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TO: Brett Johnson, General Counsel, Qantas

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CIVIL AVIATION ACT 1990, s 88

1 You have asked for my advice on certain aspects of section 88 of the Civil Aviation Act 1990 ("CAA1990"), and the relationship between that provision and section 43 of the Commerce Act 1986.

2 I summarise my views as follows:

2.1 under section 88 it is open to the Minister to authorise contractual provisions prescribing mechanisms for setting tariffs and capacities. Section 88 is not confined to authorisation of specific tariffs or tariff structures, or specific capacity levels;

2.2 section 88(4)(c) does not prevent the Minister authorising a general machinery provision for setting tariffs. Where unjustifiable discrimination between consumers in the access they have to competitive tariffs is not inherent in a provision (ie it is not expressly provided for, and the machinery prescribed will not necessarily lead to that result), subsection (4)(c) does not prevent authorisation of the provision;

2.3 the discretion of the Minister under s 88(2) is a broad discretion to be exercised in the public interest, and for the purposes of the CAA 1990. The Minister is not required to authorise a provision whenever subsection (4) does not prohibit authorisation. The Minister can and should have regard to all relevant aspects of the public interest in deciding whether or not to grant an authorisation;

2.4 where a provision that prescribes a tariff-setting or capacity-setting mechanism is authorised under s 88(2), and that mechanism is applied by

the parties to the agreement, the combined effect of s 91 CAA 1990 and s 43 of the Commerce Act is that nothing in Part 2 of the Commerce Act applies to the resulting tariffs and capacities;

2.5 among the aspects of the public interest which the Minister can take into account, in exercising the s 88 discretion, are the breadth and flexibility of the mechanism prescribed by the relevant provisions (and the resulting breadth and effect of the disapplication of Part 2 of the Commerce Act 1986), and the existence of any reasonable grounds for expecting the provision to result in unjustifiable discrimination between consumers, or for that matter any other detriments to consumers. These factors – the breadth/generality of a provision, and the possibility of discrimination under such a provision – may be relevant to the Minister's discretion, but do not preclude authorisation.

3 My reasons for these views are set out below.

Relevant provisions

4 Part 9 of the CAA 1990 is set out in the annexure to this memorandum, for ease of reference. Section 88(2), which is of particular relevance to this advice, provides as follows:

> (2) The Minister may from time to time specifically authorise all or any provisions of a contract, arrangement, or understanding made between 2 or more persons in respect of international carriage by air and related to such carriage so far as the provisions relate, whether directly or indirectly, to the fixing of tariffs, the application of tariffs, or the fixing of capacity, or any combination thereof.

5 Section 91(2) provides:

> (2) Every authorisation by the Minister under section 88 or section 90 of this Act and every issue or amendment of a commission regime under section 89 of this Act is hereby declared to be a specific authorisation by an enactment for the purposes of section 43 of the Commerce Act 1986.

6 Section 43 of the Commerce Act 1986 provides, so far as relevant:

> **43. Statutory exceptions**
>
> (1) Nothing in this Part of this Act applies in respect of any act, matter, or thing that is, or is of a kind, specifically authorised by any enactment or Order in Council made under any Act.

> (2) For the purposes of subsection (1) of this section, an enactment or Order in Council does not provide specific authority for an act, matter, or thing if it provides in general terms for that act, matter, or thing, notwithstanding that the act, matter, or thing requires or may be subject to approval or authorisation by a Minister of the Crown, statutory body or a person holding any particular office, or, in the case of a rule made or an act, matter, or thing done pursuant to any enactment, approval or authorisation by Order in Council.

7 In interpreting these provisions, it is necessary to take into account both the language used, and the purpose of the provisions. The starting point for any interpretation exercise is the words used by Parliament, and their statutory context. The courts today also emphasise that where Parliament's policy reasons for enacting a provision are clear, a purposive construction should if possible be adopted that ensures the achievement of those goals. See Interpretation Act 1999, s 5(1); Burrows, *Statute Law in New Zealand* (3rd ed, 2003) chapter 8. As Lord Diplock said, writing extra-judicially, in a passage cited by Burrows at p 137: "If … the Courts can identify the target of parliamentary legislation their proper function is to see that it is hit; not merely to record that it has been missed."

