Contents

Aviation Safety

Protection of safety information (a 'Just Culture' approach)

1. Air New Zealand appreciates the inclusion of commentary around Just Culture included in the Civil Aviation Bill (CAB), and the associated Commentary Document. The commentary document defines Just Culture as below:

> *"The term 'Just Culture' refers to a values-supportive system of shared accountability where organisations are accountable for the systems they have designed and for responding to the behaviours of their employees in a fair and just manner. Employees, in turn, are accountable for the quality of their choices and for reporting both their errors and system vulnerabilities."*

2. The philosophy behind Just Culture is one of trust, where the people within the aviation system feel comfortable to report their safety issues but understand the behaviours that will ultimately attract enforcement action. This position is well set out in the draft Bill.[1] Air New Zealand submits that a Just Culture is more than the exercise of discretion over enforcement actions for minor and inadvertent infringements of civil aviation law. The stated aim of the provisions is to increase the accurate and timely reporting of incidents to the Civil Aviation Authority, to ensure it has the best information to target safety improvements in the aviation system. With the delivery of increased reporting should come the opportunity for learning, and improved outcomes and therefore an improved safety culture within New Zealand aviation.

3. For Just Culture to be more than a promoted principle, or as set out in the CAB, as a discretion of the Director regarding enforcement action, it must become part of how everyday actions are taken – built into usual processes for both airlines and regulators. This opportunity for learning should be explicitly built in.

4. Following the CAB process, Air New Zealand understands there will be a review of the Civil Aviation Rules to align these with the revised legislation. We submit that there be a particular focus on a practical implementation of Just Culture in the Rules, potentially encompassing a collective learning process where minor infringements are thematically reported and changes to systems and processes discussed and implemented. In this way, Just Culture will be a living part of aviation safety in New Zealand.

5. The CAB commentary asks whether the full suite of protections should apply to accident reports. Air New Zealand submits that these protections should apply to accident reporting, as accidents are

[1] CAB 265

frequently caused by behaviours which would usually be reported incidents – or those which did not lead to an accident. While aviation accidents are significant events, it is even more important at these times to employ just culture principles so that root causes are understood and changes to systems and processes made.

6. In addition, Air New Zealand submits that special protections should apply to air traffic control recordings of air traffic incidents. Air New Zealand considers that the release of these to media following an incident has the potential to undermine a Just Culture. Such recordings are often mis-interpreted and sensationalised by the media in a manner that may ultimately prejudice an investigation or trial.

7. We submit that air traffic control recordings of air traffic incidents be considered protected information in the revised Civil Aviation Act. Protected information should not be subject to disclosure to media, as to do so is in conflict with Just Culture provisions.

Offences

8. Air New Zealand has discussed 43, 43A and 44 of the current Act, and Rule 12.63 with the CAA several times over recent years.[2] These are the thresholds for committing an offence. We consider that these sections indirectly discourage valuable reporting to CAA of safety failure caused by human error.

9. These clauses, and Rule 12.63 state that an offence has been committed by a person who does or omits to do an act, if that act or omission causes "unnecessary danger".

10. The legislation or rule does not discuss whether the "act or omission" that results in an offence, a misperceived risk (carelessness) or a or a conscious disregard of the risks (reckless endangerment).

11. Air New Zealand submits that the criteria of "unnecessary danger" is not a high threshold. In aviation, unnecessary risk/danger become apparent in most incidents, to a varying degree.

12. It appears that an operator or pilot who reports their safety failure could still be liable for criminal prosecution under the proposed Act for exhibiting usual human behaviour which resulted in safety being compromised.

13. A 'Just Culture' recognises the importance of safety learning over punitive action when the occurrence has been caused by acts and omissions on the lower end of the culpability scale, such as human error. We submit that prosecution action is prescribed for 'gross negligence' or 'reckless endangerment'.

[2] These clauses are now 36, 37 and 94 of the CAB

14. Air New Zealand submits that Sections 36 and 94 should be removed from the proposed Act. We also submit that Section 37 is reworded to reflect the ICAO position for "dangerous activity". This would align the proposed Act with an effective and functioning "Just Culture" within New Zealand aviation. We provide the drafting below for consideration.

15. *"An aircraft, aeronautical product, or aviation related service, where there is evidence that the occurrence was conducted with intent to cause damage, or conducted with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct."*[3]

Drone technology

16. The positive impacts of drone technology need to be considered as we move through the legislative change process and beyond. Changes arising from drone technology, such as vertical take-off, changed passenger networks and changed journeys will give rise to regulatory change requirements.

17. We note the Ministry of Transport's ongoing work around unmanned aircraft, and the review of the Civil Aviation Rules Part 101 and 102. We are supportive of this work and consider that regulatory change will continue to be necessary as technology evolves. It is critical that New Zealand airspace is welcoming to emerging aviation technology, so that New Zealand can gain best technical and economic advantage.

18. We are in support of amendments to improve measures to combat drones in restricted airspace. Any measures to pro-actively manage and control the use of drones close to, entering or in restricted airspace are positively encouraged.

19. Air New Zealand considers drone accidents should be reported in the same way as any other accident or incident that involves a manned aircraft. We agree that the Civil Aviation Authority should have oversight over such accidents or incidents and be able to investigate these.

