NZ AIRPORTS ASSOCIATION

CIVIL AVIATION BILL – EXPOSURE DRAFT: SUBMISSION TO THE MINISTRY OF TRANSPORT

22 July 2019

+64 4 384 3217

Level 8,
45 Johnston Street
Wellington 6011

PO Box 11369,
Wellington 6142
New Zealand
www.nzairports.co.nz

New Zealand Airports Association is the industry association for New Zealand's airports and related businesses. It is a not-for-profit organisation whose members operate 42 airports that span the country and enable the essential air transport links between each region of New Zealand and between New Zealand and the world.

CONTENTS

NZ AIRPORTS SUBMISSION ON DRAFT CIVIL AVIATION BILL

A: INTRODUCTION AND SUMMARY

1. New Zealand Airports Association ("**NZ Airports**") is pleased to have the opportunity to provide feedback to the Ministry of Transport ("**MoT**") on the exposure draft of the Civil Aviation Bill ("**Bill**"). A number of members of NZ Airports have had direct input into this submission.[1]

2. As invited by the Commentary Document, this submission provides feedback on both policy decisions and drafting of the Bill. NZ Airports supports much of the Bill. However, for the reasons explained in this submission, NZ Airports believes that some significant issues will require the Minister of Transport to report back to Cabinet for revised policy directions before finalising the Bill for introduction.[2]

Overview

The Bill must support the aviation sector's success story

3. The Review of the Civil Aviation Act 1990 and Airport Authorities Act 1966 ("**AAA**") was initiated because, essentially, both acts are old. However that does not mean the sector, and the way it is regulated, has been standing still over that time. To the contrary, as stated in the 2016 Cabinet Paper: [3]

> In the past 25 years since the enactment of the CA Act, New Zealand's aviation sector has flourished. Air passenger transport contributed approximately $4.3 billion (14 percent) to New Zealand's $29.8 billion tourism revenue in the year to March 2015. 17 percent of New Zealand exports and imports by value are carried by air. The aviation industry annually exports $3.8 billion of products and services and contributes 6.9 percent of New Zealand's GDP. The aviation industry is expected to continue to be a major contributor to economic growth.

4. It is very important that the Bill continues to support this success story. In that spirit, NZ Airports fully supports the Bill's intention to: [4]

   (a) improve the safety and security of New Zealand's aviation system;

   (b) update legislation in response to a growing and evolving industry; and

   (c) improve the usability of legislation.

5. We believe that all industry participants can endorse those goals, as an important part of supporting a thriving aviation sector of which we can continue to be proud. Many of the Bill's changes should help to improve aviation safety and security, and promote a more efficient regulatory system (for example, in international air licensing).

---

[1] A complete list of all members can be found on the NZ Airports website at http://www.nzairports.co.nz/forum/.
[2] In accordance with Cabinet Minute CAB-19-MIN-0167, at [35].
[3] Paper to the Cabinet Economic Growth and Infrastructure Committee "Review of the Civil Aviation Act and Airport Authorities Act: Key Policy Decisions ("**2016 Cabinet Paper**")" 2016, at [2].
[4] Ministry of Transport, "Civil Aviation Bill – exposure draft commentary document ("**Commentary Document**")", June 2019, at [24].

The Bill needlessly threatens sector welfare – particularly in the regions

6. It is therefore unfortunate that the many positive changes are overshadowed by a small number of proposed changes in relation to the economic regulation of airports, which the Government knew would be controversial. For airports, the aviation sector's success story disguises two distinct underlying economic truths, which inform NZ Airports' views on the Bill:

   (a) The economic regulation of the large international airports under Part 4 of the Commerce Act draws much political, media and stakeholder attention. Although contentious at times, the relationship between the Commerce Commission, airports and airport customers has matured and improved as they have developed greater common ground on what good performance in the interests of passengers and the many and varied other airport customers looks like. On multiple occasions, the Commission has clearly stated that airport information disclosure regulation under Part 4 is effective. There are still areas of disagreement, and even airport customers' views are often not in alignment with each other. However, with considerable time and effort from all parties, these disagreements have materially reduced. The ability of the large international airports to earn excess returns has been eliminated by Part 4. As found in the process that led to the Commerce Amendment Act 2018, the regime is effective, and no further change is required at this time. The Commission has clearly stated on multiple occasions that airport information disclosure regulation under Part 4 is effective. The large international airports are now keen to focus on delivering what they know passengers and other users want above all else – a high quality airport experience. The proposed change will impact their ability to do so.

   (b) On the other hand, some smaller regional airports are struggling to be commercially viable. Subject to low demand and airline monopoly power, they are unable to generate the revenue required to maintain safe and efficient infrastructure. As reported in the media, the Government is working hard on potential funding solutions. This is imperative for the wellbeing of our regions.

7. NZ Airports is very worried that by making changes to the AAA targeted at the large international airports (when the evidence is clear that the existing regulatory regime for these airports is working), the Bill will make life infinitely more difficult for small, regional airports. The Commentary Document is wrong to say that section 4A of the AAA does not work for regional airports. To the contrary, it provides a clear framework for airport pricing that is well understood by all parties, which promotes constructive and consistent engagement with airlines on pricing and investment. Of course, it does not provide a complete solution for airports facing commercial challenges. However for any airport struggling now, removing their power to set charges and the requirement to operate commercially, and requiring them to reach agreement on prices and investment, can only increase the challenges they face when dealing with limited demand and monopoly incumbent airlines.

