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Submitted for the LL.B. (Honours) Degree at the Victoria University of Wellington.

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INTRODUCTION

The international travel industry operates within a complicated regulatory framework designed to meet New Zealand's external civil aviation policies, and fulfil the Government's obligations to other states. But competition within the industry is strong. In order to attract business, and increase their share of the market, some airlines and travel agencies are discounting passenger fares below the levels approved by government.

Apart from the possibility that such practices are illegal under New Zealand domestic law, to condone discounting would place the New Zealand Government in breach of its obligations under several bilateral and multilateral air service agreements with other countries.

Discounting also has undesirable effects within the industry. Airlines may engage in predatory or monopolistic practices to the detriment of other airlines who are unable to compete. The State has a legitimate interest in protecting the businesses of its citizens, and may even own, or hold an interest in, an airline itself. It is recognised worldwide that government intervention is needed to protect the industry, especially smaller business interests that carry little bargaining power. If the industry is not controlled there is a risk that an unhealthy market will lead to a drop in the level of safety standards.

The New Zealand attempt to legislate in this area has been administratively ineffective. It has not produced effective control or enforcement. This paper will examine the development of New Zealand's international obligations, and its

present day external civil aviation policy. The discounting practice will be explained, and legislation or regulations used to prevent it between 1947 and 1982 will be considered.

In 1982 Parliament enacted the Civil Aviation Amendment Act 1982 to come into force on 1 July 1983, or earlier if specified by the Governor-General. It was intended to strengthen the existing law, and provide for successful policing of illegal discounting. This paper will highlight the problems that Act was intended to remedy, and consider whether it has been successful.

The present system for setting and approving international air fares, as introduced by the 1982 amending Act, will be explained. A conclusion will suggest that while the legislation has provided for an effective system, that system is not working effectively in practice.

1. NEW ZEALAND'S INTERNATIONAL OBLIGATIONS AND EXTERNAL CIVIL AVIATION POLICY

The origins of governmental control in the fixing of tariffs and conditions for international air travel can be traced back as early as 1919. International civil aviation has traditionally been subject to extensive government control and regulation. Such control is not unique to New Zealand. Nearly every sovereign state exercises similar controls, and therefore New Zealand must be seen as a part of the entire international context.

The New Zealand Government is a party to a collection of international conventions, treaties and bilateral or multilateral air service agreements that regulate travel by air between the party states. The Government has, therefore, accepted an obligation to maintain approved flights between the countries party to each agreement.[1] New Zealand's international obligations also require it to maintain tariffs approved in accordance with its air service agreements. Every agreement specifies the procedure and criteria for approving the international air fares covered by that agreement.[2]

Appended to this Paper is a copy of the air services agreement between the Government of New Zealand and the Government of the Republic of Nauru.[3] It is a typical bilateral air services agreement, and will be referred to throughout this chapter by way of illustration. As can be seen, the agreement deals with all matters in relation to air services between the two countries. Tariffs are dealt with in Article 10.

The New Zealand Government meets its obligations under this and other agreements by strictly regulating all airlines that operate in to or out of New Zealand. Control is comprehensive and regulates most aspects of an airline's operation, not merely tariffs.

The starting point, or reason why such agreements are necessary, is the sovereignty vested in all states which gives them the right to exercise absolute control over their territory and airspace. Landing rights, or rights of airspace transit, are a partial derogation of sovereignty and must be bargained for. Thus, governments bargain for such rights at an international level on behalf of airlines or other organisations domiciled in their country. The whole framework of international civil aviation has developed from this concept.

There are also wider motives. The jealous protection of sovereign rights in airspace would not only prevent the operation of all international aviation,[4] but would also have adverse effects on a country's economy. International civil aviation provides tourism, and has major implications on a country's entire sphere of international political interests and import/export trade relations.

In negotiating with other countries on bilateral air transport agreements decisions are generally based upon commercial considerations. The Government, in consultation with Air New Zealand, assesses the need for a new service within the context of existing and potential markets.[5] Alternatively, landing rights may be granted for some other favour, or withdrawn as a political sanction.[6]

In return for landing rights in one country, reciprocal rights will generally be granted in the other, even if they are not immediately used. The agreement with Nauru provides an example of this. By Article 3, and the schedule to the

agreement, it will be seen that equal rights are conferred on both parties, yet Air New Zealand has never operated a service to Nauru.

There have been a great number of international conferences and agreements on civil aviation. Often the policies of powerful countries have differed and this has resulted in smaller countries such as New Zealand being subject to competing tensions and influences.

After the Second World War the United States was in a fortunate and powerful position owing to its large resources. It had many surplus large aircraft, and many surplus war pilots. It could lead the world in passenger transportation and sought wide freedom of capacity to regulate.

The British did not have the same resources but did have control or influence over a large empire throughout the world. Landing rights in a great many desirable destinations were in the hands of the British. These factors gave each country a position of strength, and led to trade-offs and agreements between them. They were together in a position to dictate to the rest of the world how international civil aviation would develop.

The Chicago International Civil Aviation Conference of 1944[7] developed regulatory agreements and conceptualised the manner in which states could derogate from their sovereign positions.[8] The agreement with Nauru recognises the Chicago Convention of 1944, and states in its preamble -

> ....BEING PARTIES to the Convention on International Civil Aviation opened for signature at Chicago on the seventh day of December 1944;
>
> DESIRING to conclude an Agreement, supplementary to the said Convention, for the purpose of establishing air services between their respective territories
>
> HAVE AGREED as follows....

Article 2 states -

> The provisions of this Agreement shall be subject to the provisions of the [1944 Chicago Convention] and to the provisions of any other multilateral convention that is binding on both Contracting Parties in so far as those provisions are applicable to international air services.

From the Chicago Conference the 'five freedoms of the air' emerged. They are - [9]

TRANSIT RIGHTS

First Freedom: Right of transit without landing.

Second Freedom: Right of non-traffic stop for re-fuelling, etc., but not setting down or picking up load.

TRAFFIC RIGHTS (Based on an international airline domiciled in nation "A")

Third Freedom: Right to set down traffic from nation "A" at nation "B".

Fourth Freedom: Right to pick up traffic from nation "B" for nation "A".

Fifth Freedom: Right to carry traffic between foreign countries, e.g. nation "B" and nation "C".

Also developed was the right of 'cabotage', the right to carry traffic within the territory of a foreign nation, e.g: between two cities in nation "B".

Article 3 of the Agreement with Nauru deals with the granting of such rights. Article 3(1)(a) grants to each party by the other party "the right to fly across its territory without landing" (first freedom). Article 3(1)(b) grants each party by the other party "the right to make stops in its territory for non-traffic purposes" (second freedom). By Article 3(2) each party is granted third and fourth freedoms necessary to establish an air service on the routes specified in the schedule to the Agreement. The routes in the schedule to the Agreement do specify intermediate stops in other countries not party to the Agreement. This would, of course, be subject to agreement with those other countries and this fifth freedom of the air in relation to a Nauru-Auckland or Auckland-Nauru flight would not be available until the intermediate country had agreed to the picking up or discharge of passengers within its territory. By Article 3(3) the right of cabotage is expressly denied.

The Bermuda Agreement of 1946 (Bermuda 1)[10] was a bilateral agreement between the United States and the United Kingdom. Its formula provided a means of regulating the freedoms of the air and its principles were adopted by many countries for incorporation into most bilateral air service agreements. It is still used today in some agreements. Under the Bermuda 1 formula fares were to be agreed upon by the airlines in accordance with resolutions or decisions of the International Air Transport Association (IATA). The fares would then be filed for approval with the two governments at each end of the route. This is called the 'mutual approval' method of setting tariffs. Both governments have to approve of a particular fare or else it will not come into existence. All agreements involving the United States or Britain were on this basis.

That position has now changed. Since the 1970's there has been an increased demand by consumers for cheaper international air travel. This demand has not been easy

to satisfy since it has come at a time when steep increases in operating costs, notably fuel, have pushed many airlines dangerously close to economic disaster.

Australia and the United States are New Zealand's major international air travel markets and their responses to the problem have been diametrically opposed, although both aim at generating more traffic, and achieving lower fares.

Thus, New Zealand found itself stuck between two very different and conflicting policies. The New Zealand Government had to decide whether the demand for cheaper fares would best be satisfied through government control, or market forces.[11]

The United States totally changed its earlier approach and deregulated its industry in 1978. It saw less government control and open competition as the best way of eliminating inefficiency, improving services, and lowering fares.[12] Under the United States system, competitive market forces will determine fares, and government intervention will be the minimum necessary to - [13]

1. Prevent predatory or discriminatory prices or practices (e.g: action taken by one airline prepared to sacrifice current revenues with the specific intention of driving rivals from the market so that higher profits can be earned in the long run in the absence of competition).

2. Protect consumers from prices that are unduly high or restrictive because of the abuse of monopoly power.

3. Protect airlines from prices that are artificially low because of direct or indirect government subsidy or support.

Rather than the mutual approval method of approving

fares, which allows foreign governments some control over fares charged in the United States by withholding approval of a particular fare, the United States Government in its bilateral air service agreements now prefers the following methods of tariff control -

1. 'Mutual disapproval' - unless both governments disapprove of a particular fare filed by an airline that fare will come into force. In practice this does not differ significantly from mutual approval. This method is, in fact, rarely used by the United States, its preferred method being -

2. 'Country of Origin' - a government can intervene in the fare charged for a particular route, but only in relation to the price charged within its own country, i.e: it has no control over the fare offered in the other country for the same route. Such clauses allow for unilateral control, but only in relation to tickets sold within a government's own territory.