A general tariff-setting mechanism can be authorised under s 88

8 The first issue you have asked me to consider is whether a very general tariff-setting mechanism, such as is provided for in the Tasman Networks Agreement ("TNA") entered into by Qantas and Air New Zealand, can be authorised by the Minister under s 88(2). In my opinion it is open to the Minister to authorise provisions of this kind, if the Minister considers, in the exercise of his or her discretion, that it is appropriate to do so. This reading of s 88(2) is supported by the language of that provision, the statutory context, and the policy and legislative history of the provision.

9 Turning first to the language of s 88(2), the terms used could hardly be more general. The Minister is given a discretion to authorise provisions "so far as they relate, whether directly or indirectly, to the fixing of tariffs [etc]".

10 The reference to "fixing" tariffs etc is a very clear signal that machinery provisions were squarely in the contemplation of the legislature. Section 88(2) does not provide for authorisation of tariffs (see the discussion of s 90, below) or even of provisions that relate to tariffs. Rather, it provides for authorisation of provisions that relate to the *fixing* of tariffs – ie to their determination by some mechanism. The relationship between the provision and the fixing of tariffs may be either direct, or indirect: that is, the provision may itself provide how tariffs are to be fixed (a direct relationship), or it may be indirectly related to the fixing of

tariffs, for example because it governs the circumstances in which the tariff may be fixed using the relevant mechanism, or the process to be followed.

11 Turning to the TNA, the provisions that require tariff and capacity decisions to be made by the Committee or Working Group clearly "relate … to the fixing of tariffs". Provisions that specify who will fix tariffs, and the process they will follow to do so, could hardly have a more direct relationship to the fixing of tariffs.

12 The more general machinery provisions that govern the composition, appointment and operation of the Committee and Working Group making the tariff and capacity decisions also fall within the ordinary meaning of this language, as they relate indirectly to the fixing of tariffs and capacities – they are the background process provisions that relate to these matters.

13 This view is confirmed by a comparison of the s 88 language with the language of s 90, which provides for the Minister to "specifically authorise any tariff in respect of international carriage by air". There is a clear and deliberate distinction between the language used in s 90 to refer to a particular tariff, and the language of s 88 which refers to provisions relating, directly or indirectly, to the *fixing* of tariffs. Parliament plainly intended s 88(2) to be much broader than s 90, and intended that the Minister's power to grant authorisations under s 88 should extend to a broad class of provisions that relate to the fixing of tariffs, whether they do so directly or indirectly.

14 This view is also confirmed by a comparison of s 88(2) with the language of s 30 of the Commerce Act 1986, the "per se" prohibition of price fixing, which deems a provision of a contract, arrangement or understanding to breach s 27 if it "has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services" supplied by the parties or interconnected bodies corporate. It is well established that a provision agreed by a group of competitors which prescribes a mechanism for determining the price they will all charge (eg a price to be decided by a committee consisting of representatives of some or all of the group) breaches s 30, as it provides for the fixing of prices. The language of s 88(2), which was drafted with the Commerce Act squarely in mind, is even more general than the language of s 30. A provision falls within s 88(2) if it merely "*relates, directly or indirectly, to* the fixing of tariffs" whereas s 30 only applies to provisions which *provide for* the fixing of prices. If machinery provisions of this kind fall within s 30, they must also fall within the broader language of s 88(2).

15 This is not, moreover, a surprising conclusion. The predecessor provision of s88, s 29A of the Civil Aviation Act 1964, was enacted in 1987 for the purpose of

excluding certain common forms of inter-airline co-operation from Part 2 of the Commerce Act, in the light of concerns expressed about the application of the Commerce Act to international civil aviation at the time of its enactment in 1986. When the Commerce Act was enacted in 1986, these concerns resulted in a transitional exemption of international carriage by air from that Act until 1 March 1987. During that period, further policy work was carried out in relation to these issues, and that review led to the Civil Aviation Amendment Act 1987. The purpose of the provisions was to ensure that, subject to Ministerial authorisation, the Commerce Act would not apply to agreements such as the "[t]housands of interline agreements and hundreds of regularly scheduled inter-airline consultations" mentioned by the Minister in his introduction speech in relation to the Bill.[1]

16 The Minister also made it clear that he did not want to be in the business of issuing large numbers of Gazette notices in respect of specific tariffs – hence the repeal of the previous s 29A, which required all such tariffs to be Gazetted. As the Minister pointed out, it was not possible to keep up with all the new aviation agreements in the fast-changing environment that then existed. (I understand this is even more true today than in the mid-1980s.)

