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AIR NEW ZEALAND/QANTAS APPLICATION

- 1 As you know, the consultation process on the TNA application has revealed some clear disputes over the scope of the Minister's jurisdiction. For the reasons given in this letter, we request that the Minister inform the parties as to his view on key jurisdiction issues as a matter of urgency.

Issues of jurisdiction

- 2 All parties agree the Minister can only authorise contractual provisions that "relate, whether directly or indirectly, to the fixing of tariffs ... or ... capacity" (section 88(2) Civil Aviation Act 1990).
- 3 There is now a clear dispute over whether the revenue sharing arrangements in the TNA fall within this jurisdiction. The Ministry now has before it:
 - 3.1 advice from Professor Michael Taggart that revenue sharing arrangements are outside the Minister's jurisdiction;
 - 3.2 advice from Alan Galbraith QC that the revenue sharing arrangements are within the Minister's jurisdiction; and

3.3 advice from David Goddard QC that is silent on the point.

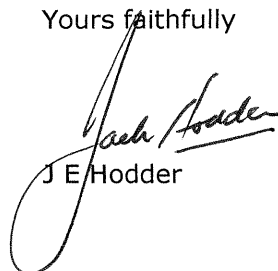
- 4 What everyone can agree on, however, is that the Minister's jurisdiction does have limits.

Uncertainty over jurisdiction impacts on fairness

- 5 Until now, the Ministry has requested submissions on all aspects of the TNA. This may have been appropriate as an initial approach, to allow the Ministry to inform itself of the range of issues raised by the TNA. However, the point has been reached where continuing uncertainty over whether the revenue sharing proposal is within the Minister's jurisdiction is impacting on the fairness of the process and the adequacy of the consultation.
- 6 Two developments highlight the unfairness of continuing with the uncertainty over which aspects of the TNA are within the Minister's jurisdiction.
- 7 First, we now have the response of the airlines to the Ministry's requests for better supporting information. While the information from the airlines continues to be inadequate, and important aspects are kept from interested parties, nevertheless it is clear the airlines are presenting the TNA as a package.
- 8 If the jurisdictional question is left unresolved until the final decision-making, this places the interested parties and as importantly the Minister in a very difficult position. If the Minister is then of the view that revenue sharing is not within the statutory jurisdiction there will not be an adequate evidential base to deal fairly and adequately with the application. In other words, the process will have misfired. Fairness and transparency to all concerned requires this jurisdictional issue to be addressed now.
- 9 The second development is the revelation of the constraints on Emirates competing in Tasman markets. The airlines have relied heavily on the proposition that the potential for expansion from Emirates will play a major role in constraining the cartel, and so reducing the welfare costs of the TNA. This fundamental plank of the airlines' case has now been revealed to be incorrect.
- 10 Clearly the airlines, the Ministry and the interested parties now need to refresh their competition analysis. Again, when doing so there is a material unfairness in requiring parties to shoot in the dark on jurisdiction questions. The information from the airlines is in (such that it is) and the task now is to conduct the best possible analysis on the information available.

- 11 This decision is too important to suggest that interested parties address all possible jurisdiction permutations. The High Court was of the view that the previous Qantas/Air New Zealand alliance would result in a net detriment to New Zealand in the order of \$100m.
- 12 For the Ministry's consultation to be meaningful, we need a statement from the Minister on what parts of the TNA are within his jurisdiction, and what parts are not to be considered. We can then conduct a thorough analysis of the costs and benefits of the provisions the Minister is considering.
- 13 For these reasons, we request as a matter of urgency that the Minister inform all parties whether he considers the proposed revenue sharing arrangements fall within his jurisdiction.
- 14 We look forward to hearing from you.

Yours faithfully



J E Hodder