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Civil Aviation Bill
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CIVIL AVIATION BILL EXPOSURE DRAFT SUBMISSION

Introduction

1. Christchurch International Airport Limited (**CIAL**) appreciates the opportunity to comment on the Ministry of Transport's (**MOT**) Civil Aviation Bill exposure draft.

2. CIAL has assisted the New Zealand Airports Association (**NZ Airports**) with its review of the exposure draft, and supports the NZ Airports submission. This submission comments on specific topics of particular interest to CIAL.

3. In Part A of this submission we address the Civil Aviation Act 1990 (**CAA**)/Airport Authorities Act 1966 (**AAA**) review overall, and the proposed policy framework for scrutinising airline alliances, and other co-operative agreements between airlines who would otherwise compete. In Part B we address more briefly other issues that are raised by the review, and refer the MOT to the NZ Airports submission for more detail where appropriate.

PART A

General comments on the CAA / AAA review

4. We urge the MOT to be highly sensitive to the risk of unintended consequences arising from this review.

5. Some important starting points for this review are:

   5.1. the aviation sector is performing well. The current legislative framework is facilitating good outcomes. As explained in the NZ Airports submission, advice to Cabinet in 2016 was that the sector is flourishing. The aviation sector contributes 14% of New Zealand's tourism revenue, carries 17% of our exports and imports, and contributes 6.9% of GDP. In short, there is a lot that is not broken, where suggested fixes then give rise to risk.

5.2. CIAL and other airports in New Zealand are a key part of this flourishing sector. Airports make the long term infrastructure investments that spur airline competition and promote growth in the sector. The long term planning horizons of airports contribute to a sustainable and thriving tourism and travel sector, and their role as important regional gateways mean the economic and social benefits of tourism and travel are distributed throughout the regions of New Zealand. A visitor arrival into Christchurch Airport has an economic impact through the South Island more than an arrival at any other port. The economic impact of that contribution has been assessed as having a GDP value of approximately $2 billion. Airports have a strong multiplier effect on the economies they serve and it has been independently estimated that for every $1 CIAL grows the regions grow by $50. Additionally, up to 7000 people are employed across 250 companies on the Christchurch Airport campus and regional employment for approximately 60,000 people is supported across 15 regions as a consequence of activity at Christchurch Airport.

5.3. in relation to the larger airports, the current economic regulation of airports was reviewed and endorsed last year. The Regulatory Impact Statement for the Commerce Amendment Bill 2018 recorded there was no evidence the current economic regulation of airports was not working, and proposed no change to the regulation of airport pricing. The Commerce Act's Part 4 regime for the regulation of airports has recently been through a review and the rule book updated, including a refresh on how the Commerce Commission tracks and scrutinises airport returns.

5.4. in short, there is no economic regulation problem to solve, and we should be careful to avoid changes that alter the balance of economic regulation that Parliament and the Commerce Commission has only recently endorsed.

5.5. the sector is diverse. Of the 32 airports in New Zealand, 3 are regulated by the Commerce Commission, 5 have regular scheduled international services and 27 smaller regional airports face the reality of a single airline customer. This means the policy settings, and legislation, must be sensitive to the very different facts and incentives faced by airports around New Zealand. When considering changes to the CAA and AAA we need to be vigilant to have all airports in mind, rather than just the three larger airports.

6. With that important context in mind, we join NZ Airports in endorsing the Bill's intention to:

6.1. improve the safety and security of New Zealand's aviation system;

6.2. update the legislation where needed to respond to evolution in the industry;

6.3. improve the usability of the legislation.

7. For these reasons there is much in the exposure draft Bill that we support, and we do so in this submission. And while we do not repeat all of our endorsements of the exposure draft in this submission, any omissions should be read positively rather than negatively.

8. However there are also aspects of the exposure draft Bill, and commentary, that are disheartening. After such a long review process, over five years, it is disappointing to be responding to:

8.1. material proposals that fall well short of good policy, in particular:

(a) a framework that will not properly scrutinise and protect New Zealand from anticompetitive airline agreements;

(b) the removal of section 4A of the AAA without understanding the role it plays and the disruption that its removal will cause for large and small airports;

8.2. a number of changes that are simply asserted, without supporting evidence, or a cost benefit analysis, counterfactual analysis or regulatory impact assessment;

8.3. several changes where existing legislation is asserted to be obsolete or redundant, without further explanation, when in fact the legislation performs a useful role.

9. At the core of a number of these problems is a failure to reflect how airports, both large and small, operate and the context that they operate in. For a sector that contributes 6.9% of GDP, this is disappointing. We do feel these policy proposals, and rationale, have fallen well short of what is required before any changes can be made with confidence.

10. In this submission, and the NZ Airports submission, we explain that material changes are needed before the exposure draft Bill goes further. This means taking the policy package back to Cabinet.

11. While this will be another step for MOT in a lengthy review, it is consistent with MOT presenting stakeholders with an exposure draft Bill in good faith, and consistent with the advice to Cabinet that accompanied the exposure draft Bill. We understand Cabinet was briefed:[1]

> Given the lack of recent engagement with the sector, the significance of change, the complexity of the CAB, and the emergence of new policy proposals, I propose releasing an exposure draft of the CAB to ensure proper engagement with the aviation sector. The consultation will also be supported by other forms of direct engagement with the sector.
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> Following engagement with the aviation sector on the exposure draft of the CAB, if changes to these policy decisions are proposed, a report-back will be prepared for Cabinet, before an updated version of the CAB is prepared for introduction to Parliament.

12. We appreciate this approach from the Minister and MOT. There remain some serious issues to work through in the exposure draft Bill. To arrive at decisions that are both good and seen to be legitimate, the engagement on the current policy proposals and exposure draft will need to be fulsome and not rushed.

Airline alliances

The status quo

13. In New Zealand, airlines that the public would expect to compete for their custom can instead coordinate with the potential for a lessening of the number of routes available to travellers and the raising of the prices paid by New Zealanders. Airlines are the only service providers in the economy that can do so without first being scrutinised by the country's expert competition regulator. This has persisted for over three decades despite the importance of the aviation sector to the economy, described above.

14. Instead, applications to cooperate rather than compete are considered by MOT officials. Applications receive no expert competition scrutiny, and there is no expert, independent investigation into the facts and claims of the airlines. The process is sorely lacking in transparency. Evidence and the detail of the claims made by the airlines proposing to cooperate is often withheld from interested parties, the MOT does not regularly test its analysis by releasing a draft decision and reasoning, and the criteria against which a decision is made is often unclear. There has been no evidence of an attempt to look at the cumulative impact of the series of cooperative agreements that airlines have struck.

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[1] Civil Aviation Bill: Confirmation of Key Policy Decisions, paper to the Cabinet Economic Development Committee (draft), attached to Ministerial Briefing April 2019; paragraphs 14 and 15

15. CIAL and other airports have been raising these issues for a number of years. The ability of airlines in New Zealand to avoid the competition regulator has long become an anachronism. The current process for granting immunity to otherwise anti-competitive arrangements compares unfavourably against modern competition practice to the extent legitimacy of decisions made by MOT and Ministers to endorse collusive agreements is undermined. Christchurch Airport is the most powerful gateway for the dispersal in the South Island of the economic and social benefits of tourism. The cumulative result of these alliances has been the gradual narrowing of the economic footprint of tourism in the South Island.