The Bill does not represent good regulatory practice, as was intended

8. The proposed changes to the AAA – particularly the removal of airports' ability to set prices - will materially disrupt an economic regulation framework that is working well due to the considerable time and effort invested by all stakeholders over a number of years. The changes are likely to drag the sector into contention and dispute, just as it was poised to focus on a period of regulatory stability and significant investment to deliver great outcomes for consumers, communities and the broader economy. In particular:

(a) The review process started (six years ago) as a "best practice regulation" review of old legislation. We understood that this would include removing provisions that were demonstrably redundant or obsolete. As noted in the 2014 Consultation Document:[5]

> The purpose of the review is to ensure that the provisions of the Airport Authorities Act 1966 provide for the effective and efficient establishment, operation, and development of airports by airport authorities, while also having due regard to airport users. The review also provides an opportunity to ensure the provisions of that Act are clear, concise and accessible. This includes the opportunity to remove provisions that are redundant.

(b) In practice, the onus has been put on airports to now demonstrate that deleted provisions should be "added back" because they are still required. This is well beyond the scope of the purpose of the original review, and the absence of transparency or explanation as to why certain provisions have been deemed obsolete amounts to poor regulatory process. This is a dangerous approach by the Government to change a system that, after years of costly and exhaustively consulted fine-tuning, is now settled, understood by all stakeholders, and working well.

(c) The Bill includes some far-reaching policy proposals regarding the AAA that are described simply as removing obsolete provisions, and are therefore unsupported by robust regulatory impact analysis (ie it has not been demonstrated that the benefits of their removal outweigh the costs). The advice to Ministers predicted that these changes would be contentious, and we are disappointed that they have been included in a "best regulatory practice" review process that should have focussed on changing provisions that are genuinely obsolete or redundant, or supported by robust regulatory impact analysis if not, and which could therefore be constructively supported by all industry participants.

(d) The cumulative impact of the changes to the AAA would be, at one fell swoop, to remove statutory provisions that were carefully designed to promote the interests of travellers and shippers by providing balance between the positions of industry participants and promoting efficiency in a sector with unique commercial features. Removing provisions that recognise the unique circumstances of airport companies, on the untested assumption that they should be treated in the same way as most businesses who, unlike airports, are not obliged to continue to supply products and services to customers who refuse to pay for those services. This will undermine a regime that was designed to recognise that if airport companies are to provide public services on a commercial basis, then they require public powers to allow them to efficiently provide vital transport infrastructure.

(e) Given the lack of analysis in the relevant Cabinet Papers and Regulatory Impact Statements, it is not clear to us that Ministers and officials fully appreciate the magnitude of the proposed changes and the potential adverse consequences. Over the last 25 years, a number of extensive policy and regulatory review processes have confirmed and strengthened the current regulatory settings (and defined a clear statutory process for changing those settings), and have actively resisted a requirement for negotiation and agreement between airports and airlines on pricing and investment matters. It is therefore confounding that, supported only

[5] Ministry of Transport "Civil Aviation Act 1990 and Airport Authorities Act 1966 Consultation Document", September 2014, at [18].

by a series of ad hoc brief statements in Cabinet Papers, it has now been decided to undermine that history by removing airports' ability to set prices following consultation.

(f) A particularly puzzling reason in the Commentary Document is the assertion that section 4A has not been effective at assisting smaller airports to defend themselves against the incumbent airline's monopoly power. That is wrong. Regional airports believe that section 4A, and the requirement to consult, is well understood (including, with some exceptions, by airlines) and greatly assists constructive engagement and outcomes. Removing it and enforcing a requirement for agreement with a party that has every reason not to reach agreement, will make the power imbalance infinitely more difficult for regional airports, who play an important role in their communities. Investment in infrastructure to facilitate air links is an important enabler for regions and the nation to thrive.

9. In contrast to the raft of changes proposed for economic regulation of airports, the Bill proposes to retain the existing economic regulation framework for airline alliances, with some minor enhancements. This is despite clear and detailed advice from all relevant Ministries and independent regulators that it is not fit for purpose, and that application of the general authorisation regime under the Commerce Act 1986 will better promote the interests of consumers. We cannot reconcile the Government's position on airport economic regulation with its position on airline economic regulation in the Bill.

Cabinet must therefore reverse its economic regulation decisions

10. Cabinet should therefore reverse the economic regulation policy decisions that have the potential to cause great disruption and harm to the airport sector in an economic regulation environment that is currently working well, and which are an unwelcome distraction from what should be a focus on positively engaging on the shared goal of promoting a safe, secure and efficient civil aviation regime.

