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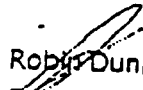
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19 June 2006


Robert Dunlop
Secretary
Ministry of Transport
PO Box
Wellington

Dear Mr Dunlop

AIR NEW ZEALAND / QANTAS APPLICATION

- 1 Thank you for your letter of 15 June 2006 which you couriered to me on the same day.
- 2 We are grateful for the more detailed explanation and timetable of the process which the Ministry proposes to follow.
- 3 We do note with considerable concern, however, that the Ministry seemingly intends to publish **only to the applicants** a draft report for their comment prior to finalising the advice that is to go to the Minister. Such a one-sided approach surely would invite the criticism of procedural unfairness – especially when those applicants were granted Ministerial audience with the Minister of Transport and other interested Ministers prior to making their application.
- 4 We are also concerned that there is still no indication of the particular matters which the Ministry will regard as relevant for the purposes of its

- advising on the application (other than competition issues in respect of the international air travel market). Our client proposes to commit considerable senior executive time and engage considerable expert resource to assist the Ministry in preparing appropriate advice to the Minister. Obviously, our client does not want its efforts to be directed at areas which Ministry does not intend having regard to. Nor will other interested parties.
- 5 Your suggestion that views provided by interested parties be posted on the Ministry's website is an excellent one and would of course facilitate proper examination of the issues. But, some prior indication from the Ministry, again posted on its website, as to what it regards as being the relevant issues for those submissions to focus on, would doubtless assist interested parties in their honest endeavours to assist the Ministry.
- 6 It would also be useful if the Ministry were to specify in advance on its website the final date for submissions, with a proviso that (say) a further week will be allowed from that date for cross-submissions on the submissions that have been duly received and posted. Allowing cross-submissions is of course the best way to avoid extravagant, prejudicial or unfair claims being made (whether against the applicants or other persons making submissions).
- 7 As regards the legal advice which the Ministry has received and has withheld as being privileged, I repeat that we are not in fact seeking release on that advice. Rather, we are asking that the Ministry make available its own decisions with regard to its intended process and criteria. We do not ask for the lawyers' reasons, but the decisions that have been or will be made.
- 8 Finally, we note your advice that "competition matters relevant to the legislation will be considered". We point out the TNA does contain matters - for example, revenue sharing, flight scheduling, service standards and holiday package pricing - that clearly are outside the scope of Part 9 of the Civil Aviation Act and are therefore currently and prospectively subject to the Commerce Act. We would therefore suggest that urgent consideration must be given by the Ministry as to whether the airlines' having entered into the TNA in its present form already gives rise to a breach of the Commerce Act which subsequent authorisation by the Minister cannot cure. As Professor Taggart has said:

... there is no magic wand of authorisation under section 88 [of the Civil Aviation Act 1990] for the Minister to waive over the TNA as a whole, and render it immune from a Commerce Act scrutiny.

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AIR NEW ZEALAND / QANTAS APPLICATION

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- 9 We would respectfully urge that the Ministry consult the Commerce Commission now as to whether there may already be a breach of that Act - and, indeed, whether the Ministry may be unwittingly involving itself in that contravention.

Yours faithfully

Grant David
Partner

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