Problems identified to the Minister

16. As part of this review, in February this year MOT officials described to the Minister several problems with the status quo. We agree with officials that change is needed to address the following problems:[2]

    16.1. The statutory criteria for assessing applications for airline co-operative agreements needs to be appropriate and clear;

    16.2. The process needs to be transparent and include consultation;

    16.3. There should be the ability to impose conditions and time limits;

    16.4. There should be the ability to enforce authorisations or undertakings;

    16.5. There should be the ability to revoke authorisations.

17. The problems raised with the Minister relate to the decision-making criteria, process and enforcement. These are important improvements and as noted above, we support changes being made in these areas.

Central problem not identified to the Minister

18. However, the central problem with the status quo was not raised with the Minister. The heart of the issue is that matters of competition analysis, with the potential to affect numerous New Zealand travellers and businesses, are currently decided by the Minister of Transport on advice from the MOT, when those institutions are not set up with:

    18.1. subject matter expertise. The MOT does not have, and to be fair is not intended to have, competition experts skilled and experienced in competition analysis of markets. This includes assessing competition impacts in aero and non-aeronautical markets, and assessing claimed benefits and detriments in both quantitative and qualitative ways. MOT is set up to have expertise in transport policy, and it should not be expected to have expertise in competition policy and competition analysis of markets to the degree required when making assessments that can change the structure of New Zealand's aviation services; or

    18.2. functional expertise. The officials at MOT that currently deal with these applications are policy officials. Again they do not have, and are not intended to have, the investigative and evidence gathering experience and resources required to support a proper competition analysis of a potentially collusive proposal, especially one that is promoted by well-resourced major corporates.

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[2] Civil Aviation Bill: Economic Issues, briefing to the Minister of Transport, 29 February 2019 (Ministerial Briefing February 2019); paragraph 20

The current proposal

19. The consultation document and exposure draft Bill summarise the problem to be solved, and the proposed solution, in the following way:

    19.1. the current statutory criteria do not explicitly allow for a full consideration of the impacts of the arrangements, the legislation does not allow for a transparent process or consultation with interested parties and it is unclear whether conditions can be imposed;

    19.2. given the role these alliances play in the regulation of provision of international service, the government considers a sector-specific regime remains appropriate; and so

    19.3. the Bill updates the regime to formalise a consultation process and to specify that in determining if an airline cooperation agreement is in the public interest the Minister must take into account the main and additional purposes of the Act.

Changes needed

20. This falls short in two very important areas.

21. First, the policy proposal misses the fundamental concern that the application of competition expertise, and investigative expertise, is not provided for.

22. The current policy proposal does not address the fundamental problem that MOT does not have, and is not expected to have, the subject matter expertise and functional expertise needed to properly assess whether applications by airlines to cooperate are lessening competition in markets to the detriment of New Zealand. This goes straight to concerns about the correctness and legitimacy of decisions being made, and public confidence in the framework overall.

23. If the problem analysis is limited to decision-making criteria, process and enforcement, then the issues of institutional expertise, capability and resourcing are missed. And yet, the key question is the institutional one.

24. Once this aspect of the problem definition is on the table, it becomes clear that any policy proposal to address that problem has to allow for New Zealand's expert competition regulator to play a role.

25. Second, the current policy proposal fails on its own terms to put in place statutory criteria that require a full consideration of the impact of any application to cooperate.

26. The proposal to require the MOT and the Minister to refer to the new purpose statement, as a way of introducing better criteria, overlooks the fact that the new purpose statement has nothing that speaks to competition concerns and economic regulation. The new purpose statement covers some important ground in the sector, unrelated to economic regulation. But it is simply incorrect to say that the new purpose statement provides specific criteria against which to assess the competition and economic impacts of an application by airlines to cooperate.

27. For this reason we agree with the submission by NZ Airports that airline applications to cooperate should be assessed against the criteria that is set in the Commerce Act (and against which all other potentially collusive agreements in the economy are tested). That is:

    27.1. a first stage inquiry as to whether the proposed agreement will have or be likely to have the effect of substantially lessening competition in a market or whether the proposed agreement contains a cartel provision; and

27.2. if that is found, a second stage as to whether the proposal will generate benefits to the public, over and above what would happen in the future absent the agreement, that outweigh the costs that flow for consumers from a lessening of competition.

28. In short, as the policy proposal is currently presented, the job is being given to officials who are not best placed or equipped to do it nor expected to be able to do it, to assess applications to enter into potentially collusive arrangements against a statutory purpose statement that in fact doesn't set a guiding test. Adding process steps will not solve for these fundamental flaws.

Official advice

29. We note that officials advised the Minister at the start of this year that the exemption for airlines to avoid the Commerce Commission be removed from the Civil Aviation Act, and that competition issues in international aviation be considered by the Commerce Commission applying the tests in the Commerce Act, as is the case for all other service providers in the economy.[3]

30. We support this advice from officials.

Objections to change overstated

31. Airlines have consistently raised objections to having their proposals to cooperate scrutinised by the country's expert competition regulator. We agree with the advice that officials have given this government on how to assess these objections by the airlines.

32. We agree with officials that:

32.1. while the cost to government and to affected parties may be higher under a Commerce Act regime, much of this is a consequence of increased robustness and transparency. Some of this cost would also occur under an improved Civil Aviation Act regime;[4]

32.2. the risk of "chilled activity" raised by the airlines is reduced in a regime that appropriately takes account of all relevant costs and benefits, and needs to be balanced against the risk, not highlighted by the airlines, of a regime that inappropriately authorises activity that is not to the benefit of consumers;[5]

32.3. the details of air service agreements have become much less relevant when assessing proposals by airlines to coordinate their activities. In the 1980s when the Commerce Act was passed and the exemption provided to airlines, New Zealand had fewer than 20 air services agreements and all of them contained restrictions on the number of services, airlines, or routing options. Now New Zealand has more than 80 air service agreements and more than half of them contain no restrictions. MOT officials, who are best placed to assess, advise that the need to understand air services arrangements (which in many cases are not all that complex) or likely future changes (when open skies arrangements are inherently future proofed) is less fundamental to alliance decisions than it has been in the past. In any case, MOT officials observe they would be available to provide advice to the Commerce Commission when necessary;[6]

32.4. the Commerce Commission does consider the full range of benefits of an alliance, and is not overly focused on quantifiable benefits and detriments to the detriment of qualitative, difficult to quantify considerations. A number of Commerce Commission

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3 Ministerial Briefing February 2019; paragraph 59

4 Ministerial Briefing February 2019; paragraph 33

5 Ministerial Briefing February 2019; paragraph 32

6 Ministerial Briefing February 2019; paragraphs 54 to 56; see also MOT: Aide Memoire to the Minister of Transport, 28 January 2019; paragraphs 15 to 18

determinations and subsequent court decisions, as recently as 2016 and 2017, have affirmed the full range of matters the Commerce Commission can consider, including non-economic factors, and the Commerce Commission's primary function in exercising a qualitative judgment in reaching its final decision;[7]

32.5. this includes the ability to take into account broader foreign policy considerations to any decision to approve or decline an application by airlines to collude. Officials advise these are only minor considerations in the context of broader foreign relationships, that officials can and have in past made submissions to the Commerce Commission where necessary to ensure it has the full range of considerations in front of it, and the Commerce Commission does have the ability to consider the full range of considerations.[8]

Moving forward

33. The time has come to make this change, it is well overdue. MOT officials have comprehensively dealt with the objections by airlines to being treated the same as other participants in the economy. It is no longer credible for this important function in this important sector of the economy to be performed by an institution that is not best equipped to do the job, and in any case does not have a test it can apply. Co-operative agreements in the aviation sector should be scrutinised by the Commerce Commission applying credible competition and public benefit tests, as is the case with all other sectors of the economy.

