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Ministry of Transport
via email: ca.bill@transport.govt.nz

## WELLINGTON INTERNATIONAL AIRPORT SUBMISSION ON CIVIL AVIATION BILL – EXPOSURE DRAFT COMMENTARY DOCUMENT

Many thanks for the opportunity to submit on the exposure draft of the Civil Aviation Bill. Wellington Airport has had direct input into the New Zealand Airports Association submission and supports the content of that submission.

In addition, there are three areas of particular interest to Wellington Airport, which we have emphasised here, along with brief comments in support of other parts of the Bill. These are:

- The proposed removal of airports' judicially tested ability to set charges, which will disrupt an increasingly settled regulatory regime and is likely to result in litigation between airports and airlines;
- The need for robust competition analysis when airline alliances and code shares are considered; and
- Proposals relating to aviation security, which we generally support, though some raise further questions of detail.

### General Principles

Our general view is that old legislation is not necessarily unfit for purpose due to its age. The interpretation of the Civil Aviation Act and Airport Authorities Act has flexed over time and for the most part both Acts have remained functional. The statutes must be read in conjunction with more recent regulatory instruments and the many court decisions which inform the application of the Acts.

We also believe there should be a presumption against changing legislative provisions unless they are proven to be redundant, or inferior to other options.

### Airport price setting

Our principal concern is with the proposed removal of airports' ability to "set charges as they think fit". It would be difficult to overstate our level of concern about this proposed change. At best, it will create considerable uncertainty; at worst, it will embolden airlines to refuse to pay airport charges. This occurs in Australia with some frequency, and has occurred in New Zealand with Wellington Airport being forced to seek legal redress when landing fees were not paid. We are loath to see a repeat of this situation as the disruption and cost is immense.

A significant amount of further analysis is required before policy decisions are taken, rather than a simple recounting of the arguments proposed by airports and airlines.

Section 4A has been a feature of the Airport Authorities Act for decades. While we recognise other changes since then have updated aspects of the legislative regime, these changes have informed the interpretation of

the Airport Authorities Act, rather than superseding it. We understand the desire to modernise the legislation but the risk of upheaval, conflict and litigation outweighs any cosmetic need to rewrite this provision.

*Repeal would lead to litigation*

Airports and airlines are beginning to enjoy a reasonably settled regulatory regime. This is the consequence of three price setting periods, litigation, Input Methodologies reviews, and the continuous testing and clarification of issues. Creating unnecessary upheaval now will set back more than a decade of progress toward stability and certainty.

While mentioned briefly in the Civil Aviation Bill Commentary Document, we do not believe the litigation risks have been seriously explored. This is not an academic risk. It is clearly demonstrated by current examples in Australia of airlines refusing to pay landing fees, and the historic refusal of airlines to pay Wellington Airport's charges despite using airport services.

Wellington Airport has faced unsuccessful legal challenges to the validity of its charges in 1992-3, and 2008-9. The most recent case took years to reach a conclusion (prices were set to apply from 1 July 2007; the Court of Appeal judgment was received on 29 June 2009). The considerable cost, not only of the litigation but of the uncertainty generated during this period, makes us extremely wary of any changes that might once again open the door to prices being challenged once they are set. We note airports are obligated to provide services to landing aircraft even if the relevant airline has withheld payment of landing fees; this places airports in an invidious position when payment cannot be enforced.

Of course, prices can be and are challenged by airlines; but the appropriate arena for this is in pricing consultation, and in submissions to the Commerce Commission during the information disclosure process.

Wellington Airport enjoys a positive relationship with airline customers and we hope the above examples would not be repeated. Even so, litigation would likely be required to test the meaning of the new legislation. We have been through a period of testing and challenging the current law and finally achieved stability. For this reason there should be a presumption against change unless clearly justified.

We also note, given the high stakes involved in pricing consultation, any area of uncertainty is likely to be tested and challenged through all available legal processes. Airline charges for a five-year pricing period amount to hundreds of millions of dollars at major airports; therefore, litigation may be seen as worthwhile even if the chance of success is low and the potential uplift in prices is small as a relative proportion of total charges.

*Airports are not able to set excessive charges*

The commentary document states section 4A "creates an environment where monopoly pricing can occur"; and that "unnecessary investments and excessive pricing can occur". However, there is very little analysis of the effectiveness of regulation under Part 4 of the Commerce Act. Section 4A must be read in conjunction with other regulatory instruments which fetter the ability of airports to set monopoly charges. It should also be recognised that the regulation is regularly reviewed by the Commerce Commission to ensure it is working effectively.