17 In order for the predecessor provisions of ss 88-91 to achieve these policy goals, it was necessary that they apply not just to specific tariffs, but also to provisions for consultations ie to machinery provisions. It was also necessary that where machinery provisions were authorised, the parties did not have to come back for authorisation of the results of those consultations each and every time they met and changed their tariffs.

18 And it was necessary that the scope of the tariff-setting provisions that could be insulated from Part 2 of the Commerce Act be no less broad than the s 30 prohibition of price-fixing activities – otherwise, the new provisions could not achieve their intended effect. That is why s 88(2) is as broad as, and indeed broader than, s 30 of the Commerce Act in its application to machinery provisions for tariff and capacity setting.

Section 88(4)(c) does not prevent authorisation of machinery provisions

19 I understand that it has been suggested by the Ministry of Transport, [redacted] s.9(2)(h) [redacted], that general machinery provisions cannot be authorised because of s 88(4)(c), which provides that the Minister must not authorise a provision which "unjustifiably discriminates between consumers of international air services in the access they have to competitive tariffs". The

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[1] 477 NZPD 6489 (18 December 1986).

concern expressed is that the Minister cannot be satisfied that there will not be unjustifiable discrimination, if a specific fare is not set and authorised by the Minister.

20 In my view this concern is understandable, but misplaced. It can be addressed through other means.

21 The starting point must be the apparent generality of s 88(2). The Ministry is in my view correct to say that if the Minister needs to be satisfied that a provision cannot lead to unjustifiable discrimination, the only way of being so satisfied would be to approve specific tariffs. But as discussed above, the language of s 88(2) makes it very clear that specific tariff-setting was not what Parliament had in mind when enacting s 88(2) (as opposed to s 90), and this is reinforced by the broader policy context. It seems unlikely that Parliament was saying in subsection (2) that machinery provisions could be approved, but was then imposing a condition on approvals which would make that impossible, in subsection (4) of the same provision.

22 This apparent difficulty is resolved if one looks more closely at the language of s 88(4)(c). That provision does not prohibit authorisation where a provision could result, or might result, or is likely to result, in discrimination. It only prohibits authorisation where the provision itself unjustifiably discriminates – in other words, where the discrimination is built into the provision (either expressly, or because the machinery prescribed would necessarily lead to that result). If a provision itself unjustifiably discriminates between consumers, it should not be authorised. That is what s 88(4)(c) is intended to rule out.

23 What, then, of the position where a provision is so general – providing for inter-airline consultations, to echo the Minister, or for a committee to set fares, as under the TNA – that the result *might* be a discriminatory tariff? In my view, s 88 does not require the Minister to assume the worst, and prohibit authorisation merely because that result is possible. That would seriously undermine the intended scope and purpose of s 88. Rather, in circumstances where the provision is so general that discrimination might or might not result, it seems to me that the better view is that:

23.1 authorisation is not precluded by s 88(4)(c);

23.2 whether unjustifiable discrimination is in fact a real risk is one facet of the public interest, which the Minster can take into account in deciding whether or not to grant an authorisation. In the absence of any good reason to consider that there is a real risk of such discrimination, the theoretical possibility would not however in my view be a relevant consideration;

23.3 if the provision is authorised, and it is subsequently used in a manner which results in unjustifiable discrimination against certain consumers, or in any other way which is harmful to the public interest, the Minister can decide to revoke the authorisation under s 15 of the Interpretation Act 1999.

24 This approach means that general machinery provisions can be authorised, and that the mere theoretical possibility of unjustifiable discrimination against consumers does not preclude authorisation of such provisions (thereby defeating the intention of the legislature with respect to s 88(2)). But if a concern about unjustifiable discrimination does in fact materialise, because the general provision is being abused in this way, the authorisation can be revoked.