International air carriage competition

20. Air New Zealand agrees with the Ministry that some changes should be made to modernise and formalise the current Part 9 regime.[4] However, we remain of the view the wider regime is 'fit for purpose'.

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[3] Proposal for replacement throughout 37(1)(a-c)

[4] See paragraphs 38-54

21. We are aware that third parties have in the past suggested that the NZCC, not the Minister of Transport, should have jurisdiction to authorise international alliances. We disagree.

22. We believe an amended Part 9 provides the most appropriate framework to assess alliance arrangements for the following reasons:

    a. change should only be made if it can be demonstrated that there is a compelling reason to fundamentally change the Ministry's involvement in the process. There is nothing to suggest that the Ministry has misapplied the regime or made any wrong decisions in the 12 alliance authorisation and re-authorisation applications that have been considered under the current process since 2010. Further, there is no evidence that a NZCC process would lend itself to a superior outcome;

    b. the airline industry is fundamentally different to any other industry given the complex regulatory environment that exists. This regulatory environment limits the ability of airlines to consolidate and/or operate globally. As a consequence, alliances have become a vital mechanism to generate scale and connectivity. Alliances are particularly important for Air New Zealand given its geographic isolation, making authorisations a regular business process for Air New Zealand;

    c. the current framework, with some minor amendments, provides greater certainty and clarity than a rarely used Commerce Act regime which has been largely untested in the international aviation context. The Ministry has developed substantial jurisprudence in its consideration of alliance applications over the last 20 years which has increased the understanding for applicants and third parties of the process – this would be put at risk under a Commerce Act regime;

    d. the purposes of the Civil Aviation Act and Commerce Act are substantially different. The purposes of the Civil Aviation Act (and the additional purposes set out in the Bill) better enable the Ministry and the Minister to consider alliances within the broader regulatory, trade and political context of international aviation. The purpose of the Commerce Act is much narrower in scope. As discussed further below, notwithstanding the *NZME/Fairfax* decision, and unlike the ACCC, under the Commerce Act regime, the NZCC must also still seek to quantify the benefits and detriments of a proposed arrangement;

    e. the Ministry has considerable depth of knowledge and experience in relation to the international aviation industry. For instance, the status of government air service agreement (ASA) negotiations can have a critical impact on the likely net benefits from an alliance. Ministry officials are uniquely placed to take into account the nuances of

these processes (which can be ongoing during the alliance review process) and to form a view on likely outcomes and timing on an ongoing basis, in a manner far superior to what could be achieved if Ministry officials were merely consulted during an NZCC authorisation process; and

f. the Part 9 regime ensures Ministry officials are well-appraised and up-to-date on the competitive dynamics on the core routes into and out of New Zealand, as well as on developments in international alliances, airline models, and other industry trends more generally – all of which benefit greatly the Ministry's ability to effective carry out its wider aviation-related functions.

23. We repeat in the attached Annex 1 the comments made in our October 2014 submission on the CAA and AAA review. These views remain valid. However, in the sections that follow, we further advance some of the considerations set out above.

Airline alliances are essential to the aviation industry

24. Alliances have become integral in allowing airlines to sustain international air services due to the highly regulated nature of the aviation industry. The ability of airlines to operate services is limited by a network of government negotiated air service agreements. Additionally, regulation in many jurisdictions prevents foreign ownership and control. Against this highly regulated backdrop, and in light of the requirement of a network approach to serving customers (as described in our October 2014 submission), alliances have become the key means by which airlines can expand their global networks.

25. New Zealand's geographic isolation means that Air New Zealand is particularly dependent on alliances to service its international network. It would not be possible for Air New Zealand to provide the New Zealand public with the degree of global connectivity it currently does without access to the networks of its alliance partners. The alliance authorisation process has therefore become a regular and iterative business process requiring Air New Zealand to seek re-authorisation for an alliance at least every five years (around one application every 18 months). This is a unique feature of the aviation regulatory regime that is not faced by any other industry or business in New Zealand. Since 2010, Air New Zealand has made nine alliance applications to the Minister (and the Minister has considered a

further four from other applicants). In the same time, there have been only eight authorisation applications filed with the NZCC for restrictive trade practices across all other industries.[5]

26. As stated earlier,[6] there is nothing to suggest that the Ministry has misapplied the regime or made any wrong decisions on alliance authorisations, nor is there any question that the alliances authorised have not delivered benefits to the New Zealand public. There has been material growth in each of the markets Air New Zealand serves with an alliance partner and alliances have enabled a number of new routes (these include Auckland – Beijing, Auckland – Houston, Auckland – Chicago and Christchurch – Hong Kong, as well as enabling Air New Zealand to operate Auckland – Singapore). At the same time, alliances have not created barriers to entry; there has been direct competitor growth or expansion in each of the markets served by our alliances.[7] Overall, the New Zealand international aviation market continues to be extremely competitive, with the number of airlines serving New Zealand having grown from 18 in 2010 to 30 in the year ending 30 June 2019.

The Ministry and the Minister remain best suited to considering the merits of airline alliances

27. Given the sheer quantity of alliance authorisations relative to other industries and the importance of alliances to the New Zealand aviation industry, it is entirely appropriate and necessary to have a dedicated arbiter for international airline agreements, with a tailored regime which is overseen by a specialist regulator.

