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25 August 2006

John Macilree
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AIR NEW ZEALAND / QANTAS APPLICATION

- 1 Thank you for your letter of today, inviting our client to elaborate on its view of what the counterfactual might be. We shall of course take the opportunity to do so, in the light of the most recently available information, including any change in the fortunes of Air New Zealand.
- 2 Thank you also for advising of the legal opinions provided by the applicants' lawyers, which have just been posted on the Ministry's website. However, we are gravely concerned that, even on a quick reading of those opinions, it is apparent that the applicants are being accorded preferential treatment vis a vis other interested parties to the extent that there is now serious procedural unfairness.
- 3 To elaborate:
 - 3.1 Mr Taylor's letter of 14 August refers to the Ministry's letters to him of 16 June, 27 July and 28 July, only the last of which is available on the Ministry's website. According to Mr Taylor, your letter of 16 June raises "issues of legal interpretation"; while the letter of 27 July

apparently refers to “issues of process and timing”. We, and presumably other interested parties, have no indication as to what those issues might be and, of course, have had no opportunity to comment on them;

- 3.2 Mr Taylor’s letter does provide some clue in its paragraph 8 as to the latter species of issues. Mr Taylor offers what he suggests is a summary of an obviously detailed process that the Ministry has set out in its letter, presumably of 27 July.
- 3.3 Even as summarised by Mr Taylor, and assuming the accuracy of his summary, that description of the process intended by the Ministry is far more detailed than the process as it has been described to us in Mr Bradbury’s letter of 28 July. For example, we have just now learned, via Mr Taylor’s summary, that not only will the applicants be provided with a draft report before the Ministry’s final report is provided to the Minister, but they will already have been provided with interested parties’ views, allowed 2 weeks to comment on those views and have been given the opportunity to comment on any issues that would be adverse to the applicants before the Ministry’s view is concluded on that issue. In other words, the applicants are given 3 bites as of right at the cherry, while other parties may only be allowed a discretionary one.
- 3.4 That, despite our numerous requests that, in the interests of fairness to all, the Ministry set out in full its own intended detailed process. Incredibly, not only has that been done for the applicant airlines but not for others; but the applicant airlines have had 1 month to comment on the process that is proposed.
- 4 Similarly, we note in paragraph 19 of the opinion proffered to Qantas by David Goddard QC that some view, for which legal privilege has been claimed, “has been suggested by the Ministry of Transport” presumably to the applicant airlines. We can only assume from the deletion and the surviving words of the paragraph that the Ministry has made available to the applicant airlines the contents of legal advice which it has received from Crown Law Office or elsewhere.
- 5 We have asked, again repeatedly, for that legal advice to be made available on equal terms to all interested parties. Indeed, when the Ministry declined to do so, we complained to the Ombudsman but our complaint was not upheld. The Ombudsman was of the view that legal privilege of the kind attaching to that advice was deserving of the highest protection.

- 6 Yet, incredibly, it would seem that the same advice, which the Ministry has so vigorously and so persistently resisted disclosing to us and other interested parties, has been made readily available to the applicant airlines.

- 7 We must repeat, as we pointed out to the Ministry in our letter of 8 August, that the process being adopted by the Ministry to deal with the application offends against the basic precepts of procedural fairness. Rather than resort to its legal remedies, however, our client would prefer that the procedural errors which are now seriously prejudicing both itself and other interested parties be addressed so far as practicable in a consensual and constructive fashion. To that end we would like to meet with you and the applicants' lawyers at the earliest opportunity.

Yours faithfully

Grant David
Partner