



13 February 2020

Dukeofurl
Fyi-request-11950-f660b3fc@requests.fyi.org.nz

Dear Dukeofurl

I refer to your email of 30 December 2019 requesting, pursuant to the Official Information Act 1982 ('the Act'):

Regarding the Air NZ and Air Tahiti Nui 'codeshare' and other 'anti competition' arrangements on flights between NZ, Tahiti and US. Could you please supply the decision of the Commerce Commission regarding this arrangement - if one has been made-and the two airlines applications and extra submissions supplied. Especially wanted are the benefits to NZ of this arrangement.

Could you also provide any other submissions that were requested by the Commerce Commission or any groups opposed to the arrangement.

Your request was made to the Commerce Commission, but was transferred to the Ministry of Transport for response as the information involved more closely relates to the functions of the Ministry.

Three documents are relevant to your request:

- Air New Zealand's emailed application of 1 December 2006
- the code-share agreement between Air New Zealand and Air Tahiti Nui
- the Ministry's internal document of 12 December 2006 considering, and approving, the application.

Information is withheld from the 1 December application, and the 12 December internal Ministry document, pursuant to section 9(2)(b)(ii) of the Act in that making available the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information. The code-share agreement between Air New Zealand and Air Tahiti Nui is withheld in its entirety pursuant to the same section of the Act.

An official's name is withheld from the internal Ministry document pursuant to section 9(2)(a) of the Act, in order to protect the privacy of a natural person.

In considering withholding information, we do not believe the reasons for withholding the information are outweighed by other considerations, which render it desirable, in the public interest, to make the information available.

The Ministry publishes its Official Information Act responses, and the information contained in our reply to you will be published on the Ministry website. Before publishing, we will remove any personal or identifiable information.

You have the right under section 28 of the Act to lay a complaint with the Ombudsman about the decision to withhold information. The email address of the Office of the Ombudsman is info@ombudsman.parliament.nz

Yours sincerely

A handwritten signature in black ink, appearing to be 'Tom Forster', written over a horizontal line.

Tom Forster
Manager, Economic Regulation

1 December 2006

Mr John Macilree
Principal Adviser Air Services
Ministry of Transport
P O Box 3175
Wellington

Dear John

**APPLICATION FOR AUTHORISATION UNDER S.88 CIVIL AVIATION ACT 1990 OF
CODE SHARE AGREEMENT BETWEEN AIR NEW ZEALAND AND AIR TAHITI NUI**

Pursuant to the provisions of S.88 of the Civil Aviation Act 1990 Air New Zealand Limited ("Air New Zealand") hereby applies for authorisation by the Minister of Transport of an agreement ("the Code-share Agreement") with Air Tahiti Nui whereby Air New Zealand and Air Tahiti Nui will market and sell under their own designator codes on each other's flights between New Zealand and Tahiti, and Air New Zealand will market and sell under its own designator code on Air Tahiti Nui flights operating between Tahiti and Los Angeles. A copy of the finalised Code-share Agreement is attached.

Nature of the Agreement

The Code-share Agreement between Air Tahiti Nui and Air New Zealand is a free-sale arrangement under which each party (acting alone) is responsible for pricing, marketing and selling available capacity on specified services operated by the other.

Background

Air New Zealand currently operates four services per week between Auckland and Papeete, three of which are operated via Rarotonga and one of which operates non-stop. The three services operated via Rarotonga continue on to operate between Papeete and Los Angeles. Air Tahiti Nui currently operates three non-stop services per week between Papeete and Auckland and 13 services per week between Papeete and Los Angeles.

Air New Zealand has been exploring for some time, options to improve the performance of its Pacific network services.

s.9(2)(b)(ii)

Under the Code-share Agreement, Air New Zealand intends code-sharing on Air Tahiti Nui flights operated twice-weekly between Auckland and Papeete, and four times a week between Papeete and Los Angeles. Air Tahiti Nui intends code-sharing on flights operated twice-weekly by Air New Zealand between Papeete and Auckland.

