APPLICATIONS BY QANTAS AIRWAYS LIMITED AND AIR NEW ZEALAND LIMITED UNDER SECTIONS 58 AND 67 OF THE COMMERCE ACT 1986 FOR AUTHORISATIONS OF STRATEGIC ALLIANCE AND PROPOSED SHARE ACQUISITION

SUPPLEMENTARY SUBMISSIONS ON PROCESS ISSUES

Reference to Prior Submissions

1. This supplementary submission is filed at the request of the Commission and in respect to a point regarding the "onus" of proof which was raised during questioning by the Commission on 19 August 2003. It also deals with another issue raised, namely whether the Applicants would be "associated persons" following termination of the Strategic Alliance Agreement ("SAA").

Further Submissions Regarding Onus of Proof

2. In their joint Submissions on Process Issues dated 14 August, the Applicants submitted that the Commission must be satisfied on the balance of probabilities that the Applications ought to be approved.

3. This further submission clarifies that the requirement that the plaintiff bear the onus of proof in a civil proceeding does not apply to determinations made by the Commission under the Commerce Act 1986 ("Act").

4. This was confirmed in *Foodstuffs (Wellington) Co-operative Society Limited v Commerce Commission* (1992) 4 TCLR 713, 721-722 (HC):

> We do not think it is appropriate to deal with this question on the ordinary application of an onus of proof. No doubt there is, to some extent, a preliminary or threshold onus on the applicant who makes his application but the matter cannot end there. The commission is an investigative body which has the function of inquiring into and deciding the matter before it. It is not a strictly adversarial procedure – there may be no opposing parties – but it is necessary at all times to consider the general public and community interests. In the end, the commission has to be brought to the point where it is satisfied, that it is more probable than not, that as a result of the acquisition a person would not be or be likely to be in a dominant position or have that position strengthened …

5. When an application for clearance or authorisation is filed, the Commission is required to embark on an inquisitorial process. It is empowered to determine aspects of its own procedure and to place such weight as it considers appropriate on evidence as it considers may assist in the execution of its statutory duty under the Act. It is constrained only by requirements that, in so doing, it complies with principles of natural justice and that it acts within the scope of administrative law principles.

6. Aspects of the Commission's inquisitorial jurisdiction conferred on it under the Act include:

   (a) The Commission is required to ensure that all interested parties, or members of the public are aware that any application for authorisation of a restrictive trade practice has been made (refer section 60);

(b) The Commission may convene a conference to hear parties' comments in relation to an application for clearance or authorisation (refer sections 62 and 69B);

(c) Any person to whom a draft determination was sent is entitled to appear any any conference (refer sections 64 and 69B));

(d) The Commission may require any person to attend a conference including its own officers or any person that it considers may be capable of assisting it to reach a determination and it may consult with any person who may assist it in making a determination (refer sections 64(2) and 68(5));

(e) Conferences are to be run with as little formality and technicality as is possible which enables the Commission effectively and efficiently to consider the application at issue (refer section 64(3));

(f) Parties are required only to be given sufficient time at a conference to provide them with a reasonable opportunity to present their views (refer section 64(5));

(g) The Commission may require the production of documents (refer sections 60(6) and 98); and

(h) The Commission is not bound by the usual rules of evidence in the conduct of its affairs (refer section 99).

Appropriate Approach to the Question of Onus of Proof

7. It is submitted that the Applicants have met any preliminary threshold onus in relation to the Applications. It is also submitted that on a proper analysis the Applicants' case for authorisation has been made out to the balance of probabilities.

Post-termination of the SAA, the Applicants would not be "associated persons"

8. The Applicants were asked whether they would be "associated persons" (as referred to in section 47(3) of the Act) if the SAA were terminated *and* Qantas retained its 22.5% shareholding in Air NZ.

9. Post-termination of the SAA, Qantas and Air NZ would *not* be associated persons. Qantas would essentially be relegated to the position of a minority shareholder **[CONFIDENTIAL]**.

10. **[CONFIDENTIAL]**

11. The Applicants note that:

(a) In light of the fact that the Crown will likely remain the majority shareholder, **[CONFIDENTIAL]** ;

(b) **[CONFIDENTIAL]** ;

(c) As, the Crown would likely be the majority shareholder, Qantas would *not* be able to block an ordinary resolution or influence the day-to-day management of the company;[1]

(d) Qantas would also be *unlikely* to have even the ability to block a special resolution. Even then, few matters require a special resolution which do not ultimately go to the strategic decision making processes of a company.[2]

12. The Applicants note that this position is consistent with the following well-known "rebuttable presumption" postulated by Berry and Riley (emphasis added):[3]

> (b) A shareholding between 20% and 30% is likely to give rise to a substantial influence **only if** there are "**other factors**". These other factors would include the distribution of other shareholdings, the ability to defeat shareholder resolutions, board representation, and the ability to influence the target's management and policy.

13. No such "other factors" would be present and Qantas would not have the ability to exert "substantial influence" over Air NZ . It would not have the ability "to bring real pressure to bear on the decision-making process" of Air NZ. As noted in paragraph 11 of the Applicants' joint Submissions on Process Issues dated 14 August, the Qantas shareholding would put it in the position of "minority shareholder [with] no ability to affect the state of competition in the market".[4] On that basis, as noted in the joint Submissions, were the equity stake being considered in its own right it would "inevitably lead to the grant of a *clearance*".

Dated 25 August 2003

Andrew M Peterson/Phil R T Taylor

[1] Qantas would (on current shareholdings) have in the order of a 63.6% in Air NZ, BIL would hold around 4.2%, Singapore Airlines around 3.5%, and there would be a "free float" of public shareholders of around 6.2%.

[2] Essentially, only "major transactions" and amendments to the Constitution.

[3] MM Berry & A Riley "Beware the New Business Acquisition Provisions in the Commerce Amendment Act 1990" (1991) 21 VUWLR 91 at 111.

[4] For the sake of completeness, the Applicants also note that, following the May 2001 amendments to the Act, the "associated persons" test in section 47(3) would only appear relevant for collective acquisitions.