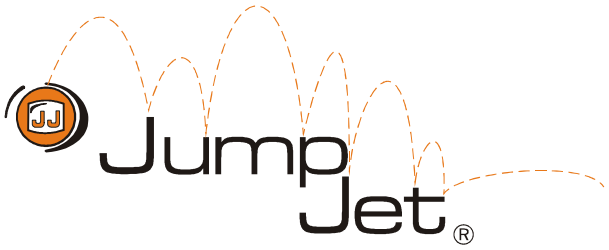

DRAFT DETERMINATION RESPONSE - PROPOSED

QANTAS AND AIR NEW ZEALAND MERGER

COMMERCE COMMISSION SUBMISSION

19 June 2003

JUMPJET AIRLINES LIMITED
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NEW ZEALAND

Copy: Australian Competition and Consumer Commission

INDEX - SUBMISSION PROFILE

Page

ATTACHMENTS

i. Market Lockup Equity Strategies
ii. Marketing Alliances – Trans Tasman
iii. Parties Appearing & Qualifications

Copy: Australian Competition and Consumer Commission

Executive Summary in Response

In response to the Commerce Commission Conference Procedures and in relation to the Draft Determinations handed down by the Commerce Commission and the Australian Competition and Consumer Commission {Commissions}, plus subsequent critical issue questions, Jumpjet Airlines Limited® accepts the Draft Determination analogies and the decisions handed down.

The following critical issue questions are directly relevant to the proposed Jumpjet® sphere of operation and other critical aspects, they are addressed by submission content.

DRAFT DETERMINATION - APPLICABLE COMMERCE COMMISSION QUESTIONS

25. The Commission seeks comment on whether Virgin Blue is likely to enter the provincial market under either the factual or the counterfactual scenarios.

28. The Commission seeks comment on the barriers to entry to the Tasman market.

29. The Commission seeks comment on whether Virgin Blue is likely to enter the Tasman market under both the factual and counterfactual scenarios.

30. The Commission seeks comment on its preliminary view that the proposed Alliance would have or would be likely to have the effect of substantially lessening competition in the Tasman market when compared with the counterfactual.

36. The Commission seeks comment on its preliminary view that the proposed Alliance would have or would be likely to have the effect of substantially lessening competition in the Tasman belly hold market when compared with the counterfactual.

39. The Commission seeks comment on its preliminary view that the proposed Alliance would result in fixing controlling or maintaining prices and is therefore deemed to substantially lessen competition.

MARKET LOCKUP

Jumpjet Airlines Limited® recognises the consequences of draft determination decision making by the Commissions in response to the infringed integrated merger via equity shareholding between Qantas Airlines and Air New Zealand. {Applicants} The following submission is aimed at addressing issues in relation to the Questions above and reinforcing information plus analogy concerning the alliance strategies in motion by major players in the Australasian aviation industry.

The infringed Grand “Monopoly” of alliances strategy identified by both Commissions would have created an effective "Market Lockup" of the Australasian region.

When completed, the resultant "Monopoly" of alliances would have effectively: -

- ✈ Controlled the southern Australasian full service market including the Trans Tasman
- ✈ Locked up the regional discount market including the Trans Tasman
- ✈ Enabled Price Control to be effectively introduced by all alliance players
- ✈ Dominated the market in a predatory sense preventing fair competition emerging

For the consumer and industry participants in Australia and New Zealand, such recent proclaimed decision making by the Commissions is a source of optimism that reason, fair play and a level playing field may be possible in the future.

The major players were {and still are} the Virgin Group/Patrick Corporation, Singapore Airlines, Qantas, Air New Zealand and their subsidiaries. The premium for Virgin would have been the discount market in Australia, possibly, across the Tasman and within New Zealand. Plus, the potential to gain elevated status for a planned initial public offering (IPO) planned for 2003.

The current ownership tree includes Singapore Airlines owning 49% of the Virgin Group's company, Virgin Atlantic. {One of billionaire Richard Branson's 200 odd companies that span 25 countries with a collective estimated 1999 turnover of $NZD 9 Billion per annum – Figures are approximate}

The Virgin Group also jointly owns the duopoly Australian carrier Virgin Blue with Patrick Corporation. Singapore Airlines also continues to own a 5% stake in Air New Zealand. Air New Zealand intended to pass a 22.5% ownership to Qantas Airlines and it fully owns Freedom Air International.

Public Information available indicated that Patrick Corporation had approached Singapore Airlines and offered that company a consequential equity share in the subsidiary, Virgin Blue. A similar shareholding could be taken up by Singapore Airlines through a possible public offering planned in 2003.

Similar research indicates that Qantas had also invited Singapore Airlines to purchase the British Airways 22% shareholding in Qantas. It is possible that Singapore Airlines could purchase either or both shareholdings to satisfy its drive into the region {Australia in particular} in 2003.

Jumpjet Airlines Limited® maintains a major concern due to the slimness of the niche Trans Tasman market that we are resolved to develop and operate within. If Virgin Blue succeeds in gaining entrance to the Trans Tasman, anticipated predatory capacity and airfare structures introduced by Virgin would efficaciously and substantially, lessen the size of the available and potential market. In this case, the Jumpjet® introduction is highly likely to encounter unfair competitive disadvantage.

It is conceivable that these alliance players were fully aware of the Jumpjet® development and part of their current strategy is to prevent the company independently entering the market.

PUBLIC OPINION

Following extensive campaigning through media programs, high level political lobbying and advertising by Qantas and Air New Zealand and manipulation efforts by Virgin Blue the public rejection of the merger remains vigorously in the majority.