Summary of Position on Key Topics

11. This submission addresses the topics summarised below:

Topic	**Commentary Document Reference**	**NZ Airports' View**
AVIATION SAFETY		
"Just Culture"	Page 19	We support the proposal to protect those who self-report incidents from enforcement action (subject to the Director's discretion).
Drug and alcohol management	Page 21	The Clear Heads statutory obligations are a welcome proposal, which will mitigate the risk and consequences of drug and alcohol use in a high-risk environment.
Drones	Page 26	We support the technical amendments to drone regulation, and the proposal to introduce new powers to deal with drones that are causing real safety risks. We consider that the Director should have first responsibility for detaining, seizing, and destroying problematic drones. However, we also support the option that, in the event that the Director is unable to respond in time, other industry participants are empowered to take action – and are protected from liability if they do so (Option 3).
ECONOMIC REGULATION		

Section 4A – power to set charges	Page 31	The statutory power to set charges under section 4A is necessary to ensure airlines pay the charges legitimately set by airports and must be retained. It operates alongside section 4B (the requirement to consult), and (for the large international airports) Part 4 of the Commerce Act to form a seamless regulatory framework that is consistently applied throughout the country. Removing section 4A would disrupt this framework, and materially increase the vulnerability of smaller airports and inevitably lead to protracted disputes around aeronautical infrastructure provision and aeronautical charges. Commercial negotiations and agreement, although desirable if they can be achieved in practice, cannot be an enforced legislative requirement. NZ Airports strongly supports retention of the current wording in section 4A. However, an alternative option is to keep section 4A, but remove the words 'as they see fit'. This would reflect the reality that regulated airports have not set charges 'as they see fit' for many years, if ever. Auckland Airport's recent aero pricing reductions for the final three years of its FY18-22 pricing period in response to the Commerce Commission's report is just one such example.
Capex consultation thresholds	Page 31	Only specified airport companies should be required to consult on capex. Consultation is unnecessary for other airports given the monopsony power of airlines. The threshold for consultation for specified airports should be the greater of $30 million or 10% of the value of non-land RAB assets - subject to our views on section 4A (as prices and capital expenditure are inextricably linked).
Section 4(3) – requirement to act as a commercial undertaking	N/A	The requirement for airport authorities to operate or manage the airport as a commercial undertaking is still important, and should be retained (ie it is not redundant or obsolete). We support an exemption from section 4(3) for an identifiable group of smaller regional airports, who serve an important connectivity purpose, but are unable to meet the section 4(3) standard. The Minister should be specifically empowered to allocate funds to such airports.
Authorisation of airline alliances	Page 33	The Commerce Commission should be the regulator to decide whether to grant an authorisation, applying the standard authorisation test under the Commerce Act. If the Minister is to make the decision, then the statutory test must be the same as that under the Commerce Act and the Commerce Commission should be consulted in that decision-making process. The Minister and Ministry should have more power to obtain information, and more responsibility for ongoing monitoring of whether alliances continue to provide a net benefit.
Land ownership, use and acquisition	N/A	The power to terminate leases under section 6 must be retained, as it is neither redundant nor obsolete. It provides an important backstop for airports to exercise control over development and expansion that is in the interests of all users of the airport. It is inconsistent to continue to restrict the ability of airports to enter a lease but remove the corresponding flexibility to terminate the lease if circumstances change.

		The exemptions for airports from other legislative requirements relating to leases, roads, and "subdivisions" should remain, as they are neither redundant nor obsolete.
Bylaw making powers	N/A	We support the decision to maintain the bylaw making powers for airport companies. Airport bylaws relating to traffic control and road use should continue to be treated as bylaws made by road controlling authorities under section 22AB of the Land Transport Act 1998. This provision is neither redundant nor obsolete.
AVIATION SECURITY		
Aviation security services	N/A	The scope of "aviation security services" should be clarified to cover activities undertaken pursuant to operational requirements that certificated providers of aviation security services are required to comply with under the Rules.
Powers of AvSec	Page 39	We support the provisions in the Bill that clarify the search and seizure powers of aviation security providers. Further clarification of the geographic extent of where those powers may be exercised is required.
AvSec's institutional arrangements	Page 43	AvSec should be required to hold an aviation document. The Director of the Civil Aviation Authority should be replaced as the regulator of AvSec by an independent Commissioner or Inspector, to more effectively reduce the conflict of interest risk.
Contestability of AvSec	Page 48	We see merit in airlines being added to section 124 of the Bill as a provider of aviation security services, but the Minister should be required to consult with the aerodrome before empowering the airline, and should be required to impose any conditions necessary to ensure the service is provided fairly and efficient for all airport users. The Act should include criteria to guide the Minister on why it is appropriate to confer a monopoly on AvSec. There should be a requirement for the Minister to publish their reasoning, and review the Gazette Notice every 5 years.
Alternative terminal configurations	Page 45	We welcome the proposal to give the Director, on application by an airport for any proposed aerodrome layout, the power to allow specified people to enter or remain in security areas.
New security designation framework	Page 46	For security reasons, it may not be appropriate to have an explicit Tier 1 and Tier 2 distinction in the legislation itself. It is unclear how it is intended that security services will be provided at Tier 2 airports.
LEGISLATIVE FRAMEWORK		
Single Act	Page 57	We are disappointed that the Bill proposes to amalgamate the Civil Aviation Act with the Airport Authorities Act. Other than operating within the same aviation industry, there is very little similarity between the two Acts, which cover different participants and have very different purposes.
Better purpose statements	Page 57	The purpose and content of the provisions transferred from the AAA should be distinguished from the remainder of the Bill. More broadly, there should be clear guidance and purpose for distinct sections within the Bill. We provide suggestions on some additional purposes.
NEW MATTERS FOR INCLUSION IN THE BILL		

Data collection	N/A	MoT should have the power to collect and publish data regarding air services.
Official information exemption	N/A	All airport companies should not be subject to the OIA or LGOIMA – as is the case for port companies.

