

18 August 1999

23 AUG 1999

ORIGINAL OF FAX

**BY FACSIMILE NO: 04 4710771**

The Commerce Commission  
Landcorp House  
101 Lampton Quay  
**WELLINGTON**

**Attention** Susan Brown  
Investigator, Commerce Act Division

Dear Susan

**J2773 - PRICE CONTROL STUDY OF AIRFIELD ACTIVITIES**

Thank you for forwarding the Commission's proposed timetable for progressing the enquiry to Mr George Bellew, Chief Executive of Christchurch International Airport Limited ("CIAL"). We have been instructed to respond. Please take this letter as CIAL's submissions on the proposed timetable change.

**Summary**

- 1 CIAL prefers that notwithstanding the extension of the reporting deadline by the Minister of Commerce, that the Commerce Commission adheres as closely as possible to the existing timetable.
- 2 In our opinion, the reasons given by the Honourable Mr Max Bradford for the extension of the reporting date to 1 August 2002 are not good reasons for the Commission to delay reporting.
- 3 The Commission as an independent body corporate cannot be instructed as to its policy and process by the Minister. The Minister's letter dated 29 July to the Commission does not require that the report be delayed. It merely extends that latest possible reporting date .
- 4 In our opinion, the Commission has a duty to complete the enquiry without undue delay and to provide its report to the Minister.
- 5 There is good reason for treating the three airport companies as separate individual entities and there is no impediment to the completion of the enquiry in respect of one or more of the them. CIAL prefers that the enquiry in respect of its activities be completed without further delay and it may be that Wellington International Airport Limited will have the same preference. Auckland International Airport Ltd indicated in consultation with the Ministry of Commerce officials that it favours

either no delay or a 2 year delay (See paragraphs 23 and 11 of the Hon Mr Bradford's memo to Cabinet dated 22 July)

- 6 In the event that the enquiry is delayed in respect of CIAL, its present intention is to apply to the High Court for judicial review of the decision. CIAL will seek a declaratory judgement in respect of the Commission's decision to act on the Minister's requirement that the reporting date be extended to 1 August 2002 by delaying the enquiry.

## Reasons

- 1 CIAL's preference that the enquiry and reporting in its case not be delayed is driven by reasons which were put to the Ministry of Commerce during the consultation process which was undertaken prior to the discussion of the matter by Cabinet on 26 July and the Minister's letter to the Commission on 29 July.

- 2 The Honourable Mr Luxton set the scope of the enquiry in his letter to the Commission of 27 March 1998, as amended by his letter of 26 May 1998, when he required the Commission to report to him by no later than 14 December 1999 on:

"A whether there is evidence that airfield activities provided by the three major international airports (Auckland, Wellington and Christchurch) supplied or acquired in a market in which competition is limited or is likely to be lessened; and it is necessary or desirable for the price of these goods or services to be controlled in accordance with the Act in the interests of users or consumers, or as the case may be, suppliers; and

B whether market conditions are such that the Commission believes that I should recommend to the Governor-General that he make an Order in Council under section 53 of the Act invoking price controls over charges for airfield activities at the three major international airports."

The Honourable Mr Luxton went on to specify matters which he required the Commission to consider and report to him on as follows:

- "1 Whether charges (sic) should be introduced for airfield activities at one or more of the three major international airports.
2. If the Commission is of the view that price control should be introduced, to which:
- (i) regions, areas or localities in New Zealand;
  - (ii) quantities, qualities, grades, or classes;
  - (iii) different persons or classes or persons
- should price control be applied?
3. What conditions, tests, or thresholds does the Commission consider would be useful in judging whether:
- (i) airfield activities are or will be supplied in a market in which competition is limited or likely to be lessened; and
  - (ii) it is necessary or desirable for the prices of airfield activities to be controlled in accordance with the Act.

4. If price control was introduced:
  - (i) what form of price control would the Commission apply;
  - (ii) and why;
  - (iii) how would the Commission operate this form of price control; and
  - (iv) what time and/or in what condition should price control end?"

Mr Luxton agreed that the definition of "airfield activities" is as defined in section 2 of the Act by which he meant the Airport Authorities Amendment Act 1997 (the "AAA Act").

CIAL is of the opinion in respect of its own activities that there is no evidence which will lead to the conclusion that it is either necessary or desirable for the price of its airfield activities be controlled. CIAL also believes that the Commission will conclude, as a result of the enquiry, that market conditions are such that the Commission will not believe that the Minister should recommend to the Governor-General that price controls be invoked over its charges for airfield activities.