The Australian Government decided on strict government control. It saw restrictions on competition, with strict control over the industry and conditions of travel, as the most effective way of lowering fares while still maintaining acceptable economic returns for the airlines. In its bilateral air service agreements Australia retained the mutual approval method of fare approval, except in its agreements with the United States.

Both those countries put pressure on New Zealand to adopt their approach. In 1979 it was considered appropriate to re-evaluate New Zealand's external aviation policy and a comprehensive White Paper was presented to Parliament on that subject.[14] It sets out New Zealand's international aviation goals and policy, and outlines the pricing principles that should be taken into account in achieving those goals.

The White Paper stated that for New Zealand there would be difficulties with both the United States and Australian approaches. The Paper states, at page 45, that -

> The [United States approach] restricts access to its total aviation market but wishes to deregulate fares and capacity between the United States and other markets while the [Australian approach] wishes to control all aspects of air carriage.

New Zealand chose a regulated market, although it is intended to be flexible and pragmatic. In the New Zealand agreements with the United States tariffs are approved on a country of origin approach. With other countries fares are approved within a Bermuda 1 mutual approval framework, but any method may be used, depending on the particular situation and negotiations. A survey of three of the most recent agreements negotiated shows that in practice New Zealand is adopting mutual approval systems, although the agreements all contain different manifestations of that model depending on the particular circumstances of an agreement.[15]

It should be noted that the Hon. Mr. Neilson, M.P., considers that the Australian regulated market has now collapsed and that there is great pressure for deregulation in that country.[16] Whether or not that is true it has not had a similar effect on the New Zealand market which remains regulated.

The objectives of New Zealand's external aviation policy are set out at page 30 of the White Paper. They are -

> (a) To enable the development of a network of adequate, efficient and competitive air services between New Zealand and other countries to provide travel,

trade and communication links at a level, at a price, and of a type consonant with New Zealand's needs;

(b) To serve New Zealand's political, strategic, and economic interests;

(c) To maintain the highest possible degree of safety and security in international air transportation;

(d) To maximise the contribution of international air transport services to the growth of net foreign exchange earnings;

(e) To pursue policies that encourage the availability of air services to and from New Zealand, which best meet the aims of (a), (b), (c), and (d) above.

Within the context of certain existing multilateral agreements,[17] bilateral air service agreements will continue to be negotiated with other countries to meet these external aviation objectives. Air rights will not be limited as a matter of principle, but will achieve the best balance between commercial factors, economic considerations and political concerns.[18] The approach to negotiations will be flexible and pragmatic.

In designing a regulatory framework the Government wanted a reasonably competitive environment. Tourism is not best served by stringent controls. However, it is seen as desirable to maintain the New Zealand national carrier so in some instances Air New Zealand may need protection against unfair competition from other airlines.[19]

The White Paper states, at page 43, that the principles upon which passenger fares and associated conditions are based should be in line with the policy goals stated earlier. The

Paper lists, also at page 43, six factors relevant to pricing, viz -

(a) Prices should be at the lowest level consistent with free play of market forces, maintaining a high standard of safety and providing an adequate return to efficient airlines;

(b) Prices should be based on the least cost at which safe and efficient services can be provided at reasonable load factors;

(c) Prices should take into account differences in convenience and quality of service offered;

(d) Prices should reflect competitive market forces and meet competition;

(e) Prices should be designed to enlarge the market and increase demand;

(f) Prices should not involve unjust discrimination, or undue preference or advantage.

It is now appropriate to discuss the tariff setting system in the air services agreement between New Zealand and Nauru. It is provided in Article 10 of the Agreement. Article 10(4) provides that whenever possible tariffs should be agreed upon by the airlines concerned. The agreed tariff is then subject to the approval of both governments, who in their consideration of the proposed tariff are expected to have due regard to the provisions of paragraph (2) of Article 10. Thus, it is a mutual approval system.

Paragraph (2) provides that -

> The tariffs on any agreed service shall be establishedd at reasonable levels, due regard being paid to all relevant factors including cost of operation, reasonable profit, characteristics of the service (such as standards of speed and accommodation) and the tariffs of other airlines.

Therefore, paragraph (2) lays down a small number of fairly general policy factors. It does not mirror the policy objectives or pricing principles set out in the New Zealand White Paper of 1979.[20] Presumably this is so as not to bind the Government of Nauru who may have different policy goals. It is left to domestic legislation to ensure that the New Zealand tariff approving machinery has due regard to New Zealand external civil aviation policy.

The question that now arises is as to an effective system of domestic regulatory control. The New Zealand Government is bound at an international level by a large number of multilateral and bilateral air service agreements. There must be legislation in New Zealand to ensure compliance by all those involved in the international travel industry so that international obligations are not breached.

In addition, the New Zealand Government wishes its external aviation policy objectives and pricing principles to be observed in the approval of tariffs. A system of regulatory control should meet the international obligations and policy goals, but be flexible enough to adapt to market forces. The New Zealand system of regulatory control is the subject of discussion in Parts 3 and 4 of this Paper.

2. THE DISCOUNTING PRACTICE

It is submitted that discounting of international passenger fares is widespread throughout the travel industry in New Zealand. The techniques are varied, but the aim remains the same - to offer a lower fare than that approved by governments, and supposedly charged by other travel retailers or wholesalers, in order to attract custom.

The Minister of Civil Aviation and Meteorological Services[21] called this a "self-defeating market malpractice".[22] He said, when introducing the Civil Aviation Amendment Act 1982 - [23]

> The international airline industry is currently suffering a worldwide downturn. [In 1981] members of the International Air Transport Association - IATA - lost US$2.1 billion on their international operations...In order to increase their share of the market, some airlines have resorted to discounting passenger fares ...below the levels approved by governments. While these airlines may gain an initial advantage over their competitors, other airlines feel obliged to match the discounts to preserve their own share of the market. The net result is that all airlines have ended up with less revenue for traffic that they would probably have carried anyway. IATA has estimated that these self-defeating market malpractices will cost its members about US$1 billion [in 1982].

The Minister talks only of airlines but the same principles apply to all those in the industry. In the Auckland suburb of Takapuna there are eleven travel retailers within a small

shopping area of no greater radius than one kilometre. Competition is fierce. One agency engages very frequently in air fare discounting. Others do so less frequently. Nearly all travel agents knowingly engage in a practice that is in fact illegal, but because that practice is so widespread, the travel agent believes it to be legitimate.

Those businesses that do not wish to discount suffer as a result of those that do. It is probable that many businesses would rather not discount, but are forced to, so as not to lose business. In 1982 the Bank of New Zealand expanded its operations by establishing a travel representative within its Takapuna Branch. Marketing of this service was comprehensive and well planned, but it is the policy of the Bank of New Zealand not to engage in any form of illegal air fare discounting. Since establishment business has been slow, and in part the Bank attributes this to its lack of competitiveness. The operation may not have survived were its initial losses not able to be absorbed into the larger resources of BNZ Travel. The poor response is considered to be a result of some retailers in the Takapuna area offering cheaper fares, or other inducements, to travellers.

It is apparent that travellers are willing to 'shop around' for the lowest fare. Travellers may be loyal to a certain agent for various reasons, but it has never been observed that travellers avoid agents that discount for fear of being involved in an illegal fare arrangement. Furthermore, it is submitted, the majority of travellers would not be aware that an arrangement entered into may be illegal.[24]

Techniques that are commonly used to discount travel below approved tariffs are -

1. The direct offer of a cheaper fare. This is the most common method and appears in many different forms, some simple, others involving complicated business procedures. A retailer may be willing to forego part of his commission and pass the saving on to the traveller. Decreasing profits in

this manner in an industry with high overheads could be dangerous.

The greatest amount of discounting is done by arrangement with a wholesaler or with the carrying airline. These organisations can offer discounts by selling package, or bulk, travel. In 1982 a small survey was conducted in Wellington on the range of prices available. For a fare from Wellington to Kuala Lumpur inquirers obtained quotes between $1,250 and $2,000.[25] Also in 1982 it was alleged that a well known airline was carrying passengers from Australia to the United States at a vastly discounted rate that would return only $12 per seat, or nothing if there was a delay in travel.[26] The ticket may or may not bear the correct fare on its face.

2. A traveller agrees to pay the approved fare initially, and is ticketed accordingly. Upon his return to New Zealand, or upon arrival at his foreign destination, or at some other time, the traveller receives a cheque by way of refund for the negotiated discount. This is the procedure referred to earlier that is so widespread most travel agents believe it to be legitimate.

It was alleged in 1982 that a well known airline was paying $40.00 per head to New Zealanders from Singapore from an external bank account unknown to the Reserve Bank.[27] There have also been reports of instances in Auckland where far greater refunds were negotiated and paid in this manner.

3. A traveller pays the approved tariff but receives other benefits such as an increased level of in-flight service, discounts on accommodation or food, or sightseeing trips.

It has been reported that New Zealand travellers are being offered very cheap accommodation in luxury overseas hotels if they travel on a certain airline. It was cynically suggested the next step might be that airline "X" will pay

travellers to stay in a top Honolulu hotel free, as long as they fly there on airline "X".[28]

It was stated that over Christmas of 1983 Air New Zealand, by arrangement with loyal tour operators, was offering stopover accommodation in Hawaii and Disneyland at a rate of $59.00 for seven nights. The package included other inducements, such as a free "lei" around the neck in Honolulu, free transfers between airport and hotel, free breakfasts, etc.[29]

Caught unawares, other airlines offered similar arrangements. Continental Airlines matched Air New Zealand's $59.00 rate, but started work on a cheaper package. Pan American Airlines offered a seven night Honolulu package at $49.00. The cheapest arrangement of all was a deal through Worldwide Air Travel Ltd. It offered accommodation for $1.00 per night at good hotels in Los Angeles and Singapore for travellers flying Air New Zealand, Pan American, or British Airways. Since no one can buy a hotel bed in Honolulu, Los Angeles or Singapore for $1.00, or even $7.00, a night, in most cases the airlines concerned must be heavily subsidising such accommodation, thus cutting into returns obtained from the air fares.[30] In some cases the subsidy may be less. The airline may own the hotel, or both the hotel and the airline may sell space at a low rate to mutually assist each other's operation.