EFFECTS OF INTERNATIONAL COMMERCE LAW

Whilst the {possible} entrance of the Virgin Group and Patrick Corporation airline, Virgin Blue, into the Trans Tasman appears to be of integrity, closer examination discloses otherwise. Virgin Blue continues in breach of the Single Aviation Market Arrangements[1] {SAM} in that the Chairman and senior shareholder is not an Australian or New Zealand citizen. In addition, public evidence identifies Board control as dysfunctional.[2] {See Part IV Single Aviation Market Arrangements [SAM]}

FAIR COMPETITION

Up to date, traditional competitive entrances have been unable to successfully provide for fair competition to be introduced into the industry and exist for any length of time. In Australia the industry has now been driven back to where it was decades ago with a duopoly that is less competitive.

High level corporate strategies that occur in the comfort of secrecy in boardrooms and are aimed at market dominance are now subject to accountability following the Draft Decisions of the Commissions and prospective future legislation. The industry has the potential to prosper within the bounds of fair competition in the future.

PREDATORY COMMERCIALISM

The infringed Qantas and Air New Zealand integrated merger would have combined the majority of regional airlines into a complex alliance structure that consisted of two major global alliances epitomising consumer fears. The merger proposal was the very reason for the necessity and existence of anti-trust, anti-monopoly and other protective legislation that preserves business ethics and promotes fair competition.

In relation to the infringed merger, both Qantas and Air New Zealand publicly admitted to the lessening of competition the merger would have delivered the consumer.

Competition would have been further eroded with the sale of Freedom Air as, originally, publicly demanded by Virgin Blue and currently promoted[3]. Thus enabling Virgin Blue to likely enter a market without competition and with consequential ownership of Freedom Air.

Currently, Virgin Blue has reiterated that the Freedom Air[4]sale remains the key to its opposition to the merger between Qantas and Air New Zealand. In other words ownership of Freedom Air would provide Virgin with a foothold in New Zealand permitting the airline to form a duopoly and become cemented by a successful merger between Qantas and Air New Zealand.

The post Draft Determination attempt to negotiate around the law by Qantas and Air New Zealand has raised the level of anti-competitiveness to a greater degree. Offers include the retraction of Freedom Air from a number of routes to permit Virgin Blue to enter the market with unobstructed access. ie. Without competition.

Media coverage has revealed notable equity offers in relation to the foundation stones of the {now} infringed monopoly of alliances. In our opinion, public awareness of industry strategies has vastly improved as a result of the Draft Determinations handed down by the Commissions.

Had associations between the Virgin Group/Patrick Corporation, Singapore Airlines, Qantas and Air New Zealand been able to develop, the combined network would have exhibited extensive and substantial power in the market.[5] Virtually preventing any new entrant from gaining funding support to enter and introduce fair competition.

MARKET LOCKUP STRATEGIES

Publicly reported efforts of senior Qantas executives and the Board of Directors to build an impending Grand Regional Alliance, that was designed to protect major regional {Alliance} airlines from international {or any} competition, were both equity and marketing based.

A merger between Qantas and Air New Zealand would have integrated two separate groups each with a substantial degree of power in the market into one powerful market force.[6] The merger would have overridden democratic economic principles within and between Australia and New Zealand. Such principles provide the right of consumers to fair competition, freedom of choice and competitive airfares - a factor that must override other economic considerations.

ANSETT AUSTRALIA COLLAPSE

Public evidence available identifies that predatory commercialism played a major role in the demolition of Ansett Australia, which resulted in multiple peripheral company bankruptcies. Plus the bankruptcy of six airlines. The end result afflicted 3.6 million creditors and caused the overall loss of in excess of 50,000 jobs in Australia considering a factual external multiplier of 2.5 to 1. The collapse was deemed the largest in Australian history and effects have been far reaching including substantial damage to the tourism industry. If successful, the emerging monopoly of alliances developing alongside the infringed merger proposal between Qantas and Air New Zealand would have ensured that the potential for such predatory commercialism was highly probable in the future.

In addition, the original Single Aviation Market Agreement {SAM} between the Australian and New Zealand governments has been recently renegotiated as a stepping stone toward a global open skies policy. Should such a policy reach conclusion the concept of future major collapses in the aviation industry similar to the Ansett collapse need to be considered distinctly probable. {See Part IV Single Aviation Market Arrangements {SAM}, Page 19}

{Logic Question: ***If predatory commercialism is considered to be a function of normal business practice, is it time for a revaluation of such an economic principle?****}*

References:

1. *The original Single Aviation Marketing Agreement {SAM} has recently been updated in August 2002. See Page 17, Part IV Single Aviation Market Arrangements {SAM}*
2. *Commerce Commission Draft Determination on the proposed Qantas and Air New Zealand merger. Paragraph 98; The Dominion Post – May 21, 2003; The Sydney Morning Herald – May 16 & 21, 2003; The Australian Financial Review – May 14 & 16, 2003*
3. *The Dominion Post – April 12, 2003*
4. *The Dominion Post – May 14, 2003*
5. *Attachment i – Market Lockup Equity Strategies*
6. *Attachment ii - Marketing Alliances – Trans Tasman*

PART 1: Fair Competition

1. If fair competition is denied in the industry, airfares will rise to levels that will be utopian for alliance major shareholders and investors and predatory for the consumer. Such would have occurred following the establishment of the proposed monopoly of alliances despite assurances to the contrary from those major players who would control prices under the umbrella of public assurance and the security of a monopoly of alliance structure.

2. Fair competition is the primary criteria that determines the well being of any industry. It introduces continuing choice for the consumer, promotes new ideas and marketing techniques that give rise to a vibrant industry.

3. Should subsidiaries, companies, groups of companies or alliances succeed in controlling the market, advantage will be taken of market power - Preventing or restricting new entrants from competing and effectively lessening existing competition in the market.

4. The Qantas/Air New Zealand infringed merger portrayed the distinct possibility that a structure of alliances could, with little undertaking, achieve a regional Market Lockup through Monopoly Alliance status.

   For the purpose of this submission the definition of Monopoly status is: -

   Monopoly - exclusive control of a commodity or service in a particular market, or a control that makes possible the manipulation of prices.[1]

5. The infringed Qantas/Air New Zealand merger was programmed to expand from a current 4.99% Equity Alliance to an Integrated Alliance status of 22.5%.