34. The MOT will continue to play to its strengths. As noted above, New Zealand now has more than 80 air service agreements, with more than half of them containing no restrictions. This success by the MOT underscores how the role has shifted in emphasis over the decades from opening up the skies to a focus on maintaining open skies, and the MOT has a valuable role to play in continuing to keep the skies open.

35. High level references to "sector considerations" or "aero-political considerations" should not be allowed to carry the day in a policy process. New Zealand consumers and businesses who are being asked to potentially carry the burden of a detrimental alliance agreement have a right to know what that means. Retaining the option to sign an airline agreement that otherwise doesn't stack up in competition and public benefit terms to score a point in a foreign relationship is unlikely to outweigh the impact on New Zealand travellers, businesses and the tourism sector. Those arguing for an exemption from competition scrutiny should be required to present a compelling cost benefit analysis for the exemption. Absent the case being made, and in the last decade no such case has, the exemption should not be carried over by this review.

Possible compromise

36. A fall back, and distant second best option is to introduce expert competition scrutiny and a proper competition test by another route.

37. Competition expertise could be introduced into the process by the Commerce Commission formally advising the Minister of Transport on the competition and public benefits analysis of any proposal to collude, as assessed against the Commerce Act tests. This advice would be public, and the Minister would be required to take this into account when making a decision.

38. A reference point could be the institutional arrangements in Australia. In Australia there are two tracks:

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[7] Ministerial Briefing February 2019; paragraphs 42 to 50; 57

[8] Ministerial Briefing February 2019; paragraph 36; see also MOT: A de Memoire to the Minister of Transport, 28 January 2019; paragraphs 19 to 24

38.1. Decisions on proposals by airlines to enter an alliance are made by the ACCC, Australia's expert competition regulator. No exemption is available.

38.2. Decisions on proposals to enter a code share agreement are made by the International Air Services Commission (**IASC**). Competition concerns are addressed by having an MOU between the IASC and the ACCC, whereby the IASC commits to consulting with the ACCC and the ACCC provides expert competition advice for the IASC to consider when making its decision.

39. An example of how the IASC/ACCC dynamic works is detailed in Appendix A to this submission.

PART B

Section 4A – enforceability of airports' charges

Current proposal

40. The exposure draft Bill proposes to remove section 4A of the AAA, which provides that prices set by airports following consultation with substantial customers are enforceable.

41. The principal reason given for removing section 4A is that it may be interpreted as giving airport companies greater discretion when setting charges than they would otherwise have.

42. The assessment in the consultation paper is that making this change has no downsides, as a specific provision in the AAA is not required to enable airport companies to set charges.

Analysis of the problem suggested

43. CIAL disagrees with the problem analysis presented in the consultation document.

44. Section 4A has been in the AAA since 1998[9]. At no time has it been interpreted as giving airport companies greater discretion when setting charges that they would otherwise have. The MOT or airlines have not identified any instance where this has happened.

45. Moreover, there is no risk of this occurring. Section 4A is only one part of the economic framework for major airports. Section 4B requires consultation on any pricing proposal, and airlines are ready to inform airports as to the proper pricing objective. This consultation is a major exercise during which airlines can have a significant influence on pricing proposals. We have relatively recently been through a major exercise consulting on our prices for the period 1 July 2017 to 30 June 2022 (in the Commerce Commission's Part 4 context, referred to as PSE3). An overview of our consultation process is in Appendix B.

46. The importance of the consultation process, the rigour it introduces into price setting, and influence that airlines have, has been recognised for some time. In 2002 the Commerce Commission observed:[10]

> Landing charges can only be set after consultation with substantial customers. In addition to having to consult over charges, airport companies must also consult on all major capital expenditure decisions. This is often tied up with the setting of prices, as the key debate is generally how and when the costs of investment will be recovered.
>
> The consultation process required before charges are set typically last one-and-a-half to two years, which delays the implementation of any price increase, and imposes costs that may make an airport think twice before proposing changes in the first place. However, under the Airport Authorities Act, airports are required to consult on charges every five years, regardless of whether they increase (or decrease) charges.

47. And in 1992 the High Court observed:[11]

> Airport companies are to be discouraged from overpricing through abuse of monopolistic competition by a compulsory opportunity for vigorous and informed objection by powerful airline interests, and the political and consumer consequences which may follow. That "consultation"

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9 Airport Author ties Amendment Act 1997, s 4(1).

10 Final Report: Part IV Inquiry into Airfield Activ ties at Auckland, Wellington, and Christchurch International Airports (1 August 2002); paragraphs 3.113 and 3.114

11 *Air New Zealand v Wellington International Airport Limited* HC Wellington 6 January 1992, at paragraph 9

obligation is to be interpreted and promoted so as to permit the full exercise of such countervailing power.

48. All pricing decisions, and the process used by an airport to consult on its prices, are scrutinised by New Zealand's expert regulator, the Commerce Commission, under Part 4 of the Commerce Act. The Commerce Commission applies its rule book, the Input Methodologies, and reports publicly whenever it considers an airport is targeting pricing and returns higher than they should be. Experience shows that when the Commerce Commission makes such a report, airports adjust in response to the feedback.

49. In short, it is unsupported assertion to say there is a risk that section 4A may be interpreted as giving airport companies greater discretion when setting charges than they would otherwise have. It has not been interpreted that way in the past, and there is a wrap-around regulatory framework which prevents that interpretation in the future.

50. In fact, section 4A has been interpreted the way it is intended: which is that prices are enforceable by an airport following consultation, as an alternative to prices being enforceable via an agreement with airlines. Section 4A says nothing about the level of prices, but it plays a central role in the process by which prices become enforceable.

Analysis of the change suggested

51. CIAL disagrees with the assessment that removing section 4A would be costless. In fact, it would be hugely disruptive for the sector, and given the consistent warnings from airports, the burden of this would ultimately by borne by consumers and communities.

52. The essential rationale for section 4A is that it is bad policy to rely on agreements between airports and airlines to generate enforceable prices. This is because:

    52.1. airport prices reflect the objectives of airports to invest in facilities that maintain and increase airline competition, and facilitate growth in the long term. Those objectives, and those prices, align with the long term interests of consumers. However individual airlines, and especially incumbent airlines, have no incentive to agree to those prices. This need not be a matter of bad faith, it is simply a function of the fact that an individual airline does not have an incentive to pay for facilities to maintain and increase airline competition, and it has shorter operating pressures and horizons than an airport;

    52.2. moreover, airlines cannot negotiate prices as a cartel, and in fact have different preferences on pricing depending on their commercial position at the time. This was CIAL's experience with its recent pricing for the 2017 to 2022 pricing period, where major airline customers represented by BARNZ on the one hand and Air New Zealand on the other had diametrically opposed views on the price structure and the relativity between domestic and international prices. So attempts to agree price would be a series of bilateral discussions across several airlines, and not coherent;

    52.3. as a consequence of these misaligned incentives between the long term investment cycle of an airport to promote competition and capacity growth and the shorter term operating cycle of an airline, and the different business models and incentives between airlines, negotiation on prices will result in either no agreement on price, or compromises on price that compromise airport investment, airline competition and future growth. Airports will find it much harder to commit to long term infrastructure projects in this environment. These predictable outcomes are to the long term detriment of consumers;

    52.4. for smaller airports servicing the regions in New Zealand, with only one airline customer, there is a further consideration, which is that to rely on agreements to generate enforceable prices makes them vulnerable to pressure from their only airline customer

to operate uncommercially and underinvest for the future. Again this is to the detriment of the long term interests of consumers.

