SUBMISSION BY
THE TRAVEL AGENTS' ASSOCIATION OF NEW ZEALAND
INCORPORATED

TO THE MINISTRY OF TRANSPORT
REGARDING APPLICATION BY AIR NEW ZEALAND AND QANTAS
FOR AUTHORISATION OF CERTAIN ARRANGEMENTS KNOWN AS THE

TASMAN NETWORKS AGREEMENT
UNDER SECTION 88 CIVIL AVIATION ACT 1990

31 July 2006

11 Pgs.

1. Introduction

1.1 The Travel Agents' Association of New Zealand Incorporated (TAANZ) makes the following submissions in response to the applications made by Air New Zealand Limited ("Air New Zealand") and Qantas Airways Limited ("Qantas") to the Minister of Transport for approval to be given under s.88(2) Civil Aviation Act 1990 for authorisation by the Minister of Transport for the entering into and giving effect to a Tasman Networks Agreement ("the TNA").

1.2 TAANZ is the national representative body for travel agents in New Zealand. Membership is not compulsory but TAANZ represents over 95% of IATA accredited agents in New Zealand. TAANZ has approximately 400 full members. These members also operate an additional 84 branch locations.

1.3 TAANZ is a member of the World Travel Agents Associations Alliance (WTAAA) being the world body of a number of international travel associations.

1.4 TAANZ regularly makes submissions on behalf of its members on issues which are of concern and relevance to the travel industry in New Zealand and to consumers of travel.

2. Summary of Position

2.1 TAANZ opposes the granting of any authorisation by the Minister to Air New Zealand and Qantas (jointly referred to as "the participants") entering into and giving effect to the TNA on the following grounds, each of which will be developed in more detail in this submission:

(a) The Minister has no jurisdiction under s.88 Civil Aviation Act 1990 to authorise entry into arrangements of the kind and nature in question;

(b) If the Minister does have jurisdiction the Minister should decline to exercise his discretion to authorise the TNA and require that the participants obtain approval for the TNA pursuant to the Commerce Act.

2.2 In addition to the jurisdiction issues raised in 2.1, TAANZ has received feedback from its members on various aspects of the TNA with:

(a) the majority of TAANZ members opposing the TNA because the TNA will result in:

(i) an increase in the cost of airfares on the Tasman;

(ii) an unavoidable and dramatic lessening of competition on the Tasman.

(b) a minority of TAANZ members have raised the same concerns as above and whilst not supporting the TNA do not formally oppose it either.

3. The Minister's jurisdiction to grant an authorisation under section 88 Civil Aviation Act

3.1 TAANZ submits that the Minister does not have jurisdiction to authorise arrangements of the kind and nature put forward by Air New Zealand and Qantas in its application for approval of the TNA.

3.2 Section 88 forms part of a bracket of provisions coming under Part IX of the Civil Aviation Act under the heading "International Air Carriage Competition". This part of the Act provides a special regime under which contracts, arrangements or understandings relating to international carriage by air may be authorised by the Minister, in order to be brought outside the application of sections 27 to 29 of the Commerce Act. These provisions confer a special excepted status on arrangements for which authorisation may be obtained, and the scope and application of these provisions should be strictly construed.

3.3 The purpose and effect of s.88 was helpfully outlined in a report prepared by the Ministry of Transport dated 8 July 1994 regarding approval of IATA agency resolutions under the Civil Aviation Act, and in the covering letter with that report from Mr Michael Sykes, adviser on international air services. A copy of that Report can be made available to the Minister should that be requested.

3.4 In para.2 of the covering letter, the purpose of s.88 was explained in the following passage which is respectfully adopted by TAANZ:

"Authorisation under section 88 of the Civil Aviation Act gives protection from certain aspects of the Commerce Act which would otherwise apply to agreements between competitors (airlines) relating to the fixing and application of prices. Section 88 was developed in recognition of the unique way in which international commercial aviation operates world-wide, being based on a high degree of both regulation and co-operation. It is the co-operative aspect which provides the facility of interlining, under which a passenger can pre-purchase one ticket for carriage to almost any destination in the world via any number of countries and airlines if so desired or necessary, at one price paid for in one currency for that total journey, with that ticket being honoured by all airlines concerned, with the ability to make changes to the routing including the airlines to be used, and with the ability to readily obtain a refund if any portion of that journey is altered or deleted.

Although the airlines can and do agree to interline on a bilateral or plurilateral basis, the enormous number of possible journey permutations require multilateral agreement by all of the world's major airlines, a task which is fulfilled by IATA." (emphasis added)

3.5 Pages 4-5 of the Report summarise the purpose of ss.88-91 of the Civil Aviation Act as follows:

"1. The primary purpose of Sections 88 to 91 of the Civil Aviation Act 1990 is to provide an appropriate and workable competition regime in NZ for commercial international aviation operations which recognises that:

(a) international aviation operates in a unique manner world-wide, with its development and continued operation resting upon a high level of agreement, co-operation and co-ordination between competing airlines; and

(b) the application of domestic competition law to international aviation in its totality would raise considerable problems in terms of this unique

nature, extra-territorial reach and New Zealand's obligations under its bilateral and multilateral aviation agreements with other states.

