

**Treasury Report: Air New Zealand - Legal Advice on What Ministers Can and Cannot Say**

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<b>Date:</b>	25 November 2002	<b>Treasury Priority:</b>	High
<b>Security Level:</b>	IN-CONFIDENCE	<b>Report No:</b>	T2002/1607

**Action Sought**

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	<b>Action Sought</b>	<b>Deadline</b>
Minister of Finance	Read	ASAP
Associate Minister of Finance (Hon Trevor Mallard)	Read	ASAP
Associate Minister of Finance (Hon Paul Swain)	Read	ASAP

**Contact for Telephone Discussion (if required)**

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<b>Name</b>	<b>Position</b>	<b>Telephone</b>	<b>1st Contact</b>
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**Enclosure: No**

25 November 2002

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Can and Cannot Say**

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**Executive Summary**

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This report is to provide legal advice on what Ministers can and cannot say on any proposal for Qantas to take a shareholding in Air New Zealand.

**Recommended Action**

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It is recommended that you note the contents of this report.

Ivan Kwok  
Treasury Solicitor

## Treasury Report: **Air New Zealand - Legal Advice on What Ministers Can and Cannot Say**

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### Purpose of Report

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1. This report is to provide legal advice on what Ministers can and cannot say on any proposal for Qantas taking a shareholding in Air New Zealand.

### Other Relevant Information

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2. In developing this report, advice has been received from the Solicitor-General and this report reflects that advice.
3. If the Crown receives any proposal that Qantas becomes a new shareholder in Air New Zealand there will be three primary aspects to the Government's consideration of the proposal:
  - ownership;
  - regulatory/national interest; and
  - competition.
4. It is difficult to predict the precise nature of all the issues that could arise. That depends very much upon particular circumstances such as the details of the proposal and what information is in the public arena. However, the most obvious risks arise from the Crown being in possession of materially price sensitive information which the public does not have and which makes the Crown an "insider" in relation to Air New Zealand.
5. The collective responsibility of Ministers for Cabinet decisions precludes complete separation of ministerial ownership responsibilities from ministerial regulatory responsibilities (which include determining whether to permit an airline or foreign investor to acquire a stake in Air New Zealand). While it is important to ensure that ownership interests do not improperly influence regulatory decisions, consultation between the Minister with ownership responsibilities and the Ministers with regulatory responsibilities can (and will inevitably) occur, as it can with other Ministers.

### What Ministers Cannot Say

6. The general advice to Ministers is to exercise caution in making public statements on any proposal. Depending upon the way in which matters develop, Ministers may have greater or lesser freedom to comment publicly when the details of any proposal become clear. Further advice can be provided at that point.

7. In the meantime, Ministers should avoid publicly discussing:
  - the detail of any proposal;
  - what they think of any proposal, i.e. whether they support it or not;
  - any materially price-sensitive information relating to Air New Zealand before that information has been publicly disclosed;
  - confidential information relating to Air New Zealand;
  - the value of Air New Zealand's shares;
  - the value or prospects of Air New Zealand;
  - whether someone should buy or sell Air New Zealand shares (and, of course, Ministers should not buy or sell Air New Zealand shares themselves, or recommend that their friends or family or others do so).
8. The reason why Ministers should avoid discussing these matters is that there are particular constraints on disclosure arising under the rules to prevent insider trading, which apply to the Crown because of its ownership interest in Air New Zealand.
9. The rules against insider trading have been identified in various Cabinet papers on this subject over the past few months. The Crown will be an insider in relation to Air New Zealand if it receives information which is not publicly available and which is likely to affect materially the price of Air New Zealand securities were it publicly available. The Crown must avoid liability for insider trading and for "tipping". Under s 9(1) of the Securities Amendment Act 1988 an insider of a public issuer who has inside information and who "advises or encourages any person to buy or sell securities of the public issuer" is liable to the persons listed in s 9(2). Therefore, Ministers must avoid making any public statements which might be construed as advising or encouraging the purchase or sale of Air New Zealand shares.
10. The Crown has undertaken to use confidential information received as owner of Air New Zealand only for the purposes of monitoring its investment. Such information should be kept under tight controls and safeguards within Government and should not be disseminated other than by approved processes. In principle, information used to discharge regulatory functions should be information provided for that purpose.

### **What Ministers Can Say**

11. Cabinet has decided that a subgroup of Ministers, comprising the Minister of Finance, Associate Minister of Finance (Hon Trevor Mallard), the Minister of Transport, and the Minister of Tourism, will sanction all communications.

12. If a proposal is announced by Air New Zealand, Ministers should feel free to indicate publicly:

- the decision-making process that will be applied by Government to the proposal;
- the proposed timetable for that process;
- the national interest criteria approved by the Cabinet Policy Committee on 20 November 2002 for use in the Government's consideration of any proposal.

Any public comment should be limited to identifying the process and criteria – detailed public discussion should at this stage be avoided.

13. Generally, Ministers may discuss factual matters once they are in the public domain, but should exercise caution to ensure their comments are not interpreted as expressing their support or otherwise for any proposal, or their views on the value and prospects of Air New Zealand or its shares. As you will appreciate, this may be a difficult line to tread and further advice should be sought if specific questions arise.