53. It is disappointing to be responding to a superficial level of analysis that airports are companies, and companies don't need anything beyond the Companies Act in order to operate commercially. This fails to engage with how the sector works, and why section 4A was introduced, described above.

54. Most companies in the economy operate in a market where the proper response to a customer refusing to enter into a contract or pay its invoices is to refuse service. This is a dynamic that the aviation sector has avoided to date by relying on the regulatory balance of section 4A, the consultation requirements under section 4B, and the regulatory oversight by the Commerce Commission of prices. As a consequence, long term infrastructure investments have been made, commercial relationships have been stable, and the sector has flourished, and making a significant contribution to GDP and regional economic and social wellbeing.

55. It is not unusual for the standard Companies Act framework to be supplemented in this way. Many sectors have more than simply the Companies Act framework to guide the incentives of participants and regulate their relationships. Examples include ports, the electricity sector, the telecommunications sector, the gas pipeline sector, CCOs, and SOEs. We urge the MOT to engage with the features of our sector.

The status quo

56. Section 4A, section 4B and the supervision by the Commerce Commission under Part 4 of the Commerce Act work together to strike a balance whereby prices take into account the views of airline customers (section 4B), they are measured by the expert regulator (Commerce Act Part 4), and they are enforceable (section 4A). The public interest in getting the price level correct is served by requiring consultation with major airline customers and requiring scrutiny by the expert regulator; the public interest in having enforceable prices and an efficient functioning of commercial relationships is served by section 4A.

57. The argument being made for change confuses these separate objectives. While the change being proposed is to how we make prices enforceable, the objective of those promoting change is to lower the price level. Yet there has been no grappling with the fact that the price level is actively monitored by the Commerce Commission. The objective, seen clearly, is to lower price below the level the Commerce Commission considers is right to support long term investment and competition in the sector.

58. The MOT has not provided any analysis showing that the public interest in getting the price level correct is not being served by requiring consultation with major airline customers and requiring scrutiny by the expert regulator. In fact, the Commerce Commission recently reported that it is. And the MOT has not addressed in any detail the public interest in having enforceable prices and an efficient functioning of commercial relationships, and suggested for testing how that would happen absent section 4A.

59. CIAL submits it is untenable for the MOT to advance these changes without doing this work and consulting on it.

Possible wording change

60. As described in the NZ Airports submission, we would be open to supporting an adjustment to the wording of section 4A, if that addressed concerns that the current wording does not set the correct tone.

61. The job that section 4A must do is provide that where an airport has complied with its consultation obligations, the resulting prices are enforceable. The specific wording of "as they see fit" is not essential to this task.

62. We would open to supporting an amendment that removed the wording "as they see fit", but still retained the certainty for the sector that following consultation prices will be enforceable.

Separate purpose for economic regulation

Current proposal

63. The exposure draft Bill proposes to consolidate the CAA and AAA. The stated policy objective is to make the legislation more accessible and remove the risk of inconsistency between two Acts.

Our concerns

64. This is an example of a change being promoted by assertion. The MOT has not attempted to test or demonstrate:

    64.1. why moving from two pieces of legislation to one increases the accessibility of legislation. Both Acts are currently available online. All participants in the sector are aware of them. The AAA in particular is quite short and readily understandable as a standalone Act. It is not obvious that joining these two Acts into one longer consolidated Act makes the law more accessible or comprehensible.

    64.2. why moving to one longer Act is necessary in order to address the consistency objective. As noted above, both Acts are familiar in the sector and the AAA is short. Any inconsistency between the two Acts would be readily identifiable. Despite the two Acts coexisting for 29 years, MOT has not identified any inconsistency, and certainly no inconsistency that could only be addressed by merging the two Acts into a single longer Act. In any event, it is not obvious that longer Acts reduce the risk of inconsistency.

65. We ask that MOT recognise the unintended consequences of bringing the AAA provisions into the Civil Aviation Act.

66. As discussed in the section above, the provisions of the AAA are an important part of the economic regulation of airports (in conjunction with Part 4 of the Commerce Act). However it is proposed that the AAA provisions will now appear in the new Act governed by a new purpose statement that does not include any elements appropriate to economic regulation.

67. To address this, we suggest that the new Civil Aviation Bill include a purpose statement for the parts of the new Act that addresses the economic regulation of airports. The use of purpose statements for parts of legislation is a common device.

68. The NZ Airports submission proposes specific purpose statements for Part 8 of the new Act that contains the economic regulation provisions, and for Subpart 2 of Part 7 that deals with international air carriage competition.

Termination of leases

Current proposal

69. The exposure draft Bill would remove the power for airports to terminate leases, which is currently provided for in sections 6(3) and (4) of the AAA.

Our concerns

70. CIAL supports the NZ Airports submission opposing this change, and wishes to note both process and substantive concerns.

71. In relation to process, no policy explanation is given for the removal of this existing power. Sections 6(3) and (4) are included in the list of "obsolete" provisions without explanation. This is despite MOT being aware from previous consultations that this is a topic of significant interest for airports.

72. This is disappointing, coming as it does at the latter stages of a review that has already been underway for five years. The MOT has had time to properly present the case for all changes proposed in the exposure draft Bill. By choosing not to, and instead simply including an item known to be of significant interest to airports in a list of "obsolete" provisions, the MOT materially undermines the quality of the review.

73. These process concerns have an impact on the substantive engagement also. By not offering up a rationale, MOT puts stakeholders in a position of having to speculate as to the reasoning that needs responding to.

74. CIAL's substantive concerns are that the existing power in sections 6(3) and (4) is relevant and used not obsolete and it is appropriate.

75. The sections 6(3) and (4) power is relevant and relied upon in several ways. First, it forms the context for direct negotiations with tenants.

Christchurch Airport RESA Extension

76. CIAL recently relied upon the sections 6(3) and (4) power in 2011. The cause for this was a civil aviation requirement that CIAL increase its runway end safety areas on Runway 11/29. This in turn required CIAL to secure an early termination of a lease with Harewood Golf Club. CIAL had previously acquired Harewood Golf Club with a view to its land being required for airport purposes in the medium to long term. CIAL then leased the golf club back to Harewood Golf Course but reserved its right to terminate the lease under the AAA.

77. Although CIAL did not ultimately have to give formal termination notice, it was able to secure a termination date by mutual consent in full knowledge by both parties that the right to serve formal notice existed if required. In the absence of any such right CIAL would have had limited ability to require the tenant to surrender its lease of the land for this purpose.