   For the purpose of this submission the definition of an Equity Alliance is: -

   Equity Alliance - A degree of ownership that exists between two or more subsidiaries, companies or groups of companies that is established by formal investment agreement to cooperate for specific purposes. Integrated ownership occurs when the degree of ownership reaches a level that includes the mutual determination of airfares, schedules, capacity, yield sharing (Revenue Income), the provision of services and the purchase of goods and services.

6. The infringed Qantas/Air New Zealand merger would have regionally integrated the two global alliances of Star and One World and included the merging of additional airlines. Some of these airlines hold separate Marketing Alliances with other airline groupings.

   For the purpose of this submission the definition of a Marketing Alliance is: -

   Marketing *Alliance - A degree of contractual cooperation between airlines providing seamless travel and mutual frequent flyer programs. Many*

alliances use code sharing and other mechanisms to reduce competition over specified routes. Very few, if any, are competitive. The global alliances of Star and One World are complex marketing alliances.*

(*) Code Sharing agreements are services operated by one carrier on behalf of another. Thus enabling the elimination of competition between the two operators.

7. In Response, we advance to the New Zealand Commerce Commission {Commission} that an Equity Alliance, a Marketing Alliance or groups of these alliances, constitutes *"a person that includes 2 or more persons that are interconnected or associated"* under Section 47 {Certain Acquisitions Prohibited} of the Commerce Act 1986. Subsequently the integrated infringed merger of Qantas and Air New Zealand would have substantially increased such associations - Both currently and in a projected manner.

Reference:

1. The Concise Macquarie Dictionary

CURRENT CORPORATE EQUITY STRUCTURING - SCHEDULED AIRLINES

8. In Response, we advance to the Commission that Equity Alliances {Regional sense} currently exist between: -

   - ✈ Singapore Airlines – Silk Air, Air New Zealand & Subsidiaries, The Virgin Group
   - ✈ Virgin Group – Virgin Blue
   - ✈ Air New Zealand – Freedom Air, Mount Cook, Air Nelson, Eagle, Air Pacific
   - ✈ Qantas – Air New Zealand, Air Pacific, Qantas New Zealand {Jetconnect}, Australian Airlines, Impulse Airlines, Airlink, Eastern Australian Airlines, Southern Australian Airlines, Sunstate, British Airways

These alliances constitute *"a person that includes 2 or more persons that are interconnected or associated"* under Section 47 {Certain Acquisitions Prohibited} of the Commerce Act 1986. Subsequently the integrated infringed merger of Qantas and Air New Zealand would have substantially increased such associations - Both currently and in a projected manner.

INFRINGED CORPORATE EQUITY STRUCTURING - SCHEDULED AIRLINES

9. The projected corporate equity structures, based on public evidence, in terms of offers portrayed in Attachment i - Market Lockup Equity Strategies, provides a valuable insight into current {publicly reported} strategies being emulated by Trans Tasman airlines presently in duopoly or aligned trading situations.

13. It is common knowledge that Singapore Airlines has the ambition to gain a stronger presence in the region. The present regulatory environment would permit the carrier to enter in its own right. However, it is highly likely that its current Joint Venture alliance with the Virgin Group would prevent direct competition with Virgin Blue in the domestic Australian market. The Singapore Airlines subsidiary, Silk Air, could enter the Australian domestic market at any time but for obvious reasons has not increased its Australasian route network.

13. An earlier report reinforces the Virgin Blue strategy of piggybacking on the infringed merger {should it have been approved} to overshadow any recognition of alliance developments that were previously in motion.[1] Quote: -

"Observers have speculated that Virgin Blue could be given concessions such as slots and assistance to accelerate its entry on the Tasman as a trade-off. The discount carrier is also interested in Air NZ's no-frills offshoot Freedom Air and has previously raised the idea of Air NZ being forced to divest the subsidiary operation..."

14. The Draft Determination rejection by both Commissions of the merger between Qantas and Air New Zealand has not removed the original strategies of Virgin

Blue. Such strategies were based on the manoeuvring of events sufficiently to gain an uncompetitive foothold in New Zealand in the discount market. Following the group's successful purchase of Freedom Air, Virgin would then support the establishment of the merger and gain duopoly status in the New Zealand and the Trans Tasman market. Public evidence from a senior executive of Virgin Blue identifies this tactic.[2] Quote: -

"...The sale of budget arm Freedom Air was the key to the alliance being opposed, because it would give Virgin Blue an immediate foothold in the {Trans Tasman and New Zealand} market."

Reference:

1. *The Australian Financial Review - October 10, 2002*

2. *The Dominion Post – May 14, 2003*

CURRENT CORPORATE MARKETING ALLIANCES

14. Fourteen (14) International Trans Tasman Airlines comprising of parent companies or subsidiaries are currently operating within some 37 Marketing Alliances with regional carriers.[1] {Includes recently approved Emirates airline}

15. In Response, we advance to the Commission that Marketing Alliances {Regional sense} currently exist in the framework hereunder: -

- ✈ Star Alliance Carriers – Air New Zealand, Singapore Airlines, Thai International, United Airlines, All Nippon Airways
- ✈ One World Carriers – Qantas, American Airlines, British Airways, Lan Chile, Cathay Pacific
- ✈ Air New Zealand – Star Alliance, Royal Tongan, Air Caledonie International
- ✈ Qantas – One World, Aerolineas Argentinas, Air Pacific, Origin Pacific, Polynesian Airlines, Norfolk Jet
- ✈ Singapore Airlines – Star Alliance, Malaysia Airlines, Virgin Atlantic {Virgin Group}, Silk Air
- ✈ Lan Chile – One World
- ✈ Garuda – Malaysia Airlines, Philippine Airlines, Silk Air
- ✈ Malaysia Airlines – Garuda, Singapore Airlines, Silk Air, Thai International, Virgin Atlantic {Virgin Group}
- ✈ Polynesian – Air Pacific, Qantas
- ✈ Royal Tongan – Air New Zealand, Air Pacific
- ✈ Air Pacific – Qantas, Polynesian, Royal Tongan, American Airlines, Air Vanuatu, Solomon Airlines
- ✈ Freedom Air – Air New Zealand
- ✈ Virgin Atlantic – Singapore Airlines, Malaysia Airlines, Virgin Blue
- ✈ Virgin Blue – Singapore Airlines, Virgin Group {Through Equity}, Regional Express {REX}
- ✈ Emirates – Thai International, Philippine Airlines

These alliances constitute *"a person that includes 2 or more persons that are interconnected or associated"* under Section 47 {Certain Acquisitions Prohibited} of the Commerce Act 1986. Subsequently the integrated infringed merger of Qantas

and Air New Zealand would have substantially increased such associations - Both currently and in a projected manner.