The regulation undertaken by the Commission effectively sets a ceiling on the prices airports are able to charge, and any deviation from the Commission's mid-point prices needs to be extensively analysed and justified by airports. The recent example of Auckland Airport's FY18-22 price setting demonstrates that airports, when deemed to be overcharging, will respond to concerns raised by the Commission, which in this case led to Auckland Airport lowering its charges, a result the Commission noted was "good for consumers and shows the benefits of the current information disclosure regulations that are applied to New Zealand's major airports".

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Ministers and government agencies make clear their expectation that airports will set prices within the bounds of the current regulation. Following the introduction of the Commerce Amendment Bill, the Government can introduce stronger regulation of airports through a truncated inquiry process. Airports work hard to ensure this will not be necessary, by closely following regulatory requirements and the guidance of the Commerce Commission.

In relation to unnecessary investment, in fact the more common complaint recently has been that airports are slow to invest. There is no evidence that airports' ability to set charges as they think fit results in over-investment, and no current examples have been provided in the material we have seen to date.

*Countervailing power of airlines*

In addition to the constraints imposed by regulation, airlines' countervailing market power mitigates the ability of airports to exercise their own market power. This particularly arises when the air services market is highly concentrated and/or airlines can credibly threaten to withdraw services from an airport. These issues were explored in detail by the Australian Productivity Commission's Draft Report into Economic Regulation of Airports. We believe a similarly extensive analysis in New Zealand would reveal a reasonable balance of power between airlines and major airports; and a significant imbalance in favour of airlines when dealing with smaller airports. We would welcome any such analysis in advance of major legislative change.

The Productivity Commission noted, in particular, that airlines can exercise countervailing power in negotiations:

> "Even without an agreement in place, airlines are able to access airport services and can refuse to pay charges at the level determined by the airport. Airlines may be able to delay concluding negotiations on contracts that would result in an increase to charges".

The repeal of section 4A would have the effect of bringing New Zealand closer to this reality seen in Australia.

*Relationship with Commerce Act*

Following discussion with Ministry of Transport officials, we understand the passage of the Commerce Amendment Act 2018 is one of the drivers for repealing section 4A. The commentary document also notes section 4A would "create unnecessary overlap if retained". This is simply inaccurate, as s 4A(4) clearly states that the section does not limit the application of regulation under Part 4 of the Commerce Act 1986. Without further clarification of the perceived issue we do not see this as a legitimate reason for repeal.

On the contrary, the passage of the Commerce Amendment Act reiterated and refined a clear process for changing the regulatory regime. Given the significance of the change introduced by repealing s 4A, we believe this amounts to a fundamental regulatory change which bypasses the consultation and analysis now required by the Commerce Act.

*Repeal creates a de facto change to the entire regulatory regime*

The commentary document states "airlines consider that this provision hinders commercial negotiations between airlines and large airports, and allows airports to ignore the views of their customers". The established position in New Zealand is that airports are required to undertake consultation, followed by information disclosure. The interchangeability of the word "negotiations" with "consultation" in the commentary is troubling, as it ignores the long-standing policy position that airports are subject to an information disclosure regime, not a negotiate-arbitrate regime.

Nevertheless, no example has been provided of s 4A hindering consultation between airports and their airline customers. Before such a significant change is undertaken, we would expect to see some analysis of the impact of s 4A in reality. The simple assertion that this one provision adversely affects consultation, despite

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the regulatory restrictions on price setting and the countervailing power of airlines, cannot be accepted at face value.

Airports frequently undertake robust and well-intentioned consultation with airline customers, above and beyond that required by law. For example, we regularly consult airline customers on significant capital expenditure projects, even when below the threshold where consultation is legally required. Consultation and airline feedback is integral to infrastructure planning; and in its review of pricing disclosures, the Commerce Commission takes airlines' views into account when determining whether capital expenditure is justified.

Consultation with airlines is an established practice which generally works well and is bolstered by airports' ability to set charges once consultation is complete. If the intended policy change is in fact to move away from consultation to "commercial negotiations" (such as occur in Australia), policy makers need to be fully cognisant of the significance of this change and the potentially adverse environment that will be created.

*Strong preference for no change*

Our strong preference is for the retention of s 4A as currently worded. The proposed change would lead to uncertainty and litigation, and has not been justified by a clear description of any problem or a thorough risk analysis. We are aware that New Zealand Airports has proposed an alternative provision, in the event that change is seen as necessary despite the arguments above. While we support this as the "next best" option we do not believe any change has been justified and remain wary of the uncertainty that will be created by any change.

## Authorisation of airline alliances

Wellington Airport believes the draft Bill does not go far enough in improving the process for considering applications for authorisation of airline alliances. While requiring the Minister to contemplate the public interest and purposes of the Act, it does not expressly require a competition analysis and does not include a role for a regulator with expertise in competition issues.

