

24 September 2008

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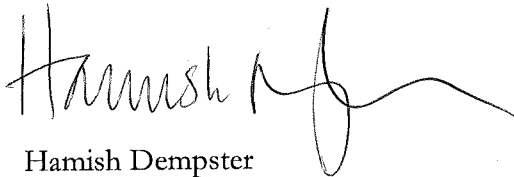
New Zealand Civil Aviation Authority
Our Ref: PVT122/345

1. I refer to your letter addressed to the Solicitor-General dated 4 September 2008 regarding the draft Legal Information Bulletin No. 4 circulated by the Civil Aviation Authority.
2. You are, of course, right that the rule of law is fundamental to constitutional government, that Parliament makes the law and that the judiciary are required to apply that law to the cases that come before them. However, I do not agree that decisions of the District Court create binding precedent. Decisions of the District Court bind the parties to the judgment only and do not create precedents in the way that decisions of the High Court do. It is clear that the Civil Aviation Authority is within its rights to prosecute a person for what it alleges is an infringement against the laws it administers under its governing legislation, despite an adverse prior District Court judgment. It runs the risk that a later District Court will reach the same conclusion (because the earlier Court was correct or because the latter court was also incorrect) but that does not mean the Civil Aviation Authority has acted unconstitutionally in pursuing the prosecution.
3. It appears you also consider the Civil Aviation Authority has purported to usurp the function of the judiciary by publishing its own interpretation of legislation it administers. I do not agree. The Civil Aviation Authority bears a public duty to administer rules and regulations made under the Civil Aviation Act. To carry out its obligation it must take a view on the interpretation of those rules and regulations for the purposes of its decisions whether to seek to enforce those rules and regulations. Accordingly, it is entirely appropriate for the Civil Aviation Authority to form a view on the correct interpretation of those rules and regulations. It is also entirely appropriate for it to express opinions on what it perceives to be the correct interpretation of those rules and regulations. In this respect the Commissioner of Inland Revenue is a perfect analogue. For many years now the Commissioner of Inland Revenue has published Tax Information Bulletins recording his opinion of the correct interpretation of tax legislation. The Courts to the highest level have ruled that this is lawful. The Courts have also ruled that such Bulletins in no way affect the Courts jurisdiction to give authoritative judgments on the interpretation of tax law. What is not appropriate is for the Civil Aviation Authority to purport to make authoritative judgments as though it were a Court. But the Civil Aviation Authority

has in no way done this. It has plainly stated that it will take its interpretation of the rules and regulation back to the Court, thereby recognising the authority of the Court to make an authoritative judgment in respect of the case before it.

4. Despite the disagreement between us on the strict legality, I agree with what I perceive to be the underlying sentiment of your letter, namely that the branches of government need to be moderate with the language they use in referring to other branches of government. That is because immoderate language may undermine public respect for the law, which is crucial to an effective system of rule by law. In this respect, I do not think that the Civil Aviation Authority has criticised the District Court immoderately in the draft Legal Information Bulletin No. 4.
5. Please feel free to call me (04 494 5674) to discuss any aspect of this letter, or the matter in general, if that would assist.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Hamish Dempster', with a long, sweeping horizontal stroke extending to the right.

Hamish Dempster
Associate Crown Counsel

Copy to:

Civil Aviation Authority
Aviation House
10 Hutt Road
PETONE
Attention: Angela Beazer