16. The infringed merger between Qantas and Air New Zealand would have amalgamated the existing groupings of Marketing Alliances into a singular grouping. Comprising of 16 applicable Jet Operators and two (2) Turboprop Operators {Origin Pacific - Aligned to Qantas}[2] and {Regional Express – Aligned to Virgin Blue}.

17. It is considered appropriate to list the airlines involved {AUS/NZ Regional sense} in order that the intensity, complexity and blanketing effect can be displayed as a result of such a merger. Airlines aligned would be: - Air New Zealand, Air Pacific, Aerolineas Argentinas, Freedom Air, Garuda, Lan Chile, Malaysia Airlines, Norfolk Jet, Origin Pacific, Polynesian Airlines, Qantas Airways, Royal Tongan, Singapore Airlines, Silk Air {Currently inactive in SAM markets}, Thai Airways International, Virgin Blue {Virgin Group},[2] Regional Express {REX} and Emirates. Plus, 11 subsidiary international, domestic or regional airlines operating within or departing from Australia and New Zealand.[3]

Reference:

1. *Table 2 - Marketing Alliances - Trans Tasman {Original Submission Attachment}*
2. *Attachment ii - Marketing Alliances – Trans Tasman*
3. *Table 1 - International Alliances - Trans Tasman {Original Submission Attachment}*

SUPPORT SERVICES: ALLIANCE MECHANISM

18. As previously defined Marketing Alliances are entered into to provide contractual support services in the commercial or marketing areas of airline operation to participating airlines. Obviously, a genuine competitor will not be supported to compete with the service-providing airline over the same routes. {Note: Engineering services are generally available to any carrier from separate autonomous engineering divisions} The aim of a Marketing Alliance is to reduce competition in a primary sense. The following newspaper report further identifies an overshadowing alliance development with Virgin Blue[1] associated with the infringed merger proposal. Quote: -

> *"Air New Zealand...said this week that terminal access and ground services would be readily given to new rivals {Virgin Blue} under enforceable {Marketing?} agreements which would include promises not to use predatory pricing to shut out competition."*

{Logic Question: ***Would you allow a genuine competitor to provide customer services to your valued clients?}***

19. In addition, more recent public evidence through television, newspaper and radio media interviews and reports confirms attempts to create, develop and offer anti-competitive strategies in Virgin Blue's favour by Qantas and Air New Zealand. It is conceivable that the final attempt to negotiate around the law will be the offer of Freedom Air for sale to Virgin Blue confirming the original strategies of monopoly alliance creation.

Reference:

1. The New Zealand Herald Website - December 11, 2002

PART 11: Price Fixing

MERGER BETWEEN QANTAS AND AIR NEW ZEALAND - CONSUMER EFFECTS

20. In a pragmatic sense and in the short term, the infringed merger would have controlled the southern Australasian full service market including the Trans Tasman. In addition, locked up the regional discount market including the Trans Tasman, enabled Price Control to be effectively introduced by all alliance players. Plus, created market dominance in a predatory sense preventing fair competition emerging. In short - Higher Airfares and Captive Choice.

THE RISK OF A GRAND MONOPOLY ALLIANCE

21. In Response, we advance to the Commission that current and developing strategies would have promoted the creation of an Australasian "antipodean" alliance. The high risk of such an alliance, in terms of substantial damage to competition, identifies the infringed merger as solidly anti-competitive. Should such market dominance have been achieved the reduction in competition may have been irreversible for many years.

22. The infringed merger proposal between Qantas and Air New Zealand reasons that size {through merger} is necessary to secure future prosperity in an industry suffering a global downturn. Currently a majority of large industry carriers are undergoing initiated revival and downsizing in response to a severe cyclic global decline in passenger traffic. Such activity is deemed as normal practice in this century.

MERGER MARKETING ALLIANCES-CONSUMER EFFECTS

23. The authentic effects of the infringed merger between Qantas and Air New Zealand would have been reduced choice, higher airfares and price fixing over a range of products offered by an alliance of carriers each marketing in a specialised sense.

TWO AIRLINE POLICY: AUSTRALIA

24. As a result of historic Australian Federal Government Policy, during the aged Two-Airline Policy years, Price Fixing was utilised by the duopoly carriers at the expense of fair competition in the market. Due to intense public political pressure the policy that existed, for in excess of five decades, prior to deregulation in 1990 was finally defeated and with it – Price Fixing.

25. In Australia today commercial law has been unable to develop sufficiently to control predatory activity exercised by multi-billion dollar airline or corporate groups. Immediate, political opportunity exists to rectify these weaknesses and amend the Trade Practises Act. However, it is appropriate to state that the Australian Federal government has agreed with the Dawson Committee Review report into the Trade Practises Act. If the report is acted upon the resultant

legislation will converge this act towards the legal approach contained in the New Zealand Commerce Act 1986.

26. In New Zealand the Commerce Act has largely achieved control of predatory behaviour as a result of review and development of the legislation to its present state of maturity. **Section 36**, **Section 47** and **Section 66 & 67** are currently in place and functional at this time.

