate disputes.	Yes	Only provides for artificially regulated "competition".	Will distort other markets.
17, 18, 19, 20 and 21	The Operating Carriers offer a condition, in respect of each Regulated City Pair, not to increase the Operating Carriers' combined capacity on that city pair during the period of 18 months following the date on which the first New Entrant officially announces its intention to commence operating flights on that city pair, except as permitted in this clause. The above condition will be terminated in respect of any Regulated City Pair: (a) if the New Entrant does not accept bookings within three months of officially announcing its intention to commence operating flights on that Regulated City Pair; (b) if the New Entrant does not commence scheduled flights within six months of officially announcing its intention to commence operating flights on that Regulated City Pair; or (c) if the New Entrant ceases to operate flights on that Regulated City	Commerce Act is to promote competition, not regulate it.	Ongoing scrutiny of Operating Carriers Schedules and loadings required. Need to determine comparability of replacement aircraft. (e.g. A320s carry additional passengers)	Will be difficult to ensure comparability but easy to evade.	Provides for artificial competition "holiday" for New Entrant. After 18 months New Entrant exposed to price war.	Artificial "entrenchment" of first New Entrant will deter entry by others.

Clause Number	Text of the Condition	Would the condition be better suited to legislation?	Does the condition require ongoing resource commitment from the Commerce Commission?	Is the condition enforceable?	To what extent does the condition ameliorate competition concerns?	To what extent does the condition create new competition concerns?
	Pair. The above condition will not apply to: (a) temporary increases in capacity for periods not greater than 14 days (for example, changing aircraft type to cover operational requirements such as planned and unplanned maintenance and engineering); (b) increases in capacity announced by either Operating Carrier prior to the New Entrant's official announcement of its intention to commence operating flights; or (c) the capacity added to meet the freight condition in clause 35 and 36. The following will not be treated as an increase in capacity on any city pair: (a) for Air New Zealand, the replacement of B737 aircraft with an equivalent number of A320 aircraft; and (b) for each Operating Carrier, the replacement of any aircraft series (for example B737-300) with an equivalent number of aircraft of the same type (for example B737-800). The above condition will terminate: (a) upon the first to occur of the expiry of the authorisation granted y the Commission or five years from the Effective Date; or (b) on any Regulated City Pair; upon the New Entrants achieving capacity equal to 50% of the Operating Carriers' capacity on that Regulated City Pair.					
22, 24 and 25	The Operating Carriers offer a condition, in respect of each Regulated City Pair, not to reduce the Operating Carriers' combined capacity on that city pair, except as permitted by clauses 24 and 25. The above condition will terminate in respect of any Regulated City Pair on the earlier of: (a) the first to occur of the expiry of the authorisation granted by the Commission or five years from the Effective Date; or (b) another airline commencing operating flights and achieving a 20% capacity share on that city pair	Commerce Act is to promote competition and efficiency, not to compel retention of inefficient services.	Ongoing monitoring.	Will be difficult to ensure comparability but easy to evade. In particular, uncertainties associated with determining "yield" will	Provides for artificial competition "holiday" for New Entrant.	Artificial "entrenchment" of first New Entrant will deter entry by others.