In the consideration of his decision as to whether to delay the reporting date, the Honourable Mr Bradford and Cabinet have considered the effect of the "AAA Act". They have referred to the original decision initiating the Commerce Commission's price control enquiry and to the understanding at the time that the regulations prescribing the information disclosure regime pursuant to the AAA Act would be in place by the time the Commission was to carry out its pricing enquiry. As you are aware, the regulations have not yet come into effect.

In effect, the rationale for delaying the reporting date for the Commission's enquiry is to give all parties time to view the information which will be made available as a result of the information disclosure regime. The availability of the reports under the disclosure regime has been balanced against the interests of users, consumers and suppliers in having any monopolistic pricing practices (if they exist), quickly discovered and controlled. Both the Minister and Cabinet have decided that the balance should be in favour of a delay of 20 months, (i.e., from 31 December 1999 to 1 August 2002, although Mr Luxton's letter referred to 14 December 1999 and not 31 December (see the Minute of Cabinet's meeting, (reference CAB (99) 442). Mr Bradford's recommendation to Cabinet was for the enquiry to start on 30 November 2000 and for the Commission to report by 1 July 2001.) We argue that the interests of users, consumers and suppliers should have been given greater weight than was given to the value of the availability of the reports.

The powers available to the Commission under the Commerce Act are such that there is no shortage of information available to the Commission in its conduct of the enquiry. CIAL has been totally open in its disclosure of information and has provided the Commission's investigators in a timely fashion with all information that the investigators have sought. The investigators have acknowledged that there is no lack of information available to them. The information which would be available pursuant to the disclosure regime is most unlikely to add anything to the information which is already held by the Commission. The information available to the Commission under the investigation powers that it has under the Commerce Act is much more detailed information than is likely to be made available under the disclosure regime. There is no information which is likely to be required to be

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disclosed under the disclosure regime which is not be available to the Commission pursuant to its investigative powers.

It is for these reasons that we argue that there is no proper reason for the delay in the case of CIAL. If there are any monopolistic pricing practices being undertaken by the airport companies, the public interest will be better served by the enquiry proceeding than it will be by a delay.

You should also be aware that CIAL claims that the effects on it of the delay are not merely procedural or nominal. There are five areas in particular where a delay in response to the Minister's new direction to the Commission would be determinative of rights:

- 2.1 If the enquiry is delayed, the existence of the enquiry "hangs over" the affected parties and in particular, the airport companies and their shareholders. There is an implication of monopoly pricing which is inherent in the holding of the enquiry. It is unfair of Government to allow this implication to stand without allowing CIAL the opportunity to challenge the implication and to have the matter resolved for the next two years. To leave an unresolved enquiry and an overhanging non specific threat of price control will have the undesirable consequence of regulation by uncertainty.
- 2.2 There has been a process of sale of shares in the airport companies which may or may not continue. The existence of an incomplete enquiry will inevitably have a depressing effect on the realisable price of shares in the companies. There is significant value at issue and there is a good chance that any continuing delay in the completion of the enquiry will result in the value of CIAL's shares being discounted.
- 2.3 The airport companies rely on debt funding in addition to shareholders' capital to fund their operations. The existence of an uncompleted enquiry may well effect the overall cost of capital for its operations and as a result will be likely to reduce profitability and to restrain capital developments.
- 2.4 CIAL has already incurred costs in responding to the enquiry, which to it, are very significant. If the enquiry is to be delayed and then later revived, the overall cost to CIAL will be greater than if the enquiry is concluded according to the original timetable. If the enquiry is delayed, much of the work which has given rise to these costs will become obsolete and will need to be redone.
- 2.5 CIAL has engaged a number of expert consultants who have now gained experience of the issues in the enquiry. CIAL is apprehensive that not all of these experts may continue to be available for the unforeseen extended period of the enquiry. If any one or more of the experts does cease to be available, CIAL's ability to put its case will be impaired.

The Minister's letter of 29 July to the Commission should not and does not direct the Commission to delay its report. In saying "I am writing.. .to require that the Commission extend the reporting date of this enquiry to 1 August 2002" the Minister should be taken to mean that the Commission has more time than it previously had but should not be taken to mean that it should slow down the enquiry process.

In summary, in CIAL's view, there is no proper reason to delay and that any significant delay will cause it unacceptable loss.