27. If the proposed merger between Qantas and Air New Zealand was cemented in place through government legislation, forming a subsequent Monopoly of Alliances, a statutory body would need to be established capable of monitoring and capping prices. That is, Price Fixing. Such a Price Fixing policy would then have been effectively introduced by government and fair competition in the market would be, consequently, removed.

28. In Response, we advance to the Commission that in New Zealand the legal mechanism to discipline the aviation industry against predatory commercialism already exists within the Commerce Act 1986 and the Fair Trading Act 1986. Providing the Commission is permitted to act on a case-by-case basis.

PART 111: Legal Conviction – NZ Commerce Act 1986

29. The proposed merger between Qantas and Air New Zealand and the consequential establishment of a monopoly of alliances involving the majority of airlines operating within the Australasian region in either an equity or marketing sense breaches New Zealand commercial law. In Response, we advance to the Commission that the proposed merger infringes **Section 36**, **Section 47** and **Section 66/67** of the New Zealand Commerce Act 1986.

SECTION 36 TAKING ADVANTAGE OF MARKET POWER

30. **Section 36 Taking advantage of market power**; of the Act states: - {A person being a company or incorporated body}

> (2) *"A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of -*
>
> *(a) restricting the entry of a person into that market or any other market; or*
>
> *(b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or*
>
> *(c) eliminating a person from that or any other market.*

31. In Response, we advance to the Commission that Public evidence and that submitted clearly demonstrates the infringed integrated merger between Qantas and Air New Zealand would have had the effect of taking advantage of market

power. Such advantage would have been accomplished through substantial Equity and Marketing Alliances that exist both in a current and projected sense. Such advantage would have restricted, prevented, deterred or eliminated any independent new entrant from entering the market.

32. **Section 36A Taking advantage of market power in Trans-Tasman markets**; of the Act states: - {A person being a company or incorporated body}

(2) A person must not, for any of the purposes specified in Subsection (3), take advantage of the person's substantial degree of power (if any)-

a) in a market; or

b) in a market in Australia; or

c) in a market in New Zealand and Australia

(3) The (Subsection 3) purposes are as follows:

a) restricting the entry of a person into a market that is not a market exclusively for services:

b) preventing or deterring a person from engaging in competitive conduct in a market that is not a market exclusively for services.

c) eliminating a person from a market, that is not a market exclusively for services.

33. In Response, we advance to the Commission that Public evidence and that submitted clearly demonstrates the infringed integrated merger between Qantas and Air New Zealand would have had the effect of taking advantage of market power in Trans-Tasman markets and would, therefore, breach Section 36A, Paragraph (2) & (3) in entirety. Such advantage would have been accomplished through substantial Equity and Marketing Alliances that exist both in a current and projected sense. Such advantage would have restricted, prevented, deterred or eliminated any independent new entrant from entering the Trans-Tasman market.

SECTION 47 CERTAIN ACQUISITIONS PROHIBITED

34. **Section 47 Certain acquisitions prohibited**; of the Act states: - {A person being a company or incorporated body}

"(1) A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market."

(2) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected or associated.

(3) For the purposes of this section, a person is associated with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other."

35. In Response, we advance to the Commission that Public evidence and that submitted clearly demonstrates the infringed integrated merger between Qantas and Air New Zealand would have had the effect of substantially lessening competition in the market and is, therefore, a prohibited acquisition. Therefore, the merger would not have met the legal requirements of Para 34, Clause (1); and;

36. Such lessening of competition would have been accomplished through substantial Marketing Alliances that would continue to exist. The merger would have met the legal requirements of Para 34, Clause (2), and;

37. Such lessening of competition would also have been accomplished through substantial Equity Alliances that would exist both in a current and projected sense. The merger would have met the legal requirements of Para 34, Clause (3).

SECTION 66 & 67 COMMISSION MAY GRANT AUTHORISATION FOR BUSINESS ACQUISITIONS

38. **Section 67 Commission may grant authorisation for business acquisition**; (3) of the Act states: {A person being a company or incorporated body}

"Commission may grant authorisation for business acquisitions -

a) If it is satisfied that the acquisition will not {have, or would be likely to have the effect of substantially lessening competition in a market}, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or

b) If it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted, by notice in writing to the person by or on whose behalf the notice was given, grant the authorisation for the acquisition.

39. In Response, we advance to the Commission that Public evidence and that submitted clearly demonstrates the infringed integrated merger between Qantas and Air New Zealand would have had the effect of substantially lessening competition in the market. Therefore, the merger would not have met the legal requirements of Para 38, Clause (a); and;

40. Public evidence and that determined by the Commission also clearly demonstrates the infringed integrated merger between Qantas and Air New Zealand would have had substantial negative benefit, in a current or projected sense, to the public and would have taken advantage of market power in Trans-Tasman markets. Such advantage would have been accomplished through

substantial Equity and Marketing Alliances that exist both in a current and projected sense. Such advantage would have restricted, prevented, deterred or eliminated any independent new entrant from entering the market. Therefore, the merger would not have met the legal requirements of Para 38, Clause (b).

PART 1V: Single Aviation Market Arrangements {SAM}

41. A meaningful function of this submission is to provide information and professional opinion to the public. Under this heading a warning is promulgated in the interest of alerting public attention to the implications of an impending global open skies policy.

42. In September 1996 Australia and New Zealand entered into a Single Aviation Market Agreement through a Memorandum of Understanding. This new regulatory approach served to open up the skies within Australia, New Zealand and between the two countries. Thus permitting suitably qualified local airlines to freely trade in any aviation situation.

43. The Agreement was amended in New Zealand in August 2002 and identifies policy that enables potential global open skies to eventuate depending on the political attitudes of governments of the day. The SAM Agreement is virtually superseded by the new agreement classified; **Agreement Between the Government of New Zealand and the Government of Australia Relating to Air Services.** This agreement permits governments to introduce into the aviation industry virtually any global carrier. The implications of this policy are described herein.