4. Travel via a non-approved route or service. There are many alternative routes to a given destination and it may be cheaper to circumvent the Ministry of Transport with a more circuitous route.[31]

It has been reported that a traveller could fly from Auckland to Los Angeles via Fiji on Air Pacific for $898, against the Air New Zealand approved fare of $1,323. Air Pacific's Fiji-Los Angeles fare is not on the Ministry of

Transport's record of approved fares, but it could be purchased in Auckland.[32]

5. There are many cheaper fares sold in overseas countries. They may be legal or illegal in terms of that country's law. A traveller on a long journey may save money by purchasing only the initial leg of the trip, say as far as Australia, in New Zealand. He pays his travel agent in New Zealand the appropriate sum of money for the remaining legs and is given a Miscellaneous Charges Order (M.C.O.). The M.C.O. is presented to a retailer overseas and is convertible into onward air tickets. This practice is illegal, as will be shown in Part 4 of this Paper.

It has been suggested that at one stage a traveller could get from Honolulu to London for a week at a price of $39.00.[33] Extremely cheap airfares are available in countries such as Holland and Greece.

3. REGULATORY CONTROL IN NEW ZEALAND PRIOR TO THE CIVIL AVIATION AMENDMENT ACT 1982.

In the early days of international civil aviation air fare discounting was not a recognisable problem. Under most air service agreements, as explained earlier, fares were agreed upon between airlines, in the context of I.A.T.A. resolutions, and submitted to governments for approval. Airlines had sufficient input into the fare setting process and were generally content. Air fare discounting, as a major problem, emerged in the 1970's as economic difficulties forced airlines to compete, not only to avoid bankruptcy, but to meet the public demand for lower fares.

Up until 1978, had it been necessary, action could have been taken against a discounting airline under the provisions of the International Air Services Licensing Act 1947. However, it was the aim of that Act to provide for the issue of air service licences, not to regulate tariffs. An analysis of the provisions of the Act gives rise to the following list of reasons for its unsuitability as a vehicle for tariff control -

1. By section 9(1) the Minister may grant a licence to operate an air service subject to such conditions as he thinks fit. By section 9(2)(f) the Minister, in granting any licence, may prescribe the fares to be charged for the carriage of passengers. By section 16(1) the Minister may at any time appoint a person to hold an inquiry as to whether or not any international air service is being carried on in conformity with the terms and conditions of the licence.

If the Minister is satisfied that the licensee is not carrying on the service in conformity with the licence (for example, fares are being discounted below those prescribed under section 9(2)(f)) the operator's air service licence

may be revoked,[34] or suspended for a period.[35] Revocation or suspension of an airline's operating licence was seen as too severe as a sanction against discounting.[36] Without a licence an airline cannot operate that route.[37] The airline may have to lay off staff, and business lost may be never recovered. As well as being out of proportion to the offence, revocation or suspension of an air services licence could have bilateral repercussions for the government under its air service agreement with the country at the other end of the route concerned.

2. The only other sanction that could be imposed in respect of non-compliance with the terms of an international air services licence was a small fine.[38] A small fine is no deterrent to a large airline.

3. The Act deals only with airlines. It does not provide for any control over travel agents or other people in the industry, except by creating an offence and imposing a small fine where such a person does an act in relation to an air service as agent for the airline concerned where there is no licence in force.[39] There is no offence by an agent in respect of a breach of a condition of an air services licence in force, and held by an airline.

4. The Act controls international air services. The definition of 'international air service' in section 2 of the Act does not include travel between two locations outside New Zealand, with no stops in New Zealand, where such travel is arranged and paid for in New Zealand. It is the aim of the government to subject such travel to the same regulation as all other travel purchased in New Zealand.

The provisions of the International Air Services Licensing Act 1947 do not cater for the extensive regulation needed in the control of tariffs. To amend this Act for that purpose would involve a major re-drafting of many of its sections.

The changes desired were more easily made by amending the Civil Aviation Act 1964. All control of tariffs is now exercised pursuant to the Civil Aviation Act, its amendments, and subordinate legislation made under it.

In the mid to late 1970's illegal air fare discounting had become a major problem. The International Civil Aviation Organisation (I.C.A.O) called upon member states to adopt enforcement procedures to curb and eliminate illegal discounting. As a result most countries now have some form of compliance machinery for the enforcement of approved tariffs. New Zealand's response to the I.C.A.O. call, as stated above, was to amend the Civil Aviation Act 1964 to enable the introduction of the International Air Tariff Regulations 1978.[40]

The Civil Aviation Act 1964 had an extensive regulation making section,[41] but neither that empowering provision, nor the Act itself, specifically dealt with the control of tariffs. Section 5 of the Civil Aviation Amendment Act 1976 extended section 29 of the principal Act so as to give wide powers to promulgate regulations for the control of air fares sold for travel between New Zealand and any place outside New Zealand. Also authorised was the creation by regulation of offences for non-compliance, and the imposition on offenders of fines not exceeding $5,000.00.

The Civil Aviation Amendment Act 1977 by section 3 further amended the principal Act by extending the regulation making power to include not just control of tariffs for carriage between New Zealand and places outside New Zealand, but also where carriage is purchased, sold, or arranged in New Zealand, for travel between places outside New Zealand.

Pursuant to these powers, the International Air Tariff Regulations 1978 were promulgated on 24 January 1978. They were notified in the Gazette on 26 January 1978[42] and came into force twenty-eight days later on 23 February 1978.[43]

Under these Regulations control and approval of tariffs was exercised by the Secretary for Transport. His main powers were contained in Regulation 4. By Regulation 4(1), any person could submit a tariff, or an amendment to an approved tariff to the Secretary for his approval. The Secretary could approve or refuse to approve any tariff or amendment submitted to him.

In approving a tariff the Secretary could approve it in whole or in part, or even approve it in a form varied by him.[44] The Secretary could, of his own motion, at any time direct that an approved tariff be amended in any specified way.[45] In addition the Secretary had a discretion, at any time, to withdraw his approval of an approved tariff, or part of an approved tariff.[46]

Regulation 5 directed that in the exercise of his powers under Regulation 4 the Secretary should have regard to certain matters. They included any relevant international convention, agreement or arrangement to which the Government of New Zealand is a party, and any relevant resolution or decision of the I.C.A.O. or I.A.T.A. that has been approved by the Minister.

Regulation 3 provided for adherence to approved tariffs. By paragraph (1) it was provided -

> ...no person shall sell, arrange, or provide, or undertake or advertise his ability or willingness to sell, arrange, or provide, any international carriage by air not in accordance with an approved tariff.

Paragraph (4) deemed international carriage by air not to be in accordance with a tariff if -

> ...there is advertised, offered, given, paid, provided, or allowed, in connection therewith, by or to any person whomsoever, any reward, payment, bonus, gift, prize, rebate, commission, discount, in-flight service, allowance, or other benefit whatsoever -
> (a) Not specified in the tariff; or
> (b) Otherwise than subject to the conditions...specified in the tariff...

Paragraph (5) provided that any person who acted in contravention of or failed to comply with Regulation 3 committed an offence, and was liable on conviction to a fine not exceeding $5,000.00.

It is interesting to note that Regulation 3(6) provided a defence to a charge brought under Regulation 3 if -

> ...the defendant shows that he neither knew that the international carriage by air concerned was not in accordance with an approved tariff nor had any reasonable means of ascertaining whether or not that carriage was in accordance with an approved tariff.

Generally, ignorance of the law is no excuse, and it is unusual to find such a provision. The writer believes that this was a recognition by the Government of one of the biggest problems in the then, and in the present, system of regulatory control. That problem is that there is no organised system of advising all people in the travel industry of approved tariffs. There are many relevant publications, including the principal Act, Regulations, Gazette notices, the 'Overseas Airline Guide', the 'A.B.C.of World Travel', Air New Zealand's 'Agents' Advice', and other airline manuals.

Approved tariffs are constantly changing and because the system cannot adapt to this, some protection was needed for innocent breaches of the Regulations.

It should be the responsibility of the Government to provide reasonable means of ascertaining approved tariffs.[47]

Regulation 6 provided that all air travel organisers were required to keep records relating to all international travel by air organised by them, for a period of two years after that travel was completed. The records required to be kept were extensive, and could together provide a complete audit trail should it be necessary to investigate a suspicious travel arrangement.

Regulation 7 provided search and seizure provisions. Any person authorised in writing by the Secretary could -

(a) Inspect the records of any air travel organiser:
(b) Require any person to make available to him for inspection all records relating to any matter specified in regulation 6(1)...
(c) Take copies of or extracts from any records relating to any matters specified in regulation 6(1)...

'Records' was defined in Regulation 2. It was an inclusive rather than an exhaustive definition. It appears that Regulation 7(a) therefore allowed the inspection of all of an organisation's records, not just those relating to matters specified in Regulation 6(1). However, the taking of copies or extracts of records is limited by Regulation 7(c) to those relating to matters specified in Regulation 6(1).

Regulation 8 provided for further offences not covered by Regulation 3. The penalty for these offences was a fine not exceeding $1000.00.