B: AVIATION SAFETY

12. NZ Airports welcomes the proposals in the Bill that seek to improve safety outcomes in the aviation industry. New Zealand prides itself on its reputation and its long history of strong performance in aviation safety. It is important that we do not get complacent, and continue to seek opportunities to stay in step with, or ahead of, the rest of the world.

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

13. We consider that an important part of safety promotion is to encourage participants in the industry to 'speak out' where necessary, without fear of reprimand or other adverse consequences. The focus must be on enabling forward looking continuous safety improvement for the sector as a whole, rather than backward looking punishment of individuals. We agree that offering protection from enforcement action to people who self-report incidents is an important step in improving the quality and extent of safety information provided to the CAA.

14. We are also comfortable with the Commentary Document's suggestion that this should not be unrestricted, and support the proposal to:

    (a) limit the approach to incidents or hazards, on the understanding that accidents are more severe, and generally come to the attention of the CAA in any event; and

    (b) grant the Director the discretion to take action in certain instances (weighing the public interest against the benefit of frequent reporting) – but on the basis that the incident report is still not admissible as evidence (section 264).

15. We think the Bill's drafting will achieve the policy decisions.

Drug and alcohol regulation

16. We also applaud the Bill's introduction of the Clear Heads statutory obligations for commercial operators. In many instances these procedures are already in place (such as DAMP testing), but it is helpful to have the statutory mandate to counter any potential resistance within the sector.

17. NZ Airports agrees that public tolerance for aviation safety risks are low, and understandably so. Anything that can be done by the industry to mitigate these risks should be encouraged.

Drones

18. Drones have introduced new challenges and additional risk to the aviation sector, and airports are now frequently in situations where drones are causing disruption to air traffic, but airports are relatively powerless to do anything in response.

19. We support the Bill's technical amendments to drone regulation, and the proposal to introduce new powers to deal with drones that are causing safety risks. We consider that the Director should have first responsibility in detaining, seizing, and destroying problematic drones. However, we also support the option that, in the event that the Director is unable to respond in time, other industry participants are empowered to take action (Option 3).

20. It should also be made clear that, in the event that airports (or other industry participants) are required to take action, they should not be held liable for damage caused by the reasonable

exercise of power for that purpose (which might include damage to drones or other property, or any consequential loss).

C: ECONOMIC REGULATION

Section 4A – Power to set charges

Summary of NZ Airport's position

21. NZ Airports is deeply concerned about the proposal to repeal section 4A of the Airport Authorities Act. In summary:

(a) It is wrong and misleading to say that section 4A is redundant or obsolete and that airports will have the same legal power to set charges absent section 4A. It is clear from the Cabinet Papers that removing section 4A was intended to require commercial negotiations and agreements on prices.[6] That is, there is an unexplained and unjustified policy intent to achieve a change in outcomes, which is clearly not removal of redundant or obsolete provisions. Airports will have legal power to enter an agreement on charges, but will not have a legal power to set and enforce them in the absence of an agreement as is currently the case under section 4A. This is a fundamental, material and disruptive change to the economic regulation framework for airports.

(b) Parliament introduced, and later confirmed, section 4A (coupled with consultation in section 4B), on the express basis that forced commercial negotiation and agreement would not work for airports and airlines. The airport / airline commercial relationship is unique, and its efficient functioning in the interests of consumers requires a statutory power for airports to set charges. There is good reason to treat airports differently.[7] The situation is different for other commercial relationships where it is sufficient for a company to have inherent power to enter an agreement that sets charges for its services, with the option of not providing the service if agreement is not reached. Airports provide essential infrastructure for public use, and cannot practically refuse service if airlines do not agree to pay their charges.

(c) There is a real risk that airlines will refuse to pay some charges. All airports will be subject to this risk (as demonstrated by historic refusal to pay Wellington Airport's charges and extensive AAA litigation history), but it will be particularly acute for regional airports with an incumbent monopoly airline. It would be naïve to think that airports can avoid this risk by charging "reasonable" prices. A price perceived as reasonable by an airline to meet its short-term needs is often unreasonable to an airport needing to invest in essential infrastructure to provide safe and high quality services for all customers in the long term. And while some airlines will welcome planned aeronautical infrastructure investment and be happy to pay to use that infrastructure, others may prefer to constrain capacity for the long term in order to limit new competition.

(d) Airports do not want to retain section 4A in order to set charges at an excessive level. It is about maintaining certainty in a legal framework for pricing that has been tried and tested on a consistent basis throughout the country over a number of years. Any change now carries a high risk of disruption and unintended consequences. Airlines have been lobbying for a negotiate/arbitrate regime (here and elsewhere around the world) for decades. Parliament and successive Governments have resisted those calls, for good reason. Removing section 4A will

[6] 2016 Cabinet Paper, at 5; Paper to the Cabinet Economic Development Committee, "Civil Aviation Bill: Confirmation of Key Policy Decisions ("**2019 Cabinet Paper**")", 2019, at 49.
[7] Despite what the 2016 Cabinet Paper says at [154].

now reverse that position and provide airlines with the regulatory regime that has been deliberately resisted by lawmakers for so long. The passing of the Commerce Amendment Act (as recently as 2018) reinforced that changing the airport regulatory framework required a recommendation by the Commerce Commission, after following a clearly defined process that tested the benefits and costs of any such change.

