

23 May 2006

Mr. Grant David

Partner

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Auckland

Privileged and Confidential

Dear Mr. David

Re: Tasman Networks Agreement

1. I have considered the responsible Minister's powers of authorisation under the Civil Aviation Act 1990 in relation to the publicly available parts of the Tasman Networks Agreement [TNA]. The detailed opinion follows, but in summary my conclusions are:
 - (i) The Minister's power to authorise is limited to specified types of provisions in the TNA. In other words, there is no magic wand of authorisation under s. 88 for the Minister to wave over the TNA as a whole, and render it immune from Commerce Act scrutiny. The Minister only can authorise the things that fall properly within the "specific authorisation" power in s. 88.
 - (ii) Even if the Minister were to authorise all such provisions in the TNA, the rest of the TNA and the consequent behaviour of Air New Zealand and Qantas both before and after the agreement becomes operative is subject to the jurisdiction of the Commerce Commission under Part II of the Commerce Act 1986. Aspects of the TNA – such as revenue and loss sharing – that cannot by any stretch of the statutory wording come within s. 88 CAA – fall within the jurisdiction of the Commerce Commission right now.

Notwithstanding the filing of the application for authorisation and irrespective of the success or otherwise of the application, nothing in s. 91 CAA displaces the jurisdiction of the Commerce Commission to investigate now or at any future time any provision or behaviour that does not relate to tariffs or capacity and that appears to breach one or more of the provisions in Part II CA.

- (iii) There are strong grounds for thinking that the several aspects of the TNA that clearly do not fall within the Minister's jurisdiction to authorise under s. 88 are likely to infringe Part II of the Commerce Act 1986 and hence the Commerce Commission will have jurisdiction to intervene and should do so.
- (iv) In considering the TNA application the responsible Minister has a discretion whether to authorise all or any provisions in the agreement relating to tariffs and/or capacity and any combination of these things. The discretion is the Minister's (or her delegate's should she decide to delegate the function under existing legal authority) and it cannot be abdicated or surrendered to other ministers or Departments or effectively exercised by others.
- (v) The Minister must regard the public interest and cannot consider the government's financial interest in Air New Zealand. The regulatory power overrides any ownership or financial interest. In addition, the administrative law rule against bias requires that the financial interest of the government be completely disregarded and the decision-making insulated from any such extraneous influence.
- (vi) The prohibitions on authorisation in s. 88(4) CAA set outer limits to the exercise of the discretion (subject, if triggered, to override in the interests of international comity: s. 88(5)). Within those limits the Minister has a broad discretion to consider the public interest. It is not the case that if the prohibitions are not engaged (or overridden) the Minister is duty-bound to approve the application. That would do violence to the language, statutory scheme and legislative history. Within those limits the Minister has a discretion

that must be exercised for the public benefit and in the public interest.

- (vii) In exercising that discretion, the Minister may take account of the effects of the provisions in the agreement (if authorised) upon competition and the broader public interest. The point of exempting certain types of provisions in international carriage by air agreements from domestic Commerce Commission scrutiny under ss. 27-29 CA was not to disavow the relevance of competition matters, but rather to place these matters in the hands of the Minister responsible for international civil aviation obligations. Such matters clearly fall within the discretion of the Minister to further the public interest.

Legislative Background

2. The Commerce Act 1986 [CA] contained a transitional provision that stated nothing in ss. 27 and 29 “shall have any application before 31 March 1987 to - (a) The entering into of a contract or arrangement, or arriving at an understanding, in so far as it contains a provision relating to international carriage by air: (b) The giving effect to a provision of a contract, or arrangement or understanding relating to international carriage by air” (s. 111(3)). Section 111(4) made identical provision for requiring the giving or giving of “a covenant relating to international carriage by air” or its implementation or enforcement.
3. This provision staved off the application of ss. 27 and 29 (and ss. 80-82) CA to such contracts, etc, until midnight on 31 March 1987. It should be noted that it did not save contracts, etc, entered into on or before 31 March 1987. What it gave was some breathing space – from the time the Commerce Act came into force on 1 May 1986 until 31 March 1987 – to make provision for such contracts, etc, that otherwise would fall within the Commerce Act regime.

