

4 August 2006

John Macilree  
Ministry of Transport  
P O Box 3175  
WELLINGTON

Dear Mr Macilree

**Re: Proposed code share arrangement between Air New Zealand and Qantas**

We understand that over the coming months the Ministry of Transport will be advising Minister Hodgson, who will be operating under delegated authority from the Minister of Transport, on the matter of a proposed code share arrangement between Air New Zealand and Qantas. We also understand that the Ministry is prepared to accept representations on issues surrounding the proposal, particularly in relation to the matters that should be considered under the Civil Aviation Act 1990 (CAA 1990) in deciding whether to approve or decline the application.

This letter is a representation on behalf of the Wellington Mayoral Forum, which includes the Mayors of Wellington, Hutt, Upper Hutt and Porirua City Councils; Kapiti Coast, Carterton, South Wairarapa and Masterton District Councils; and the Chair of Greater Wellington Regional Council. Note however that the Mayor of Porirua City, Jenny Brash, does not support this submission.

The Mayoral Forum has a fervent interest in planning for and ensuring the success of the Wellington region. We should note that we are representing the region's interests - the ownership interest of Wellington City Council in Wellington International Airport Limited is a separate matter that has not influenced our position.

The letter is structured to outline our interest in the code share application, to discuss the proposal in relation to the Civil Aviation Act 1990, and then to deal specifically with the matters which must be considered under the Act.

**Our Interest**

The region is in the process of developing a Wellington Regional Strategy that addresses economic development and the need for Wellington to increase its

international competitiveness. All of the parties listed above, plus many other private sector and government stakeholders are involved in the development of this Strategy, which recognises the crucial importance of effective, high quality air links from Wellington. These links cater for the needs of the many New Zealanders, business people and overseas tourists who travel to and from the capital city. We are acutely aware of the enormous significance of air services to our reputation as an ideal place to do business and to our thriving tourist industry.

In relation to any code share arrangement, the circumstances of Wellington are of particular concern. Compared to Auckland and Christchurch there are fewer international carriers operating, and there appears to be less potential for competition. We are not however disputing the need for Air New Zealand to operate in a sustainable manner - i.e. we accept they need to make appropriate financial returns.

In summary we, as regional leaders and representatives of communities in the Wellington Region, have a strong and abiding interest in the air services using Wellington Airport, including the trans-Tasman services provided by Air New Zealand and Qantas which are the subject of the proposed code share agreement.

### **Proposal in relation to the Civil Aviation Act 1990**

We acknowledge the constraint on the Minister of Transport (or delegate) to focus principally on the matters nominated in the Civil Aviation Act 1990 in deciding on any code share approval under the Act. However we are also aware of the view that some matters relating to competition should not and cannot be considered under the Act, and should therefore fall under the jurisdiction of the appropriate competition authority, i.e. the Commerce Commission. This view is supported by a legal opinion from Auckland barrister Professor Michael Taggart which is now publicly available<sup>1</sup>.

Moreover, the intent of the Act in relation to approving code share proposals is to provide a process that recognises the potential conflict with competition legislation. The types of code share arrangements envisaged by the Act are clearly incidental or one-off arrangements. These are deemed acceptable under the Act from a competition perspective because they allow an airline to fill a gap in its network or allow greater network coverage, for the benefit of its passengers. We note however that in other jurisdictions such as Australia and the US, code share arrangements with competition implications are referred to specialist competition bodies. The OECD recommended a change to New Zealand arrangements in its report on NZ in July 2005 indicating that there is an expectation that code-share arrangements with competition implications will require a significantly higher test.

The proposal by Air New Zealand and Qantas to use this provision to gain approval for a far wider code share arrangement affects all 25 routes and 242 flights weekly between two countries. We suggest that the intent of the Act to provide exemption for minor or one-off proposals only should be upheld, and by legislative amendment if necessary.

On this basis the entire proposal should be revisited, but we acknowledge that a proposal already presented may need to be considered under existing legislation. Even in this situation, there appear to be significant aspects that raise competition issues not

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<sup>1</sup> <http://www.transport.govt.nz/assets/NewPDFs/31-July-06-WIAL-Schedule-4.pdf>

covered by the Act. These aspects should be investigated by the Commerce Commission as this is the appropriate forum for a thorough analysis.

Without prejudging that analysis, we note that the question of a closer relationship between Air New Zealand and Qantas, at either the operational or ownership level, has already been dealt with in detail by the Commission. Their determination released in October 2003 and upheld after a High Court appeal found that “the detriments from the proposed Alliance would heavily outweigh the benefits, and as a result that there would be a net loss to the public of New Zealand if the Alliance were to proceed”.

Although the latest proposal is more narrowly focussed, the principles applying to trans-Tasman travel are likely to be similar, since both proposals involved a close operational relationship while maintaining the separate identities of the airlines. This raises significant concerns about the potential for the proposal to lessen competition, and that this would result in higher prices for consumers.

In summary the wide scope of the code share proposal raises issues around whether the Act appropriately constrains code share approvals to incidental or one-off situations, and whether there are competition issues that fall outside the narrow criteria for approval in the Act. We believe that for the former, the Minister might consider how this intent of allowing very specific exemptions only should be maintained, and for the latter that investigation by the Commerce Commission be actively encouraged.

#### **Matters to be considered under the Civil Aviation Act 1990**

The Act sets out specific criteria for approval of a code share arrangement, recognising that this type of arrangement is potentially anti-competitive per se. However there does appear to be wide discretion for the Minister to consider public interest and competition issues in addition to the generic requirement to act in the public interest in making decisions of this type.

Section 88(4) of the Act sets out the areas which the Minister is directed to consider in determining whether or not to exercise his/her discretion to authorise a code share agreement. The wording in Section 88(4)(c) is particularly relevant:

*Authorisation shall not be given under this section to any provision of any contract, arrangement, or understanding that unjustifiably discriminates between consumers of international air services in the access they have to competitive tariffs.*

An arrangement of the type proposed by Air New Zealand and Qantas potentially raises issues of the significant lessening of competition. This needs to be fully analysed and if this showed significant disbenefit to consumers, a justification that met the test in Section 88(4)(c) is unlikely to be sustained.

Notwithstanding this, we believe that there is a wider obligation on the Minister to consider the public interest beyond the specific matters set out in the Act. To determine how the public interest is affected (in this case, primarily in terms of lessening of competition issues) a thorough analysis as above will be required.

## **Summary and conclusion**

In conclusion we ask you to note our fundamental interest in the future success of Wellington region, and to take account of our strongly held view that this proposal requires careful scrutiny of its potential impact on competition. We have significant concerns about the potential for the proposal to lessen competition, and that this would result in higher prices for consumers. This scrutiny should happen either under the discretion afforded by the Civil Aviation Act, or under current competition legislation, or both. The appropriate forum for examination of competition issues is the Commerce Commission

In addition we request a meeting with the Minister or with officials to discuss our concerns in more detail.

Yours sincerely

Kerry Prendergast  
**Chair, Wellington Mayoral Forum**

### **Copy to:**

Hon Pete Hodgson  
Hon Annette King  
Hon Trevor Mallard  
Hon Phil Goff  
Hon Lianne Dalziel  
Hon Dr Michael Cullen