As a consequence of the code-share, Air New Zealand will cease operating the RAR-PPT sector. Air New Zealand will, however, establish a non-stop RAR-LAX service.

Consumer Choice

As a result of the Code-share Agreement, passengers flying between New Zealand and Tahiti, and between Tahiti and Los Angeles, will continue to have the choice of choosing either carrier's fare offering on services over both these sectors. Furthermore, passengers wishing to access a non-stop Air New Zealand Auckland-Papeete offering will have an expanded range of services to choose from. This choice for customers maintains competition benefits for consumers travelling between Auckland and Papeete, Auckland and Los Angeles, and Papeete and Los Angeles.

It should also be noted that maintaining Air New Zealand's code on the Papeete-Los Angeles sector will ensure that consumers from long haul source markets in Europe booking Air New Zealand and Star Alliance products will continue to be able to access stopover options including Tahiti.

Air France also currently operates three times per week on the Papeete-Los Angeles sector.

Seamless Service

Under the Code-share Agreement the two carriers commit to devising as seamless a product as possible with the objective of providing the best product to their passengers on the code-shared flights.

Consumer Protection

Both Air New Zealand and Air Tahiti Nui are aware of the need to ensure that their passengers on the code-share services are fully informed, at the earliest point of time, of the identity of the operating carrier if the carrier designated on the tickets is the passive code-share partner and not the actual operator of the aircraft. Both parties undertake to ensure that computer reservation systems displays, timetables and other publications advertising the codeshare flights clearly indicate to the consumer that the flights are code-share flights with the actual operator clearly shown.

The procedures will be the same as those that have been progressively developed under other code-share arrangements such as those between Air New Zealand and Air Caledonie.

Competitive Environment

The Code-share Agreement does not constitute an arrangement, contract or understanding which has the purpose, effect or likely effect of substantially lessening competition in the New Zealand-French Polynesia, nor the New Zealand-United States, air services market. Rather, its purpose and effect is the reverse. It will enable Air New Zealand and Air Tahiti Nui to each continue to offer to consumers competitive access to services in these markets.

The agreement between Air New Zealand and Air Tahiti Nui provides for an arrangement whereby both carriers may sell available capacity on the specified services operated by the other through the free-sale process. The Code-share Agreement does not involve sharing of revenues or yield management, which could impact directly on carriers' fare levels. The Air New Zealand/Air Tahiti Nui arrangement involves no collusion or co-operation and both carriers will continue to remain competitive with each other. Article 2.3. (b) of the Code-share Agreement states:

S. 9(2)(b)(ii)

The Code-share Agreement does not impose any limit on the ability of either party to independently participate in the marketplace for the sale of air travel. Indeed the Code-share Agreement goes further in terms of specifying that:

S. 9(2)(b)(ii)

Furthermore under Article 16, the Code-share Agreement specifically allows for the operation of additional flights by either party outside the arrangement (Article 16.2), thereby preserving capacity related competition as well.

Benefits

As noted above, authorisation of the Code-share Agreement would ensure Air New Zealand's continuing presence in this market, providing consumers with additional service choice and price options.

Maintaining Tahiti as a stopover option on the Air New Zealand network will also have flow-on benefits to the New Zealand tourism sector as Tahiti is a particularly attractive option for UK/Europe sourced tourists wishing to combine a visit to New Zealand with a Pacific stopover. These tourists are generally high quality visitors contributing a high spend to the New Zealand economy.

s.9(2)(b)(ii)

Discussions with the Government have confirmed that it continues to see significant value in Air New Zealand's continuing presence in the market. Indeed the French Polynesian Government, as a major shareholder in Air Tahiti Nui, has been promoting the concept of a code-share arrangement between Air New Zealand and Air Tahiti Nui as a means of enhancing the ability of both carriers to contribute to the tourism sector in Tahiti. As the key contributor to the French Polynesian economy, the success of the tourism sector is a key consideration for the French Polynesian Government.

s.9(2)(b)(ii)

As the single largest carrier of inbound visitor to New Zealand and a major promoter of New Zealand it is in the national interest that Air New Zealand is a strong and competitive international network carrier. As a New Zealand-based carrier, Air New Zealand's incentives for promoting New Zealand are significantly greater than any other operator and the impacts on New Zealand of its promotional efforts are also proportionally greater.

