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by email

31 October 2006

John Bradbury
Acting Secretary of Transport
Ministry of Transport
PO Box 3175
Wellington

Dear Mr Bradbury

**REVIEW OF NEW ZEALAND'S AIR SERVICES ARRANGEMENTS WITH
UNITED ARAB EMIRATES**

1 I refer to your letters to us of 15 September and 26 October 2006.

2 In the former letter you revealed that:

The Ministry wrote to Emirates in 2005 with the aim of encouraging the airline to bear in mind the principles in the New Zealand – UAE Air Services Agreement (ASA) governing capacity, and to do more to focus on travel between the Middle East and New Zealand.

3 You also indicated in that letter that:

Ministers have been briefed on the subject and further work has been requested.

Request regarding ASA

4 In our submission to the Ministry of 25 September 2006 entitled "Tasman Networks Agreement – WIAL Response to Tretheway" we said that these statements reveal that a constraint has been imposed on Emirates' ability to compete that was not made known previously, either to the Applicants' own expert or to ourselves and other interested parties. We suggested therefore that the Ministry give a full briefing on the ASA and the action now being taken in relation to it.

5 You have declined that suggestion in your subsequent letter on the basis that:

... This is a sensitive and ongoing matter involving New Zealand's international relations with the United Arab Emirates, which I do not consider it appropriate to disclose.

6 We appreciate that sensitivity. Equally however you must appreciate that the existence, and the actual or threatened exercise, of that regulatory constraint on Emirates changes fundamentally the competitive landscape as viewed previously by both the Commerce Commission and the ACCC (and their respective appellate tribunals).

7 Put bluntly, the "blue skies" opportunity for Emirates to expand on the Tasman, as has been presented by the applicants, is illusory. The practical problem is that the Ministry is the only person with the information to properly dispel that illusion.

8 In this regard, we remind you of Treasury's initial advice in its report entitled "How an application for a code-sharing arrangement between Air New Zealand and Qantas might be handled", that:

[Public perception] will depend on it being shown that the airlines were being subject to tests as stringent as those applied [by the Commerce Commission and ACCC] to its 2002 application. Perceptions that the assessment process in New Zealand was somehow inferior to that in Australia might be less likely were appropriate levels of resources available to assess the New Zealand application, and were the application treated with a similar level of scrutiny.

9 There is also the statement in the UK Civil Aviation Authority's just released discussion paper "Ownership and Control Liberalisation", that:

The most realistic option is to require countries within a bloc to sign up to a fair competition agreement that commits the signatory to abiding to a set of principles and rules governing the application of competition policy ... Such an approach has recently been adopted in the UK's talks with New Zealand ...

10 Both those observations suggest that the Ministry would be putting not only its own credibility, but also this country's international position, at risk, were it to depart from usual competition law precepts and process in formulating its advice on the present application.

11 We have no wish to jeopardise New Zealand's international relations by pursuing our Official Information Act request regarding the ASA. But, we do urge that you have proper regard to its competition consequences when providing that advice to the Minister.

Request regarding Air New Zealand's involvement

12 To return to our submission of 25 September, we also said that the revelation of the exercise of the regulatory constraint on Emirates raises questions that require answers, including:

What role did Air New Zealand play in having the Government pursue Emirates about their traffic on the Tasman and compliance with the ASA?

Was Air New Zealand aware of the pressure being applied to Emirates when they made submissions asserting that they are unconstrained competitors? If so, how does that fit with their submissions and public statements about Emirates?

Was the need for enforcement of the ASA discussed with Ministers at Boulcott St Bistro on 13 March 2006? If so, why has that not been explained more clearly?

Why was the ACCC not told of the active threat to Emirates' rights and freedom to compete on the Tasman?

Why were other parties who made submissions to the Ministry and the ACCC not advised of the restriction in the ASA and its review?

Why was Air New Zealand's expert economics witness not advised of this extremely significant factor before he provided his latest evidence to the Ministry and to the ACCC?

- 13 Those were not intended to be rhetorical questions. But, to date there has not been a response.
- 14 Of immediate interest to us are the answers to those questions relating to the role that Air New Zealand may have played in triggering the action taken by the Ministry and "further work" requested by Ministers. For the avoidance of doubt, we ask in terms of the Official Information Act:
- 14.1 What role did Air New Zealand play in the action that the Ministry has taken to date, or the further work that has been requested, in relation to Emirates?
- 14.2 When, and to what extent, was Air New Zealand made aware of that action by the Ministry, and the further work that has been requested?
- 14.3 Was the need for enforcement of the principles in the ASA discussed at Air New Zealand's meeting with Ministers at Boulcott St Bistro on 13 March 2006?
- 14.4 Did a request for any further work either in relation to the ASA, or Emirates more generally, follow from that meeting?
- 15 We ask that this request be treated as an urgent request as the information we are seeking may be relevant to submissions to the ACCC that we will shortly be preparing on the proposed code sharing arrangement.

Request regarding counterfactual

- 16 We note that in your letter of 26 October you persist in your withholding of the content of the applicants' answers to your question 16 regarding the counterfactual. We advised the Ombudsman on 25 October of your failure to provide that information, who will now review your refusal.

We have not sought confidentiality

- 17 Finally, we acknowledge again your willingness to meet with us to discuss any confidential information we wish to present.

18 But, as we also have said previously, proper competition analysis requires that there be adequate testing of assertions made and information submitted by any party. That cannot happen without disclosure to other parties. We have therefore deliberately not sought confidentiality for the information or submissions we have provided to the Ministry.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Grant David', is positioned above the typed name.

Grant David
Partner