4. PROBLEMS WITH THE REGULATORY CONTROL, AND THE CHANGES INTRODUCED BY THE CIVIL AVIATION AMENDMENT ACT 1982.

A. The Problems with the 1978 Regulations.

By 1981 it was clear that a new system of control was needed. It had been hoped by the Minister that the existence of the 1978 Regulations, along with self-policing by airlines and travel agents, would be sufficient to tidy up the market-place in New Zealand without recourse to prosecutions.[48]

However, that was not to be the case. The Hon. Mr. Neilson, M.P., said "that to ask the airline industry to enforce air ticket discounting was like putting Al Capone in charge of enforcing prohibition."[49] Discounting was widespread and the industry was calling for effective control from the Government. It was obvious that positive enforcement by way of prosecution was needed, so the Ministry appointed a small number of investigative officers and began to gather evidence.

It was then discovered that the existing Regulations were defective and that prosecutions were not likely to succeed. The reasons why a prosecution would not succeed were given to Parliament by the Minister as -

1. ...the various commissions payable by airlines to travel agents turned out to have a greater bearing on the mechanics of discounting than had been envisaged when the original empowering legislation was drafted.[50]

2. ...the complex relationships between airlines, agents, sub-agents, overseas travel organisers, and customers, meant that it could prove difficult to provide a court

with sufficiently compelling evidence to convict any particular person or organisation of an offence.[51]

3 It was a "difficult matter on which to get evidence."[52]

Thus, there was never a prosecution taken under the 1978 Regulations. Despite what the Minister said it is submitted that the blame for this cannot be placed wholly on the Regulations, but must be laid partly at the door of the Ministry. The main problem was that the Ministry never came up with an organised list of approved tariffs. It was very difficult, under the 1978 Regulations, to establish exactly what was the approved fare for a given route on a given date. Where an officially approved tariff existed there was no organised system of promulgation. There was no system for the updating of altered tariffs. Where there was no statement of approved tariff in respect of a particular route, establishing the fare required a detailed analysis and interpretation of a great number of documents or publications.

Because of this uncertainty, it would be easy for a defendant to avail himself of the defence offered by Regulation 3(6), and show that he neither knew, nor had reasonable means of ascertaining, that the carriage was not in accordance with an approved tariff.

It is submitted that where an airline had sought and obtained an approved tariff, the 1978 Regulations would have supported a conviction against that airline subsequently discounting the fare. They could not claim they did not know the approved tariff. It is submitted that persons with accounting experience, upon examination of a travel organiser's records, would not find the airline commission scheme, nor the industry's complex relationships, a barrier to establishing what price a customer had paid and whether it was less than the approved tariff.

The Minister's claim that evidence was hard to obtain is a direct contradiction to what he had at other times said in Parliament, for example - [53]

> Investigations by the Ministry of Transport uncovered clear evidence that a small number of major carriers serving New Zealand were openly flouting the law.

It is believed that prosecutions were not initiated where evidence existed, because the Ministry recognised that its systems were incomplete and out of line with the Minister's promises to the Industry. A prosecution may have looked 'unfair'.

B. The Civil Aviation Amendment Act 1982.

The Civil Aviation Amendment Act 1982[54] revoked the International Air Tariff Regulations 1978,[55] and repealed those parts of the existing regulation making power in the principal Act that authorised regulations in respect of air tariffs.[56] Section 2(1) of the amending Act added a large new section 29A to the principal Act, which now provides the authority for all subordinate legislation in respect of the approval and control of international air tariffs. It was intended to remedy the defects in the previous system so as to provide for effective control and enforcement. In addition, the amending Act provided an opportunity to change and better organize the scheme of regulatory control to bring it in line with the goals set out in the 1979 White Paper on New Zealand's external civil aviation policy.

Whilst it was the opinion of the writer that some prosecutions could have been successful under the 1978

Regulations, there is no doubt that the 1982 amending Act is a vast improvement, at least on paper. Regulation is now far more detailed. A system of tariff approval and promulgation has been provided for, although it is not yet in effective operation.

According to the Controller of Air Services Policy one of the major aims of the Ministry is to achieve equality.[57] A problem with illegal discounting in New Zealand is that cheap fares are available to only a small number of travellers, usually in Auckland. A traveller can find that the person in the seat next to him has paid less money for the same journey. Travel agents are also disadvantaged through not having access to cheaper fares that an airline only offers through some travel consortiums.

The Ministry is, therefore, not so much concerned with the dollar amount of a particular fare. Its concerns are that only approved fares are sold, that the approved fares comply with bilateral obligations, meet the policy objectives, and are all available to every New Zealander in every town in New Zealand. The Ministry even discourages student fares, youth fares, or other discrimination between various sectors of the public, in the belief that all sectors of the public should have equal access to the widest range of fares.[58] To the criticism that New Zealanders are being discriminated against by not having access to cheap fares available overseas, the Ministry responds - [59]

> Each Government is responsible for doing its job in the market in which it has jurisdiction. It is the New Zealand Government's responisiblity to ensure that fair pricing practices apply in New Zealand .... If a matter is out of hand in another part of the world, there is no reason why we should be a party to allowing the same matter to get out of hand in New Zealand.

This desire for equality is not expressed in the legislation. It is, however, how the Ministry intends to work within its discretion. The writer believes that the only way to achieve the desired equality is not to threaten airlines with sanctions, but to show the airlines that their desire for a cheaper fare can be satisfied legally. In the past the system of tariff approval has been so slow and restrictive that airlines have bypassed it with illegal, or unapproved, cheaper fares. This results in the inequality mentioned above.

But if the system is seen to be quick, and available to approve what an airline wants, subject only to compliance with bilateral obligations and policy goals, airlines will have faith in the system and realise that there is no need to discount illegally. This will satisfy everybody concerned. The Ministry will be satisfied that bilateral obligations are met. New Zealand's external aviation policy goals will be met. The airlines will be satisfied, and most important of all - the New Zealand traveller will be satisfied because he will be sure when buying travel that the fare he is paying is the cheapest available, and that anyone buying the same journey, in New Zealand, will be paying the same.

The indications are that the Ministry agrees with this view. A spokesman has said that the system will be quicker, airlines will have more control over fares, and that the Minister will lend a sympathetic ear to any request for a new fare, or an amendment to an existing fare.[60]

(1) <u>The new system</u>

Responsibility for control and approval of tariffs is now exercised by the Minister of Transport, and not the Secretary for Transport as was the case under the 1978

Regulations. When the Bill was introduced to Parliament the Secretary for Transport had been placed in control, but the Labour Opposition persuaded the Government at the Select Committee stage that such control would offend against a 1980 report of the Statutes Revision Committee.[61] That report found it undesirable that a government official, who is not answerable to Parliament, can by his own order create criminal offences, or promulgate wide and extensive tertiary legislation.

The Act came into force on 1 July 1983. For the present purposes, the most important term used in the new section 29A is 'relevant tariff'. By section 29A(3) it is provided that -

> ...no person who is engaged...in the business of arranging, providing, or selling international carriage by air (whether as principal, agent, sub-agent, or otherwise howsoever) shall arrange, provide, or sell any international carriage by air otherwise than in accordance with the relevant tariff.

By section 29A(4) it is further provided that -

> ...no person shall undertake, or advertise his ability or willingness, to arrange, provide, or sell international carriage by air that, if arranged, provided, or sold in accordance with the undertaking or advertisement concerned, would be arranged, provided, or sold otherwise than in accordance with the relevant tariff.

It is therefore the relevant tariff that must be complied with. Definitions are provided by section 29A(12). A

'relevant tariff' is comprised of a 'specific tariff' and applicable 'general tariff conditions'. In the absence of a 'specific tariff' the 'relevant tariff' is to be calculated or ascertained from the 'fare pricing rules'.

'Specific tariffs' are statements specifying all fares, rates and charges applicable to a particular route. They also lay down conditions that are to apply to international carriage by air on that route, and which of the 'general tariff conditions' are to apply to that route. Specific tariffs are issued by the Minister and notified in the New Zealand Gazette in accordance with section 29A(2). The first of these appeared on 30 September 1983.[62] It specified the fare and conditions applicable to first class travel between New Zealand and London and expired on 30 November 1983. The next specific tariff issued was on 14 October 1983.[63] It allowed certain cheap fares between New Zealand and Australian destinations, and expired on 9 December 1983.

What is needed is a comprehensive list of specific tariffs for all desinations in the world. The first part of this appeared on 14 June 1984.[64] It lists specific tariffs to thirty-two European destinations.[65]

'General tariff conditions' are defined as a statement of the conditions subject to which fares, rates, and charges, specified in specific tariffs are generally to be payable for international carriage by air. They are issued by the Governor-General under section 29A(1), and were notified in the Gazette on 30 March 1984 to come into force on 16 April 1984.[66] There are some 123 separate conditions available for inclusion in specific tariffs. They do not apply to a particular route unless expressed to apply to that route's specific tariff.

In the absence of a specific tariff the relevant tariff is to be calculated or ascertained from the 'fare pricing

rules'. They are defined as being a statement of rules for calculating or ascertaining fares, rates, and charges, for international carriage by air that are not capable of being ascertained by reference only to the general tariff conditions and specific tariffs. Fare pricing rules are issued by the Governor-General under section 29A(1). They have not been issued, and there were never any such rules under any previous system.

According to a spokeswoman in the Ministry[67] it is not intended to issue any fare pricing rules as the Ministry considers all the factors it needs to implement have been included in the general tariff conditions. This is astonishing. The general tariff conditions only apply when included in a specific tariff. They do not provide for the calculation of a fare in the absence of a specific tariff. The Act specifically refers to 'fare pricing rules', and they are critical where there is no specific tariff issued for travel between two points.

There could never be specific tariffs issued to govern travel between all locations in the world. To compile such a list would be an impossible task. Even when the intended three sets of specific tariffs are issued[68] they will only cover travel between a New Zealand airport and a specified overseas airport. Yet the Act controls not only carriage between New Zealand and any place outside New Zealand, but also carriage between places outside New Zealand, if that carriage is purchased, sold, or arranged in New Zealand.[69] It is submitted that without fare pricing rules, relevant tariffs cannot be calculated in the absence of a specific tariff.