28. Based on current workload, removing the current process would more than double the number of authorisations of restrictive trade practices the NZCC would determine,[8] and would make them the default regulator of international aviation. There is no evidence to suggest that the NZCC would be any better equipped in this role or would produce better outcomes for the New Zealand public or New Zealand's civil aviation system than the Minister currently does. The NZCC is currently focussed on implementing several new processes as a result of the new market studies power, cartel criminalisation, a new telecommunications regulatory regime and potential Commerce Act section 36

[5] https://comcom.govt.nz/case-register.

[6] Para 22 (a)

[7] While no new competitor has commenced direct New Zealand - Singapore, the alliance has seen a number of competitors commence operations between New Zealand and key alliance markets such as the Philippines and Malaysia.

[8] This can be contrasted with the ACCC, where airline applications account for only a very small percentage of its overall authorisation workload.

changes. This can be contrasted with other competition authorities such as the ACCC, where airline applications account for only a very small percentage of its overall authorisation workload.

29. Contrary to some of the views on the regime, New Zealand is not an outlier in its approach to airline alliances. The United States has a separate regime apart from general competition laws which is considered by a specialist transport regulator - the US Department of Transportation (DOT), who work closely with the Department of State to ensure that US foreign policy goals are aligned with transportation needs. The DOT was explicitly granted statutory authority to authorise airline alliance agreements because the U.S. Congress was concerned that competition authorities would not be fully aware of aviation policy implications and would not be able to weigh whether antitrust immunity is justified by public benefits raised by the agreements. Further, the U.S. Congress expressed misgivings about granting the antitrust agency, which has clear enforcement goals, authority that is alien to its mission. US foreign policy goals are a key element of alliance assessments, and the DOT will grant immunity *unless* its adverse to the public interest.

30. In line with the US, Canada has also recently introduced a specialist regime for airline joint ventures involving an assessment by the Minister of Transport. Of the other jurisdictions which Air New Zealand's alliance network touches, none require the restrictive and/or iterative authorisation process that the Commerce Act would require. Hong Kong and Europe each have self-assessment regimes, China is still developing, and in Singapore authorisations are granted for an unlimited period of time, with a particular focus on the benefits of promoting Singapore as an aviation hub.

The Court of Appeal's NZME/Fairfax judgment has not broadened the NZCC's approach

31. The Court of Appeal judgment on the NZME / Fairfax authorisation application does not mean the NZCC is better placed to assess non-quantifiable aspects of airline alliances.

32. The Court of Appeal judgment merely confirmed the approach the NZCC had followed for some time in relation to assessing non-quantifiable factors – indeed the NZCC's decision to decline authorisation hinged on its treatment of a non-quantifiable factor (media plurality), an approach upheld by the Court. It is not the case that has been any real 'change' as a result of *NZME/Fairfax* which now means the NZCC is any better equipped to assess the non-quantifiable aspects of alliance applications.

33. Firstly, it remains the case that the Ministry's deep understanding of the regulatory, political and diplomatic environment in which ASAs and other bilateral arrangements are negotiated, and in which airlines must operate, means it is far better placed to weigh non-quantifiable factors than the NZCC, who would consider airline alliances periodically, but unlike the Ministry does not have officials who are involved in the detail on a daily basis.

34. Secondly, notwithstanding *NZME/Fairfax*, and unlike the ACCC, the NZCC must still seek to quantify the benefits and detriments of a proposed arrangement. This necessarily means applicants must undertake expensive and time-consuming economic modelling of the benefits and detriments. Given the complexity of airline markets this involves considerable cost, time and effort.

35. The proposed Air NZ/Qantas authorisation process in 2002/3 (which the NZCC heard due to the equity and domestic NZ components) provides some context. While that alliance involved a number of affected routes, the extent of the economic issues raised were not a function of the number of routes involved. The following provides a sense of the economic aspects of the process.

    a. The applicants' expert economics report ran to some 220 pages, with the highly detailed economic model in addition to that. Reports and submissions by third party experts were in addition to these.

    b. In addition to the expert economists retained by third parties and the applicants, the NZCC itself retained two third party economic experts (in addition to utilising their own internal economics branch).

    c. Ultimately, there were more than 10 expert, external economists who provided detailed input into the process, with a large number of other economists playing a supporting role for each of these leading economists.

36. If Air New Zealand was required to undertake a costly and lengthy NZCC assessment process for every authorisation and/ or re-authorisation, it would disincentivise Air New Zealand from pursuing alliances, and indeed disincentivise potential airline partners from entering into these with airlines of New Zealand. This would have a detrimental effect on New Zealand's international aviation connectivity and the development of New Zealand's civil aviation system.

Suggested amendments to the Part 9 regime

37. For the reasons set out above, Air New Zealand considers that the Minister of Transport is the most appropriate decision maker in relation to the authorisation of international airline cooperative agreements.

38. Air New Zealand supports the introduction of a formal process in the Bill for the review of international airline cooperative agreements by the Ministry of Transport. The process set out in the Bill largely reflects the current practice developed by the Ministry. However, we have set out below our comments and suggestions to ensure that the process provides all relevant parties with sufficient clarity and certainty.