4. On 28 February 1987 the Civil Aviation Act 1964 was amended by the insertion of new sections (ss. 29A-29D) that are almost exactly the same as the present regime in Part IX of the Civil Aviation Act 1990 [CAA]. The Civil Aviation Amendment Act 1987 repealed ss. 111(3) and (4) of the Commerce Act 1986. The 1987 Amendment Act provisions (carried over into the 1990 Act) were intended as the solution to the possible inconsistency perceived at the time between the new competition regime and the necessities of civil aviation within the international context of New Zealand's multilateral and bilateral trade and civil aviation responsibilities. It seems clear that whatever the Minister decided to do in the public interest as regards the provisions in agreements about carriage by air it is a primary consideration that the New Zealand government have regard to its international (multi-lateral and/or bilateral) civil aviation obligations.

5. As noted above, the 1987 Amendment Act provisions are almost identical to those found in what became Part IX of the Civil Aviation Act 1990. The one omission in 1990 was the provision that stated that in considering whether to grant authorisation pursuant to the forerunner of s. 88(2) the Minister "shall ... have regard to policies on external aviation from time to time promulgated by the Government of New Zealand" (s. 29A(3), Civil Aviation Amendment Act 1987). Otherwise, in 1990, the 1987 Act provisions were simply rolled over, becoming Part IX with the heading "International Air Carriage Competition". This heading is important (and can be taken account of in interpreting the Act) in that it confirms that in determining what the public interest requires the Minister may take account of the impact on competition.

6. In 1990, Part IX CAA sat between Part XIII "Aviation Security" and Part X "Aerodromes, Facilities, and Joint Venture Airports". But in 1996 Part VIIIA "International Air Services Licensing" was added and in 1999 so was Part IXA "International Carriage by Air". While neither of these new Parts refers to the Commerce Act, both underline the significant international obligations that New Zealand is a party to and must

implement and enforce. They reinforce the primacy of New Zealand honouring its international obligations as one reason for allowing this limited exemption from the coverage of the Commerce Act and the jurisdiction of the Commerce Commission.

7. This exemption from ss. 27-29 CA is provided by the operation of s. 91 CAA and s. 43 CA. Section 43 has a legislative history going back 1958: see *New Zealand Apple & Pear Marketing Board v Apple Fields Ltd* [1989] 3 NZLR 158, 172, per Richardson J (CA)(unaffected by reversal by Privy Council: [1991] 1 NZLR 257). Section 43 requires for exemption from the CA that “acts, matters, or things” be specifically authorised “by any enactment or Order in Council made any Act”. Parliament in s. 43 allowed for statutory exemptions as long as they were “specific” (see s. 43(2)) and therefore required a conscious decision by a past or future Parliament or Executive Council to displace the Commerce Act. There is no doubt that the 1987 Amendment Act was specific and adequate for the purpose of exemption from the Commerce Act. Indeed, as noted above, the transitional provision contemplated that specific legislation would need to be brought into force within a few months of passage of the CA, and it was. Section 91(2) CAA explicitly states that an authorisation under s. 88 (or s. 90) CAA satisfies s. 43 CA.

Section 88 & Part IX, CAA

8. Section 88 confers a discretion without setting out any positive criteria to guide the Minister in deciding whether or not to authorise all or any of the provisions in any agreement that falls within s. 88(2). The Act does provide explicit criteria negatively in subsections (3) and (4) by setting out grounds of prohibition, which, if established, will prevent the Minister granting authorisation (unless, in turn, overridden by the demands of international comity: s. 88(5)).

9. It is axiomatic that power is delegated for the furtherance of the public interest, and hence all statutory discretions (no matter how wide or narrow) must be exercised in the public interest. The classic statement of this position is in successive editions of the late Professor Sir William Wade's textbook on *Administrative Law* (H. W. R. Wade & C. F. Forsyth, *Administrative Law* (Clarendon Press, Oxford, 9th ed. 2004), 355: almost identical passages appear in earlier editions):

The powers of public authorities are ... essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way, a private person has an absolute power to allow whom he likes to use his land, release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. ...[U]nfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."