Clause Number	Text of the Condition	Would the condition be better suited to legislation?	Does the condition require ongoing resource commitment from the Commerce Commission?	Is the condition enforceable?	To what extent does the condition ameliorate competition concerns?	To what extent does the condition create new competition concerns?
	During the period of operation of this condition, the Operating Carriers may reduce capacity on a Regulated City Pair if, for any continuous three month period, seat factors decline to less than 70% or yield declines by more than 5%, provided they first obtain the written confirmation of the Independent Third Party.			provide the Applicants with scope to evade.		
23 and 24	The Operating Carriers offer a condition to increase capacity on each Regulated City Pair at the same average rate as the remainder of the Tasman Routes or Domestic New Zealand Routes (as applicable). The above condition will terminate in respect of any Regulated City Pair on the earlier of: (a) the first to occur of the expiry of the authorisation granted by the Commission or five years from the Effective Date; or (b) another airline commencing operating flights.	Commerce Act is to promote competition and efficiency, not to compel retention of inefficient services.	Ongoing monitoring.	Will be difficult to ensure comparability but easy to evade.	Provides for artificial competition "holiday" for New Entrant.	Artificial "entrenchment" of first New Entrant will deter entry by others.
26 and 27	The Operating Carriers offer a condition not to increase prices on Regulated City Pairs on the Tasman beyond airline cost base increases (measured in accordance with an appropriate structured producer price index for an Australasian airline operating on the Tasman) for market and fare segments (originating from Australia or New Zealand) to be agreed with the Commission. The above condition will terminate in respect of any Regulated City Pair on the Tasman on the earlier of: (a) the first to occur of the expiry of the authorisation granted by the Commission or five years from the Effective Date; or (b) another airline commencing operating flights on that City Pair.	Commission's powers in relation to price control are set out in Part IV. Not appropriate to use conditions for that purpose.	Ongoing monitoring of prices	Easy to evade.	If price control is necessary and desirable, Part IV should be used.	"Controlled" price for Operating Carriers will effectively become the industry wide prices.

Clause Number	Text of the Condition	Would the condition be better suited to legislation?	Does the condition require ongoing resource commitment from the Commerce Commission?	Is the condition enforceable?	To what extent does the condition ameliorate competition concerns?	To what extent does the condition create new competition concerns?
28, 29, 30 and 31	The Operating Carriers offer a condition to commence operating: (a) eight weekly flights (four return services) between Auckland and Adelaide within one year of the Effective Date; and (b) two weekly flights (one return service) on each of the following city pairs within one year of the Effective Date: (i) Auckland – Hobart; (ii) Wellington – Canberra; and (iii) Auckland – Canberra. The Operating Carriers will continue operating flights on these city pairs for a period of one year. The Operating Carriers may reduce capacity, or cease operating, on a city pair in clause 28 if, for any continuous three month period, seat factors decline to less than 70% or yield declines by more than 5% (against the business case), provided they first obtain the written confirmation of the Independent Third Party. The above condition will terminate in respect of a city pair immediately upon another airline commencing operating flights on that city pair.	Commerce Act is to promote competition, not to compel introduction of inefficient services.	Ongoing scrutiny of schedules required.	Operating Carriers can trigger capacity "reduction" by introducing flights at low fares and then raising prices. "Yield" is a concept providing scope for evasion.	Presumably these new flights will attract travellers from other destinations, e.g. Wellington-Sydney, and counter the effect of condition not to increase capacity on those routes.	Inefficient services will require cross-subsidy from other services the Operating Carriers provide.
32 and 33	The Operating Carriers offer a condition to spend an additional A$5.4 million in the year following the Effective Date on costs directly associated with the implementation of the Qantas Holidays business plan and designed to stimulate an additional 50,000 tourists to New Zealand (including 18,000 dual destination tourists) which includes A$1.75 million on direct sales and marketing. The A$1.75 million amount will be spent in conjunction with national and state tourism bodies where that is likely to maximise tourism flow.	Commerce Act is to promote competition not tourism.	Ongoing monitoring.	Will be difficult to "audit" the amount spent for what purpose.	N/A	May not be the most appropriate channel for additional marketing spend
34	If tourism targets are not met for any reason other than force majeure (such as SARS) by the end of year 3, the Operating Carriers will spend a further A$5.4 million on direct sales and marketing in conjunction with national and state tourism bodies where that is likely to maximise tourism flow.	As above.	As above.	As above.	As above.	As above.
35 & 36	The Operating Carriers offer a condition to add two weekly return Tasman wide-bodied "back of the clock" services specifically for freight to each of Auckland	Commerce Act is to promote	Ongoing scrutiny of	Yes.	Will increase	Inefficient services will

