



BARRISTERS AND SOLICITORS

By email

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Dear John

Air New Zealand - Qantas - Application for Authorisation under section 88 (2) Civil Aviation Act

1. We refer to your letters of 16 June, 27 July and 28 July 2006. We respond to three matters raised in those letters:
 - Issues of legal interpretation which you raised in your first letter;
 - Issues of process and timing referred to in your letters of 16 June and 27 July; and
 - Process for responding to your airline related questions posed in your letter of 28 July.

Issues of interpretation

2. In your letter of 16 June 2006 you posed a number of matters of interpretation in respect of which you sought the Applicants comment. We respond briefly to each of these issues under a sub-heading which identifies your question:
3. **Please identify specifically those provisions of the Tasman Networks Agreement (the TNA) to which you consider section 88 applies and for which you seek authorisation as being –**
 - ***Directly or indirectly related to the fixing or application of tariffs;***
 - ***Directly or indirectly related to the fixing of capacity.***

In the Applicants view, the TNA is an agreement between Air NZ and Qantas which has interconnected provisions, all of which relate, directly or indirectly to the fixing of tariffs and/or capacity. Accordingly, authorisation is sought for all of the provisions of the TNA.

4. ***For completeness, please identify any provisions of the TNA that you consider are not directly or indirectly related to either tariffs or capacity and for which you therefore do not seek authorisation.***

For the reasons set out above, the Applicants consider that all the provisions of the TNA are directly or indirectly related to the fixing of tariffs and or capacity.

5. ***The Ministry, after receiving advice, has formed the preliminary view that even if the Minister were to authorise provisions relating to tariff and capacity setting, i.e. the process by which those matters are set, it does not follow that the resulting tariffs and capacity are similarly authorised. Those would either require a fresh authorisation or else fall under the Commerce Act 1986. Please provide your comments on this proposition.***

The Applicants requested Mr Alan Galbraith QC to advise on this preliminary view and also obtained a separate opinion from Mr David Goddard QC. Both Senior Counsel have advised that authorisation of provisions that relate directly or indirectly to the fixing of tariffs or capacity also extends to the resulting tariffs or capacities. A copy of both Mr Galbraith QC's opinion and Mr Goddard QC's opinion is attached .

The advice received from both Senior Counsel is consistent with the approach that has been taken by successive Ministers in exercising the Minister's powers under s 88 (2) since that power to authorise aviation agreements, arrangements and understandings was introduced.

6. ***In an oral discussion to clarify the background to the preceding question, the Ministry indicated that the issue arose in part out of a concern that the Minister might not be able to determine if the prohibition under section 88 (4) (c) applied.***

The Applicants requested Mr Galbraith QC and Mr Goddard QC to take that concern into account in reaching their respective opinions in the previous question. Both Senior Counsel have advised that the prohibition contained in section 88 (4) (c) only applies where there is a positive "unjustifiable discrimination" contained in a provision itself.

Once again, this view is consistent with the approach that has been taken by successive Ministers in exercising the Minister's powers under s 88 (2) since that power to authorise aviation agreements, arrangements and understandings was introduced.

7. ***The Ministry has been provided with a legal opinion prepared by Professor Taggart for Wellington International Airport Limited. The opinion has also been referred to in the media and is to be found on Wellington International Airport's Website. I invite you to provide comments on that opinion.***

The Applicants asked Mr Galbraith QC to address the specific issue raised by Professor Taggart concerning whether the revenue sharing provisions of the TNA are capable of being authorised. Mr Galbraith QC has advised that the authorisation power under section 88(2) is wide and will encompass the revenue sharing provisions (as they are indirectly related to both capacity and tariffs).

We would be grateful if the Ministry could let us know if there are any additional issues arising out of Professor Taggart's opinion that it would like the Applicants to consider.

Issues of Process and Timing

8. The MOT has asked for comment on the process set out in its Letter. Broadly, that process can be summarised as:
- the Ministry has advised parties who have expressed an interest that they have an opportunity to provide their views in writing before the end of July. Those views will be taken into account, to the extent they are relevant, in forming the report to the Minister;
 - interested party views will be forwarded to the Applicants by the beginning of August, and the Applicants will be allowed two weeks to provide comment.
 - the Applicants will be provided with the opportunity to comment on any issue that would be adverse to the Applicants before concluding a view on that issue. It is also intended the Ministry will provide the Applicants with a draft report before the Ministry's final report is provided to the Minister. At the date of sending the letter the Ministry was not intending to publish or provide the draft report for interested parties (other than to the Applicants) to comment on, although that may be reconsidered depending on the content of such interested parties' views and on other matters that may arise in the course of consideration of the application.
 - the Ministry is considering placing the application (with appropriate deletions) and interested party views (with any appropriate deletions) on its web site. Generally it proposes to advise interested parties, and the Applicants (with regard to future information provided to it), to identify material which they and consider ought to be withheld under the Official Information Act.
9. The Applicants comment as follows;
- The Applicants are working towards getting the Ministry a response to the third party submissions early in the week of Monday 21 August. While the Applicants were aiming to respond within two weeks from the beginning of August (as suggested by the Ministry) there have been substantial submissions filed only recently which will need to be considered in any response. .
 - The Applicants will respond on other process issues in due course.

Process for responding to the Ministry's airline questions

10. The Applicants are in the process of collecting the information and will be in a better position to update the Ministry on the timing of the response early next week.

Kind regards

[Sgd: Phil Taylor / Torrin Crowther]

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cc : Andrew Peterson/Andrew Robinson, Russell McVeagh