Public interest test and criteria

39. We support a general public interest test for the authorisation of international airline agreements. We suggest making the public interest test explicit in section 189 (2) using wording paraphrased the Ministry's 2018 report into the Air New Zealand / Singapore Airlines alliance, namely:

    The Minister shall only grant an authorisation pursuant to subsection (1) if authorisation will be in the public interest of New Zealand.

40. We agree that the main and additional purposes in the Bill cover the matters that the Minister should consider in granting an authorisation. However, we are concerned that the requirement that the Minister "must" take into account all purposes of the Act encourages a checklist approach, applying equal weight to all purposes of the Act, including those which may not be particularly relevant to international airlines agreements.[6]

41. We recommend an explicit reference to a public interest criterion for authorisation, with a softer reference to the purposes of the Bill (which does not suggest all purposes must be considered). Even if the reference to purpose is removed entirely, the Minister will nevertheless be required to interpret the meaning of public interest in light of the purposes of the Bill, consistent with the Interpretation Act 1999.

List of what the Minister may authorise (section 189)

42. Section 189(1) largely captures those activities which would currently be subject to an exemption from the Bill. We suggest some minor changes to ensure section 189(1) can appropriately accommodate the different alliance structures we have observed in the industry, and to futureproof the process:

    a. change the end of the first sentence to "*authorise a contract, arrangement or understanding that includes 1 or more of the following*". While this broadens the scope of what can be authorised, ultimately the Minister can choose not to authorise an agreement on public interest grounds if it includes activities which stretch the purpose of the authorisation process;

    b. replace "revenue sharing" with "mechanisms for sharing of revenues and/or profit"; and

    c. remove "operational" from section 189(1)(h).

Powers to specify conditions, and revoke or vary an authorisation/conditions should not be automatic (section 192)

43. We agree with the introduction of formal powers for the Minister to vary, revoke or specify conditions in relation to authorisations, although an unfettered power is likely to create considerable uncertainty for airlines.

44. As alliances require significant investment to both implement and unwind, the power to vary or revoke an existing authorisation should be limited, require the Minister to consult with the parties to the authorised agreement and come into force only after a reasonable period of time to allow the parties to adjust to any order. The power to revoke or vary an existing authorisation should be limited to circumstances where there has been a material change in circumstances since the authorisation, that an authorisation was granted based on false/misleading information or a breach of a condition. We believe these encompass the reasons which might give rise to a need to revoke or vary, and would thus provide an appropriate balance between protecting the public interest and ensuring airlines have an appropriate level of certainty and transparency as to when such a process may be invoked.

45. The power to specify conditions should also be limited to those that "are necessary to secure the public interest arising from the proposed contract, arrangement or understanding".

46. Given that alliance arrangements are constantly evolving, the Ministry should also adopt a procedure to allow the Ministry to allow or approve minor variations to an authorised agreement. In the US, minor variations that are just minor technical understandings regarding day-to-day operations with no substantive significant do not need to be submitted to DOT for prior approval. We suggest a similar approach under the new process.

Commerce Act exemption (section 194)

47. Section 194 refers to "contracts, arrangements and understandings" being exempt from the Commerce Act, whereas section 189 states that authorisations cover a list of specified activities. To remove this inconsistency, and provided the minor amendment suggestion is adopted as set out above, a consistent reference to contracts, arrangements and understandings in both section 189 and section 194 provides greater certainty to the parties.

48. This will avoid the need to consider the agreement clause by clause, as the Ministry has done in the past. The reference to "contracts, arrangements or understandings" in section 189(1) will not expand the scope of activities covered by the authorisation power, as the broad discretion provided by the public interest will allow the Minster to decline to authorise alliance agreements that include activities that are not covered by the list set out in section 189(1).

49. Section 194 should be amended to allow for authorisation of contracts, arrangements or understandings that have already been entered into, although any exemption from the Commerce Act for these arrangements should only apply to activities undertaken after the Minister has authorised the arrangement. There are a number of instances where an existing legitimate activity may require an authorisation in order to prevent it breaching the Commerce Act, for example:

    a. the Commerce Act is amended, with the effect that conduct which was permissible would breach the amended Commerce Act;

    b. there is a change (or potential change) to the interpretation of the Commerce Act (whether due to a ruling of the Courts, the Commerce Commission, or an overseas regulator) such that an activity previously compliant is subsequently considered to raise competition issues; and

    c. some other legal or regulatory change, or a change to the Air Services Agreement between New Zealand and a country to which the arrangement applies.

50. Air New Zealand is not suggesting that any authorisation will apply retrospectively. Any exemption from the Commerce Act should only apply from the date of authorisation, and any activities undertaken under the alliance prior to the date of authorisation would remain subject to the Commerce Act. The change merely avoids an inefficient outcome whereby parties would need to terminate and re-enter into an agreement in order to seek an authorisation. Without the amendment, there would be an incentive to obtain authorisation for every arrangement to avoid any of the circumstances set out above.

Existing alliances

51. Given the ability of the Minister to revoke or amend an authorisation, we do not see the need for any complex transitional arrangements for existing alliance authorisations, other than the obvious need for new alliances, and renewals of existing alliances, to meet the amended process.

