

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

**Concerns with the Manner in which
the Applications have been
handled**

Grant David

CONCERNS WITH THE MANNER IN WHICH THE APPLICATIONS HAVE BEEN HANDLED

- 1 The competition concerns arising in connection with the Proposals must be fully - and publicly - tested.

Conclusions right, but some procedural errors

- 2 We believe there are some areas in its process where the Commission has erred. We stress, the Commission so far, has reached the right factual conclusions despite those procedural errors. But, it is important that these procedural errors be noted, so the Commission can avoid them in future cases.
- 3 The Applicants have been accorded special treatment in the following ways:
 - 3.1 Being able to collapse both Applications into one and thereby circumventing the requirements of the Commerce Act (as we have already discussed);
 - 3.2 Being granted timetable extensions outside the parameters contemplated by the Act and in a manner prejudicial to interested parties;
 - 3.3 Being allowed to delay with regard to access to confidential information given to counsel and experts.
 - 3.4 Being allowed to claim that special regard must be the Government's supposed intentions outside of the section 26 mechanism prescribed by the Act.

Timetable extensions

- 4 In terms of timetabling, the process has been unnecessarily and inappropriately protracted. We note that:
 - 4.1 Extensions were granted in breach of a mandatory statutory procedure seemingly on the basis of the convenience of the Applicants;
 - 4.2 The Commission's final determinations will not be made until almost 10 months after the Applications were filed. Delays of that magnitude would defeat the whole purpose of Part V of the Commerce Act;
 - 4.3 With respect to the Alliance Application, section 62(5) clearly states the Commission **shall** appoint a date not being a date later than 20 working days after the date fixed under section 62(3). The

Commission failed to fix this date – but did not so fail in the Pohokura gas marketing proceedings;

4.4 All of this means that the day or days fixed for the conference in respect of the Alliance Application should have been **no later than 27 May**;

4.5 There was no consultation with interested parties as to the revised timetable.

Access to confidential information delayed

5 In terms of access to confidential information, we note that:

5.1 An extraordinary volume of information has been withheld from interested parties under the guise of confidentiality - this lack of transparency has been highly prejudicial to the ability of interested parties who are not able to justify significant legal and economist assistance to give properly informed and structured comments to Commission; and

5.2 Even when interested parties have requested access to such information on a “confidential to counsel and experts” basis (in accordance with the Commission’s well established procedures), the provision of that material has been subject to significant delay primarily on the basis that the Applicants have received previously unprecedented accommodation from the Commission with respect to whatever concerns they have voiced from time to time – this has resulted in even those interested parties who have spent significant sums of money on legal and economist assistance in respect of this matter being materially disadvantaged in their ability to comment on and test the propositions before the Commission.

Improper regard to Government’s intentions

6 Various statements by the Applicants give rise to concern that improper regard may be had to the role of the Government with respect to these Applications. In particular, in their cross submission in response to third party submissions, the Applicants asserted that the Commission should have regard to the views the Government has expressed in its role as shareholder in Air NZ and also the ‘formal statutory (sic) “Kiwi shareholder” approval process’. However, we note that, so far, the Government has left the matter of competition issues in the hands of the relevant expert authorities on both sides of the Tasman.

7 Indeed, the Government’s position on competition issues was made explicit in the relevant minute of the Cabinet Business Committee of 18 December 2002. Consequently, in the course of their joint statement accompanying

release of the minute, the leading Ministers involved, the Minister of Finance, Hon Dr Michael Cullen, the Minister of Transport, Hon Paul Swain, and Associate Minister of Finance, Hon. Trevor Mallard, made specific and emphatic reference to the role of the Commerce Commission in the context of competition issues:

The government is aware that the proposed alliance will reduce competition in New Zealand and across the Tasman and has made it very clear to the airlines that they will need to get authorisation from both the New Zealand Commerce Commission and the Australian Competition and Consumer Commission.

The government is concerned at the potential impact on consumers of any reduction in competition but has confidence in the ability of the Commerce Commission, and of the regulatory framework in which it works, to deal effectively with these matters.

When the two Commissions released their draft determinations on 10 April, Dr Cullen expressed some surprise but, nevertheless, told reporters:

... I do want to repeat that there is no change in the government's position – that is that approval of this deal is subject to Commerce Commission and ACCC approval. There is no intention of over-riding the decision when it finally comes whatever that decision may be.

- 8 It is clear from these ministerial statements that, from the outset, the Government has drawn a distinction between, on the one hand, decisions on national interest issues for which it takes full responsibility, including those relating to its ownership and Kiwi Shareholder roles to which the Applicants referred in their cross submission; and, on the other hand, responsibility for the determination of competition issues which is vested by law in the Commerce Commission.
- 9 We are concerned that this stance be maintained and in that regard consider it important to reflect on the avenue prescribed by Parliament with respect to drawing policy concerns to the attention of the Commission. The Commerce Act prescribes (in section 26) the avenue by which Government policy can be communicated to the Commission. The legal position regarding the persuasiveness of that policy as communicated is clear – the Commission must “have regard” to the statement, but it is not determinative. In any case, the Government has not issued and, according to our communications with the Ministry of Commerce do not intend at any stage to issue, a Government policy statement under section 26.
- 10 The Minister of Commerce has confirmed to us that:

... the Government's position has always been that competition concerns will be dealt with by the two national competition authorities, being The New Zealand Commerce Commission and The Australian Competition and Consumer Commission ...

- 11 This apparent indifference in respect of the Applications contrasts markedly with the position taken by the Government with respect to the current Pohokura joint gas marketing authorisation application where the Government, facing an electricity crisis and an imminent exhaustion of gas supply out of Maui, issued two section 26 policy statements.

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