25 This seems to be to be a practical, workable approach to s 88 that is in keeping with its language, and with its policy goals and legislative history.

The breadth of the Minister's discretion

26 I turn next to the question of the breadth of the discretion under s 88(2). I have already anticipated this to some extent in earlier references to the public interest.

27 It seems plain to me that the Minister is not required to authorise an agreement merely because it falls within the scope of s 88(2), and authorisation is not prohibited by s 88(4). Section 88(2) is expressed in the characteristic language of a discretion – the Minister *may* from time to time authorise certain provisions. There is no duty to authorise.

28 The conferral of the discretion on a Minister is consistent with a broad discretion to be exercised in the public interest, and for the purpose of pursuing the goals of the Civil Aviation Act, for which that Minister has responsibility. Nothing in the legislation expressly limits the breadth of this discretion, and I cannot see any reason to imply limits, apart of course from the usual public law limits that apply to any exercise of a statutory power.

Scope of authorisation – application to resulting tariffs etc

29 Finally, you have asked me whether the grant of an authorisation for a machinery provision under s 88(2) would mean that the resulting tariffs and capacities were also excluded from the application of Part 2 of the Commerce Act, or whether the resulting tariffs/capacities would need separate authorisation under s 88.

30 I consider that the former is the better view, having regard to the language of the relevant provisions, and also to their purpose.

31 Section 91(2) provides that an authorisation under s 88 is a specific authorisation by an enactment for the purposes of s 43 of the Commerce Act 1986. So if the

Minister authorises a machinery provision (as in my view the Minister can), that machinery provision is specifically authorised for the purposes of s 43.

32 If the machinery provision is specifically authorised for the purposes of s 43, then nothing in Part 2 of the Commerce Act applies in respect of it (so far as it relates to the matters referred to in s 88(2)). So s 27(1) (and s 30) do not apply to entry into the provision (and this is also protected by s 90(1) of the CAA1990), and s 27(2) does not apply in respect of giving effect to that provision. Section 27(4), which provides that provisions that harm competition are unenforceable, also does not apply.

33 It follows that the Commerce Act does not prohibit giving effect to the machinery provision, and that the parties can enforce the machinery provision against each other. In these circumstances it would be odd if the results of giving effect to the machinery provision themselves risked breaching Part 2 of the Commerce Act, and were unenforceable – that would make a practical nonsense of the authorisation. There is no point in excluding a machinery provision from Part 2, making it enforceable as between the parties, if the results of that machinery are caught by Part 2 and are unenforceable – the exclusion would serve no useful purpose. And (a related point) the Minister would receive the very deluge of specific tariffs for authorisation that the 1987 amendments were intended to avoid.

34 I do not think that the language of these provisions requires such an odd result. It seems to me that if nothing in Part 2 applies in respect of the provision, so giving effect to the provision is not a breach and the provision is enforceable, both the process and the result of giving effect to the provision must fall outside Part 2. Put another way, Part 2 does not apply to the process of using the machinery, or to the outcome of using the machinery, where the use of the machinery has been specifically authorised for the purposes of s 43.

35 As against this it might be argued that although the machinery has been specifically authorised, particular outcomes have not been specifically authorised. It is well established that where legislation provides for a discretionary decision to be made, that is not a specific authorisation of each and every decision that might be made: see *New Zealand Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257 (PC).

36 In my opinion, however, this argument is flawed because it leads to an absurd result in the context of these inter-related statutory provisions. Reading s 43 with s 91 of the CAA 1990, the combined effect must have been intended to be that where a machinery provision was authorised, this had some practical consequence – namely that the use of the machinery, and its results, would be excluded from the Part 2 prohibitions. There would be a strange circularity in trying to argue that

s 27 or s 30 applied to a tariff set using the authorised machinery, when the focus of those provisions is on prohibiting collusive price-setting (rather than particular levels of price), the very thing authorised under s 88 of the CAA 1990.