Interested person (section 186(2))

52. We do not think that the reference to interested person is required. This appears to have been lifted from the Commerce Act, although in Commerce Act authorisation procedures “interested persons” have particular rights, which are not mirrored in the Bill. The public notice of the application, the ability for the Minister to consult with any person and the requirement to provide public notice of a proposed decision is sufficient to ensure that all relevant views are received by the Minster.

Power to obtain information (section 187(3))

53. It is not clear whether the phrase "any person to whom the application relates" is meant to include parties that might be directly affected by the application and/or interested third parties. The section should also require the Minster to set a reasonable deadline for production of the information.

Regulation of Airport Companies

S4A: *"… every airport may….set such charges as it from time to time thinks fit…"*

54. Air New Zealand supports the Ministry's position that s4A should be repealed.

55. The introduction of 4A was to make clear that airports were able to act as normal commercial entities. This was important at the time, given the history. However, as the Ministry notes, retention may be interpreted as giving airport companies greater discretion when setting charges than they would otherwise have – which was not the intent of the provision.

56. Furthermore, and as the Ministry rightly notes, the Commerce Amendment Act 2018 has made the case for repeal of s4A even stronger.

57. In contrast to the case for its repeal, Air New Zealand does not believe a case has been made for its retention.

    a. During the 2014 consultation, submissions from the airports and the NZ Airports Association revealed the airports' understandable desire to maintain a privileged position whereby, unlike other natural monopolies, the charges they impose would be insulated from any meaningful judicial oversight.

    b. The airports' arguments centred around the fact that litigation is time consuming and expensive, and the outcome sometimes uncertain. The same logic could be applied in a myriad of circumstances – no doubt natural monopolies across New Zealand would also prefer their customers' recourse to the courts was similarly constrained. The potential costs and uncertainty (inherent in all litigation) should not be a reason for extinguishing potential legal rights customers may otherwise have.

    c. Comments made by WIAL in 2014 further reinforce the point. One of WIAL's concerns was that repealing s4A "will provide an avenue for argument that the position has reverted to the common law doctrine", which "requires a provider of essential services to supply services at fair and reasonable price". This reveals that, at least in the case of WIAL, not only is there a desire to truncate customers' rights of redress to the courts, the

reason for doing so is to remove the risk that the outcome is that an airport has to supply services at a fair and reasonable price.

58. The "price setting event" definition is no basis to retain s4A. Air New Zealand acknowledges that a "price setting event" in the Airport Services Input Methodologies Determination 2010 is defined as "a fixing or altering of price for a specified airport service by an airport under s 4A and s 4B of the Airport Authorities Act 1966…".

59. We do not believe that reference means the s4A power must be retained. A simple amendment to the definition to remove the reference to the AAA would suffice – Information Disclosure would continue to apply to the prices set by the airports, albeit no longer technically set pursuant to the AAA.

Dual till settings

60. Air New Zealand notes that the Bill does not seek to address the "dual till" settings that arise due to the limited scope of the "specified airport services"[9] subject to regulation under the Commerce Act. Air New Zealand considers that highlighting the issues that arise from dual till settings is important for any conversation about the best future state of aviation in New Zealand.

61. The definition of "Specified Airport Services" in the AAA includes *aircraft and freight activities*, *airfield activities*, and *specified passenger terminal activities*. These services are subject to the Information Disclosure regime under the Commerce Act. This definition excludes the provision of space for retail services, and does not include commercial leases for retail, operation of car parking, hotels, or any other non-aeronautical activity in the airport landholding. Income earned by Auckland, Wellington and Christchurch airport companies from these services and any other non-aeronautical service, is not regulated.

62. This means the airport's returns on its investment into these commercial services does not have to be justified via the Commerce Act regulatory regime. Therefore, airport companies can (and do) seek monopoly returns on these commercial investments. It also means that investment in these services is far more attractive to management and boards of specified airport companies than investment in aeronautical services which are regulated.

[9] Specified Airport services include aircraft and freight activities, airfield activities, and specified passenger terminal activities. The Commerce Act refers to the Airports Authorities Act for definitions of each of these. These definitions are found in Part 8 of the exposure draft CAB and are unchanged.

63. Airport companies who take advantage of these settings, in the extreme, would only make Investment in aeronautical assets once they are at absolute breaking point. Until then, the dual till settings incentivise the airport to invest in commercial services over regulated services. These settings are especially problematic where airport companies are publicly listed, and shareholder return becomes the predominant driver. This is evident in the case of AIAL which has driven shareholder returns arising from the commercial till while sweating aeronautical assets.

64. Auckland Airport is at an aeronautical infrastructure crisis point. Almost all of its infrastructure, from terminals to roading to runways requires a level of investment. This creates huge resilience issues at New Zealand's national gateway. When the need arises to invest in aeronautical assets, AIAL comes to airlines, and specifically to Air New Zealand, setting out costly requirements for investment and asking us to agree to fund requirements in price setting, or to accept further delay or reduced scope. AIAL is not an investment partner, rather a monopoly landlord.

65. Dual till settings create an economic incentive for AIAL to divert investment away from aeronautical infrastructure toward its commercial undertakings. This could be addressed by broadening the scope of services which are subject to regulation through a wider definition of "specified airport services" This could include retail, carparking and/or commercial lease earnings. This would ensure that the airport is subject to the right economic incentives when allocating resources between its aeronautical and commercial projects.