Airline alliances, by their very nature, have an effect on competition, in a market where competitiveness is already constrained. The appropriate regulator to analyse these impacts, as for every other industry, is the Commerce Commission. This is supported by the advice of the Ministry of Transport, Treasury, MBIE and the Commission itself. Though referencing "aero-political" considerations, the Cabinet papers and consultation document released by the Ministry do not provide evidence for departing from this advice.

We agree that aero-political considerations ought to be taken into account by the Minister when approving an alliance. However, political factors ought not to be so overwhelming that the impact on consumers is subordinated or ignored. The cost of an alliance to consumers should be the starting point, and any countervailing political factors must be demonstrated to be greater than the cost before an alliance is approved.

The Commerce Commission is the expert competition regulator across every other market. Though it is true there are unique aspects to aviation, this is true of all markets. The Commission is able to apply flexible tests and qualitative judgments to make assessments case by case. We also note that in Australia airline alliances are considered by the Australian Competition and Consumer Commission. There is no reason for the authorisation regimes to be different between Australia and New Zealand; and in fact, given that many alliances involve trans-Tasman routes, it makes good sense for them to be the same.

At the very least, if this role remains with the Ministry of Transport, the Minister should specifically obtain advice from the Commission on the competition effects of a proposed alliance before making a decision. We cannot see any reason for this not to occur, given competition effects ought to be at the heart of any authorisation, and the Commission is the appropriate body to assess those effects.

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Ongoing monitoring of alliances should also be a standing requirement for authorisation. Though alliances are subject to renewal, there is little opportunity for review even if an alliance begins to have a demonstrable effect on competition some time after being entered into.

We also suggest a "post facto" assessment would be most useful in analysing the impact of an alliance. In the wake of an alliance ending, airlines' changes to routes and frequencies are often immediate and stark. This provides a useful counterfactual to assess the nature of competition had the alliance not been approved in the first place, compared to the level of competition while the alliance was operative.

## Aviation Safety

Wellington Airport is very supportive of the proposals to promote aviation safety. In particular, recognising Just Culture principles and taking further steps to reinforce drug and alcohol management requirements are welcome changes. In both areas, the legislative changes will be consistent with practices already undertaken by airports and the Civil Aviation Authority. Wellington Airport has taken a Just Culture approach to internal incident reporting for some time and we agree this incentivises the proactive reporting and recording of incidents.

We also strongly support amendments to regulation of drones. This is one of the clearer examples of the legislation being obviously outdated as it does not contemplate the modern reality of unmanned aircraft and the potential for serious safety risks when drones are misused. In addition to the changes proposed in the Bill, we will continue engaging with the Ministry and other government agencies on the review of Civil Aviation Rules Part 101 and 102 and look forward to further developments.

Wellington Airport is supportive of Option 3, which would create a general ability to take action against illegal drones. In the first instance, this is rightly the responsibility of law enforcement agencies, but some circumstances may require industry participants to take action. Given the urgency of response and significant potential disruption in the most serious cases, a broad ability to take action is appropriate. As technology changes airports may well develop their own capability to seize or disable drones, and the legislation must retain the flexibility to enable a range of possible responses.

## Aviation Security

*Providing for alternative airport terminal configurations and implications for security screening*

The proposed change in the Bill, which would enable non-passengers to proceed through security screening, is welcome. Wellington Airport is currently working through planning and terminal design options as part of our 2040 Master Planning process and in preparation for pricing consultation with airline customers.

We are cognisant that security screening requirements may change in future, and it is important for the legislation to retain the flexibility to accommodate different screening arrangements. For some airports, this could involve screening all airport users at a single point of entry. The current legislation would prohibit family members or companions of departing or arriving passengers, shoppers, and other airport users from entering the terminal if this were the case. Therefore we believe this is a sensible change.

However, for international airports, a situation as described above would require all passengers to be screened to international standard. We note there remain significant issues to work through. For example, Aviation Security Services charges for international passenger screening are much higher than those for screening domestic passengers, so there would be a gap between the cost of minimum required level of screening, and the actual cost of screening all passengers to a higher level. We believe this issue could be resolved or at least lessened through greater efficiencies, scale, and potentially through the introduction of competitiveness to the provision of airport security. This would likely reduce the cost differential between international and domestic screening. Another option that would allow flexibility of screening arrangements might be to change the

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passenger levy into a "pay by the hour" for aviation security screening services. While the domestic and international security regimes will, for the most part, be aligned by 2022, there is no certainty this will remain the case in future. Therefore, any future change which introduces stricter requirements for international security would need to be replicated for domestic security. If not, airports which have moved to a single point of access would be required to retrofit two levels of security into the terminal; or government agencies would need to contemplate how to address the cost differential between required screening and actual levels of screening.