(e) Section 4A is key to retaining coherency in the regulatory framework, which (for international airports) encompasses Part 4 of the Commerce Act. It is wrong to think that retaining it is a potential impediment to the effectiveness of regulation under Part 4.

22. While we understand that some stakeholders have concern about the words "as they from time to time think fit", and the extent of power these words convey on airports, we think this is considerably overstated. In the event that the Government remains of the view that section 4A should not be retained in its current form, NZ Airports proposes an alternative provision, which maintains the statutory authority to set charges, while removing the words 'as they from time to time see fit'. We expect that this would soften the provision (and reflect the constraints that operate in practice anyway), without dismantling the existing well-performing regulatory regime.

Reasons in the Commentary Document

23. The Commentary Document suggests the following reasons for the removal of section 4A:

(a) A specific provision is not required to enable airport companies to set charges. The Companies Act 1993 provides adequate basis for airport companies to operate or manage their airports as commercial undertakings.

(b) It has not proven effective in countering the difficulties faced by small airports, which often have to negotiate with one major airline customer when seeking to change prices.

(c) The risk of retaining section 4A is that it may be interpreted as giving airport companies greater discretion when setting charges than they would otherwise have, which is not the intent of the provision.

(d) There is unnecessary overlap between section 4A and Part 4 of the Commerce Act, particularly in light of recent amendments to the Part 4 regime.

24. The above reasoning in the Commentary Document has been taken (almost word for word) from the Ministry of Business, Innovation and Employment's ("**MBIE**")'s Briefing note to the Minister of Commerce, dated 23 January 2019. That is surprising because, as we describe below, in its years of advising Ministers on the effectiveness of Part 4 regulation, MBIE has to our knowledge consistently been of the view that the regime is effective and no change to the form of regulation is required.

25. Although not in the Commentary Document itself, the relevant Cabinet Papers clearly state that the Government believes that removing section 4A "will encourage negotiations between airports and airlines and reinforce the recent changes to the Commerce Act, strengthening the threat of more heavy-handed regulation which underpins the current information disclosure regime".[8]

[8] 2019 Cabinet Paper, at [49].

26. It is very difficult to identify logic in this reasoning:

(a) There is no explanation why, after 25 years of the current consultation obligations, it is now considered desirable and appropriate to require negotiation. This is especially difficult to understand given the proposal is to retain consultation obligations; and

(b) The Commerce Amendment Act, passed in October 2018, reinforced that the combination of consultation under the AAA and information disclosure regulation under Part 4 is working. No changes were required, other than enhancing the threat of more heavy-handed intervention by giving the Commission clearer powers to recommend further regulation. The clearly established position was that any change in airport regulation (including any imposition of forced negotiation) is a matter to be first considered by the Commission, following the specific processes in the Commerce Act.

(c) Only three airports are subject to regulation under Part 4.

27. As we explain in greater detail below, each of the reasons in the Commentary Document is incorrect:

(a) Section 4A is used every time airports set prices.[9] It is quite plainly not redundant or obsolete.

(b) There is no evidence to support the assertion that section 4A does not assist small airports who have to engage with one major airline customer. The experience of small airports is that it clearly assists. The major airline customer brings a largely economically rational approach to consultations, which has been conditioned by the consultation framework being applied consistently throughout the country. If section 4A is removed, airlines will be encouraged to shift their approach to more confrontational negotiation (as seen in Australia and which some regional airports are now seeing more of in New Zealand), and seek to use their significant power to reduce charges and/or not agree to investment plans. Section 4A is therefore required to avoid significant sector disruption and cost.

(c) Conversely, airlines will be impeded from collaborating on charge setting, as additional competition issues will arise (since, as competitors, they will be sharing information, views and positions on pricing negotiations and agreements). In particular, BARNZ will be excluded from pricing discussions.

(d) Retaining section 4A does not provide airports with monopoly power. Airports' ability to set charges is significantly constrained by Part 4 regulation including the Commerce Commission's role as consumer advocate, the threat of heavier-handed regulation, and/or the countervailing power of airlines. The Cabinet Papers and Regulatory Impact Statements do not provide any evidence that airports are exercising monopoly power. In fact, the evidence is clear that the current regulatory regime is working well.

(e) Section 4A and Part 4 form a seamless regulatory framework. If section 4A is removed, that framework will be significantly disrupted.

[9] And, as discussed below, the information disclosure requirements for major airports set by the Commission under the Commerce Act 1986 expressly recognise that airports set prices under section 4A of the AAA.

Section 4A was designed on the express basis that negotiation and agreement was unreasonable

28. Under section 16 of the Companies Act 1993, airport companies have "full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction". It appears that the Commentary Document refers to this provision as empowering airport companies to operate airports as commercial undertakings. Clearly, airport companies have the same legal powers as all other companies under the Companies Act. That has been the case ever since airport companies were formed.