The passage has been judicially approved both in New Zealand and the United Kingdom. See, e.g., *Webster v Auckland Harbour Board* [1983] NZLR 646, 650, per Cooke & Jeffries JJ.; *Webster v Auckland Harbour Board* [1987] 2 NZLR 129, 131, per Cooke P. (CA); *R v Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd* [1988] 1 AC 858, 872, per Lord Bridge of Harwich (HL).

10. This passage is important also because it underscores the irrelevance of the circumstance that at this time the New Zealand government (as trustees for New Zealanders) own 83% of Air New Zealand. As the passage makes clear, self-interested exercise of the authorisation power to benefit Air New Zealand and directly or indirectly the New Zealand government as owner would be unlawful. It is in law an irrelevant consideration.
11. It is clear law that the Government's regulatory responsibilities override any financial or shareholding interest: see *Petrocorp Exploration Ltd v*

Minister of Energy [1991] 1 NZLR 641 (PC, New Zealand). The Treasury and the Minister of Finance appear to have recognized this by separating responsibility for the regulatory issues from the ownership interest.

Nevertheless, the interest of Treasury and the shareholding Minister in the application is evident from the documents disclosed under the Official Information Act 1982, which show considerable behind-the-scenes activity and the adoption of an active ‘watching brief’ by Treasury over the TNA application to the responsible Minister.

12. The responsible Minister, both in the decision reached and in the process of consultation and deliberation that precedes it, will have to be scrupulous and transparent in disregarding such entreaties for two further reasons. First, the decision is her’s not Treasury’s or any other Minister’s. She cannot abdicate her decision-making to others, or allow others to effectively make the decision for her. This is axiomatic: *Dannevirke Borough Council v Governor-General* [1981] 1 NZLR 129 (HC); *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 (HCA); *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54. Secondly, unless these matters of financial interest are completely disregarded, the Minister will not only abuse her power (see para. 9) but also will breach the administrative rule against bias.
13. There are circumstances where a statute may explicitly or implicitly authorise a financially interested party to decide a matter (see *Jeffs v New Zealand Dairy Board* [1967] NZLR 1057 (PC, New Zealand)) but that is not the case here. Nor would the doctrine of necessity operate, as it is perfectly possible to insulate the decision-making from the financial interest.
14. The responsible Minister has discretion to “specifically” authorise “all or any” provisions in an agreement respecting and relating to international carriage by air between two or more airlines (legal persons). The provisions in such an agreement that can be authorised by the Minister

must “relate, whether directly or indirectly, to the fixing of the tariffs, the application of the tariffs, or the fixing of capacity, or any combination thereof”.

15. The terms “tariff” and “capacity” are defined for the purpose of Part IX in s. 88(1) CAA. Essentially, a “tariff” is a “statement” “specifying ... [t]he fares, rates, and charges applicable to international carriage by air” between two specified points, and includes the conditions of such travel (s. 88(1), “Tariff”). Under s. 90 CAA, the Minister may specifically authorise “any tariff”, and in giving authorisation the Minister must have regard to several factors: whether the proposed tariff is excessive in terms of a reasonable return on investment; sustainability of service at that level of tariff; and the likelihood of substantial benefit to consumers, either generally or a significant group of consumers (s. 90(2)).
16. It is important to focus on this for a moment because on the face of the statute there appears to be some tension between s. 88(2), which empowers the Minister to “specifically authorise” provisions relating “whether directly or indirectly, to the fixing of tariffs ...”, and s. 90, which empowers the Minister to “specifically authorise” “any tariff”. Obviously, the power in s. 90, when read in light of the definition of tariff in s. 88(1), means the Minister must have before her an application with a stated tariff. Whereas, under s. 88(2) the provision has to relate, directly or indirectly, to the fixing of rates.
17. The TNA does not specify rates and the application under Part IX does not seek the Minister’s authorisation for a ‘schedule’ of specified tariffs. Rather the TNA sets out a mechanism by which tariffs will be established by the two airlines through a Working Group. Unlike in s. 90, there are no criteria stipulated in the TNA to guide the tariff setting by the Working Group. Under the TNA, it is fair to say, the setting of tariffs is left completely to the mutual decision-making of the two airlines and

presumably the criterion will be what the market will bear. (The application makes this plain.)