66. Air New Zealand is not blind to the disruption this change would have for AIAL's share price, and for investor confidence. However, we believe that left unchecked, dual till settings will continue to deliver poor outcomes for consumers, particularly where a share market listed company must be motivated to deliver increasing returns to shareholders. We are very open to discussion on this point, and on any other proposal designed to solve the infrastructure crisis at Auckland Airport which is Air New Zealand's home port, and the gateway to New Zealand.

Consultation on capital expenditure

67. Air New Zealand agrees with the proposal to retain the obligation on airports to consult on charges and certain capital expenditure. The pricing power afforded to airports under the current regulatory regime makes this a critical step in the process.

68. Air New Zealand is supportive of the levels of capex which are proposed to trigger consultation as set out in the exposure draft. We consider that the consultation processes underway at airports generally capture this level of capex in any case, and that this would not introduce significant change to current state.

69. Air New Zealand also believes these consultation obligations should persist in the event the price setting regulatory regime was changed, for example to negotiate/arbitrate.

70. Negotiate/arbitrate regulation is available in the Commerce Act. Regulated airports can now be moved from one form of regulation to another via an Order in Council process, as set out in the Commerce Act. While negotiate/arbitrate regulation is not in place for any other regulated monopoly group, Air New Zealand considers that establishing this form of regulation for airports would be simple and efficient.

71. The nature of negotiate/arbitrate is that it mirrors commercial negotiation. The pricing consultations of today would become content of commercial negotiation, against a background of published airport WACC, as already published annually by the Commerce Commission. Returns above regulated WACC could be achieved in return for delivery of infrastructure as agreed with airline customers. Failure of parties to reach agreement would be referred to a specialist arbitrator, and the decision of that arbitrator would be binding on all parties.

72. Negotiate/arbitrate regulation would certainly deliver better infrastructure outcomes at Auckland Airport in particular, as Auckland Airport urgently requires significant investment. AIAL as current managers of that monopoly asset should be duly incentivised to deliver that investment.

Deletion of Airport Authority Act provisions identified in Schedule 8 of the Civil Aviation Bill.

73. Air New Zealand supports the deletion of the provisions in Schedule 8. We agree that those provisions are now obsolete and/ or outdated in a modern commercial context. We also consider that certain of the provisions are very onerous for lessees and are inconsistent with normal commercial leasing practices and expectations.

74. The provisions we discuss below ensure that a potential lessee is significantly disadvantaged when entering into any lease negotiation with an airport authority. To retain these provisions would not be consistent with the aim of the Bill to strike a good balance between the rights of individuals and the security of New Zealand's aviation system.

75. The Bill provides that any leases granted must not affect the safe operation of aircraft on or over an aerodrome. The retention of the provisions discussed below are at odds with the stated intentions of the Bill. In particular we note that:

    a. Section 6(3) of the Act allows airport authorities to terminate a lease, at any time, if the property is required for "the purposes of the airport" (the **Purpose**). The potential scope of that termination right is unclear and (in any event) very wide. That means that

termination of a lease could be entirely unrelated to matters such as airport safety or efficiency. Termination might be for purely commercial considerations, such as the redevelopment of land for purposes unrelated to the airport operations.

b. Section 6(3) of the Act applies to leases, irrespective of whether it is expressly referred to in the lease, so that a lessee may be unaware that its lease could be terminated pursuant to the Act.

c. No compensation is payable to a lessee, when a lease is terminated under Section 6 of the Act, unless the lease provides for compensation to be payable for improvements effected by the lessee during the lease term. This is in contrast to the process set out in the Public Works Act 1981 (PWA) where there is a clear process to be followed to fairly compensate the lessee for the loss of its lease, including but not limited to being compensated for the improvements it has effected during the lease term. Whilst it is not uncommon for a landlord to have the ability to relocate tenants and/or terminate the lease, it is standard practice for the parties to negotiate the terms that will apply to that relocation and, in particular, the compensation that will be paid by the lessor.

76. In relation to Auckland Airport, we note that it has been determined [10] (in the context of the PWA) that the land described in the Auckland Airport Act 1987 is held for the Purpose (and so does not have to be offered back under the PWA). However, that case does not provide any real guidance as to how the Purpose would be interpreted in the context of section 6(3) of the Act. The court reached its conclusion, in relation to Auckland Airport and the offer back provisions in the PWA, on the basis that, in practical terms, there are not discrete areas of land within the airport precinct which can be separated out and offered back from time to time. This is quite different to the considerations that would be before the court when deciding whether the Purpose was relevant to the termination of a tenancy.

Airline Liability provisions

77. We note that the draft Bill introduces new regulation making powers which would enable the Minister to prescribe requirements for the disclosure of information about passenger rights regarding delayed, lost, damaged and/or delayed baggage. We acknowledge the trend for this disclosure in other jurisdictions, where such incidents occur with greater frequency.

[10] *McElroy v Auckland International Airport Ltd* [2009] NZCA 621 at [74].

78. We consider that given Air New Zealand's proactive care for customer baggage delay and loss, that there is currently little benefit in prescribing such disclosure. In the event that such disclosure was required, Air New Zealand would appreciate early consultation with the Ministry with respect to the data points, frequency and method of disclosure required, so that any disclosure can be systemised with little cost to industry.