29. The key point missed by the Commentary Document is that general powers under the Companies Act ***are insufficient*** for airports to efficiently operate their businesses, and to make investment and pricing decisions for the benefit of all users of the airport. In recognition of the fact that they are an important public utility, airport companies have numerous powers and obligations under legislation (such as the Public Works Act, Resource Management Act, Civil Defence and Emergencies Act, and Land Transport Act) to ensure they can provide critical public infrastructure in an efficient manner. Essentially, airports require statutory powers that ordinary private companies do not possess.

30. That is why section 4A exists. Under a framework where airport companies provide services to the public in a commercial manner, it is important that they have a mechanism to efficiently set charges and obtain revenue to cover the costs of providing those services. The Companies Act does not impose any liability on airlines to pay charges in the absence of an agreement in the way that section 4A does. Section 4A provides ***additional and necessary*** statutory authority for airports to set charges. Essentially, if airlines choose to use the services provided by an airport, then they are bound to pay the charges legitimately set in accordance with sections 4A and 4B. Although extensive consultation is required, which may at times feel like a commercial negotiation to airports and their substantial customers, the essential foundation of the current regime is that airports will not be able to efficiently provide services to the public if they are forced to reach agreement with all airlines in all cases.

31. Airports' powers under the Companies Act do not conflict with section 4A, nor do they make section 4A obsolete or redundant. In the 2007 *Air New Zealand* v *Nelson Airport* case, it was clearly stated:[10]

> The fact that such a [charge setting] power is covered by the Companies Act 1993, does not mean that s 4A(1) does not expressly and specifically contain such a power. In other words, the existence elsewhere of general powers that may well encompass the s 4A(1) power, does not negate that specific power. At best, it suggests some duplication, though only in adding the specific to the very general.

32. We also note that in that case, it was argued (unsuccessfully) by Air NZ that section 4A did not contain a charge setting power because airports have that power in other statutory provisions, including section 3 of the AAA.

33. The section 4B statutory obligation to consult on charges is equally unique for a private company, and there is no suggestion that it be removed. As has been noted by the High Court: [11]

[10] *Air New Zealand v Nelson Airport Ltd* BC200861752 (Strike out application), 11 June 2006, at [24].
[11] *Air New Zealand v Nelson Airport* CIV-2007-442-584, 16 June 2008, at [41].

> Of course a statutory obligation to consult about prices for services is exceptional, but it might be simply interpreted as a counterbalance to the airport company's statutory right to charge customers.

34. Ultimately, ***both*** sections 4A and 4B are unique, and work hand in hand:[12]

> I am unsure why Parliament chose specifically to empower airport companies to set charges, but the likely reason was the Parliament wished to make that specific power subject to the s 4B duty to consult substantial customers before fixing or altering charges. The fact that the one section follows immediately after the other strongly suggests that that is the reason.

35. It follows that for so long as airports are subject to a statutory duty to consult, the power to set charges cannot be obsolete or redundant, and vice-versa.

36. Airports are not opposed to entering into commercial agreements with airport users, and frequently do when feasible (incentive arrangements to promote growth on certain routes is an example). However, the current power to set charges recognises that agreement is not always possible, and instead sets out a clear process for airports to make enforceable pricing and investment decisions in the absence of that agreement.

37. The implementation of the section 4A power to set charges, following consultation, was a deliberate policy choice to ensure that airports could efficiently provide quality services to all users of the airport:

(a) Section 4A in its current form was enacted by the Airport Authorities Amendment Act 1997, to clarify the ability of airport companies to set charges.[13] Obviously, this occurred after the Companies Act 1993 was enacted. It was noted in Parliament on the first reading of the bill that major airlines have countervailing powers at airports, and that airports could be held to ransom by a single operator.[14] The specific example given in parliamentary debate was that of Air New Zealand link flying out of New Plymouth:[15]

> That airline, as the major operator, could be seen to be in the position of saying: "We would like this extra facility to make our operation easier. Please provide it or we'll go somewhere else." Obviously the airport's interest is to keep up the passenger network, to keep the flights in and out and to keep them full […] The difficulty comes when there is a dispute between an airline company and an airport company over what is an appropriate facility and what is an appropriate charge.

(b) It was acknowledged that it is unreasonable to expect airports to have agreements with all airline customers in all circumstances. For example, investment programmes cannot be separated from prices, and it will never be the case that competing airlines have exactly the same capex expectations and/or are happy to pay for all airport investment that benefits all passengers and airlines. As noted by the Select Committee that considered the 1997 Amendment Bill:

> The substitution of negotiation for consultation would give airlines the option of vetoing all airport financial decisions because agreement between the parties

[12] *Air New Zealand v Nelson Airport Ltd* BC200861752 (Strike out application), 11 June 2006, at [25].
[13] Transport Committee "Airport Authorities Amendment Bill" [1996], at ii.
[14] (6 March 1997) 558 NZPD 736
[15] (6 March 1997) 558 NZPD 730.

> would be required. This would be a significant departure from the Bill's consultation process which leaves the final decision to an airport company. It would be difficult for an airport company to negotiate unanimous agreement with all relevant airlines in pricing or capital expenditure decisions. For example, at Auckland International Airport, there are approximately 25 airlines operating scheduled services alone. Arbitration would, therefore, be a likely outcome.