Commissions payable within the industry are controlled through sections 29A(6) and 29A(7). Under section 29A(6) the Minister may issue 'commission regimes', and by section 29A(7) it is provided that -

> No person shall allow, charge, demand, disburse, give, offer, pay, provide, or retain, any agency commission otherwise than in accordance with every regime so issued and not revoked in its entirety.

'Commission regime' and 'agency commission' are both extensively defined in section 29A(12). The first commission regime was notified in the Gazette on 1 July 1983.[70] It was subsequently revoked and replaced by new commission regimes notified on 12 September 1983.[71] It is apparent from the detail of the commission regime, and the definitions in section 29A(12) that every imaginable way of arranging a commission has been dealt with.

Sections 29A(1) and 29A(2) provide that the issuing of fare pricing rules, general tariff conditions and specific tariffs is to be for the purpose of giving effect to -

> (a) Policies on external aviation from time to time promulgated by the Government of New Zealand; or
>
> (b) Any relevant international convention, agreement, or arrangement to which the Government of New Zealand is a party; or
>
> (c) Any relevant resolution or decision of [I.C.A.O] or of the [I.A.T.A.].

Section 29A(5) allows for a measure of flexibility in the promotion and sale of travel. Subject to approval, people may advertise and sell travel in anticipation of the issue of a relevant tariff, subject to the condition that it is not ultimately provided except in accordance with the issued relevant tariff.

Sections 29A(8) and 29A(9) require those in the industry to keep all records relating to international carriage by air for a period of two years from the date that all the international carriage by air to which they relate was completed. The Secretary, or persons authorised by him, may inspect or take copies of all these records.

By section 29A(10) international carriage by air is deemed to be not in accordance with a relevant tariff if -

> ...there is allowed, given, offered, paid, or provided, in connection therewith, by or to any person whomsoever, any allowance, bonus, discount, gift, payment, prize, rebate, reward, service, or other benefit whatsoever, -
> (a) Not specified in that tariff; or
> (b) Otherwise than subject to the conditions, and in the circumstances, specified in that tariff in that behalf.

The offence and penalty is provided by section 29A(11). Every person who acts in contravention of or fails to comply with any provision of this section commits an offence and is liable to a fine not exceeding $5,000.00. There is no defence available such as was provided in Regulation 3(6) of the International Air Tariff Regulations 1978. Ignorance of the law is no longer an excuse.

(2) <u>The discounting techniques - all covered</u>?

Earlier in this Paper five methods of discounting air fares were outlined. It is now appropriate to examine whether the new system of tariff control has outlawed them.

Clearly the direct offer of a cheaper fare is illegal. Section 29A(3) prohibits the selling of carriage not in accordance with the relevant tariff. Some methods of discounting are simple and others are complicated. All are potentially illegal. The problem with a complicated method is not its illegality, but in investigating and proving the offence. In addition, the general tariff conditions provide a host of controls that may be included in a specific tariff. They control such matters as validity of tickets, group sizes, stopovers, baggage, children, refunds, cancellations, discounts for staff, possession of tickets, documentation, methods of payment, routing, etc.

Paying the listed fare and receiving a refund later, apart from being an obvious attempt to avoid a relevant tariff, is covered by standard conditions 45 through to 52, if expressed to be included in the specific tariff. They provide that refunds are payable only in certain circumstances.

Receiving extra benefits not specified in the relevant tariff is outlawed by section 29A(10). As shown earlier the section deems international carriage by air not to be in accordance with a relevant tariff if there is -

> ...allowed, given, offered, paid, or provided, in connection therewith, by or to any person whomsoever, any allowance, bonus, discount, gift, payment, prize, rebate, reward, service, or other benefit whatsoever, -
> ...Not specified in that tariff;...

Problems may arise in the interpretation of this subsection as the benefit becomes more remote from the air travel itself. To be illegal the subsection requires that the benefit be 'provided, in connection therewith' i.e. with the air travel. Clearly cheaper accommodation, increased levels of in-flight service (e.g: being upgraded to first class),

free transport, and other benefits offered as an inducement to travel are in connection with the travel, but what of receiving a free 'lei' around the neck upon disembarkation? Although probably caught by the maxim de minimis non curat lex, such an attraction may well be in connection with the air travel since there is a 'grey area' between leaving your flight phase at that desination, and beginning the next phase independent from the airline.

Routing is covered by standard conditions 90 through 108, available for inclusion in specific tariffs. However, they can only apply where a specific tariff has been issued. What of the Fiji to Los Angeles fare offered by Air Pacific and mentioned earlier in this Paper? In the absence of a specific tariff, fare pricing rules are essential under the statute. In the absence of a fare pricing rule outlawing a specific arrangement, that route cannot be illegal to sell. Section 29A(3) does not say international carriage by air must not be provided except in accordance with a relevant tariff, it says 'the relevant tariff', indicating that unless there is a relevant tariff in force for a given route, carriage by air along that route is not prevented from being sold by the section. It is submitted that in the absence of fare pricing rules there is no relevant tariff in existence for routes not covered by specific tariffs, and accordingly their provision is not illegal under the present law.

A traveller may go overseas and purchase a cheaper fare, but if there is a specific tariff in force for that route in New Zealand, it may not be pre-paid for by a Miscellaneous Charges Order in this country. M.C.O.'s are controlled by standard conditions 113 through 116, available for inclusion in specific tariffs. In the absence of a specific tariff travel on the route may be sold, and M.C.O's issued, until fare pricing rules say otherwise.

(3) The problems - are they solved?

The Minister cited three major problems with the 1978 Regulations. Commissions payable within the industry are now extensively controlled by the commission regimes referred to earlier, and the detail of those commission regimes appears to have provided for all contingencies.

To some extent the commission regimes will assist in areas where complex relationships between those involved in the industry have caused problems. However, in the opinion of the writer such problems could have been, and can be, solved by positive investigation and enforcement, it being not a problem with the law, but of gathering evidence. The same applies to problems of evidence mentioned. Provision is made for inspection of records under section 29A(8), and a system of investigation and enforcement is essential if the system is to be effective.

It is unfortunate that the question of a complete and organised system of tariff promulgation was not addressed by the 1982 amending Act. It is hoped that such a scheme may yet be introduced by the Ministry, beyond mere notification of tariffs and notices in the Gazette.

The system is still not flexible enough. Recently cabinet approval was given to increase all international air fares by seven percent to offset the effects of devaluation. Rather than being able to issue a single notice providing for an across the board increase the Ministry has had to rewrite the complete list of specific tariffs to Europe.

Approval had been given on 14 August 1984 and it was intended that all fares would rise from midnight that day. Many people purchasing travel on 15 August 1984 were charged the extra seven percent. Those travelling to Europe are entitled to a refund of that extra seven percent. Section 29A(2) of the Act states -

> ...the Minister may from time to time, by notice in the Gazette, -
> (a) Issue specific tariffs:
> (b) Amend or revoke any specific tariff so issued.

The wording of the section makes notification in the Gazette mandatory before a specific tariff can be issued, amended or revoked. Until the revised European specific tariffs are gazetted it is unlawful to charge more than the fare laid down in the existing specific tariff.

C. The Effect on the Traveller

Discounting may have an effect on the traveller concerned, under both civil and criminal law.

(1) Civil law

According to the Minister there have been several instances in which passengers with illegally discounted tickets have been stranded and financially embarrassed at overseas airports because airlines have refused to honour tickets.[72]

It is submitted that in most cases it would be a breach of contract by the airline not to honour a ticket, whether or not it had been discounted. If the airline itself issued the ticket it would clearly be a breach of contract not to honour it. The position is not so clear where the ticket is issued by an agent.

The general rule is that a contract made with a third party by an agent is just as enforceable against the principal as if the principal himself had made the contract. An important qualification, however, is that the principal is only liable for authorised acts of the agent. If the agent

exceeds his authority the principal will not be liable for the excess.

An airline may give an agent actual authority to discount, in which case the airline will be bound by the arrangement.[73] Actual authority may be express or implied.[74] In the absence of actual authority to discount, an apparent or ostensible agency may be as effective to bind the airline as an agency deliberately authorised. While, therefore, an airline cannot be bound as principal by a contract made without its authority, if the proved result of its conduct is that the travel agent appears to be the airline's agent, and makes a contract with a third party who relies on that appearance, the airline may be estopped from denying the existence of the authority.[75]

If an airline normally discounts a particular fare through an agent, and does not advise the agent that such discounting is to stop, the airline will be bound to honour the ticket.[76]

Where an airline is bound to honour a ticket an action will generally lie against the airline only. The general rule is that if the agent is known to be an agent, and the contract is made for a named principal, the principal alone can be sued.[77]

If the travel agent was acting outside his authority such that the airline is not bound to honour the ticket then the liability of the agent will depend upon his state of belief. If the agent knew he had no authority to discount the ticket then an action will lie against the agent in the tort of deceit.[78] An innocent mistake will not render the agent liable in deceit, but it is submitted that a discounted fare would rarely be an innocent mistake.

(2) Criminal law

Like the legislation before it, the 1982 amending Act makes no specific mention of the traveller committing an offence, and it is submitted that under the wording of the Act a traveller does not commit a breach of its provisions by accepting travel not in accordance with a relevant tariff. To infringe section 29A(3) the 'person' must be a travel organiser. Nowhere in the Act is the 'acceptance' of anything prohibited.