2. The scheme of authorisation introduced in Sections 88 to 91 provides for the exemption from Part II of the Commerce Act only of those international aviation contracts, arrangements and understandings considered to require factors additional to normal competitive considerations to be taken into account; and only where such contracts etc meet the specific criteria developed to take account of both these additional factors and fair trading practices appropriate to international aviation.

3. In considering any application for authorisation under Section 88, it is therefore necessary:

(a) to determine firstly whether the application falls within the categories stipulated in subsection 88(2); and

(b) if so, whether it then meets the criteria set down in the subsequent subsections of S88."

3.6 Of particular significance also is the discussion at the top of pp.5 and 6 of the Report on the eligibility for authorisation under s.88(2) of inter-airline agreements entered into through IATA Conferences and IATA Traffic Conferences. Exempting legislation was necessary in order that these agreements, which would otherwise be affected by the provisions of the Commerce Act, would be protected.

The Report refers to two broad but inter-related categories of agreements negotiated at IATA Traffic Conferences, which require this protection –

- agreements enabling the negotiation and agreement of fares, rates and charges and their related conditions, plus rates and levels of commission on sales;

- procedural matters: enabling the co-ordination of trade association matters relating to the arrangement, sale and provision of carriage at such fares, rates and charges.

3.7 It is submitted that the purpose of the special exemption regime – 1991 Civil Aviation Act – is to provide a statutory form of exemption, by way of authorisation from the Minister, for contracts, arrangements and

understandings entered into by airlines on a co-operative basis through the IATA Traffic Conferences. The "co-operative aspect" of inter-airline negotiations and arrangements which these sections are particularly designed to protect, in the way set out in the extract from the covering letter earlier referred to, is the co-operation between international airlines through the IATA Traffic Conferences. The legislation is not intended to provide protection outside of that multilateral context. See the underlined wording in the quotation at para 3.4.

3.8 It is submitted that the legislation was never intended to provide a means for protecting negotiations and arrangements entered into by international airlines outside of the IATA Traffic Conferences. In particular, it is submitted that the purpose of these provisions was not to provide protection for arrangements entered into by the two major airlines competing on a route in order to provide a special tariff regime for those airlines and obtain for those arrangements the protection from challenge under the anti-competitive provisions of the Commerce Act that ministerial authorisation provides.

3.9 In further support of this submission, TAANZ says:

(a) the special regime in ss.88-91 of the Civil Aviation Act should, as already submitted, be construed strictly, having regard to the exemption which it provides from Commerce Act provisions directed at anti-competitive practices which would otherwise have general application.

(b) Section 88(2) empowers the Minister to authorise contracts, arrangements and understandings which relate to "the fixing of tariffs, the application of tariffs, or the fixing of capacity, or any combination thereof." The definition of "tariff" in s.88(1) has special significance in this respect. Although the definition relates to statements expressed to apply to "one or more specified airlines", or to "all airlines other than one or more specified airlines", or to "all airlines", the broad application of the word "tariff" must be read having regard to the specific matters that are then set out in sub-paras.(a), (b) and (c) of that definition.

(c) Sub-paragraphs (a), (b) and (c) of the definition of "tariff" are directed to facilitating the fixing of fares, rates and charges "between specified points" (para.(a)) and apply only to international carriage "between those points" (para.(b) and para.(c)). It is the facilitation of co-operative entry [through IATA Traffic Conferences] of arrangements to cover interlining between different points to which this definition is directed. It is this particular feature of international air travel, which necessarily involves the co-operative aspect between airlines, that the legislation is designed to protect. It is submitted that the legislation was never intended to enable the two airlines which together have a dominant share of the market on the Tasman to obtain exemption in relation to a restrictive regime enabling those airlines to fix fares and charges between particular points on an exclusionary basis.

(d) The same submission applies to the definition of "capacity" in s.88(1). That definition also applies to flights to be undertaken "between specified points". Once again, it is this aspect of interlining [through IATA Traffic Conferences] that requires protection. The provision, it is submitted, was never intended to enable the two airlines which together have a dominant share of the market on the Tasman to take advantage of the regime in ss.88-91 to develop an exclusionary fare structure and to control the volume of traffic/capacity.

(e) It would be surprising if New Zealand were considered to have a legislative regime which provided protection from such arrangements being scrutinised by the competition watchdog when the other comparable regime, namely Australia, has no such protection. In Australia the proposed TNA requires examination by and the approval of Australia's competition regulator. The New Zealand legislation should be treated as having a different application only on the basis that the clearest language requires this.

4. The Minister's Discretion

4.1 If the Minister does technically have jurisdiction the Minister should decline to exercise his discretion to authorise the TNA on the grounds that:

(i) the proposed arrangements set out in the TNA are arrangements which introduce and would sanction anti competitive conduct in a very important market affecting large numbers of New Zealanders;

(ii) Part IX of the Civil Aviation Act was not intended to provide a mechanism for authorising arrangements of this type. (Refer previous submissions as to jurisdiction.)