44. Originally, to preserve opportunities for local incorporated companies and promote **Closer Economic Relations {CER}** between the two countries {New Zealand and Australia}, the Basic Requirements of a Single Aviation Market {SAM} airline were and remain: -

    a) Effective control of a company must remain in the hands of Australian or New Zealand nationals. Headquarters may only be in either country.

    b) The majority of Shareholders must be Australian or New Zealand citizens.

    c) A Two-thirds majority of Board members must be Australian or New Zealand citizens.

    d) The Chairman must be an Australian or New Zealand national.

45. However, a second set of policy circumstances is contained in the agreement and identifies a "Stepping Stone" global open skies strategy through an additional airline classification of Designated Airline. The implications of such a policy are also described herein.

VIRGIN BLUE DISQUALIFIED: SAM

46. **Article 2** of the Single Aviation Marketing Arrangements {SAM}**;** Paragraph 4, (a) requires that:

> *"(a) the airline is majority owned and effectively controlled by nationals of either or both parties…"* {Parties being the Australian or New Zealand governments}

In Response, we advance to the Commission that Virgin Blue is in breach of Article 2, Paragraph 4, (a) of the Single Aviation Market {SAM} Arrangements in that the Virgin Blue Board is dysfunctional.[1] The airline is ineligible to enter a SAM market.

Regulatory questions exist in relation to Board control of Virgin Blue meeting the majority two-thirds Australian and New Zealand SAM requirements. The airline company is a subsidiary of the Virgin Group, a British corporation, which is jointly owned and controlled by a British national and Singapore Airlines. Virgin Blue is jointly owned by the Virgin Group and the Australian Patrick Corporation. Public evidence identifies that critical doubts exist as to whether the Virgin Blue Board is effectively controlled by nationals of either Australia or New Zealand.[2] The Patrick Corporation has initiated a legal mediation process in an attempt to conclude decision making concerning the future business direction of the company due to Board processes being dysfunctional.

47. **Article 2** of the Single Aviation Marketing Arrangements {SAM}, Paragraph 4, (c) requires that:

> *"(c) the airline has, as chairperson of its board, a national of either party…"* {Party being the Australian or New Zealand government}

In Response, we advance to the Commission that Virgin Blue is in breach of Article 2, Paragraph 4, (c) of the Single Aviation Market {SAM} Arrangements in that the Chairman of the Board is not an Australian or New Zealand citizen.[3] The airline is ineligible to enter a SAM market.

Reference:

1. *Commerce Commission Draft Determination on the proposed Qantas and Air New Zealand merger. Paragraph 98; The Dominion Post – May 21, 2003; The Sydney Morning Herald – May 16 & 21, 2003; The Australian Financial Review – May 14 & 16, 2003*

2. *Commerce Commission Draft Determination on the proposed Qantas and Air New Zealand merger. Paragraph 98*

3. *Commerce Commission Draft Determination on the proposed Qantas and Air New Zealand merger. Paragraph 98*

THE DESIGNATED AIRLINE: DEMOLITION OF LOCAL INDUSTRY

48. The Designated Airline {Paragraph 45} regulatory requirements of the **Agreement Between the Government of New Zealand and the Government of Australia Relating to Air Services** are similar to that of a SAM airline except there is a continuing relaxation of requirements to permit the advancement towards a global open skies policy. The Designated Airline, by nature of its point of departure and definition, can be virtually any subsidiary of a global airline. Or the local establishment of a clandestine airline company {ie. without an aircraft fleet} that is permitted to trade in the market using the aircraft fleet of any international operating airline.

49. A major factor concerning the Ansett Australia collapse was the effect of predatory commercialism being levelled against the company. Under a global open skies policy such commercialism becomes Scenario One as many of the 1,400 significant airlines of the aviation world maintain budgetary and monetary power that equals that of quite a number a small nations. In this scenario, predatory commercialism introduced into the industry by a global carrier would render the Ansett type collapse – Mild.

50. It is conceivable that the current bi-government pressure in support of the infringed merger between Qantas and Air New Zealand has its origin in the recognition that a global open skies policy could substantially damage either national carrier in a Scenario One competitive environment.

51. An evaluation of a failure of Qantas under Scenario One type commercialism has alarming consequences. For example, Qantas unmerged employs 35,000 and considering the Ansett collapse experience of a 2.5 to 1 multiplier, the total job loss would be approximately 90,000. The Qantas/Air New Zealand merged figure raises the total job loss to some 110,000. Or by population comparison - equal to the city of Hobart, in Tasmania, or Porirua, Upper Hutt and sections of the Kapiti Coast in the Wellington Region. {Figures are approximate}

52. Based on the Ansett collapse experience, a merged failure could produce in excess of 7.0 million creditors by comparison and the possible bankruptcy of 13 airlines. Plus an unknown number of commercial failures.

53. In terms of risk assessment comparison, the United States Congress has not ever sanctioned developing mechanisms that would result in a global open skies policy. This is a significant American political attitude, which supports the US constituency, in an aviation industry that ranks the largest single market existing on the globe.

{Logic Question: ***Why does the United States government protect its national aviation industry and therefore it's parochial constituency?****}*

54. Scenario Two considers the bypass of the decisions made by either or both New Zealand and Australian competition commissions and the compelled merger of

Qantas and Air New Zealand as a result of government legislation. In this case the argument for a global open skies policy becomes justifiable. The probability that an expansion of the initial established monopoly of alliances, {ie. between Qantas and Air New Zealand} to include new entrant global alliance carriers is distinctly – High. Such a scenario would increase monopoly power in the region, particularly considering the extent of current global alliance structures.