An innocent traveller will therefore commit no wrong. But it is submitted that a traveller who suggests, knowingly accepts, conspires, or in any other way takes an active part in an illegal discounting arrangement will commit an offence against section 66 of the Crimes Act 1961, and thereby become a party to the offence liable to the same punishment as the principal.[79]

CONCLUSION

The new system, as provided by the 1982 amending Act, has now been in force for over a year, and it is submitted that it has had little effect on the international travel industry. The system is cumbersome and complex. The problem is revealed in a surprisingly frank admission contained in the explanatory note to the General Passenger Tariff Conditions Order - 80

> The provisions of this order, taken together, are neither comprehensive nor coherent....

The law, as in any situation, will only be respected if it is clear, and is being effectively controlled and policed. To be clear it is submitted that an efficient system of tariff promulgation is required. In 1983 many travel agents paid $228.20 each for a folder and subscription service to the forthcoming regulations, notices and orders. It was the most expensive item sold by the Government Bookshop. As yet this service has not been provided. Such a service should be provided. It must be comprehensive and flexible. Tariffs should be regularly updated, and all changes advised.

For the law to be respected, gaps in the legislation, such as the absence of fare pricing rules, must be remedied. The Ministry should provide a staff of full-time investigators to police the provisions of the Act. The investigators should have accounting and travel industry experience. Airlines and other travel organisers' records should be regularly inspected under section 29A(8) with a view to bringing prosecutions if evidence of illegal discounting is discovered. Test tickets should be purchased to catch discounters who falsify records or documents. No matter how much faith an airline has in the system it may still wish to discount to undercut a competitor. Perhaps stronger sanctions, such as imprisonment for serious offending, should be

introduced as a more effective deterrent. Random checks on tickets should be made at airports to ensure correct fares have been paid. That such investigation should be the responsibility of the Ministry is shown by the failure of a private policing scheme in early 1984.[81]

There have been no prosecutions to date. This, in a system that was introduced to clean up the law, is astonishing. The legislation has provided for an effective system, but it is not working in practice. The legislation has so far imposed a large financial burden on the industry. Many airlines and travel agents have spent thousands of dollars on legal fees in trying to interpret and understand the subordinate legislation mentioned in this Paper. In return for this the industry is entitled to an effective system of tariff approval and enforcement. The costs so far have only added to the costs of discounting.

If the system is not working soon it is submitted that the industry may lose patience and call for deregulation. Some travel agents are already demanding that the law be either properly enforced or withdrawn.[82] If the industry is deregulated competition may become cut-throat. Revenues will fall and so, therefore, will safety standards. New Zealand's external civil aviation policy goals will not be met, and bilateral agreements may have to be re-negotiated. With inspiration by the Government, this need not happen.

FOOTNOTES

Abbreviations

App.J.H.R.	Appendices to the Journals of the House of Representatives, New Zealand.
N.Z.T.S.	New Zealand Treaty Series. Wellington. Department of External Affairs.
U.K. Misc.	British Parliamentary Papers. Command Papers. Miscellaneous Series. London, H.M. Stationery Office.
U.K.T.S.	British Parliamentary Papers. Command Papers. Treaty Series. London, H.M. Stationery Office.
U.N.T.S.	United Nations Treaty Series. (Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations).

1. N.Z. Parliamentary debates Vol. 448, 1982: 4625.

2. N.Z. Parliamentary debates Vol. 449, 1982: 5642.

3. Agreement Between the Government of New Zealand and the Government of the Republic of Nauru Concerning Air Services, Wellington, 5 August 1980. N.Z.T.S. 1980, No. 10; App.J.H.R., Vol.1, 1982, A.27.

4. External Civil Aviation Policy of New Zealand, Parliament. House of Representatives. App.J.H.R., vol. 8, 1979, H.3:6.

5. Ibid. 19.

6. For example, during the Falkland Islands conflict in 1982 landing and operating rights at Auckland International Airport were withdrawn from Aerolineas Argentinas.

7. Convention on International Civil Aviation, Chicago, 7 December 1944. App.J.H.R., vol.1, 1945, A.9; U.K. Misc. No.6; (1945; Cmd 6614); 84 U.N.T.S. 389.

8. External Civil Aviation Policy of New Zealand, op.cit., supra n.4, 6.

9. Ibid. 7.

10. Agreement between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services between their Respective Territories, Bermuda, 11 February 1946, 3 U.N.T.S. 253.

11. External Civil Aviation Policy of New Zealand, op.cit., supra n.4, 22.

12. It is interesting to note that Air Florida was a major proponent of deregulation. When this occurred in the United States in 1978 Air Florida expanded its operation, offering more routes, increased frequencies, and cheaper fares. On 4 July 1984 Air Florida filed for bankruptcy, with large debts, and a great loss of employment. (Television New Zealand News, 5 July 1984).

13. External Civil Aviation Policy of New Zealand, op.cit., supra n.4, 23.

14. External Civil Aviation Policy of New Zealand, Parliament. House of Representatives. App.J.H.R., vol.8, 1979, H.3.

15. See Agreement between New Zealand and Japan for Air Services, Auckland, 18 January 1980 (in force 18 June 1980). N.Z.T.S. 1980, No. 7; App.J.H.R., vol.1, 1982, A.24, article 11; Agreement between New Zealand and the Kingdom of Tonga Concerning Air Services, Wellington, 26 November 1980, N.Z.T.S. 1980, No. 12; App.J.H.R., vol.1, 1982, A.29, article 9; Agreement between the Government of New Zealand and the Government of the Republic of Nauru Concerning Air Services, op.cit., supra n.3, article 10.

16. N.Z. Parliamentary debates Vol. 448, 1982: 4629.

17. Interim Agreement on International Civil Aviation, Chicago, 7 December 1944. App.J.H.R., vol.1, 1945, A.9; U.K. Misc. No. 6, (1945; Cmd. 6614); 171 U.N.T.S. 345; Convention on International Civil Aviation, Chicago, 7 December 1944. App.J.H.R., vol. 1, 1945, A.9; U.K. Misc No.6, (1945; Cmd. 6614); 84 U.N.T.S. 389; Interim Air Services Transit Agreement, Chicago, 7 December 1944. App.J.H.R., vol.1, 1945, A.9; Protocol Amending the Convention on International Civil Aviation, Montreal, 27 May 1947. U.K. Misc. No 11, (1947; Cmd. 7202); 418 U.N.T.S. 161; Protocol Relating to an Amendment to the Convention on International Civil Aviation, Montreal, 14 June 1954. U.K.T.S. No. 24, (1958; Cmnd. 482); 320 U.N.T.S. 209; Protocol Relating to Certain Amendments to the Convention on

International Civil Aviation, Montreal, 14 June 1954. U.K.T.S. No. 26, (1957; Cmnd. 107); 320 U.N.T.S. 217.

18. External Civil Aviation Policy of New Zealand, op.cit., supra n.14, 32.

19. Ibid. 41.

20. For example the following factors are not mentioned (apart from the possibility that they will be considered under 'all relevant factors'): safety and security in international air transportation; market expansion and increase of demand; unjust discrimination, preference or advantage.

21. Referred to in this Paper as 'the Minister'. In both the then National Government and the present Labour Government offices of Minister of Civil Aviation and Meteorological Services, and Minister of Transport are held by the same person.

22. N.Z. Parliamentary debates Vol. 448, 1982: 4625.

23. Idem.

24. The effect of discounting on the traveller, under both civil and criminal law, is the subject of discussion in Part 4.C. of this Paper.

25. N.Z. Parliamentary debates Vol. 448, 1982: 4629.

26. Ibid. 4627.

27. Idem.

28. National Business Review, Wellington, New Zealand, Vol. 15, No. 2, 30 January 1984, p.6.

29. Idem.

30. Idem.

31. National Business Review, op.cit., Vol. 15, No.1, 23 January 1984, p.31.

32. Idem.

33. N.Z. Parliamentary debates Vol. 448, 1982: 4626.

34. Section 16(4).

35. Section 16(5).

36. Per Mr. J. Kennedy-Good, Controller of Air Services Policy, Ministry of Transport, Interview with writer, 4 April 1984.

37. Section 4(1).

38. Section 4(1),(2).

39. Section 4(4).

40. N.Z. Parliamentary debates Vol. 448, 1982: 4625.

41. Section 29.

42. New Zealand Gazette, 26 January 1978, No. 4, p. 170.

43. Regulation 1(2).

44. Regulation 4(2).

45. Regulation 4(4).

46. Regulation 4(5),(6).

47. This problem is the subject of later discussion in this Paper in relation to the present system of regulatory control.

48. N.Z. Parliamentary debates Vol. 448, 1982; 4625.

49. Ibid. 4629.

50. Ibid. 4625.

51. Idem.

52. N.Z. Parliamentary debates Vol. 443, 1982: 215.

53. N.Z. Parliamentary debates Vol. 448, 1982: 4625.

54. This Act was introduced to Parliament in 1982 as the Civil Aviation Amendment Bill (No. 2). It should be noted that the first Civil Aviation Amendment Bill of that year dealt with certain domestic matters and was not relevant to international civil aviation, although the matter was briefly referred to during the first reading (N.Z. Parliamentary debates Vol. 443, 1982: 214, 215, 217). That first Bill was held over to the 1983 session, held over again to the 1984 session, and subsequently lapsed upon the dissolution of Parliament on 15 June 1984.

55. Section 2(4).

56. Section 2(3).

57. Interview with writer, 4 April 1984.

58. External Civil Aviation Policy of New Zealand, op.cit., supra n.13, 24.

59. N.Z. Parliamentary debates Vol. 448, 1982: 4628.

60. Supra, n.36.

61. Review of the Civil Aviation Regulations 1953, Amendment No. 22 (S.R. 1979/18) - Report of the Statutes Revision Committee Pursuant to Standing Order 377, 24 July 1980. App.J.H.R., vol.5, 1980, I5:17.

