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1 June 2006

Robin Dunlop
Secretary for Transport
Ministry of Transport
PO Box 3175
Wellington

Dear Robin

AIR NEW ZEALAND/QANTAS APPLICATION : DISCLOSURE OF PROCEDURE AND CRITERIA

Thank you for your letter dated 26 May 2006 in response to our request of 28 April that your department provide to us – and other interested persons – *official guidance as to the process the Minister will follow and the factors the Minister will be taking into account* in relation to the application that Air New Zealand together with Qantas have made to the Minister of Transport pursuant to Part 9 of the Civil Aviation Act.

Before your letter in fact was released to us on 30 May, however, your department asked us to confirm that our request of 28 April was not a request under the Official Information Act. We duly did so.

Earlier Request

We had made that request because, as you point out in your letter, Part 9 of the Civil Aviation Act does not prescribe a formal hearing process. Nevertheless, we

were aware from your own response to our earlier Official Information Act request, and from our informal enquiries, that:

- detailed advice on the procedure to be adopted and criteria taken into account in relation to Part 9 applications had been provided to your department previously by Crown Law Office;

- your department had sought, and presumably obtained, further specific advice from Crown Law Advice Office as to how it should handle the Air New Zealand/Qantas application;

- Treasury has volunteered its own detailed thoughts, through your Minister, as to how that application should be approached.

The Law on Consultation

In the absence of any useful disclosure from your department, or any other government department or Minister which so far involved itself in the process, we sought our own guidance from Professor Michael Taggart, one of New Zealand's foremost authorities on administrative law, as to how the Minister's power under Part 9 ought to be exercised. As soon as Professor Taggart's detailed opinion was available to us, we forwarded it, without deletion, to the Minister of Transport for her information. We would assume that a copy of that opinion together with our covering letter of 24 May, has already been forwarded to you by the Minister's office. However, in case it has not, copies of both Professor Taggart's opinion and our letter are **enclosed** for your information.

You will note that in paragraph 9 of Professor Taggart's opinion, he quotes the classic statement of administrative law that all statutory discretion (no matter how wide or narrow) must be exercised in the public interest, as follows:

> *The powers of public authorities are ... essentially different from those of private persons. A person making his wish 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 they may use them for the good.*

It follows that, for the Minister's power under Part 9 to be properly exercised for the public good, there must be an appropriate process of consultation and deliberation to precede the Minister's decision. And, for there to be a proper process, there must be *effective* disclosure to interested parties of what that process will involve.

Contemptuous Response

Your reply of 26 May expressly recognises that need for consultation. But it fails totally to disclose *any* process other than a 2 month deadline and an addressee. We, in effect, waited over one month to be told that there would be two months allowed!

Fresh OIA Request

In light of the detailed advice your department has received, Professor Taggart's clear explanation that the law requires the Minister's discretion to be exercised in a particular way, and your own acknowledgment that third parties will have a recognisable interest in this matter, we now ask, for the avoidance of doubt, under the Official Information Act, for all information the Ministry holds on the process it will be following to ensure proper consultation and on how the criteria specified in the Act are to be weighed and applied (that is, the specific matters that the Ministry regards itself as having to consult on).

In addition, having regard to Professor Taggart's opinion, we request the Ministry advise on whether it is considering all features of the TNA for the purposes of section 88 of the Civil Aviation Act, and whether the Ministry proposes to consider the competition effects of the TNA.

Legal Privilege?

We also ask, again under the Official Information Act, for details of any information or advice already given by the Ministry to either Air New Zealand or Qantas in this regard.

We accept for the moment the Ministry's longstanding refusal to provide copies of privileged legal advice. But, it is only the advice itself that you can keep secret. That privilege does not extend to the process and criteria which the Ministry determines upon in light of that advice.

Crucially, the obtaining advice does not change the character of what may be determined. While you might choose to withhold the lawyers' reasons influencing the process and criteria, that does not mean you can suppress the product of the advice – that is, your own knowledge of the intended process and criteria.

Lawyers' letters cannot be used as a veil over your knowledge of your own decisions to make them invisible.

Unwritten Information

If the Ministry has not committed its thinking on process and criteria to writing that is not an excuse nor need it be an obstacle. The Official Information Act is not so easily avoided. It applies to the information held in officials' heads. We would be happy to receive an oral presentation of the information from yourself or others in the Ministry. We would record it.

In the interests of fairness, we would even be prepared to transcribe that presentation ourselves and provide it openly to all those third parties who are interested in this matter.

Why Consultation is Vital

It is vital that opportunity be given to third parties to express their views on the current proposal and to test the assertions being made by the applicants. It was only the Commerce Commission's consultation process that disclosed last time that the 60,000 additional in-bound tourists to New Zealand that the airlines claimed would result from the Alliance in fact comprised the net of 85,000 New Zealanders having to holiday at home because of higher airfares, and foreign tourist being deterred for the same reason.

It would seem that the airlines' claims this time are similarly extravagant and creative. For example, in paragraph 4.22 of their current application, the airlines state:

> *In summary, New Zealand's size, geographical isolation and the importance to the tourism industry mean that a sustainable national carrier is vital.*

That statement, and others in the application or made about the TNA proposal by the airlines, clearly imply that without the TNA, New Zealand's national carrier will not be sustainable.

But, clearly that view is not now shared by Air New Zealand's immediate past CEO, who was a leading proponent of the previous Alliance proposal. Ralph Norris responded last week in the *Australian Financial Review Magazine* to the question "What was your greatest achievement?" as follows:

> *Professionally, it's the turn around of Air New Zealand. When I joined as CEO in February 2002, it was a company on the verge of failure. To turn this around in 3 and a half years and see the airline become one of the strongest in the world from a financial perspective, and have one of the youngest fleets of any airline in the world, that is an achievement.*

That obvious contradiction aptly demonstrates why the airlines' claims now must be properly and openly tested through adequate consultation with third parties.

Yours faithfully

Grant David
Partner