South Island Parcel Freight Distribution Centre

78. A further scenario that demonstrates the potential complexities in aligning the termination of lease with operational requirements arose in 2015. Consistent with its master planning since the 1990's, CIAL wished to contemporaneously relocate its major freight operators to new purpose built parcel freight warehouse facilities and a new freight apron.

79. The construction of those facilities, each in excess of 15,000m², required not just relocating those operators but also the resolution of Public Works Act (PWA) proceedings in relation to the widening of SH1 involving NZTA, CIAL and an affected nearby landowner, and Local Government Act (LGA) proceedings in relation to the stopping of Avonhead Road. In total, no less than six sets of proceedings were involved. In this instance each of the leases had expired and were able to be held over without the need to rely on termination provisions. However if multi-party negotiations had been required in the window of time available then in all likelihood the opportunity to create what is now the predominant South Island parcel freight distribution centre would have been missed.

Security Screening Requirements

80. On a smaller scale the ability to relocate tenancies within the terminal building, again for operational efficiency or to respond to changes such as the potential imposition by the Director General of new screening requirements, is another example where this power is and will be used.

81. Second, the sections 6(3) and (4) power is relevant because airport management have sections 6(3) and (4) in mind when they make decisions about how to maximise the use of a modern airport campus.

82. When it comes to property management and airport planning, airports are solving for a number of objectives at once: articulating the major land use and infrastructure components required to cater for forecast demand and user requirements, committing to commercial leasing arrangements on areas of the campus not immediately expected to be used for aeronautical purposes; and allowing for the reality that the needs of the aeronautical business can change, sometimes in relatively sudden and material ways.

83. Sections 6(3) and (4) create a backdrop against which all parties can take a long term view and acknowledge that change may need to be made if the aeronautical needs of the business change. Sections 6(3) and (4) allow Master Planning documents to provide a long-term land use and infrastructure planning framework for delivery of the airport's strategic objectives. An example of this is the Christchurch Airport Master Plan[12] which was released in 2017 and provides a guide for future development, allowing the Airport to grow activity in a flexible, efficient, safe and sustainable manner that continues to support the region and New Zealand as a whole.

84. Leases entered into over buildings and/or land at airports also tend to be long term in nature as tenants and CIAL can take a long term view, contingent on sections 6(3) and (4) covering the possibility of changes in the aeronautical business. CIAL carried out a review of its leases as part of the Commerce Commission review of its 2017 pricing decision. That review highlighted the average lease term (including renewals) of its regulated lease portfolio was 26 years with the longest lease term being in excess of 50 years.

85. For airports to meet the interests of consumers in long term planning at the airport, the long term perspective of tenants, the inevitable changes in aeronautical needs that arise, and the obligations on airports under section 6(1) to lease in a way that is consistent with the safe and efficient operation of the airport, sections 6(3) and (4) are an important part of the balance in the legal framework. Without sections 6(3) and (4), airports would have to take a very conservative approach to leasing.

86. Third, the existence of the sections 6(3) and (4) power plays an important role in the PWA and local planning contexts, reinforcing the fact that use of land on the airport campus for commercial purposes is secondary to the long term purpose for which the land is held. For example, it is assumed in CIAL's planning regime for the Specific Purpose (Airport) Zone ("SPAZ") that CIAL has the capability to terminate leases if required. By proposing to delete sections 6(3) and (4), the MOT is proposing to disturb a legal balance that has long existed and been relied upon in these related areas of airport operation, and, at worst, could revive questions about land held and used at airports around the country.

87. In summary, the role played by sections 6(3) and (4) is appropriate. The possibility of the changing operational needs of the airport conflicting with a long term lease for commercial purposes has to be anticipated, and it is assumed in related areas of airport operation.

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12 https://www.christchurchairport.co.nz/media/880032/christchurch_airport_2040.pdf

88. Our experience with the requirement to extend our RESA is a good example of these expectations. This is most efficiently done by having the airport and commercial parties negotiate lease terms against a clear legislative backdrop where arrangements can be terminated in the interests of airport operations. In the absence of a right to terminate a party to a lease would simply be able to remain in occupation of the buildings and/or land, irrespective of whether they were able to obtain a market or otherwise price and simply be difficult.

89. Airports have an interest in maintaining a reputation for being a stable and credible landlord. They will not use the sections 6(3) and (4) capriciously (and that has not been suggested). In practice the sections 6(3) and (4) power acts to facilitate a negotiated termination and avoid hold up.

Long term leases not treated as subdivisions

Current proposal

90. The exposure draft Bill and consultation documents propose to delete section 6(8) of the AAA on the basis that it is obsolete. Again, no explanation is given for that view.

Our concerns

91. CIAL supports the NZ Airports submission opposing these changes, for the reasons described in that submission. In brief:

    91.1. section 6(8) is not obsolete;

    91.2. long term leases are a very real feature of an airport environment. As explained in the NZ Airports submission, section 6(8) currently performs an important role ensuring that long term leases on the airport campus are not treated as subdivisions under the RMA, which means the detailed requirements of the RMA aimed at ordinary subdivisions (and long term leases otherwise deemed by the RMA to be de facto subdivisions) do not apply;

    91.3. these are deliberate policy decisions reached after a full analysis and consultation in the planning and RMA setting. The existing policy settings recognise how airports operate, how different planning on an airport campus is different from a subdivision, and how the general rules relevant to subdivisions are inappropriate;

    91.4. the MOT has not provided the policy work to support a proposal to reverse these policy settings in the sector and deter long term leases on airport campuses, nor has the MOT explained its position on the disruption that would flow under the RMA, LGA and PWA from this change.

92. We support the NZ Airports submission that section 6(8) of the AAA be retained.

Bylaw making powers

93. CIAL supports the NZ Airports submission on these changes, for the reasons described in that submission. In brief:

    93.1. most of the bylaw making powers in the AAA are relevant and used by airports. CIAL supports the proposal to retain these bylaw making powers;

    93.2. a small number of the bylaw making powers in the AAA are redundant and we support the proposal to remove them. Specifically we support the removal of section 9(1)(h), (ia) and (j); however

93.3. we do not support the removal of section 9(1)(g) and (i) as proposed in the exposure draft Bill and consultation document; and

93.4. we do not support the removal of section 9(7).

94. The removal of section 9(1)(g) would have unintended consequences for existing warrants granted to ground transport enforcement officers under the Land Transport Act 1998 (LTA), and the removal of section 9(1)(i) is a potentially relevant mechanism for airports to give effect to charges.

95. As explained in the NZ Airports submission, the consequences of removing section 9(7) are that airports relying on existing traffic regulation bylaws to manage traffic on their campus may no longer be able to enforce the bylaws.

96. This would not be a small change. On CIAL's airport campus there are approximately 30,000 vehicle movements per day. There are established practices to manage the safety and operational efficiency considerations with this daily traffic flow. CIAL owns the majority of the roads on the Christchurch Airport campus and is a "road controlling authority" under the LTA, possessed of similar powers to a local authority. Reflecting this its ground transport enforcement officers are granted warrants by the Commissioner of Police for the purposes of enforcing specified provisions of the LTA. There are personnel and systems focused on this very practical feature of safety and security in the landside airport environment.