(c) The Select Committee therefore determined that a price setting power and an obligation to consult on the setting of charges should be retained in statute.[16]

Removing section 4A will fundamentally change the legal basis for aeronautical pricing

38. Airports are deliberately not subject to negotiate-arbitrate regulation, but information disclosure only. Although consultations, in practice, can and do involve extensive exchanges of views, positions and information on a commercial basis, consultation is not the same as negotiation and mandatory agreement. This was expressly noted in the 1993 case of *Wellington International Airport Ltd v Air New Zealand*:[17]

> Section 4(2)(a) empowers the airport company to fix charges but only after consultation with airlines which use the airport. The word consultation does not require that there be agreement as to the charges.
>
> The airport company is given the power to fix charges. Before doing so it must consult […] The process is quite different from negotiation, however. One cannot expand the statutory requirement by replacing the word "consultation" with "negotiation" and then importing into the section the very different meaning of the latter word.

39. In the airport industry, a well-understood and common practice has developed (borne out of a statutory requirement in section 4B) where airports generally consult on and set charges every five years. This practice is commercially tried and tested, providing certainty for the parties. Airports and most airlines are well attuned to the obligations of airports to approach the consultation process with an open mind, provide their customers with all the information reasonably required to provide informed views, to give adequate time for customers to provide feedback, and then to carefully consider those views.[18] It is often the case that an airport's starting position will materially shift in response to valid and constructive points made by airlines – with the result being better commercial outcomes for all users of the airport.

40. Although the Bill intends for it to continue to be the case that only consultation on prices will be required, the reality is that removing the statutory power to set charges will require airports to have agreements on prices with all of their customers (which appears to be the intention expressed in the Cabinet Papers). There is clear case law to this effect:

(a) Transpower sets charges for use of the national grid, payable by electricity generators and distributors connected to the grid. In the 2001 High Court case, *Transpower v Meridian*, Meridian argued that, in the absence of any statutory power to require payment of charges, there was no agreement for it to pay Transpower's charges. This was despite the fact that it used Transpower's services.

---

[16] Transport Committee "Airport Authorities Amendment Bill" [1996] at iii.
[17] *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671 at 26 and 30.
[18] *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671 36.

(b) The Court found that where an offeree takes the benefits offered, but in doing so makes it clear that it rejects the terms on which they were offered, there can be no finding that the offer has been accepted.[19] In that case, Meridian was not contractually bound because it clearly voiced its rejection of the terms.[20]

(c) As a form of redress, it was open to Transpower to sue in quantum meruit, which is the general principle that the provider of a service has a claim for reasonable value of the service that has been provided.[21] The difficulty with this form of compensation is that it is up to the Court to ***retrospectively*** value the services that have ***already*** been provided. That is, quantum meruit is not a prospective price-setting mechanism – it is a remedy to avoid unjust enrichment.

41. The principles of the *Transpower* case were originally applied in the aviation sector, where a pilot refused to pay Airways' charges, despite continuing to use its services. The repeated rejection of the charges meant that no contract existed between the parties. Again, the court held that in the absence of agreement, quantum meruit was Airways' only remedy to recover charges for services provided.[22]

42. In summary, the courts have held that in the absence of a statutory power to set charges, normal principles of contract apply. In the absence of agreement on price, service providers can either refuse to provide a service (not an option for airports), or resort to quantum meruit to seek payment for services provided (an option that would render Part 4 regulation redundant and obsolete – unless the Commission was to review the Court's decision).

43. Airlines are very alive to the above legal analysis, as they have previously sought to argue that in the absence of a statutory power to set charges, a contract is required: [23]

> Mr Jagose submitted that if NAL's increased charges were not imposed in exercise of the s4A(1) power, then to be enforceable they must be contractual. He set about a contractual analysis. But for the s 4A(1) power unilaterally to impose charges, Mr Gedye accepted they would need to be agreed and would be recoverable under the contract. My interpretation of s 4A(1) [as a charge setting power] makes it unnecessary to deal with the contractual argument.

There is a high risk of uncertainty and litigation

44. NZ Airports strongly encourages the Government to reconsider whether it wishes to reverse the long policy history of avoiding a requirement for airports and all airlines to agree on pricing and capital expenditure in all cases, particularly given the high risk of uncertainty and litigation cost that will result.

45. The effect of removing the statutory power for airports to set prices is likely to result in the following problems:

(a) As noted in MBIE's advice to the Minister of Commerce, Air New Zealand and BARNZ have lobbied for section 4A to be repealed "to allow for genuine commercial negotiation to take place".[24] This strongly suggests that if section 4A is repealed, airlines will want agreements to be mandatory in all cases. If airlines do not achieve every position they advocate for in pricing consultations, they are likely

[19] *Transpower New Zealand Ltd v Meridian Energy Ltd* [2001] 3 NZLR 700 at [49].
[20] *Transpower New Zealand Ltd v Meridian Energy Ltd* [2001] 3 NZLR 700.
[21] *Transpower New Zealand Ltd v Meridian Energy Ltd* [2001] 3 NZLR 700, at [59].
[22] *Airways Corporation of New Zealand Ltd v Geyserland Airways Ltd* [1996] 1 NZLR 116, at 11-12.
[23] *Air New Zealand v Nelson Airport* CIV-2007-442-584, 16 June 2008, at [33].
[24] Ministry of Business Innovation and Enterprise "Briefing Paper for the Minister of Commerce", 23 January 2019, at [35].

to voice their concerns and reject the formation of a contract (consistent with the litigation history described above), as it will always be more commercially advantageous for airlines to seek to pay less. Some customers are always likely to be left unsatisfied, as it is impossible for airports to deliver the specific requirements for every customer, who often do not speak with a uniform voice and have competing interests. This should not be a reason or excuse for customers to refuse to pay.