Airways New Zealand

Enshrining the Airways monopoly will not deliver good outcomes

79. It is proposed in the Bill that the 1992 amendment to the Civil Aviation Act allowing the termination of Airways New Zealand's statutory monopoly provider status be repealed.

80. At this time, Airways New Zealand is functioning as a monopoly provider of air control services. Air New Zealand considers that it is not necessary or beneficial to enshrine the Airways monopoly.

81. In the past, we have seen interest from other providers in offering Airways services – it is not without doubt that new entrants could offer the same or similar services to those currently provided by Airways New Zealand. It is also possible that another provider could offer a sub-set of current Airways services for a more competitive price.

82. Given the changes the industry anticipates in participation in air services, with the increase of drone use and electrification of flight, Air New Zealand considers further certain monopoly services not to be in the interests of industry. To this end, we oppose the removal of the 1992 amendment.

External review of price and quality is necessary

83. In addition, Air New Zealand considers that light-handed regulation should be imposed on Airways New Zealand. While the Civil Aviation Authority currently reviews safety outcomes for Airways, there is no external review of price methodology or of service delivery.

84. Air New Zealand is concerned about Airways New Zealand's service provision. Airways New Zealand is not always able to provide air traffic control for hours or for locations we request. There are also occasions where scheduled air traffic control is not able to be provided as planned, causing flights to be re-routed or cancelled. Air New Zealand considers that reporting on service provision would provide necessary transparency and would allow a monitoring agency to observe service quality trends.

85. Like monopoly airports, Airways New Zealand is currently able to set charges as it wishes, following a consultation process. As with all monopoly consultation processes, airlines have no countervailing power to influence price methodology and resulting prices, and no ability to decline to pay.

86. In the last year, Air New Zealand has participated in consultation on changes to Airways charges which have resulted in significant price rises for Airways customers. Commencing in July 2019, the three year price period will see charges for Airways services increase by 21.4%.

87. Review of Airways prices would require a review of the price methodology, and the building blocks of prices set, including target return (WACC). Reviewing target return need not be complex, and could involve, for example, a comparison to regulated returns of electricity distribution companies, or of airports, as published by the Commerce Commission.

88. Air New Zealand urges that measures be taken to ensure the price and quality of Airways New Zealand services delivers best outcomes for consumers of these services. We consider there are two options for such controls:

    a. The New Zealand Commerce Commission could regulate the Airways monopoly. This could be achieved by imposing an individualised price path, or other option as available in the Commerce Act.

    b. Formalised governance oversight from the Ministry of Transport. This could include information disclosure reporting of service quality, and a price setting review process. We welcome the opportunity to discuss options for price/quality measures directly with the Ministry.

Air traffic control services benefits

89. In considered regulation of Airways New Zealand price and service, it will be necessary to consider who benefits from these services. As control of the skies changes to encompass changing technology, modern air traffic control will benefit other industries, and the New Zealand public. It is time to consider whether airlines should fund all capital investment required for changing technology, even where they may not be users of or providers of that technology.

Rising costs and the effect on demand

90. Air New Zealand is price taker for multiple monopoly services. Over the next three years, we will see price rises for all monopoly services charged to airlines.

91. By 2021 domestic Avsec charges will have increased by 30%, and international Avsec charges by 50%.

92. By 2021, Airways charges will rise by 21.4%, front loaded with a 12.7% increase for 2019 pricing.

93. Over the current 5 year price period to 2022, (PSE3) domestic landing charges at Auckland Airport will increase by almost 7% on 2017 charges. While international charges will reduce by 5% over the same period, the domestic increase has a more significant impact on Air New Zealand's business. It is particularly frustrating to be paying increased prices for domestic services when domestic terminal services provided by AIAL are constrained and deteriorating. Landing charges are expected to rise further in PSE4 and beyond as AIAL requires airlines to cover terminal and airfield investment now urgently required.

94. In addition, airport charges across all New Zealand ports have risen, are projected to rise over the next decade. All these monopoly charges will ultimately be passed to customers via increased ticket prices.

95. In Air New Zealand's experience, increases in ticket prices correlate to a similar reduction in demand. In the event that prices rise, we expect that fewer tickets will be sold. In this scenario, there are then fewer customers over whom costs may be spread, which in turn leads to further price rises.

96. Air New Zealand's ability to offer air connectivity in New Zealand, and to connect New Zealanders to the world, will be impacted by rising monopoly charges. We are particularly concerned about changes to ticket pricing as will impact regional routes, especially those routes which are only marginally commercially viable today. We urge the Ministry of Transport to be mindful of the impact on demand in reviewing any change to pricing, in particular for Avsec and Airways.

97. We encourage the Ministry to continue with the changes to controls for monopoly airports as set out in the Civil Aviation Bill. While changes such as the removal of s4A of the Airports Authorities Act will not practically impact price setting by airports, it is an important move away from absolute monopoly control by airport companies and will set the scene for better outcomes for both pricing and aviation infrastructure.