(iii) The Commerce Act provides the legislative basis upon which such applications should be considered.

4.2 These grounds are made out by an analysis of the form and substance of the submission prepared by the participants in support of the application. The submission is clearly lengthy and it concentrates on the effect that the TNA would have on the Tasman aviation market and competition within it.

4.3 It is clear that the discretion given to the Minister to authorise the provisions of contracts and arrangements in section 88(2) of the Civil Aviation Act is wide. The Minister is required to consider the effect that such authorisation would have on the NZ Government complying with relevant international conventions it is a party to (section 88(3)) and a number of specific factors listed in section 88(4) and the effect of the authorisation on international comity between New Zealand and any other state.

4.4 The Minister may, should and will consider other matters in determining whether he should exercise discretion to grant authorisation. In this case, as is implicit from the application and submission of the participants, the effect of the TNA on competition on the Tasman aviation market is a matter at the heart of the issue.

4.5 The issues raised by the application should be determined under the authorisation provisions of the Commerce Act where proper weight can be given, by those expert in such matters, to all relevant factors and to the public benefit. The Minister of Transport is not equipped and does not have the expertise or experience available to the Commerce Commission to deal properly with issues relevant to such applications.

4.6 That the submission made at paragraph 4.5 is correct is hardly surprising given the fact that the policy considerations which provide the rationale for the discretion given to the Minister in section 88 of the Civil Aviation Act do not extend and were never intended to extend to the granting of authorisation in a case such as this. This in itself provides the most compelling reason why the Minister should decline to authorise the TNA and refer the matter to the Commerce Commission for deliberation.

5. Impact on airfares

5.1 The TNA reduces capacity across the Tasman and as a consequence TAANZ believes that prices will almost certainly rise as the number of seats is reduced and inventory is managed by the participants to maximise yield in a market in which the participants will not have any real competition. Not only will fares within each category or price band rise but also the number of fares in the lower price bands will reduce markedly, particularly over peak periods. This will result in a significant number of New Zealanders paying considerably more to travel to and from Australia. The Minister should accept this as an inevitable consequence of the Minister granting approval to the TNA. The Minister would no doubt wish to be satisfied that there were other benefits which outweigh this undoubted detriment before granting approval to the TNA.

5.2 Travellers connecting domestically within New Zealand with trans-Tasman flights under the TNA may also face increased fares on these domestic sectors, particularly those operated by Air New Zealand, as part of yield maximisation.

6. Impact on competition

6.1 Qantas and Air New Zealand together account for a high proportion of capacity and frequency on trans-Tasman routes and on some routes

represent 100% of capacity. Overall the participants handle about 80% of the passengers travelling on trans-Tasman routes.

6.2 In the important business market almost all travellers use either Qantas or Air New Zealand, even if other carriers operate on the routes they wish to travel. This is mainly because business travellers prefer the frequency of departures offered by Qantas and Air New Zealand throughout the day. Larger companies often have a corporate deal with one of these two carriers that is linked in with a frequent flyer programme which has an important impact on their choice of carrier. Business use of Pacific Blue is very limited due to their lower level of in flight service, limited schedule (many of their flights are at non-peak periods) and lack of frequent flyer benefits and airport lounges. Pacific Blue also focuses on leisure destinations. Business use of fifth freedom carriers is also low due to their limited schedule and unsuitable departure times of flights based on being part of a longer global route structure, and a lack of frequent flyer benefits and airport lounges.

6.3 The approval of the TNA will see no competition on Wellington-Sydney, Wellington-Melbourne, Auckland-Adelaide, Christchurch-Coolangatta and all routes from Queenstown. These are routes on which currently Qantas and Air New Zealand (or their subsidiaries) compete with one another.

6.4 The approval of the TNA will see only minimal competition on Wellington-Brisbane and Christchurch-Melbourne routes. These are routes on which currently Qantas and Air New Zealand compete with one another and also with Pacific Blue.

6.5 The TNA has the potential to enable the participants to exert considerable influence over what remains by way of competition in this market.

6.6 TAANZ members do not see that there is any capacity in the existing airlines operating on the Tasman to compete effectively with the participants if the TNA is approved. Issues include schedule flexibility, availability of airport slots and aircraft availability. Fifth freedom carriers are heavily constrained in terms of what they can offer in schedule flexibility as their trans-Tasman services are only a minor part of much longer routes to and from the Australasian market. They have very limited

ability to expand services. None of the fifth freedom carriers currently has aircraft working the Tasman which are capable of operating routes into Wellington which has significant runway constraints.

6.7 Approval of the TNA will significantly reduce competition on the Tasman routes. TAANZ is concerned that approval of the TNA may result in there being no effective competition on the Tasman.

DATED at Wellington this 31st day of July 2006

Paul Yeo
Chief Executive