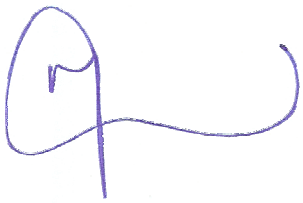
37 The scope of a "specific authorisation" is in each case a matter of construction, having regard to the authorising provision – what is it that Parliament intended to authorise (or require), and that it would therefore be inappropriate to unravel under Part 2 of the Commerce Act? In the context of Part 9 of the CAA 1990, the irresistible conclusion is that Parliament intended to enable the Minister to authorise machinery provisions relating to the fixing of tariffs and capacities, and that both the use and the outcomes of such machinery provisions was to be excluded from Part 2 of the Commerce Act.

38 This conclusion is reinforced by the fact that some outcomes of machinery provisions could not themselves be authorised under the CAA 1990, giving rise to the absurd situation that the process would be excluded from Part 2 of the Commerce Act, but the result of the process would necessarily remain subject to the Commerce Act, rendering the authorisation useless for all practical purposes. Consider, for example, a provision in an agreement between airlines providing for capacities on a route to be determined by an independent expert applying a formula, with some matters of discretion or judgment involved in this process. If the expert makes a decision on capacities on that route, that decision is not a tariff which can be approved under s 90, and it is not a provision of an agreement between all those airlines, so cannot be approved under s 88.

39 Indeed it could be argued that even where an authorised process (eg a consultation or committee process) leads to an agreement that fixes specific tariffs and capacities for a route, that agreement cannot be authorised under s 88, as it does not relate to the *fixing* of capacities (ie to the process). Section 30 of the Commerce Act draws precisely this distinction between agreements which (themselves) fix prices, and those which provide for the fixing of prices. The phrase used in s 88(2) is so broad that it might be understood to apply to such an agreement. But the more natural reading of s 88(2) suggests that the outcome of an authorised consultation or committee process that fixes capacities could never itself be authorised under s 88 or s 90.

40 Parliament cannot sensibly have intended that airlines participating in an authorised consultation, or some other authorised tariff and capacity-fixing process, would have an exemption under the CAA from Part 2 of the Commerce Act so far as the process was concerned, but would be subject to the Commerce Act in respect of the result arrived at (which would, in most cases, necessarily breach s 30 of the Commerce Act). This would make s 88 largely pointless, and certainly would not achieve the policy goals of Part 9. The provisions of Part 9

make sense, and achieve their policy goal, if and only if an authorisation of a machinery provision is a specific authorisation for Commerce Act purposes of both the process provided for, and the tariffs and capacities arrived at by applying that process.



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ANNEXURE

PART 9 - INTERNATIONAL AIR CARRIAGE COMPETITION

88. Authorisation of contracts, arrangements, and understandings relating to international carriage by air—

(1) In this section and in sections 89 to 91 of this Act, unless the context otherwise requires,—

``Capacity'' means a statement, expressed to apply to one or more specified airlines, or to all airlines other than one or more specified airlines, or to all airlines, specifying the number of flights to be undertaken between specified points in a period or successive periods by the airline or airlines, whether or not by reference to specified classes of aircraft or the number of seats or volume of cargo space to be provided:

``Commission regime'' means a statement, expressed to apply to any specified international carriage by air, specifying the rates and bases of calculation of agency commissions (including any benefit, whether in monetary form or otherwise, supplied to an agent) to be allowed, charged, disbursed, given, offered, paid, provided, or retained, in relation to the international carriage by air to which it is expressed to apply, and the circumstances and conditions under and subject to which any such commission is to be allowed, charged, disbursed, given, offered, paid, provided, or retained; and different rates, bases, circumstances, and conditions may be specified in respect of all or any of the following:

(a) International carriage by air provided by different airlines:

(b) International carriage by air arranged by persons of different classes:

(c) International carriage by air provided for persons of different classes:

``International carriage by air'' means the carriage by air of persons, baggage, or cargo—

(a) Between New Zealand and any place outside New Zealand; or

(b) Where that carriage is purchased, sold, or arranged in New Zealand, between places outside New Zealand:

``Tariff'' means a statement, expressed to apply to one or more specified airlines, or to all airlines other than one or more specified airlines, or to all airlines, specifying—

(a) The fares, rates, and charges applicable to international carriage by air between specified points (whether direct or indirect, and whether or not including any stopovers) that may at any time be provided by the airlines to which it is expressed to apply; and

(b) Any conditions subject to which any such fares, rates, and charges, or any of them, are to apply to international carriage by air between those points; and

(c) Any conditions subject to which international carriage by air between those points is to be provided on such fares, rates, and charges.