Aviation Security

98. Air New Zealand is generally supportive of the clarifications made with respect to the powers and operations of Avsec in the Bill. We offer the following comments for consideration:

Baggage searches and dangerous goods

99. The Bill sets out that Avsec may conduct hold stow baggage searches without the consent of the passenger for both domestic and international travel, where there is a risk to aviation safety or

security that requires immediate response. Air New Zealand considers that triggers for such a search should be set out explicitly; these would include inconclusive screening, actionable intelligence, or reasonable doubt.

100. The Bill sets out that Avsec officers may retain dangerous goods for the purposes of evidence. Air New Zealand is supportive of this position. We also consider that Avsec should then be responsible to return the retained DG to the customer, in the event that it is not required for evidential purposes. Air New Zealand considers this process should be set out in an associated Rule, rather than in primary legislation.

Aerodrome designations and security

101. The Bill proposes a new designation system for aerodromes. Currently described as security designated (SD) or non-SD, the Bill proposes three designations. These are tier 1 and tier 2 security designated, and non-security designated.

Variation of aerodrome configuration

102. The Bill provides for the Director, on application by an aerodrome operator for any proposed aerodrome layout within a security designated aerodrome, the power to allow any specified group of persons or member of the public to enter or remain in any security area.

103. Air New Zealand considers there are likely benefits for airport infrastructure in allowing alternative terminal configurations, up to and including sterile terminals. However, such changes bring consequences for pricing of services currently operated by Avsec.

104. Currently, Avsec services are paid for by airlines, as a cost per travelling passenger. The price methodology does not allow for persons not travelling to be screened. In the event that all visitors to an airport were screened, we estimate screening volumes could increase by 40-60% which would impact time to screen, equipment required for screening, human resources for screening, and in turn, charges for screening.

105. In advance of any approval for entirely sterile terminals, there must be a review of the Avsec price methodology. Aviation screening benefits all those present at airports, and indeed all New Zealanders as it is in the national interest that we operate a safe and resilient aviation system. Air New Zealand considers that other payers should join airlines in contributing to aviation security costs. We would be happy to discuss this with the Ministry directly.

Defence Force personnel as aviation security officers

106. The Bill proposes that subject to the Defence Act 1990, Defence Force personnel may act as aviation security officers (ASOs) for specified or limited purposes. Air New Zealand is supportive of this proposal.

107. Deployment of Defence Force personnel as aviation security officers would be particularly beneficial at Ohakea air base, in the rare event that a commercial airline landed there, and passengers were required to disembark and later board.

108. We note that the Defence Act Part 9 restricts the Defence Force from providing services in the event of an industrial dispute, except at the direction of the Minister. We would encourage an exception for this restriction in particular to be specified, as in the event of an industrial dispute impacting Avsec staff, the Defence Force would be required to conduct screening without delay. Absent this exemption, New Zealand might be faced with closure of its outbound air border.

Airlines as aviation security providers

109. The Bill proposes airlines as a third potential provider of aviation security services. Air New Zealand is generally supportive of this proposal. However, in the event that Air New Zealand was to offer aviation security services, we would like to be able to submit proposals to the Director for variation to matters such as scope of responsibility under Part 140, and/or to propose variation of equipment to be used.

110. It is likely that the ability to propose such variation would impact on the commercial viability of the offering. We submit that the ability to make such proposals with respect to aviation security services be made explicit, as this will encourage more consideration of the opportunity by airlines.

111. Air New Zealand considers that airlines should be able to sub-contract a supplier to carry out aviation security services. In this scenario the airline would retain responsibility for compliance. We consider allowing this option would allow airlines to be agile to deliver screening services more quickly, and with specifically trained staff, than to stand up a new business unit inside its own structure.

Changes to treatment of AIC holders

112. The Bill proposes changes to treatment of Airport Identity Card (AIC) holders, allowing for Avsec to demand and seize these cards. Air New Zealand submits that it be made clear why any seizure is actioned, and that Avsec notify the AIC holder's employer as soon as practicable in the event of seizure, as operational impact to loss of AIC is significant.

In Flight Security Officers

113. The Bill allows for In Flight Security Officers (IFSOs) to operate on board commercial aircraft to counter aircraft hijacking, and notes that if triggered, IFSOs may be provided by airlines or by government agencies.

114. Air New Zealand does not agree that airlines should provide IFSOs. In the event that these are triggered, it is appropriate they be a government-led force. Being government led provides appropriate liability, legal settings and cost burden. We also note that jurisdictions such as the United States are moving away from this model as screening technology improves.

Cyber Security

115. Cyber security is not currently mentioned in the Bill. Air New Zealand submits that the aviation security system should encompass cyber security. Threats to aviation can arise from breaches of cyber security, and we consider this to be an emerging concern globally.

116. ICAO annex 17, chapter 18, provides guidance for policy in this space. In addition, it may be appropriate for the Civil Aviation Act to link to other New Zealand legislation or regulation as may be extant.

Unruly passenger offences

117. In addition to the unruly passenger offences set out in the Bill, Air New Zealand is supportive of ratification of Montreal Protocol 14 (MP14). MP14 provides a more practical basis for dealing with unruly behaviour by extending the legal jurisdiction for such events to the territory in which the aircraft lands. States are now called to ratify MP14. New Zealand may wish to take this opportunity to ensure legislation drafted in the Bill aligns with MP14 as it sees fit, ratifying accordingly.