Clause Number	Text of the Condition	Would the condition be better suited to legislation?	Does the condition require ongoing resource commitment from the Commerce Commission?	Is the condition enforceable?	To what extent does the condition ameliorate competition concerns?	To what extent does the condition create new competition concerns?
	and Christchurch. The Operating Carriers may reduce capacity, or cease operating, the additional freight services to Auckland and Christchurch for any period where there is a material adverse change to the financial returns earned by the Operating Carriers on that service.	competition and efficiency, not to compel retention of inefficient services.	schedules required.		supply.	require cross-subsidisation from other services the Operating Carriers provide.
37, 38, 39 and 40	The Operating Carriers offer a condition to provide annual audited reports (in a form to be agreed with the Commission) to the Commission demonstrating compliance with the Part A Conditions and Part B Conditions. Should the Commission request, the Operating Carriers will fund an Independent Third Party to receive the annual audited reports and monitor compliance with the Part A Conditions and Part B Conditions. Any Independent Third Party will act as agent of the Commission, and will be obliged to deal with all issues concerning implementation of these conditions, including the adjudication of all disputes arising in the course of implementation and report to the Commission on compliance. Protocols for duties of any Independent Third Party to the Commission and to the Operating Carriers will be prepared for approval by the Commission.	"Secondary" conditions. See comments on primary conditions.	Yes. Review and Liaison with Independent Third Party required	Yes	"Secondary" conditions. See comments on primary conditions.	"Secondary" conditions. See comments on primary conditions.

SCHEDULE B
CONDITIONS IMPOSED BY COMMISSION IN PREVIOUS RESTRICTIVE TRADE PRACTICES AUTHORISATIONS

Decision	Parties	Date	Conditions Imposed
Draft Determination	Preussage Energie GMBH, Todd (Petroleum Mining Company) Limited, Shell Exploration New Zealand Limited, Shell (Petroleum Mining) Company Limited	16/5/03	Would grant authorisation with conditions prescribing: (a) 5 year limit on period of authorisation; (b) will produce gas by February 2006 and full production by June 2006; (c) will not apply to applicants' successors; and (d) ring fenced marketing of the Pohokura field.
473	Electricity Governance Board Limited	30/9/02	Authorisation granted subject to condition that Rulebook be amended in four particular ways.
369	Transpower New Zealand Limited	13/8/99	Authorisation granted without condition
356	Newcall Communications Limited, Teamtalk Limited, Telecom New Zealand Limited, Telstra New Zealand Limited, Vodaphone New Zealand Limited.	17/5/99	Authorisation granted without condition.
281	New Zealand Rugby Football Union Incorporated	17/10/96	Authorisation granted without condition.
277	Electricity Market Company Ltd/ Electricity Corporation of NZ Ltd/ Contact Energy Ltd	30/1/96	Authorisation granted without condition.
274	NZ Futures and Options Exchange	1/8/95	Authorisation granted subject to new conditions to notify Commission of any arrangement to either change the Net Tangible Assets requirement or impose a Net Liquid Asset requirement.
273	A consortium of meat companies	2/2/95	Authorisation granted without condition.
271	NZ Futures and Options Exchange	22/12/93	Authorisation granted subject to condition that NZFOE reports developments to the Commission annually.
231	The NZ Stock Exchange	10/5/89	Authorisation granted subject to condition that Rule be amended in specific way.
232	The NZ Stock Exchange	10/5/89	Authorisation granted without condition.
223	Life Underwriters Assn of NZ (inc)	15/12/88	Authorisation granted subject to condition that Code be amended in specific way.
221	NZ Kiwifruit Exporters; NZ Kiwifruit Coolstores Assn (inc)	15/9/88	Authorisation granted subject to conditions prescribing: (1) the parties to the agreement; (2) what the agreement must incorporate; and (3) the limited term of the authorisation. (note: authorisation revoked by decision number 238)
205	Weddel Crown Corporation Ltd/ Waitaki International/ Richmond Ltd	22/7/87	Authorisation granted without condition.