18. Section 88(2) states that agreements can make provision, directly or indirectly, for the “fixing” of tariffs. The verb “to fix” in this context would ordinarily mean to set or to decide upon, choose, select or to specify or determine. And, on its face, this would allow the mechanism of a Working Group to establish tariffs in the future with no further involvement of the Minister. It is for the Minister to consider the desirability or otherwise of that in all the circumstances of a particular application. The Minister has the discretionary power to authorise all, any or none of the proffered provisions.

19. The essential difference between s. 88 and s. 90 is that s. 88 deals with a (bilateral or multilateral) contract, agreement or understanding relating to international carriage by air between two or more airlines and s. 90 deals with a tariff offered by one carrier in respect of international carriage by air. In other words, s. 88 envisages a package – something (in the words of s. 91(1) CAA) that is negotiated or concluded between two or more airlines. Clearly the fact that under that agreement a mechanism is put in place to set (“fix”) future tariffs is of cardinal importance in considering the public interest and the Minister can have regard to the factors that s. 90 lays down as mandatorily relevant to setting tariffs under s. 90. If it were otherwise, airlines would be able to achieve something through an agreement as regards tariffs that any individual airline could not get away with under s. 90. This is hardly likely to have been intended. The criteria in s. 90 at the very least are permissively relevant considerations that the responsible Minister can take into account in considering in the public interest whether or not to authorise the provisions of the TNA that relate to tariff fixing. It should be noted again that the Minister has a discretion to approve any, some or all of the provisions in an agreement relating to fixing tariffs and/or capacity in any combination. This envisages that the Minister might approve provisions about capacity (flight frequency, etc)

but not a mechanism to fix tariffs that does not contain protections against the matters mentioned in s. 90. Authorisation of the present tariff-fixing mechanism in the TNA will allow Air New Zealand and Qantas to price as they like.

Jurisdiction under s. 88

20. Section 91(1) CAA provides that nothing in ss. 27-29 CA prevents Air New Zealand and Qantas from negotiating or concluding an agreement containing provisions covered by s. 88, as long as authorisation is given under s. 88 before the provisions become effective. The TNA appears to conform to this: the granting of Ministerial authorisation under s. 88 is one of several “condition precedents” to the agreement coming into effect. (I simply note here, and discuss below at paras 27-28, the corollary that ss. 27-29 and the rest of Part II CA apply to any provisions of the agreement or behaviour that do not fall within s. 88 CAA.)
21. Section 91(2) goes on to declare every authorisation under s. 88 to be “a specific authorisation” for the purposes of s. 43 of the Commerce Act. If the Minister authorised all the provisions in the TNA that relate, directly or indirectly, to fixing tariffs, the application of tariffs or the fixing of capacity or any combination of these things, then s. 91(2) would shield them from scrutiny under Part II CA.
22. The TNA, however, does many more things than establish a mechanism for the fixing of tariffs and capacity, and the application of tariffs. It is vital to appreciate that the power of the Minister to grant authorisation under s. 88(2) is limited to provisions providing for those things, and those things only. That is the significance of the phrase “so far as” in s. 88(2). In other words, there is no magic wand of authorisation under s. 88 for the Minister to wave over the TNA as a whole, and render it immune from Commerce Act scrutiny. The Minister only can authorise the things that fall properly within the “specific authorisation” power in s. 88.

23. The TNA establishes a revenue and pricing arrangement whereby the companies effectively operate as one for the purpose of running flights and allocating the profits and losses between themselves on the Tasman route. The TNA looks to be designed to drive competitors out of the Trans-Tasman market. In effect, they want to combine so as to gang up on the other airlines that in certain parts of New Zealand are presently undercutting their businesses by genuine competitive means. This raises obvious and very important issues about the lessening of competition under ss. 27-29 and taking advantage of market power under ss. 36 and 36A. These provisions are not displaced by s. 91 CAA as they fall outside matters capable of authorisation under s. 88. Whatever the Minister decides under s. 88(2), there is no doubt that the power of authorisation is limited to the particularized aspects of the agreement. At any point the Commission has jurisdiction to consider whether provisions in the agreement, other than those related to s.88 (2), breach Part II CA.