(2) The Minister may from time to time specifically authorise all or any provisions of a contract, arrangement, or understanding made between 2 or more persons in respect of international carriage by air and related to such carriage so far as the provisions relate, whether directly or indirectly, to the fixing of tariffs, the application of tariffs, or the fixing of capacity, or any combination thereof.

(3) In considering whether to grant authorisation under subsection (2) of this section, the Minister shall ensure that the granting of such authorisation will not prejudice compliance with any relevant international convention, agreement, or arrangement to which the Government of New Zealand is a party.

(4) Subject to subsection (5) of this section, authorisation shall not be given under this section to any provision of any contract, arrangement, or understanding that—

(a) Provides that any party to it may directly or indirectly enforce it through any form of action by way of fines or market pressures against any person, whether or not that person is a party to the contract, arrangement, or understanding; or

(b) Has the purpose or effect of breaching the terms of a commission regime issued under section 89 of this Act; or

(c) Unjustifiably discriminates between consumers of international air services in the access they have to competitive tariffs; or

(d) So far as it relates to tariffs, has the effect of excluding any supplier of international carriage by air from participating in the market to which it relates; or

(e) Has the purpose or effect of preventing any party from seeking approval, in terms of section 90 of this Act, for the purpose of selling international carriage by air at any other tariff so approved; or

(f) Prevents any party from withdrawing without penalty on reasonable notice from the contract, arrangement, or understanding.

(5) Notwithstanding the provisions of subsection (4) of this section, the Minister may authorise any provision of any contract, arrangement, or understanding under this section if the Minister believes that to decline authorisation would have an undesirable effect on international comity between New Zealand and any other State.

(6) If the Minister declines to authorise any provision of any contract, arrangement, or understanding under this section, the Minister shall give notice in the Gazette that authorisation has been declined.

Cf 1964 No 68 s 29A; 1982 No 175 s 2(1); 1987 No 12 s 2(1)

89. Minister may issue commission regimes—

The Minister may from time to time, by notice in the Gazette,—

(a) Issue commission regimes; and

(b) Amend or revoke any commission regime so issued.

Cf 1964 No 68 s 29B; 1987 No 12 s 2(1)

90. Authorisation of tariffs by Minister—

(1) The Minister may from time to time specially authorise any tariff in respect of international carriage by air where the relevant places of departure and destination are within the territories of 2 countries, one of which is New Zealand, whether or not there is to be a break in the carriage or a transhipment.

(2) In giving authorisation under this section the Minister shall have regard to—

(a) Whether the proposed tariff is excessive in terms of a reasonable return on investment by the supplier of the carriage; and

(b) Whether it is likely that supply of the relevant carriage can be carried on for a reasonable period at the level of tariff proposed; and

(c) Whether there is likely to be a substantial degree of benefit accruing to consumers generally, or to a significant group of consumers, as a result of the application of the proposed tariff,—

and shall ensure that the granting of such authorisation will not prejudice compliance with any international convention, agreement, or arrangement to which the Government of New Zealand is a party.

Cf 1964 No 68 s 29C; 1987 No 12 s 2(1)

91. Application of Commerce Act 1986—

(1) Nothing in sections 27 to 29 of the Commerce Act 1986 shall apply to or in respect of—

(a) The negotiation or conclusion of any contract, arrangement, or understanding so far as it contains a provision relating to international carriage by air, so long as that provision is not given effect to before its authorisation under section 88 of this Act; or

(b) Any provision of a contract, arrangement, or understanding relating to international carriage by air so long as it is not given effect to before its authorisation under section 88 of this Act.

(2) Every authorisation by the Minister under section 88 or section 90 of this Act and every issue or amendment of a commission regime under section 89 of this Act is hereby declared to be a specific authorisation by an enactment for the purposes of section 43 of the Commerce Act 1986.

Cf 1964 No 68 s 29D; 1987 No 12 s 2(1)