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Memo

To Rob Sharp, Secretary

From Sally Webb, Chief Legal Officer

Date 3 March 2022

Subject **Briefing Requirements**

1. Context

You have asked for advice on whether Transport meets its obligations regarding Ministerial briefing practices in relation to significant developments, noting that this question has arisen following the events leading to the operational decision to shut down the rail network on 21 February 2021.

2. Briefing Requirement

To ensure that our Ministers have the requisite information to exercise their responsibility and accountability for the administration of the *Transport Administration Act 1988 (TAA)* (noting that the Secretary and chief executives of the operating agencies are subject to Ministerial direction and control under section 3B), the TAA contains a number of provisions requiring the operating agencies to keep the Minister informed generally and specifically of significant developments (the **Briefing Requirement**). The TAA expresses this Briefing Requirement as follows:

- (a) *supply the Minister or a person nominated by the Minister with any information relating to its activities that the Minister or person may require, and*
- (b) *keep the Minister informed of the general conduct of its activities **and of any significant development in its activities**¹.*

The Briefing Requirement is a principle-based obligation on each operating agency to ensure that the Minister is briefed on its operations and any significant developments. The TAA does not specify the timing or format of the briefing for which there is necessarily a degree of flexibility however to facilitate the Minister's ability to direct and control, briefings must necessarily be timely, accurate and comprehensive. 'Significant development' is not defined in the TAA – it has its ordinary meaning which would reflect a consideration of the context at any time. Information must be provided to enable the Minister to discharge his or her

¹ See sections 30, 35M, 36I, 37I, 38K.

ministerial oversight and ultimate accountability and responsibility for the administration of the TAA.

3. Form of Briefing Requirement

The Briefing Requirement is flexible to accommodate Transport agencies' operational environments which are dynamic, evolving and time sensitive. In these situations, the Briefing Requirement can be satisfied through verbal briefings and text message exchanges regarding significant issues and developments.

In ordinary circumstances, and where sufficient time is available, Ministers should be provided with written briefings to give assurance that the issues and options have been developed and presented and these should be sent to the Minister in a briefing note for endorsement before acting on the recommendations.

In dynamic and evolving situations verbal briefing on significant issues to the Minister and his or her advisers will be appropriate and necessary to enable timely communication of information. Any decisions and key points of the discussions should be sent to the Minister promptly following the discussion to record the Minister's contemporaneous endorsement.

Where an unplanned or unforeseen significant event occurs (eg a safety incident or severe weather event), a briefing to the Minister will necessarily occur promptly following the event.

I note that Transport has an extensive governance and reporting framework that supports our obligations to provide information to our Ministers to ensure compliance with the Briefing Requirement.

4. Industrial action and network safety

I am aware that a number of briefings and updates regarding the industrial action and its impacts on the rail network were given to the offices of Ministers Elliott and Faraway, including in some instances, to the Ministers themselves. A number of these briefings and updates were given during the period from 17-21 February 2022 as developments occurred.

The events on 20-21 February 2022 regarding the industrial dispute and leading to the shutdown of the rail network were evolving and dynamic and the form of briefings reflected this and, in my view, satisfied the Briefing Requirement. Decisions and key points of the discussions should however be sent to the Minister promptly following the discussion to record the Minister's contemporaneous endorsement.

Sally Webb
Chief Legal Officer