97. From what we can understand from the consultation document, removing the legal foundation for this part of the airport safety and security system is an unintended outcome. Once it is appreciated that section 9(7) is relevant and being used – is not redundant or obsolete – then no case has been made for its removal.

98. We support the NZ Airport's submission for the retention of section 9(7).

Security

Current proposal

99. The exposure draft Bill and the consultation document propose updating the security framework, including the governance and powers of Avsec, in various ways.

100. The overall objective of the changes is to bring greater clarity to the powers and role of Avsec, and update the balance between security imperatives, NZBORA rights, and the efficient flow of people and goods through an airport.

Specific comments

101. CIAL supports the submission made by NZ Airports. In summary, CIAL supports the following changes proposed in the exposure draft Bill:

101.1. clarifying the search and seizure powers of Avsec officers;

101.2. clarifying that Avsec can search suspicious items of hold baggage without passenger consent;

101.3. clarifying Avsec's powers to deal with dangerous goods;

101.4. providing for alternative airport terminal configurations;

101.5. a new security designation framework for aerodromes. Note that, as explained in the NZ Airports submission, it is currently not clear how the Minister will classify an airport as either Tier 1 or Tier 2, and it is not clear how security will be provided at Tier 2 airports.

102. We suggest that further policy work is needed on the following change proposals:

102.1. Avsec's institutional arrangements. As explained in the NZ Airports submission, the current proposal to replace the requirement for Avsec to hold an aviation document with an obligation to meet requirements prescribed in rules will not resolve the conflict of interest issue identified. A different solution is required;

102.2. the contestability of security services. The existing framework allows for the possibility of Avsec or the aerodrome operator to provide security services, to which the exposure draft Bill will add airlines. We support the expansion of potential service providers. However the exposure draft Bill currently anticipates that before an airline becomes the provider at an aerodrome the Minister should consult with the Director and Avsec. The aerodrome operator should also be consulted before any change is made.

General comments

103. CIAL supports the focus on improving the security framework, and as noted above supports a lot of the specific changes proposed in the exposure draft Bill.

104. As a general comment, the focus on making improvements to the current framework has left some important big picture questions unanswered or uncertain. These include:

104.1. what we mean by "aviation security services". As discussed in the NZ Airports submission this is left undefined, and has generated uncertainty in the sector about what security activities Avsec will do, and what security activities airports must make other provision for;

104.2. this is especially so in the landside environment, which in a modern airport can include a large campus containing many commercial enterprises and people. In CIAL's case, our campus includes:

(a) 860 hectares of CIAL owned land;

(b) 250 different businesses based on and operating from the campus;

(c) approximately 7000 FTE's employed on the campus;

(d) approximately 30,000 vehicle movements per day.

104.3. for example, when we bear in mind the scale of a modern airport campus, it is not clear where the role of Avsec in exercising coercive search and seizure powers on the land side of an airport stops and the role of the Police starts;

104.4. how is this boundary between the role of Avsec and the police rationalised? Is the boundary informed by institutional capability and training, and resourcing?

104.5. against that backdrop of being clear who may exercise coercive search and seizure powers, what role should commercial imperatives and competition play in the provision of security services, and what are the full range of options for achieving an outcome where security services are provided at a good standard in an efficient way?

104.6. generally, what are the respective roles of Avsec, the police, and airport management when dealing with both day to day security activities and a crisis situation?

105. CIAL encourages the MOT to engage the sector on these and other questions that go to the roles in the security context. Greater clarity and consensus at this level will inform the incremental changes being made as part of the review.

Aerodrome vs airport

106. The proposal to move from two separate Acts to a single Act has prompted a knock-on proposal to then choose between the terms "airport" (used in the AAA) and "aerodrome" (used in the CAA). The exposure draft Bill proposes to adopt "aerodrome".

107. As discussed in the NZ Airports submission, the definitions in the AAA (airport) and the CAA (aerodrome) are largely the same on the page. So if the focus is kept narrowly on these two Acts, the terms could be seen as interchangeable.

108. However it is a mistake to approach this issue with such a narrow focus. Suddenly describing CIAL as an aerodrome, or, in the reverse, articulating the machinery in the CAA as applying to an airport, could be a lot more complicated than it appears at first glance.

109. For a start, airports operate within, and rely upon, legal frameworks beyond these two Acts. In particular, two very important legal frameworks for the holding of and use of airport land – the PWA and the RMA planning rules – have a history of debates over the difference between "aerodrome" and "airport". In these legal contexts, the terms "aerodrome" and "airport" are not tied to the definitions in the AAA and the CAA. Whether there is a distinction, and if so how to describe it, is approached as a matter of statutory interpretation in the context of the PWA and the RMA.

110. Airports have faced the argument that "aerodrome" describes a narrower set of activities than "airport", and PWA obligations and RMA planning rules should be read in light of that distinction. To users of planning law and planning instruments, this can seem like a natural distinction to make, regardless of the current definition of "aerodrome" in the CAA. For this reason, decisions in the PWA and RMA arena, that go to the heart of the ability of airports to hold and use land, have been influenced by describing what CIAL does as an airport. Which is what the AAA does. The meaning of the term airport, in this context, has been described as continually evolving.

111. Even more complex, there is a sense in which the substantive scope of the CAA is influenced by the description aerodrome, even although the definition on the page is similar to the definition in the AAA of airport. We suspect it would come as a surprise to some stakeholders if the machinery, roles, powers and obligations in the CAA were also said to apply across the entirety of a modern airport rather than an aerodrome. The definitions in each Act have been applied in their context, influenced by the term used (airport or aerodrome) and the content of the legislation.

112. Which makes the consequences of a decision to now collapse the AAA and the CAA into a single piece of legislation, and use only one of "airport" or "aerodrome", unpredictable. On the one hand, to describe CIAL and others as an aerodrome, has the real potential to disturb the legal balance in the PWA and RMA contexts in unpredictable ways. If these risks crystallise they would have serious implications for New Zealand airports current holding and use of land. On the other hand, to describe the current substance of the CAA as applying across an airport could also have unpredictable consequences.

113. At a technical level, there will be linkages across the statute book to take care of, too. For example, if the AAA is repealed, consequential amendments to the PWA will be required, which currently uses the definition of airport authority in the AAA to apply the PWA framework to

airports. Care will also be needed to ensure the existing airport authorities are transitioned successfully to the new legal framework with all existing rights and assets intact.

114. We urge the MOT to engage on this set of issues further. It is complex and nuanced and would benefit from more input and perspectives from stakeholders across the sector, and from a range of perspectives familiar with current practice in areas covered by the AAA, the CAA, the RMA, and PWA, and others.

Remove airports from the OIA / LGOIMA regimes

115. CIAL supports the submission by NZ Airports that in a policy review aimed at addressing inefficiencies in the aviation sector, it is time to remove airport companies from the scope of the OIA and LGOIMA regimes.

116. The NZ Airports submission describes how airport companies come to be technically covered by the OIA or LGOIMA regimes and subject to the administrative burden of responding to requests.