62. The First Class Special Round Trip Tariff from Auckland, Christchurch, or Wellington to London Notice 1983. New Zealand Gazette, 30 September 1983, No. 163, p.3309.

63. The Economy Special Round Trip Tariff from New Zealand to Australia Notice 1983, New Zealand Gazette, 14 October 1983, No. 169, p. 3441.

64. International Air Tariffs, Normal First and Economy Class Air Fares between New Zealand and Europe. New Zealand Gazette, 14 June 1984, No. 96, p.1907.

65. At the time of writing two more volumes were stated by the Ministry to be only a few weeks away from being issued.

66. The Civil Aviation (General Passenger Tariff Conditions) Order 1984. New Zealand Gazette, 30 March 1984, No. 51, p. 1019.

67. Interview with writer, 23 July 1984.

68. Supra n.65.

69. Section 29A(12), 'International carriage by air'.

70. Civil Aviation (Agents' Commission Regime) Notice 1983, New Zealand Gazette, 1 July 1983, No.95, p.2067.

71. The Civil Aviation (Passenger Agents' Commission Regime) Notice 1983. New Zealand Gazette, 12 September 1983, No. 146, p.3043.

72. N.Z. Parliamentary debates Vol. 448, 1982: 4625.

73. Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd. [1964] 2 Q.B. 480,502; [1964] 1 All ER 630,644.

74. Hely-Hutchinson v Brayhead Ltd. [1968] 1 Q.B.549, 583; [1967] 3 All ER 98,102.

75. J.F. Northey (ed.), Cheshire and Fifoot's Law of Contract (5 ed., Butterworths, Wellington, 1979), p.392.

76. Debenham v Mellon (1880) 5 Q.B.D. 394, 403.

77. Montgomerie v United Kingdom Mutual Steamship Association Ltd. [1891] 1 Q.B. 370,371.

78. Polhill v Walter (1832) 3 B. & Ad. 114.

79. Section 66 reads -

(1) Every one is a party to and guilty of an offence who -

(a) Actually commits the offence; or

(b) Does or omits an act for the purpose of aiding any person to commit the offence; or

(c) Abets any person in the commission of the offence; or

(d) Incites, counsels, or procures any person to commit the offence.

(2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

80. Supra, n. 66.

81. National Business Review , op. cit., Vol.15, No. 1, 23 January 1984, pp. 1,3.

82. The Dominion, Wellington, 14 August 1984, p.1.

A P P E N D I X

Agreement betweeen the Government of New Zealand and the Government of the Republic of Nauru Concerning Air Services.

New Zealand Treaty Series 1980, No. 10
Ministry of Foreign Affairs

AGREEMENT

BETWEEN THE GOVERNMENT OF NEW ZEALAND AND THE GOVERNMENT OF THE REPUBLIC OF NAURU CONCERNING AIR SERVICES

Wellington, 5 August 1980
(in force 5 August 1980)

Presented to the House of Representatives by Leave

BY AUTHORITY:
P. D. HASSELBERG, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1982

Price 75c.

AGREEMENT BETWEEN THE GOVERNMENT OF NEW ZEALAND AND THE GOVERNMENT OF THE REPUBLIC OF NAURU CONCERNING AIR SERVICES

The Government of New Zealand and the Government of the Republic of Nauru (hereinafter referred to as "the Contracting Parties");

BEING PARTIES to the Convention on International Civil Aviation opened for signature at Chicago on the seventh day of December 1944;

DESIRING to conclude an Agreement, supplementary to the said Convention, for the purpose of establishing air services between their respective territories

HAVE AGREED as follows:

ARTICLE I

Definitions

1. For the purposes of this Agreement, unless the context otherwise requires:

(a) the term "the Convention" means the Convention on International Civil Aviation, opened for signature at Chicago on the seventh of December 1944 and includes any Annex adopted under Article 90 of that Convention and any amendment of the Annexes or Convention under Articles 90 and 94 thereof so far as those Annexes and amendments have become effective for or been ratified by both Contracting Parties;

(b) the term "aeronautical authorities" means, in the case of New Zealand the Minister for the time being responsible for civil aviation and in the case of Nauru the Civil Aviation Authority and in either case includes any person or body authorised to perform any functions at present exercisable by him or by it or similar functions;

(c) the term "designated airline" means an airline which has been designated and authorised in accordance with Article IV of this Agreement;

(d) the term "territory" in relation to a state means the land areas and territorial waters adjacent thereto under the sovereignty, of that State and in the case of New Zealand also includes the Cook Islands and Tokelau;

(e) the term "air service", "international air service", "airline" and "stop for non-traffic purposes" have the meanings respectively assigned to them in Article 96 of the Convention.

2. The Schedule to this Agreement (hereinafter called "the Schedule") forms an integral part of this Agreement and all references to this Agreement shall be deemed to include references to the Schedule.

ARTICLE II

Chicago Convention and other Conventions

The provisions of this Agreement shall be subject to the provisions of the Convention and to the provisions of any other multilateral convention that is binding on both Contracting Parties in so far as those provisions are applicable to international air services.

Article III

Grant of Rights

1. Each Contracting Party grants to the other Contracting Party the following rights in respect of its scheduled international air services:

(a) the right to fly across its territory without landing;

(b) the right to make stops in its territory for non-traffic purposes.

2. Each Contracting Party grants to the other Contracting Party the rights specified in this agreement for the purpose of establishing scheduled international air services on the routes specified in the appropriate Section of the Schedule annexed to this Agreement. Such services and routes are hereinafter called "the agreed services" and "the specified routes" respectively. While operating an agreed service on a specified route the airline designated by each Contracting Party shall enjoy in addition to the rights specified in paragraph 1 of this Article the right to make stops in the territory of the other Contracting Party at the points specified for that route in the Schedule to this Agreement for the purpose of taking on board and discharging passengers and cargo including mail, separately or in combination.

3. Nothing in paragraph 2 of this Article shall be deemed to confer on the airline of one Contracting Party the privilege of taking on board, in the territory of the other Contracting Party, passengers and cargo including mail carried for hire or reward to be set down at another point in the territory of the other Contracting Party.

Article IV

Designation of Airlines

1. Each Contracting Party shall have the right to designate in writing through the diplomatic channel to the other Contracting Party an airline for the purpose of operating the agreed services on the specified routes.

2. Each Contracting Party shall have the right, on notification in writing to the other Contracting Party, to withdraw its designation of an airline and to designate another airline in its place.

3. On receipt of a designation the other Contracting Party shall, subject to the provisions of paragraphs 4 and 5 of this Article, without delay grant to the airline designated the appropriate operating authorisation.

4. The aeronautical authorities of one Contracting Party may require an airline designated by the other Contracting Party to satisfy them that it is qualified to fulfil the conditions prescribed under the laws and regulations normally and reasonably applied to the operation of international air services by such authorities in conformity with the provisions of the Convention.

5. Each Contracting Party shall have the right to refuse to grant the operating authorisations referred to in paragraph 3 of this Article, or to impose such conditions as it may deem necessary on the exercise by a designated airline of the rights specified in Article III of this Agreement, in any case where the said Contracting Party is not satisfied that substantial ownership and effective control of that airline are vested in the Contracting Party designating the airline or in its nationals.

6. When an airline has been so designated and authorised it may at any time operate the agreed services, provided that a tariff established in accordance with the provisions of Article X of this Agreement is in force in respect of that service.

ARTICLE V

Revocation or Suspension of Operating Authorisations

1. Each Contracting Party shall have the right to revoke an operating authorisation or to suspend the exercise of the rights specified in Article III of this Agreement by an airline designated by the other Contracting Party, or to impose such conditions as it may deem necessary on the exercise of these rights—

(a) in any case where it is not satisfied that substantial ownership and effective control of that airline are vested in the Contracting Party designating the airline or in nationals of that Contracting Party; or

(b) in the case of failure by that airline to comply with the laws or regulations of the Contracting Party granting these rights; or

(c) in a case where the airline otherwise fails to operate in accordance with the conditions prescribed under this Agreement.

2. Unless immediate revocation, suspension or imposition of the conditions mentioned in paragraph 1 of this Article is essential to prevent further infringements of laws or regulations, such right shall be exercised only after consultation with the other Contracting Party.

ARTICLE VI

Customs Regulations

1. Aircraft of the designated airline of one Contracting Party operating international air services, and the supplies of regular equipment, fuel, lubricating oils, and aircraft stores (including provisions of food, drink and tobacco) on board such aircraft, shall be exempted on arrival in the territory of the other Contracting Party from all customs duty, inspection fees, and other similar duties and charges, provided that such supplies either:

(a) remain on board the aircraft concerned until departure from the territory of the latter Contracting Party or are used on the part of the journey performed over that territory; or

(b) are unloaded from the aircraft with the permission of the appropriate customs authorities, pursuant to the provisions of paragraph 3 of this Article.

2. The same exemption from duties and charges, save in respect of reasonable charges made for services rendered, shall apply to:

(a) aircraft stores, of whatever origin, obtained in the territory of one Contracting Party within the limits permitted by relevant laws and regulations of that Contracting Party, and taken on board aircraft of the other Contracting Party operating an international air service;

(b) spare parts imported into the territory of one Contracting Party for the maintenance or repair of aircraft of the other Contracting Party operating an international air service;

(c) fuel and lubricating oils obtained in the territory of one Contracting Party and intended for fuelling aircraft of the other Contracting Party operating an international air service, even though such supplies are to be used on that part of the flight which passes over the territory of the Contracting Party in whose territory they were taken on board;

(d) at the discretion of the customs authorities, equipment (including specialised ground equipment), intended for incorporation in or use on aircraft of a designated airline of the other Contracting Party engaged on an international air service, or for use solely in connection with the operation or servicing of such aircraft.