55. **Article 2** of the **Agreement Between the Government of New Zealand and the Government of Australia Relating to Air Services** concerning Designated Airline Arrangements**;** Paragraph 2, (*) requires that:

> *"(*) effective control of that airline is vested in the Party designating the airline, nationals of that Party, or both..."* {Parties being the Australian or New Zealand governments}

In Response, we advance to the Commission that Virgin Blue is in breach of Article 2, Paragraph 2, (*) of the Designated Airline Arrangements in that Public evidence identifies that critical doubts exist as to whether the Virgin Blue Board is effectively controlled by nationals of either Australia or New Zealand.[1] {See also Paragraph 46} The Patrick Corporation has initiated a legal mediation process in an attempt to conclude decision making concerning the future business direction of the company due to Board processes being dysfunctional. The Virgin Blue airline is ineligible to gain Designated Airline status.

GLOBAL POSITIONING

56. A more relaxed regulatory environment has eventuated in Australia and New Zealand for the purposes of encouraging more competition from international operators. However, strategic planning by overseas long haul airlines or airline groups with global ambitions may exhibit more interest in global positioning. Or intensifying their own companies or subsidiaries rather than the provision of long term regional services in the interests of parochial economic development.

57. In the context of global positioning the practice of "capital shipping" is undertaken by overseas parent owners in the interest of international business strategies. For example, Virgin Blue, as the duopoly partner, in Australia has actualised a reported gross profit of $NZD 180.0 Million this financial year of which a consequential percentage of the net {$NZD 126.5 million}[2] is highly likely to be transferred to overseas business interests.[2] {Figures are approximate} Capital shipping could be described as an economic transfer of capital.

DUOPOLY MARKETS

58. The infringed merger between Qantas and Air New Zealand used a justification that the current {duopoly} markets are threatened by low fare carriers commonly known as Discount {DA} or Value Based Airlines {VBA} based on new international trends. However, research indicates that many of these carriers have been in existence for over a decade without dismantling traditional {FSA}

Full Service Airlines. In general, they {DA/VBA} currently service only 10% of the market. Predatory business models belong to specific strategies generally used by multi-billion dollar corporate groupings. For example, Historically, Virgin Blue as the new Australian duopoly partner Page 3 Predatory Commercialism and Qantas as an incumbent airline.

59. The Jumpjet® business model was initially developed as a Value Based concept and seeks the opportunity to trade in the market as a variant without predatory commercialism being levelled against it from incumbent airlines including established duopoly operators. *{Jumpjet: Incorporated - January 1999}*

MERGER: DISCOUNT PRODUCTS

60. Should the infringed merger between Qantas and Air New Zealand have been successful the monopoly of alliances that was founding would have offered a complete range of products from FSA products to DA/VBA products. In Response, we advance to the Commission that the merger was omnivorous in itself and is a departure from sound democratic economic principles.

REGULATORY: CAPACITY AND TRADING EXCESSES

61. In view of recent industry events there is growing public concern that the sedate regulatory environment may have developed too tolerantly within and between Australia and New Zealand. The original reasoning behind more regulatory relaxation was to foster increased competition in the light of an industry that has lacked fair competition for many years.

62. Current Virgin Blue public strategies are unable to be determined as wide spread public reports indicate significant inconsistencies. Critical doubts exist as to the chastity of any public strategy planned by the corporate. However, original public statements indicated that Virgin Blue is planning a typical traditional entrance into Trans Tasman operations as indicated recently by the company.[3] Quote: -

> *"Virgin Blue plans to fly to New Zealand next year and have a fleet of eight planes operating international flights by the end of 2004."*

63. The Trans Tasman operations of Qantas and Air New Zealand currently uplift some 40,600 passengers or 1850 passengers per aircraft per week. {Figures used are one-way and approximate} Qantas uses 10 aircraft and Air New Zealand 12. The predatory capacity increase by Virgin would be in excess of 40%.

{Logic Question: ***What industry could absorb a 40% plus increase in competitiveness within a short period of time?}***

64. In Response, we advance {Following researched consideration} to the Commission that the answer to insatiable commercialism lies effectively within

the existing Commerce and Fair Trading Acts. In relation to current issues involving the Applicants {Qantas and Air New Zealand} or any subsidiaries, companies, groups of companies or alliances, the Commerce Act, **Section 36** – Taking Advantage of Market Power, **Section 47** – Certain Acquisitions Prohibited and **Section 66/67** – Commission May Grant Authorisation for Business Acquisitions; are sufficiently advanced to discipline any subsidiaries, companies, groups of companies or alliances { ie. a "person" under the Act} regardless of high levels of monetary, political or market power. However, the question remains as to whether the **Commission** has the capacity to act on a **case-by-case** basis?

65. In Australia the window of opportunity to amend the Trade Practices Act to a capability of legal discipline against offending subsidiaries, companies, groups of companies or alliances has opened. Public evidence confirms that the Trade Practises Act is insufficient in its current state to cope with industry operational issues in the airline aviation industry. Information available indicates that significant amendment is under serious consideration to enable the Trade Practices Act to effectively prosecute parties involved in predatory commercial behaviour in the market. In view of the Ansett collapse, airfare wars and other recent events in Australia - amendment is surely in urgent need.

66. The distinction between fair competition in the market and predatory commercialism lies within the trading conduct of the airline operator. That is, any airline operator, incumbent or entrant carrier.

67. The two critical factors that identify predatory commercialism are the introduction of excessive capacity, by a predator, followed by a barrage of unsustainable airfares. Technical solvency is maintained by the support of cash gained as a result of the "capital shipping" of equity funding from a parent group. Currently, the New Zealand Commerce Commission is in a legal position to issue "Cease and Desist" orders, discharged, to immediately suspend a suspect practise until the results of a subsequent investigation are known. A remaining question revolves around the operational restrictions on the **Commission** preventing immediate action in relation to Applications on a **case-by-case** basis?