- 3 The discretion given to the Minister by section 53 of the Commerce Act is not unfettered. As you are aware, sub-section 2 provides:

*“the Minister shall not make a recommendation under sub-section 1 (of this section) unless the Minister is satisfied that -*

- (a) Goods or services to which the recommendation relates are or will be supplied or acquired in a market in which competition is limited or is likely to be lessened; and*
- (b) It is necessary or desirable for the prices of those goods or services to be controlled in accordance with this Act in the interests of users, or consumers or, as the case may be, of suppliers. ”*

Clearly the Minister has power under section 53 to form his opinion as to whether it is necessary or desirable for the prices of any airport services to be controlled without the need to consult the Commerce Commission. The Minister has his own staff and the ability to retain outside consultants to do appropriate analysis and to gather information to enable him to form a proper opinion. Section 54, which is an ancillary provision to section 53, enables the Minister to require the Commission to report to him on whether or not he should make a recommendation under section 53. As the Minister has elected to take advantage of the provisions of section 54, the Commission is required to consult with interested persons to furnish their views before it submits a report to the Minister.

In contrast to the freedom of process which is available to the Minister under section 53, there is a statutory process which has been set in train as a result of the Minister taking advantage of section 54. Once the Commission has embarked on the process of enquiry and consultation it obviously cannot report to the Minister until it has completed the process set out in section 54(2), including public notification of the requirement to which it relates and inviting interested persons to furnish their views.

Having considered the matter at some length and having taken Counsel's opinion on the matter, we have concluded that the Minister has the power to both reverse the original request to the Commission and to alter the latest date by which the Commission is required to report, provided that he does so for proper reasons. We acknowledge that the Minister is entitled to exercise the facility in section 26 of the Commerce Act to communicate with the Commission on matters of Government economic policy. Our argument is that the reasons which the Minister and Cabinet have relied on in coming to their conclusion that the Minister wishes to extend the reporting date are not proper reasons.

- 4 In any event, in our opinion it is important to distinguish the concept of extending the reporting date on the one hand and requiring the Commission to not report until the extended date on the other. Of course, the Minister cannot and presumably, is not endeavouring to direct the Commission to delay its decision. The Minister's power is to change the deadline. Obviously the Commission is not a bidable

Government department. It has its own schedule and is currently on time on that schedule.

The only reason that has been presented to the Commission for which it might revise its timetable is to allow time to see the effect of the disclosure regime regulations. We have already made the point that the Commission will gain no further information from the regulations than it currently has available to it in the case of CIAL. Likewise, the parties involved, because of the decision made by the Commission to release all relevant information to the parties' experts, will also have access to all of the information which has been gathered by the Commission. What possible further information can there be?

The Commission may hold the view that it is important to have comparative information available from each of the airport companies and from airport operators in other countries to enable appropriate standards or benchmarks to be used to measure the pricing behaviour of each of the companies. We understand that this information will now largely be held by the Commission and that any delay will result in all of the analysis that has been done by the Commission having to be redone.

If there are monopolistic pricing practices being undertaken by any of the airport companies, ( which CIAL does not accept in its case) then it must surely be in the interests of the public and other users of the airport facilities that the matter be dealt with without delay. Delaying the process by a further 20 months, if there are monopolistic pricing practices being undertaken, is really a decision in favour of allowing those pricing practices to continue to the detriment of the public and other purchasers of services.

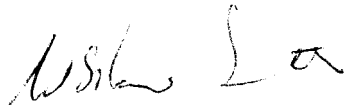
- 5 We draw your attention to the fact that Mr Luxton in his request to the Commission has contemplated the possibility of price control being introduced in one or more but not necessarily all regions, areas or localities in New Zealand.

It is apparent from the material which has been made available to us by the Ministry of Commerce that Cabinet was concerned by the effect of the continuation of the enquiry on the new shareholders in Auckland International Airport Limited. There are no such prospectus concerns applicable in the case of either Wellington International Airport Limited or CIAL. Each should be considered separately for the purposes of the enquiry.

- 6 Because of the extent of the impact of the delay on CIAL, in the event that the Commission's decision is to defer reporting in respect of CIAL until the new reporting deadline, we have been instructed to prepare an application to the High Court for a declaratory judgement. We would be most grateful if you would advise, having completed the present consultation process, if the Commission's decision is to delay reporting and to adopt the new timetable. We would then endeavour to obtain a conference with a High Court Judge to obtain an interim order under section 8 of the Judicature Amendment Act so as not to unduly delay the Commission or to impede its processes. We suggest that it may be appropriate for CIAL and the Commission to co-operate in an application for a declaratory judgement to resolve the matter of the possible illegality as soon as possible.

Thank you for the opportunity to provide these submissions.

Yours sincerely  
**ANTHONY HARPER**

A handwritten signature in black ink, appearing to read "Mark Smith". The signature is written in a cursive, slightly slanted style.

**Mark Smith**  
Partner

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