No Infringement of Section 88(4)

Section 88(4) of the Civil Aviation Act details the concerns which the Minister is directed to consider in determining whether or not to exercise discretion to authorise the Code-share Agreement. The Code-share Agreement does not materially impact on any of the matters raised by the provisions of section 88(4).

Authorisation shall not be given under this section to any provision of any contract, arrangement or understanding that 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 (section 88(40(a))).

The Code-share Agreement makes no provision for either Party to directly or indirectly enforce it through any form of action by way of fines or market pressure against any person.

Authorisation shall not be given under this section to any provision of any contract, arrangement, or understanding that has the purpose or effect of breaching the terms of a commission regime issued under Section 89 of this Act (section 88(4)(b)).

The Code-share Agreement does not have the purpose or effect of breaching the terms of any commission regimes.

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 (section 88(4)(c)).

The Code-share Agreement does not contain any provision which discriminates between consumers in the access they have to tariffs.

Authorisation shall not be given under this section to any provision of any contract, arrangement, or understanding that 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 (section 88(4) (d)).

The Code-share Agreement has no impact on the ability of any supplier of international carriage by air from participating in the market to which it relates.

Authorisation shall not be given under this section to any provision of any contract, arrangement, or understanding that 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 (section 88(4)(e)).

The Code-share Agreement does not prevent any party from seeking authorisation for approval of any tariff under section 90 of the Civil Aviation Act.

Authorisation shall not be given under this section to any provision of any contract, arrangement, or understanding that prevents any party from withdrawing without penalty on reasonable notice from the contract, arrangement, or understanding (section 88(4)(f)).

The Code-share Agreement provides for either party to terminate it at any time once it comes into force.

S.9(2)(b)(ii)

Conclusion

The intent and purpose of the Code-share Agreement between Air New Zealand and Air Tahiti Nui is to provide an improved consumer offering on both carriers in the markets served by each carrier.

The Code-share Agreement will ensure the maintenance of existing consumer choice on the routes it covers and indeed will enhance the ability of Air New Zealand to grow the long haul UK/Europe market interested in stopover options involving New Zealand and the Pacific. Each carrier will continue to have independent control over pricing and capacity covered by the Code-share Agreement.

Air New Zealand considers that the matters outlined above justify the grant of a specific authorisation of the arrangement pursuant to S.88 of the Civil Aviation Act 1990. It is considered that such an authorisation would be entirely consistent with New Zealand's international air transport policy and that the grant of authorisation would not prejudice compliance by the Government with any relevant international convention, agreement or arrangement to which it is a party. Furthermore, it is Air New Zealand's view that the arrangement as contemplated and intended to be effected does not fall within the provisions of any of paragraphs (a) through (f) of S. 88(4) of the Civil Aviation Act 1990.

Should you require any elaboration on or clarification of any of the above, please do not hesitate to contact me.

Yours sincerely



Sean Ford
Procurement Manager Aeronautical

OPAANZ-C

12 December 2006

To: John Bradbury
cc: John Macilree

From: [REDACTED] S. 9(2)(a)

AIR NEW ZEALAND/AIR TAHITI NUI: APPLICATION FOR AUTHORISATION OF CODE SHARE AGREEMENT

Proposal

1. It is proposed that you authorise, pursuant to Section 88 of the Civil Aviation Act 1990 (the Act), a code share agreement between Air New Zealand and Air Tahiti Nui (the Agreement). Authorisation of the Agreement would be consistent with the Act.