117. In relation to the substantive policy position, CIAL endorses the NZ Airports submission that:

117.1. it is burdensome for airports to comply with OIA and LGOIMA requests. The nature of these schemes means there is no real filter on the requests that can be made, and responding can commit significant time and resources;

117.2. airports are commercial enterprises, set up with a requirement to operate as a commercial service as distinct from a purely public service. This is the MOT policy objective and it has underpinned this policy review. OIA and LGOIMA requests can be distracting and a poor use of resources (likely to have a greater proportionate impact on smaller airports with small budgets and staff), and potentially harmful to the commercial activities the airport company is charged with undertaking;

117.3. there is no public policy purpose served that outweighs these costs:

(a) provision of information: airports provide statements of intent and annual reports under the LGA, and disclosures under the AAA and the Commerce Act;

(b) accountability of airports for their airport operations: airports are held accountable by their owners, by the Commerce Commission, and by public stakeholders referring to public reports;

(c) accountability of local government and central government owners: local government and central government owners of airports are themselves appropriately subject to the OIA and LGOIMA regimes;

(d) comparison with similarly placed enterprises: in 2012 Parliament endorsed the continuing exclusion of sea ports from the OIA and LGOIMA on the basis that this was necessary to preserve their ability to operate as efficient businesses. Airports should be afforded the same consideration.

Concluding remarks

118. Reflecting on the balance of issues being discussed here – where the policy proposals are well supported and their implementation is clear, compared to where the need for change and the viability of proposed changes needs much more work – it has occurred to us that progress may be made by separating the consideration of the AAA and progressing the review of the CAA.

119. The issues of safety, security, culture, drugs, drones and so forth that are attracting widespread support and where changes will have predictable consequences in practice sit in the CAA. A lot of work has been done on these issues and from here the sector can work with the MOT to progress these issues, resolve the treatment of airline alliance proposals, and improve the framework for everyone's benefit, at a good clip. It is the proposed changes to the AAA where much more work needs to be done on whether a change is required, and to be confident about how any changes will play out in practice.

120. If you have any questions about this submission, or CIAL's position on any aspect of the Civil Aviation Bill exposure draft, please contact:

Michael Singleton
General Manager Corporate Affairs
[redacted]

APPENDIX A: EXAMPLE OF AUSTRALIAN PROCESS FOR CODESHARE AUTHORISATION

121. In Australia, the International Air Services Commission (**IASC**) is the decision-making authority for codeshare authorisations, in the course of which it seeks input from the Australian Competition and Consumer Commission (**ACCC**).

122. This Appendix summarises a recent draft decision from the IASC to decline a codeshare variation for Qantas and Cathay.

The agreement

123. The airlines proposed to offer codeshare services on flights between Australia and Hong Kong that are sold as part of a through journey, either to domestic airports in Australia not directly connected to Hong Kong, or to other cities in Asia.

124. The application to the IASC was made as an application to vary an existing codeshare agreement between the airlines, to come into effect from 31 March 2019. The variation would "permit the utilisation of capacity for codeshare services with Cathay Pacific on the Hong Kong route".

125. The existing codeshare agreements between Qantas and Cathay and subsequent international regulatory approvals mean that:

    125.1. Qantas can currently place its code:

        (a) on 15 one-way routes operated by Cathay/Cathay Dragon within Asia from Hong Kong to certain destinations from India, Myanmar, Sri Lanka and Vietnam;

        (b) on Cathay's services from Hong Kong to Perth and from Hong Kong to Cairns (routes not operated by Qantas); and

    125.2. Cathay can currently place its code on 25 one-way routes operated by Qantas on the domestic Australian network.

126. The proposed variation would allow:

    126.1. Qantas to add its code to an additional 19 one-way routes operated by Cathay/Cathay Dragon from Hong Kong to India, Japan, South Korea and Sri Lanka;

    126.2. Qantas to add its code to select Cathay services from Hong Kong to Sydney, Melbourne and Brisbane, where passengers were connecting to a Qantas Australian domestic service;

    126.3. Cathay to add its code to an additional 32 one-way domestic Australian routes operated by Qantas; and

    126.4. Cathay to add its code to select Qantas services from Sydney, Melbourne and Brisbane to Hong Kong, where passengers are connecting to a Cathay/Cathay Dragon service to another destination in Asia.

ACCC opinion

127. IASC requested that ACCC make comments on the application. This request was not made in the context of formal consultation under the IASC Act.

128. The ACCC initially asked the IASC to request more information from Qantas (after reviewing the application and a submission from Virgin). The IASC asked Qantas to provide data on passenger numbers, market share and revenue for each Hong Kong-connected route.

129. The ACCC set out "a number of issues that the IASC may wish to take into consideration in its assessment of whether the Proposed Variation is likely to have a detrimental effect on competition in any relevant markets." It noted that Cathay and Qantas are (in that order) by far the largest and second largest competitors in the market for Australia-Hong Kong air passenger services. Vigorous competition between these two carriers is critical to the process of competition in the market.

130. Virgin Australia is the only other competitor on routes to Hong Kong, after Hong Kong Airlines stopped servicing Australia in October 2018. The ACCC's decision recorded the three airlines' share of frequencies for Australia-Hong Kong routes as: 65% Cathay; 23% Qantas; and 12% Virgin.

131. The ACCC noted that if it were assessing the application in its role of enforcing the Competition and Consumer Act 2010, the ACCC would normally assess the competition impact of the codeshare arrangement between Qantas and Cathay in its totality. However, in this instance the ACCC was only asked to comment on the component involving 126.4 above. The airlines did not require approval from the IASC to engage in the other elements of the proposed expanded codeshare arrangement, and the airlines had received the necessary approvals from international regulators for 126.1 and 126.2. As noted in the IASC decision, Qantas' ability to sell Qantas-coded services operated by Cathay Pacific was outside the scope of the application as the ACCC's task is only to regulate the allocation of Australian international air services capacity.

132. The ACCC considered that:

> While it is a decision for the IASC to make, our main competition concern is that the conduct may soften competition in the Australia-Hong Kong air passengers services market by making it easier for Qantas and Cathay to coordinate their price and capacity decisions so as to raise price (or reduce service) for Australia-Hong Kong passengers who connect with a domestic Australia flight and/or a flight between Hong Kong and places in Asia. For example, this may include delaying the deployment of additional capacity between Australia and Hong Kong.
>
> The realisation of this competitive harm will depend on a number of factors that we believe merit scrutiny, including:
>
> - the importance of connecting passengers for Qantas' and Cathay's load factors, yield and capacity planning decisions on Australia-HK services;
>
> - whether, absent IASC approval of the Proposed Variation, Qantas is able to continue to add its code on selected Cathay services from Hong Kong to Sydney, Melbourne and Brisbane, where passengers are connecting to a Qantas Australian domestic service;
>
> - the extent to which the Qantas flights on which Cathay will codeshare have been selected to minimise schedule overlap to incentivise each carrier to continue to promote and market their own metal services whilst utilising the codeshare flights to maximise connectivity options to each carrier's extensive behind/beyond networks; and
>
> - the extent to which Virgin, together with its alliance partner Hong Kong Airlines, is likely to disrupt any attempt by Qantas and/or Cathay under the arrangement to raise price (or reduce service). Here it will be relevant to consider not just whether Virgin could disrupt, but whether Virgin would be likely to disrupt any softening of competition between Qantas

> and Cathay. It may be more profitable for Virgin to not disrupt a softening of competition between the two largest carriers.
>
> If the IASC decides to approve the variation of the Determination, we consider it would be prudent for IASC to closely monitor Qantas and Cathay's behaviour on the route and Virgin Australia's response. In doing so, the IASC may wish to monitor the carriers' load factors, capacity flown, yield and route profitability as well as take-up of available spare capacity on the route, including by Virgin Australia.