3. Supplies of regular equipment and aircraft stores referred to in paragraph 1 of this Article may not be unloaded except with the permission of the customs authorities of the Contracting Party concerned. If this permission has been granted, the supplies shall be stored in accordance with the directions of the customs authorities pending re-exportation or compliance with normal customs procedures.

Article VII

Transfer of Earnings

Each Contracting Party grants to the designated airline of the other Contracting Party the right of free transfer of the excess of their receipts in its territory over their expenditure therein. Such transfers shall be effected on the basis of the prevailing foreign exchange market rates for current payments.

Article VIII

Principles Governing Operation of Agreed Services

1. There shall be fair and equal opportunity for the designated airline of each Contracting Party to operate the agreed services on the specified routes between their respective territories.

2. In operating services on any specified route the designated airline of each Contracting Party shall take into account the interests of the designated airline of the other Contracting Party so as not to affect unduly the services which the latter provides on the whole or part of the same route.

3. The agreed services provided by the designated airline of each Contracting Party shall bear close relationship to the requirements of the public for transportation on the specified routes and shall have as their primary objective the provision, at a reasonable load factor, of capacity adequate to carry the current and reasonably anticipated requirements for the carriage of passengers and cargo including mail originating from or destined for the territory of the Contracting Party which has designated the airline. Provision for the carriage of passengers and cargo including mail originating from and destined for points on the specified routes in the territories of States other than that designating the airline shall be made in accordance with the general principles that capacity shall be related to:

(a) traffic requirements to and from the territory of the Contracting Party which has designated the airline;

(b) traffic requirements of the area through which the agreed service passes, after taking account of local and regional services;

(c) the requirements of through airline operation.

Article IX

Change of Gauge

In operating any agreed service on any specified route a designated airline of one Contracting Party may substitute one aircraft for another at

a point in the territory of the other Contracting Party on the following conditions only:

(a) that it is justified by reason of economy of operation;

(b) that the aircraft used on the section of the route more distant from the terminal in the territory of the first Contracting Party is not larger in capacity than that used on the nearer section;

(c) that the aircraft used on the more distant section shall operate only in connection with and as an extension of the service provided by the aircraft used on the nearer section and shall be scheduled so to do; the former shall arrive at the point of change for the purpose of carrying traffic transferred from, or to be transferred into, the aircraft used on the nearer section; and its capacity shall be determined with primary reference to this purpose;

(d) that there is an adequate volume of through traffic;

(e) that the airline shall not hold itself out to the public by advertisement or otherwise as providing a service which originates at a point where the change of aircraft is made;

(f) that the provisions of Article VIII of this Agreement shall govern all arrangements made with regard to change of aircraft;

(g) that in connection with any one aircraft flight into the territory in which the change of aircraft is made, only one flight may be made out of that territory.

Article X

Tariffs

1. For the purposes of the following paragraphs the term "tariff" means the prices to be paid for the carriage of passengers and cargo and the conditions under which these prices apply, including prices and conditions for agency and other auxiliary services excluding remuneration and conditions for the carriage of mail; the term "designated airline concerned" means a designated airline currently operating, or proposing to operate, on the routes covered by a tariff.

2. The tariffs on any agreed service shall be established at reasonable levels, due regard being paid to all relevant factors including cost of operation, reasonable profit, characteristics of the service (such as standards of speed and accommodation) and the tariffs of other airlines.

3. Such tariffs shall be submitted for the approval of the aeronautical authorities of both Contracting Parties at least sixty (60) days before the proposed date of their introduction. In special cases this period may be reduced, subject to the agreement of the said authorities. This approval may be given expressly. If neither of the aeronautical authorities has expressed disapproval within thirty (30) days from the date of submission of a tariff in accordance with this paragraph, the tariff shall be considered as approved. In the event of the period for submission being reduced, as provided for in this paragraph, the aeronautical authorities may agree that the period within which any disapproval may be notified shall be less than thirty (30) days.

4. The tariffs referred to in paragraph 2 of this Article shall, whenever possible, be agreed by the designated airlines concerned. In all cases the agreed tariffs shall be subject to the approval of the aeronautical authorities of both Contracting Parties who shall have due regard to the provisions of paragraph 2 of this Article.

5. If the designated airline or airlines concerned cannot agree on the appropriate tariffs, or if the aeronautical authorities of either Contracting Party do not approve the tariffs submitted to them in accordance with the provisions of paragraph 3 of this Article, the aeronautical authorities of the Contracting Parties shall endeavour to determine the tariffs according to the provisions of paragraph 2 of this Article by agreement between themselves.

6. If the aeronautical authorities of the Contracting Parties cannot agree on the determination of any tariff under paragraph 5 of this Article, the dispute shall be settled in accordance with the provisions of Article XIII of this Agreement.

7. No new or amended tariff shall come into effect unless and until it is approved by the aeronautical authorities of both Contracting Parties or is settled in accordance with the provisions of Article XIII of this Agreement.

8. When tariffs have been established in accordance with the provisions of this article, these tariffs shall remain in force until new tariffs have been established in accordance with the provisions of this Article. Nevertheless, a tariff shall not be prolonged by virtue of this paragraph for more than twelve (12) months after the date on which one Contracting Party shall have given notice in writing to the other Contracting Party of its intention to withdraw its approval.

9. Unless otherwise agreed between the parties each Contracting Party undertakes to use its best efforts to ensure that any tariff specified in terms of its national currency will be established in an amount which reflects the effective exchange rate (including all exchange fees or other charges) at which the designated airline of each Contracting Party can convert and remit the reserves from their transport operations into the national currency of the other Contracting Party.

Article XI

Provision of Statistics

The aeronautical authorities of a Contracting Party shall supply to the aeronautical authorities of the other Contracting Party at their request such periodic or other statements of statistics as may be reasonably required for the purpose of reviewing the capacity provided on the agreed services by a designated airline of the Contracting Party referred to first in this Article. Such statements shall include all information required to determine the amount of traffic carried by the airline on the agreed services and the origins and destinations of such traffic.

Article XII

Consultation

1. In a spirit of close co-operation, the aeronautical authorities of the Contracting Parties shall consult each other from time to time with a view to ensuring the implementation of, and satisfactory compliance with, the provisions of this Agreement and shall consult when necessary to provide for modification thereof.

2. Either Contracting Party may request consultations which may be either oral or in writing and shall begin within a period of sixty (60) days of the date of receipt of the request, unless both Contracting Parties agree to an extension of this period.

Article XIII

Settlement of Disputes

1. If any dispute arises between the Contracting Parties relating to the interpretation or application of this Agreement, the Contracting Parties shall in the first place endeavour to settle it by negotiation.

2. If the Contracting Parties fail to reach a settlement by negotiation, they may agree to refer the dispute for decision to some person or body; if they do not so agree, the dispute shall at the request of either Contracting Party be submitted for decision to a tribunal of three arbitrators, one to be nominated by each Contracting Party and the third to be appointed by the two so nominated. Each of the Contracting Parties shall nominate an arbitrator within a period of sixty (60) days from the date of receipt by either Contracting Party from the other of a notice through diplomatic channels requesting arbitration of the dispute by such a tribunal, and the third arbitrator shall be appointed within a further period of sixty (60) days. If either of the Contracting Parties fails to nominate an arbitrator within the period specified, or if the third arbitrator is not appointed within the period specified, the President of the Council of the International Civil Aviation Organisation may at the request of either Contracting Party appoint an arbitrator or arbitrators as the case requires. In such case, the third arbitrator shall be a national of a third State and shall act as President of the arbitral tribunal.

3. The Contracting Parties shall comply with any decision given under paragraph 2 of this Article.

4. The expenses of the national arbitrators shall be borne by the respective Contracting Parties. All other expenses of the arbitral tribunal, including the fees and expenses of the third arbitrator, shall be shared equally by the Contracting Parties.

Article XIV

Amendment

If either of the Contracting Parties considers it desirable to modify any provision of this Agreement including the annexed Schedule, such modification, if agreed between the Contracting Parties and if necessary after consultation in accordance with Article XII of this Agreement, shall come into effect when confirmed by an Exchange of Notes, through the diplomatic channel.

Article XV

Termination

Either Contracting Party may at any time give notice to the other Contracting Party of its decision to terminate this Agreement; such notice shall be simultaneously communicated to the International Civil Aviation Organisation. In such case the Agreement shall terminate twelve (12) months after the date of receipt of the notice by the other Contracting Party, unless the notice to terminate is withdrawn by agreement before the expiry of this period. In the absence of acknowledgment of receipt by the other Contracting Party, notice shall be deemed to have been received fourteen (14) days after the receipt of the notice by the International Civil Aviation Organisation.

ARTICLE XVI

Entry into Force

This Agreement shall enter into force on the date of the signature.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed the present Agreement.

DONE in duplicate at Wellington this 5th day of August 1980 in the English language.

HAMMER DEROBURT
For the Government of
the Republic of Nauru

LANCE R. ADAMS-SCHNIEDER
For the Government of
New Zealand

ROUTE SCHEDULE

SECTION 1

ROUTE OF THE DESIGNATED AIRLINE OF NEW ZEALAND

Point of Origin	Intermediate Points	Points in Nauru
Points in New Zealand	Honiara Noumea Port Vila	Nauru

ROUTE OF THE DESIGNATED AIRLINE OF NAURU

Point of Origin	Intermediate Points	Points in New Zealand
Nauru	Honiara Port Vila	Auckland

Note: Points on the routes set out in Sections 1 and 2 of this Schedule may be omitted on any or all flights provided that each service begins or ends in the territory of the Contracting Party designating the airline in question.

BY AUTHORITY:
P. D. HASSELBERG, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1982
85930A—82 PT