Background

2. The proposed Agreement is a free-sale arrangement under which each party is responsible for pricing, marketing and selling available capacity on specified services operated by the other. Under the Agreement, Air New Zealand intends code-sharing on Air Tahiti Nui flights operated twice-weekly between Auckland and Papeete, and four times a week between Papeete and Los Angeles. Air Tahiti Nui intends code-sharing on flights operated twice-weekly by Air New Zealand between Papeete and Auckland.

3. Air New Zealand has advised that the United States Department of Transportation has approved the arrangements.

4. Under the Agreement each party would set its own fares for seats in its capacity entitlement.

5. Air New Zealand has been re-examining the manner in which it serves points in the South Pacific. It has recently commenced own aircraft services to Vanuatu and entered into a code-share agreement with Air Vanuatu. The airline also intends seeking approval for a code-share agreement with Air Pacific. This proposed Agreement forms part of that wider Pacific strategy.

Section 88 Considerations

6. Sections 88(3) to 88(5) of the Act set out considerations which the Minister of Transport (or delegate) must take into account when considering an application for authorisation of any contract, arrangement or understanding, pursuant to the Act. Each of these considerations, and an analysis of the relevant parts of the agreement, are specified in turn below.

- (i) ***Authorisation will not be given to any provision where that would prejudice compliance with any relevant international convention, agreement or arrangement to which the Government of New Zealand is a party (s.88(3)).***

The relevant international arrangements are the New Zealand – France Air Services Agreement and associated Memoranda of Understanding with France and French Polynesia.

The 2001 MoU provides for code-sharing as follows:

...the delegations decided that the designated airlines of both sides could code-share, including with those third-country carriers holding the necessary authorisations, on the Auckland-Papeete sector.

The delegations also confirmed that there are no restrictions on the ability to code-share including with third-country carriers holding the necessary operating authorisations, on the Papeete-USA route for New Zealand airlines and on the Auckland-Australia route for French airlines.

The France – New Zealand arrangements are not explicit about how code-share capacity will be counted (the references to capacity entitlements use the word 'operate' but the proposal here would be within the four services per week each side is permitted, even if the frequencies were to count against the marketing carrier (each airline is permitted to operate up to 1,300 seats per week with up to six frequencies. New Zealand airlines are permitted to operate up to four beyond services).

Therefore the Agreement would not prejudice compliance with the relevant international arrangements.

- (ii) ***Authorisation will not be given to any provision that provides for any party to the contract, arrangement or understanding to directly or indirectly enforce it through any form of action by way of fines or market pressures against any person (s.88(4)(a)).***

The Agreement does not have any provisions that provide for it to be enforced through fines or market pressures.

All redactions this page s. 9(2)(b)(ii)

- (iii) ***Authorisation will not be given to any provision that would have the purpose or effect of breaching the terms of a commission regime issued under section 89 of the Act (s.88(4)(b)).***

The Agreement does not have the purpose or effect of breaching the terms of a commission regime.

- (iv) ***Authorisation will not be given to any provision that unjustifiably discriminates between consumers of international air services in the access they have to competitive tariffs (s.88(4)(c)).***

As discussed in more detail below in relation to subsection 88(4)(e), the Agreement would not set tariffs but rather provides that each airline will set its own tariffs and allows for the parties to compete with each other. Tariffs would therefore be set on the basis of commercial considerations. Therefore, there is no provision in the Agreement that would unjustifiably discriminate between consumers of international air services in the access they have to competitive tariffs.

- (v) ***Authorisation will not be given to any provision that, so far as it relates to tariffs, would exclude any supplier of international carriage by air from participating in the market to which the contract, arrangement or understanding relates (s.88(4)(d)).***

As set out elsewhere, the Agreement does not set tariffs, and the airlines will continue to set tariffs individually, therefore in terms of tariffs the Agreement does not have any effect on any party participating in the New Zealand – French Polynesia market.