Therefore, Wellington Airport supports the permanent alignment of domestic and international security standards in order to promote efficient terminal design and the best possible amenity for passengers and other airport users. While this does not need to be reflected in the legislation, the Ministry ought to be cognisant that simply allowing the screening of non-passengers does not go far enough to give airports full confidence to permanently alter terminal layouts and screening arrangements. This would be regrettable in cases where the most efficient and low cost way to screen passengers is via a central screening point.

We also welcome the signal in the draft Bill that the contestability of aviation security has been considered, with the addition of "airlines" to the list of organisations permitted to provide security services. We have recently completed an information sharing tour with Australian and Canadian airports and note that in both countries, airport security is provided competitively. While this maintains the same security outcome, it results in lower cost and better service. We would encourage the Ministry to consider these examples and would welcome a wider conversation about the future of the s79A(1) *Gazette* notice which maintains Avsec's statutory monopoly. We would also be happy to share insights gained in our discussions with international airports.

*Airport Identity Cards*

Section 113(5) of the draft Bill identifies that Police and authorised aviation security providers are jointly responsible for:

(a) the prevention of the commission of crimes against the Aviation Crimes Act 1972 at that aerodrome or installation; and
(b) the protection of persons and property from dangers arising from the commission or attempted commission of such crimes.

This is in addition to s 5A of the Aviation Crimes Act 1972, which outlines offences committed against an international airport. This includes:

(a) at the international airport, commits an act of violence that causes or is likely to cause serious injury or death; or
(b) destroys or seriously damages the facilities of the international airport; or
(c) destroys or seriously damages an aircraft that is not in service and is located at the international airport; or
(d) disrupts the services of the international airport.

Section 132 of the exposure draft clearly outlines that the search powers of aviation security officers includes those areas not covered within the airside area (i.e. within the security area, security enhanced area or sterile area of the airport).

While various security measures are already in place to prevent various forms of threat entering the airside area, the same is not applied to the landside area of the airport. Insider threats are now being considered more relevant and while airport personnel entering the security area are subject to security checks, reference Section 118 of the exposure draft, the same is not true of those numerous employees who work within an airport terminal.

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Wellington Airport has previously proposed to the Director that an additional level of Airport Identity Card (AIC) be introduced to identify those staff that are employees at the airport but otherwise do not require access to the security area, but more importantly that the individual is subject to security checks similar to those required to enter the security area of the airport.

This proposal was declined by the Director based upon the domestic legislation and current powers under Section 77F of the existing Civil Aviation Act 1990, to conduct background security checks. These checks can only be applied to persons specified in Rule 19.357 as requiring a security check. The focus of the current rule is on persons entering and remaining within the security and security enhanced areas. Any use of the powers provided under Section 77F of the Civil Aviation Act 1990 relating to background checks in a manner inconsistent with the scope of the intent of that legislation was not considered appropriate.

We therefore take the opportunity raised by the drafting of new legislation to reiterate this proposal. It seems only sensible to ensure that the Act and associated Rules be adjusted to permit security checks to be undertaken on individuals for the issuance of an Airport Identity Card if working within a passenger terminal area of the airport. .

*AVSEC Institutional Arrangements*

Wellington Airport does not oppose per se the removal of the requirement for Avsec to hold an Aviation Document. However, we note section 129 of the exposure draft allows the Director to require the Aviation Security Service to comply with any requirements prescribed in the rules that apply to the holder of an Aviation Document for the provision of aviation security services.

Furthermore we note the CAA presently has an Aviation Security regulatory oversight unit within its organisation that audits and ensures that aviation document holders comply with the requirements of the rules. However it is assumed from the discussion document (given the concept of obtaining periodic external audits of AvSec) that this specialist unit would not be involved in any way for ensuring some form of quality assurance or check that the Aviation Security Service are meeting expectations.

While the current drafting of the rule may remove the conflict of interest created when the Civil Aviation Authority regulates and audits part of its own organisation (Avsec), it is not clear from the Bill how the CAA will continue to ensure Avsec meets the requirements and standards provided in the Civil Aviation Rules. We strongly support the suggestion that some level of auditing and regulation is required by an external party.

Further consideration is also required to give comfort to aerodrome operators that all regulatory matters are still decided by the Director of Civil Aviation or their designate. By removing the requirement for Avsec to hold an Aviation Document, the existing lines of accountability are removed. We would also appreciate further clarity on the treatment of disputes at an operational level if they were to occur between Avsec and an airport. Currently the Aviation Security Service often purport to be the regulator when in fact they are currently a service provider. We are concerned that any operational dispute with frontline Avsec staff may be construed as a breach of the Act as drafted.

## Questions and further contact

If you would like any clarification or further information on matters raised above, please do not hesitate to contact me. I can be reached on

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Thank you again for the opportunity to submit and we look forward to continuing to engage with you on this matter.

Kind regards,

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