133. The ACCC reminded the IASC of its views on hard block code share arrangements (vs free sale). It also noted that any decision by the IASC to approve the variation would not provide any protection for the airlines under the Competition and Consumer Act 2010 and would not prejudice any possible future consideration of codeshare operations by the ACCC.

The IASC draft decision

134. The IASC found it was likely that the variation would result in some consumer benefits in terms of improved connectivity and potentially some consumer benefits in terms of improved connectivity and potentially some increase in route options. However, the IASC found the variation likely to entrench and expand the market position of Qantas and Cathay Pacific to the detriment of Virgin's competitive position and the position any future entrants on the route. If this occurs, it is likely to weaken competition on the route, leading to an increase in prices and/or a reduction in other benefits to consumers.

135. Qantas already has the ability to codeshare on a range of Cathay Pacific flights beyond Hong Kong, connecting to the same aircraft the application sought approval for. It is, therefore, already possible for Qantas to offer a single airline code on these aircraft through Hong Kong to Australia. Codeshare and interline arrangements between Qantas and Cathay are already in place giving Cathay the ability to offer through-journey connectivity to passengers from Australia to various destinations via Hong Kong and vice versa. The IASC considered the marketing of complex itineraries did not depend on the approval of this application.

136. The IASC also found that without the proposed variation, Qantas was able, under codeshare arrangements currently in place, to market its code on a range of services operated by Cathay Pacific and Cathay Dragon to various destinations in Asia, including cities in India, Vietnam and South Korea.

137. The IASC found the likely public benefits of the variation were substantially outweighed by the likely public detriment that would follow from the proposed variation. For this reason, the IASC was satisfied that the variation would not be beneficial to the public within the meaning of the Act. Accordingly, the IASC must not make a decision approving the variation.

What happens next

138. The IASC invited submissions on the draft decision. Submissions closed on 17 July 2019.

APPENDIX B: CIAL'S PSE3 CONSULTATION PROCESS

1. CIAL's consultation with airlines involved the following steps:

   1.1. On 16 November 2016 CIAL sent out its Initial Proposal and model, prepared with assistance from independent experts Incenta and Three Consulting, for airlines' consideration and feedback.

   1.2. Airlines were given the opportunity to provide feedback on CIAL's proposal consultation timetable and briefings, by 23 November 2016.

   1.3. On 29 November 2016 CIAL ran an initial briefing to:

      (a) ensure shared understanding of the framework of CIAL's proposal;

      (b) give an overview of the main elements of the proposal; and

      (c) hear whether substantial customers sought briefings on any other elements of the proposal.

      Representatives from the Board of Airline Representatives New Zealand (**BARNZ**), Air New Zealand and China Airlines attended the briefing at Christchurch Airport in in person, and representatives from Qantas, Jetstar and Virgin Australia attended by phone.

      CIAL's advisers Incenta and Chapman Tripp also attended the meeting so as to assist CIAL's substantial customers if required.

   1.4. CIAL's substantial customers were given until 5 December 2016 to ask specific clarification questions regarding CIAL's Initial Proposal.

   1.5. On 13 December 2016, at BARNZ's request, representatives from BARNZ and Air New Zealand were shown around the Airport terminal in order to understand the terminal layout and pricing allocations.

   1.6. On 19 December 2016, CIAL sent its substantial customers answers to clarification questions raised at the initial briefing, in writing and at the tour held on 13 December.

   1.7. On 11 January 2017 BARNZ asked clarification questions regarding CIAL's model. CIAL engaged Jeff Balchin of Incenta to provide written clarifications, which were sent to all substantial customers on 25 January 2017.

   1.8. On 2 February 2017 BARNZ requested data used by Incenta relating to CIAL's asset beta. This request was also made by BARNZ and Air New Zealand in written feedback sent to CIAL on 7 February 2017.

   1.9. On 7 February 2017 CIAL's substantial customers provided written feedback on CIAL's Initial Proposal. CIAL received three specific pieces of feedback – one each from Air New Zealand, Qantas Group and BARNZ.

   1.10. On 17 February 2017 CIAL sent BARNZ and Air New Zealand the data requested on asset beta. In response, on 20 February 2017, BARNZ provided CIAL a memorandum prepared by Dr John Small entitled "Comments on ChCh Airport's PSE3 Proposal".

   1.11. On 17 February 2017, in response to comments from substantial customers, CIAL also offered a workshop or call to identify additional information CIAL could provide on two

proposed capital projects – the extension of runway 11/29 and the aeronautical contribution towards reconfiguring CIAL's terminal.

1.12. On 14 March 2017, in response to additional discussions with substantial customers, CIAL offered an alternative call on the proposed runway extension and terminal reconfiguration projects, this time for CIAL to brief its substantial customers on the reasons for, and potential scope of, the projects. This call went ahead on 21 March 2017, attended by representatives from BARNZ, Air New Zealand, China Airlines, Qantas, Jetstar and Virgin Australia. CIAL's advisers Incenta and Chapman Tripp also attended the call so as to assist CIAL's substantial customers if required.

1.13. On 20 March 2017 BARNZ asked three specific clarification questions regarding CIAL's model. CIAL responded to BARNZ's three questions by email on 27 March 2017.

1.14. On 24 March 2017 BARNZ provided CIAL a second memorandum prepared by Dr John Small entitled "Comments on Incenta's WACC Analysis for ChCh Airport".

1.15. On 24 March 2017 BARNZ provided CIAL comments from Bob Fletcher, Head of Operations Support at Air New Zealand, concerning CIAL's proposed extension to runway 11/29.

1.16. On 21 March 2017 BARNZ emailed CIAL requesting information on CIAL's quarantine waste management arrangements. CIAL responded on 31 March and BARNZ came back with additional questions on 3 April, which CIAL responded to in the Revised Proposal.

1.17. On 5 April 2017 CIAL emailed its substantial customers informing them of a minor adjustment to the consultation timeline, with the Revised Proposal to be sent out in the morning of 10 April and written feedback due by 5 May.

1.18. On 10 April 2017 CIAL sent out its Revised Proposal and model, prepared with assistance from independent experts Incenta and Three Consulting, for airlines' consideration and feedback.

1.19. On 5 May 2017 Air New Zealand and BARNZ provided written feedback on CIAL's Revised Proposal, with BARNZ also providing a second memorandum prepared by Dr John Small entitled "Further Comments on Incenta's WACC Analysis for ChCh Airport". On 8 May Qantas Group also provided written feedback on CIAL's Revised Proposal.

1.20. On 25 May 2017 CIAL emailed its substantial customers:

(a) seeking feedback on two specific changes CIAL was considering, relating to an adjustment to the rate of change of the proposed prices, and the cross-wind runway 11/29; and

(b) explaining the effect of CIAL's mechanical WACC update to take account of the Commerce Commission's 31 March 2017 WACC inputs (as flagged earlier in CIAL's Revised Proposal).

1.21. On 7 and 8 June 2017 respectively, BARNZ and Air New Zealand provided written feedback on the two specific changes proposed, and WACC update explained, in CIAL's 25 May further consultation document. Qantas Group provided no feedback at this stage.