Reference:

1. *Commerce Commission Draft Determination on the proposed Qantas and Air New Zealand merger. Paragraph 98; The Dominion Post – May 21, 2003; The Sydney Morning Herald – May 16 & 21, 2003; Australian Financial Review – May 14 & 16, 2003*

2. *The Dominion Post – May 16, 2003; Australian Financial Review – May 16, 2003*

3. *Section 58 Application document submitted by Qantas & Air New Zealand - December 9, 2002*

68. In the case of a new entrant airline not yet operating in the market, a primary form of assessment could easily take place at the licence issue stage prior to the carrier entering the market. The Ministry of Transport is in an apt position to assess, grant or reject a licence application based on the scheduled capacity of the entering airline. For example, an operator intending to introduce predatory jet services into the New Zealand Domestic Trunk Routes, using two Boeing 737-800's in a high density passenger configuration, could effectively introduce in excess of 830,000 seats into the market per annum. Figures constituting balanced capacity could easily be determined by the ministry based on particular market research and established policy.

PART 1V: Jumpjet - Access to the Market

69. Over the last decade predatory commercialism has become a traditional activity in the Australian market when a new entrant carrier has challenged an existing duopoly. Other factors contributing to lack of success of entrant carriers include lack of support from either commercial and aviation regulations or financial and investment institutions or both. In 2003, the current duopoly, in Australia, now consists of a joint subsidiary of an overseas group and Qantas. The skies are less competitive today than they were decades ago. {Market Share: Qantas 72%; Virgin Group/Patrick Corporation 28%} Competition in the market from new local entrants continues to remain distinctly low and unsupported.

THE TRANS TASMAN MARKET

70. The Australasian market is expansive with the number of airlines operating reducing due to the shutdowns, mergers, alliances and acquisitions that have occurred within the last few years. Jumpjet® seeks the opportunity to develop the low yield and tourist niche market with a value based concept (VBA). Growth planning is conservative and precise in a market that has moderate growth potential.

71. In terms of preparation, Jumpjet® is well past an embryonic stage, having achieved sufficient completeness in terms of the Business Model design and company development to enable immediate operational capitalisation. Financial structuring methodology has been confirmed as feasible by a leading international institutional banking group. Required contractual responsibilities have been pre-negotiated to judiciously beyond preliminary stages. The Airline Company is adequately equipped to commence an instant countdown to launch following the fulfilment of capitalisation activities.

72. Capitalisation is currently being negotiated and an official countdown date is highly likely to be confirmed within two months. Funding issues have been challenging due to the perceived dismal state of international global aviation by the investment and finance industries. Current outstanding regional industry issues have also had a bearing on negotiations. Australasian markets are largely

unaffected. {apart from Asia} However, the overflow of the September 11th terrorist attack on the US, severe recession, the SARS Flu epidemic {now fading} and the effects of the war in Iraq {now at an end} have plunged the US airline industry into crisis. A similar severe downturn is evident to and from Asia, China, the Middle East, parts of Europe and the Atlantic routes.

73. In this volatile industry the one surety is its cyclic nature. Such cycles generally occur every 18 months to three years and are a relief valve in an industry that is seen to be extravagant in terms of excesses.

TOURIST FOCUS : NICHE MARKET DEVELOPMENT

74. The Jumpjet® company has changed little from the original focus that was to specialise on the Trans Tasman as a hybrid carrier cultivating the tourist niche market. The development has modest growth expectations and the mission is to provide an operation with value, service and integrity.

ADDITIONAL CONSUMER CHOICE

75. The Trans Tasman market consists of aligned {Trunk Route} carriers that are interconnected in terms of equity and marketing balance. A return has occurred to an inelastic establishment of duopoly airlines both in New Zealand and Australia that network through wholly owned subsidiaries and marketing alliances.

76. Jumpjet® seeks the opportunity to commence fair-trading in the market and provide consumers with complimentary choice. The strategic capacity of the airline being that of an independent and accountable competitive carrier. The company has its own unique brand and trading methodology. The commercial structuring is fresh, new, vibrant and accommodates the natural concerns of consumers.

PART V: Conclusion

In Conclusion, we advance to the Commission that the proposed merger between Qantas and Air New Zealand repetitiously infringes the legal requirements of the New Zealand Commerce Act 1986. The overwhelming consideration approving such a merger would essentially need to be the Applicants ability to meet the Law, not their ability to negotiate through the Law using floating economic bias.

The resultant Monopoly of Alliances would have breached a number of sections within the act. Namely, **Section 36 & 36A** by taking advantage of market power. Plus, **Section 47**, which prohibits the acquisition of a business or shares that, will result in the consequence of substantially lessening competition in the market.

Also, **Section 67**, which also denies acquisition of a business that will result in the consequence of substantially lessening competition in the market. Although, part of the requirements for acquisition is the proof of public benefit, public detriment has been determined by both Commissions, to implicitly outweigh public benefit. In addition, the New Zealand Commerce Commission has recently concluded an increasing negative benefit factor. That is, when considered in terms of economic modelling, existing legislation and the floating economic controversy presented by the Applicants.

Continuing strategies by major players mentioned herein confirm rather than deny the foundation establishment of a monopoly of alliances through association and orchestration.

{Logic Question: ***How could the creation of a Monopoly*** *{of Alliances}* ***prove public benefit superior to fair and meaningful competition in the aviation market?}***

The Single Aviation Market {SAM} Arrangements govern and regulate the market between and within Australia and New Zealand and currently the airline company, Virgin Blue, does not meet the regulatory requirements of this international bilateral agreement. The company is ineligible to enter both the SAM and Designated Airline markets.

The merger applied for by the Applicants under **Section 58** does not meet the legal requirements of the Commerce Act 1986, as such an eventuality would no doubt substantially lessen competition in the market - Politically, economically and in respect of consumers. Also, insufficient public benefit could be demonstrated that replaces the democratic principle of fair and meaningful competition in the market.

Jumpjet® unconditionally supports confirmation of both the Draft Determinations handed down by the Commissions and acknowledges the measure of activity undertaken to achieve such assessment.

ATTACHMENTS

Attachment i - Market Lockup Equity Strategies
Attachment ii - Marketing Alliances – Trans Tasman
Attachment iii – Parties Appearing & Qualifications

Copy: Australian Competition and Consumer Commission