The Agreement does not impact upon the ability of any airline other than Air New Zealand or Air Tahiti Nui to participate in the market on an own aircraft basis should that airline determine that there is sufficient consumer demand.

In terms of code-sharing with and by other airlines, [REDACTED]

With regards to additional service by Air New Zealand or Air Tahiti Nui, [REDACTED]

[REDACTED] The operating carrier is to offer the marketing carrier the opportunity to codeshare on these.

- (vi) **Authorisation will not be given to any provision where that would have the purpose or effect of preventing any party to the contract, arrangement or understanding 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 (s.88(4)(e)).**

Article 2.3 of the Agreement provides that:

- (a) [REDACTED]
- (b) [REDACTED]
- (c) [REDACTED]
- (i) [REDACTED]
- (ii) [REDACTED]
- (iii) [REDACTED]

Therefore either airline party to the Agreement is free to sell international air carriage at any tariff they determine, and may seek approval for this if required (although as a matter of regulatory practice approval would not normally be required for unilateral tariffs).

- (vii) **Authorisation will not be given to any provision where that would prevent any party to the contract, arrangement or understanding from withdrawing, at reasonable notice, without penalty (s.88(4)(f)).**

The Agreement may be terminated or cancelled at any time by either party upon giving at least [REDACTED] notice to the other party, so long as the effective termination date shall coincide with the last day of the current IATA Season (Article 23.1). Given scheduling and forward booking requirements this is reasonable, [REDACTED]. Termination without notice is permitted in specified circumstances.

All redactions this page s. 9(2)(b)(ii)

7. As the Agreement does not breach sections 88(3) and 88(4) of the Act, consideration under section 88(5), which provides for the Minister to authorise a contract, arrangement or understanding notwithstanding the provisions of section 88(4) of the Act, on international comity grounds, is not relevant.

Other Considerations

8. We now have legal advice that confirms that there is a general public interest discretion embodied in s.88 of the Act.

9. In a case like this, where the airlines will continue to independently price and sell air travel to consumers, and where combined frequency is daily or less, code-sharing has the strong potential to provide benefits to consumers.

10. Air New Zealand advises that based on the current pattern of operations it forecasts that it would [REDACTED] on services to/through Tahiti in the current year and that, in the absence of the code-share [REDACTED]. Given Air New Zealand's recent withdrawal from other unprofitable routes there is no reason to doubt this.

11. The proposed arrangements would give consumers access to services to Papeete four times a week, rather than three if only the current Air Tahiti Nui services were retained.

12. Maintaining Air New Zealand's code on the Papeete-Los Angeles sector will also ensure that consumers from long haul source markets in Europe booking Air New Zealand and Star Alliance products will continue to be able to access stopover options including Tahiti.

13. Arrangements have now been made to ensure the continuation of a Los Angeles – Rarotonga service by Air New Zealand once it withdraws from the Auckland-Rarotonga-Papeete-Los Angeles route.

14. The airlines undertake to ensure that computer reservation systems displays, timetables and other publications advertising the code-share flights clearly indicate to the consumer that the flights are code-share flights with the actual operator clearly shown.


Conclusion

15. Approval of the Air New Zealand – Air Tahiti Nui code-share arrangements would be consistent with the Civil Aviation Act and will provide benefits to consumers.

Recommendation

16. I recommend that you **authorise**, pursuant to Section 88 of the Civil Aviation Act 1990, Sections 28 and 41 of the State Sector Act 1988, a delegation from the Minister of Transport dated 12 October 2004, and a sub-delegation from the Secretary for Transport dated 12 October 2004, the code share agreement

between Air New Zealand Limited and Air Tahiti Nui, a copy of which is attached to this memorandum.


Principal Adviser

s. 9(2)(a)

Authorised: _____
John Bradbury
Date: ___/___/2006

RELEASED UNDER THE
OFFICIAL INFORMATION ACT