

**AIR NEW ZEALAND/QANTAS
APPLICATIONS FOR AUTHORISATION**

**Concerns with the Legal Form of
the Applications**

Grant David

CONCERNS WITH THE LEGAL FORM OF THE APPLICATIONS

- 1 The Applications are presented in a form inconsistent with the scheme of the Commerce Act and in a manner that did not allow for the Commission or interested parties to test their respective merits appropriately.
- 2 In particular, the Equity Proposal should have been filed in the form of notice prescribed by the Commission under section 109. That form expressly states that it is a requirement in giving notice under section 67 that public benefit submission be made as part of the notice. It says:

These should include full details of the nature and extent of public benefits which the applicant believes will result from the acquisition.

- 3 Of particular concern to us has been the Commission's failure to treat the two Applications discretely, as is required by law. At law the Equity Proposal and the Alliance Proposal are separate applications with different legal tests and procedural rules applying in each case. Both must be proven in their own right.
- 4 Throughout the Conference the Applicants have expressly claimed that the benefits flow from the Alliance Proposal. They have not claimed, or shown, a single benefit to result from the Equity proposal.
- 5 In terms of the applicable legal tests, the Applicants must demonstrate:
 - 5.1 in the case of the Equity Proposal, that the acquisition will result in *such benefit to the public that it should be permitted*; and
 - 5.2 in the case of the Alliance Proposal, that, in all the circumstances, *the resulting public benefit outweighs any lessening in competition*.
- 6 In terms of the procedural rules:
 - 6.1 in the context of the Equity Proposal, the Commission must disregard any undertakings that are not structural in nature ("conditions" imposed with respect to the Alliance Application offend against this);
 - 6.2 in respect of the Alliance Proposal, the Commission retains a key disciplinary mechanism not available in the context of the Equity Application. In particular:
 - (a) the Commission can impose conditions on the grant of authorisation under section 61(2) of the Commerce Act;

- (b) the authorisation would be limited to the duration of the arrangement; and
- (c) the authorisation would be subject to the Commission's jurisdiction under section 65 of the Commerce Act to revoke or amend an authorisation if there has been a "material change of circumstances since the authorisation was granted".

- 7 Significantly, the prescribed timeframes for consideration of each application are different – we consider this separately in our presentation.
- 8 The Applicants bear the evidentiary onus in respect of *each* Application to attribute benefits and detriments as between each Application in a discrete manner. Their failure to do so has ensured that neither the Commission nor interested parties are able to assess the individual merits of each Application.
- 9 We included in our submissions of 20 June 2003 the attached Appendix in which we attempted to allocate the benefits and detriments estimated by the Commission in its draft determination, using where possible the conclusions reached by the Commission. The effect is to show quite starkly the net public detriments resulting from each Application.
- 10 In any case, the Equity Proposal and Alliance Proposal each have different implications in respect of the competitive landscape going forward. One is permanent, the other more flexible.
- 11 In short, the approach taken by the Applicants should have been rejected outright by the Commission, with the Applicants told to re-file the Applications in the prescribed form.
- 12 Importantly, we are not saying that the Commission should have held separate conferences in respect of those two Applications. But, within the combined conference, the two Applications should have been treated more separately. In particular, the benefits and detriments attributed to the individual Applications and the effect of the proposed conditions confined to the Alliance Proposal.

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