

**From:** Ditchburn L (Liz) **On Behalf Of** DG Economy

**Sent:** 15 September 2017 16:21

**To:** Maxwell S (Stewart) (Special Adviser) [Redacted] Nicholls J (John) (TRANS) [Redacted] Minister for Transport and the Islands <[Redacted]> Cabinet Secretary for Finance and the Constitution [Redacted]

**Cc:** Cabinet Secretary for Economy, Jobs and Fair Work [Redacted] Cabinet Secretary for the Rural Economy and Connectivity [Redacted] DG Economy [Redacted] Chief Financial Officer Brannen R (Roy) PS/Transport Scotland Transport Scotland Directors; McAllan M (Mary); Rollison R (Richard) [Redacted] Lloyd E (Elizabeth); [Redacted]

**Subject:** RE: Official - Sensitive : FMEL, CMAL and mediation

Minister

I spoke to Erik Ostergaard yesterday as flagged in the submission. It was a fairly positive discussion. He is looking forward to meeting on Monday and believes that, given the situation, it will be helpful to be in direct contact with ministers rather than only hearing ministers' perspectives through SG and TS officials. His concern is that mediation may lead nowhere (he maintains that the CMAL position in terms of non entitlement is very strong), that it could therefore be a waste of time and an unhelpful distraction. He is also concerned that we may have a desired outcome in mind from the start, regardless of the process. I assured him that we saw the process as valuable in its own right in getting the parties talking, acknowledged that it was possible that a mediator would conclude quite quickly that there was no possibility of progress or that there was no substance to the claims, but that that would still be a step forward from the current stalemate. There were also potential benefits for CMAL in understanding better what case FMEL might make if they subsequently chose to go to independent dispute resolution or the commercial courts, that it was SG policy to use all means possible to manage disputes, and that courts would look favourably on a genuine attempt to address the dispute if it did ever end up in the courts. I said we could discuss the mediation issue in more detail on Monday.

He was keen to know whether FMEL's cash issues had been resolved. Without giving him details, I said that we had been able to secure a commercial arrangement that meant that there was a path through for FMEL. He was pleased to hear that as he was concerned that FMEL might be relying on contract variations for short term cash flow and also that if FMEL were to end up in administration, this would create problems in terms of getting the ships finished (though they were making contingency plans).

I reiterated that our ask of CMAL was that they implemented the contract as we would expect a good contracting authority to do, that mediation was within that as a means of dispute resolution, and that we would want CMAL to engage openly in that process. Furthermore, we had entered into our arrangement with FMEL in good faith on the basis of our understanding from Kevin Hobbs that CMAL were willing to participate in mediation.

My overall impression is that he will agree on Monday that CMAL and FMEL proceed to negotiation. He will be keen to hear from ministers that we understand that the process may not result in an agreement, that we have no interest in paying anything

other than the right price for the ships, and that any price changes would need to be based on evidence. Equally, we will expect CMAL to engage constructively and open-mindedly in the process, and to listen to FMEL's points.

Liz