Relevant Considerations

24. The Minister's discretion in s. 88(2) is not exhausted or limited by the prohibitions in s. 88(4). Even if those prohibitions are not encroached upon, the Minister has a broad discretion. It is clear why Parliament wanted to give this discretion to the Minister whose portfolio includes civil aviation. As mentioned earlier, international obligations and comity loom large in this context. In 1986-87 Parliament preferred these matters to stay in the hands of the Minister whose portfolio included civil aviation. That is the reason for the exemption of some provisions in contracts relating to international carriage by air from ss. 27-29 CA. It is important to note in this regard that Parliament deliberately did not exclude s. 36 CA. It shows that Parliament intended the jurisdiction of the Commerce Commission to operate unabated except "in so far as" particular provisions were authorised by the Minister. Secondly, Parliament was not declaring by implication that issues relating to competition were irrelevant or improper

for the Minister to consider under s. 88; merely that it was for the appropriate Minister of the Crown to decide such matters in the public interest.

25. Lessening of competition and analysis of the costs and public benefits clearly fall within the public interest which ultimately must guide the Minister. These are relevant considerations in s. 88(2) CAA and must have intended to be taken into account: *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).
26. It follows from this and general administrative law principles that the Minister must adequately inform herself on the costs and benefits of authorising or not all or some of the provisions in the TNA relating to tariffs and capacity, and to that end will need to access expert advice from appropriate quarters as well as engaging stakeholders in that assessment process. Any decision must be fairly made, reasonable and legitimate. The CAA lays down no process, and nor is there much precedent to be followed as s. 88 applications are uncommon, and this one is much more significant than any of the earlier ones. The Minister will need to give careful consideration to the consultative and advice gathering processes she and her officials employ.

Jurisdiction of the Commerce Commission

27. Section 91 CAA provides that nothing in ss.27-29 CA applies to or in respect of: (a) the negotiation or conclusion of any agreement “so far as it contains a provision relating to international carriage by air, so long as that provision is not given effect to before its authorisation” under s. 88, or (b) any provision in that agreement relating to international carriage by air, again “so long as that provision is not given effect to before its authorisation” under s. 88. This distinction between the entering into an agreement and the relevant provisions in the agreement mirrors that in ss. 27 and 29 CA between entering into agreements and giving effect to

provisions in those agreements. So the distinction in s. 90(1) CAA is dictated by the structure of ss. 27 and 29 CA and can only properly be understood in that light.

28. Consequently, ss. 27-29 CA is displaced as regards both the negotiation/conclusion of agreements containing such provisions as fall within s. 88 and the provisions themselves, as long as the provisions are authorised under s. 88 before coming into effect. The linchpin to this displacement of the CA is that it relates to provisions that legitimately fall within s. 88. Clearly the jurisdiction of the Commerce Commission in relation to any provision or behaviour that does not fall within s. 88 is not displaced or limited. It would make no sense to read s. 91(1) as preventing the Commerce Commission from immediately examining provisions in agreements for international carriage that have nothing to do with tariffs or capacity just because there is another provision that does, and authorisation of that has been sought from the Minister. The restrictive attitude that the Courts on judicial review take towards privative clauses would apply in the context of a general administrative tribunal like the Commerce Commission and, in my opinion, a court would be unwilling to cut down on the jurisdiction of the Commission on the basis of opaque language unsupported by cogent policy justification. This view is also in keeping with Parliament's intention as shown by the fact that s. 91 does not touch the Commerce Commission's jurisdiction under all other provisions of Part II, including the prohibitions on taking advantage of market power in ss. 36 and 36A CA.

29. In my opinion, the Commerce Commission has the jurisdiction now to investigate provisions of the TNA that do not fall within s. 88 CAA. Just as s. 88 does not provide a wand that can be waved over the entire TNA, nor does s. 91(1) cover the agreement with a blanket immunity from Commerce Commission scrutiny of aspects of the agreement that clearly do not fall within the terms of s. 88.

Yours sincerely

A handwritten signature in black ink, reading "Michael Taggart". The signature is written in a cursive style with a large, sweeping flourish at the end.

Michael Taggart
Professor of Law