(b) Under current processes, airports spend significant time and effort setting charges and determining investment and development plans that work for all customers. The input methodologies set by the Commerce Commission are applied by airports subject to Part 4, and the reasonableness of airport charges and returns are subsequently reported on and reviewed by the Commerce Commission. The input methodologies also guide price-setting by other airports. It would be illogical and wasteful to now require courts to undertake a calculation of the value of services provided by airports. A quantum meruit action would effectively ask the courts to determine a reasonable price for a regulated service provided by airports. That is the role the Commerce Commission already plays today when it reviews and assesses the reasonableness of airport pricing decisions. In the event that the Court reaches a conclusion on the value of the service provided, it would be illogical for the Commerce Commission to then review this price-setting outcome in accordance with its Part 4 responsibilities. In other words, the Courts would effectively become the retrospective price setter (in lieu of airports), and the regulator of price setting (in lieu of the Commerce Commission). In addition to the obvious substantive concerns, it would introduce significant administrative cost and uncertainty.

(c) The courts fully recognise that they are not well placed to determine airport prices given the complexity of issues involved, and have appropriately deferred to the expertise of the Commerce Commission under Part 4 regulation. For example, in the *Air New Zealand v WIAL* Court of Appeal case, the Court stated that:

> Parliament has decided that price control will be undertaken through the mechanisms in Part 4 of the Commerce Act rather than through the courts. That is a feature of the light-handed regulatory regime. There are good reasons for it.
>
> […]
>
> The regime does not envisage that the courts will examine the "reasonableness" or "rationality" of pricing decisions.
>
> […]
>
> Intervention in pricing decisions, whether by regulators or courts, imposes costs. The light-handed regulatory regime, through Part 4 of the Commerce Act, provides mechanisms for assessing whether the benefits of intervention outweigh its costs. Such mechanisms are not available to the courts.

(d) Even if airlines do not refuse charges as a whole, they may expressly reject particular charges that they disagree with. For example, if an airport were to legitimately seek to introduce peak charging (something which the Commerce Commission has expressly recommended airports consider to improve efficiency and encourage peak spreading), there is a prospect that airlines adversely affected by that change will refuse to pay. This is the type of outcome that Parliament

feared when it introduced section 4A, noting the "substantial leverage from the users. The users have some quite strong powers to say: "We will not pay your landing fees", and that has happened elsewhere".[25]

(e) This has been the case in Australia, where Qantas has simply refused to pay airport charges and left airports, such as Darwin International, and Northern Territory, out of pocket. The debt continued to accumulate as the options for recovery were limited to a negotiated outcome, a court ruling, or a write off – none of which were commercially viable.[26] Qantas did, however, continue to use airport services, and passed on to customers all or part of the fees it was invoiced.[27] The biggest concern for the Australian airports was the adverse implications for their ability to provide services to the travelling public, including their ability to build additional capacity to meet the ongoing needs of airline partners and the travelling public.

(f) Overall, reflecting the position in the Commentary Document that airlines hope for consultation to align more closely with commercial negotiations, there is a high prospect that airlines will pick and choose which price terms they are willing to agree to. This is not a problem for most commercial relationships where a service can be withheld where it is not paid for, but airlines will continue to use airport services even if they do not pay. Airports provide critical national infrastructure and therefore cannot practically refuse to provide services. We note that most regional airports operate on the basis (published in the Aeronautical Information Publications) that they are "available for use without the permission of the operator".

46. The problem goes deeper than this. For airports, any uncertainty that arises from the inability to set charges will make it difficult to plan necessary investment for the benefit of all customers. This is because the design of that investment, the ability to recover its cost and to earn a fair return on the investment made will depend on the willingness of the airline to pay for it. Airport planning horizons are long, and planning commences well in advance of pricing decisions (but is also a key component of pricing consultations). Airline planning horizons are (naturally) much shorter, given the flexibility in purchasing, and disposing of aircraft, for example, compared to a fixed runway or terminal. In addition, while airlines must take into account the requirements of multiple passengers, they are not required to cater to a small number of powerful customers in the way that airports must. Accordingly, although airports strive for broad alignment wherever it can be found, agreement between airports and all customers on capital programmes is simply not possible. This is a key reason why agreements on aeronautical prices are rare. Knowing this, airports will have no confidence to plan for investment that will provide benefits for passengers, regions and the broader economy.

47. This is not scaremongering, but a real risk of increased contention between parties, and further litigation, with adverse outcomes for consumers. Parliament, officials and courts have recognised the likelihood of disputes over many years:

[25] (6 Mar 1997) 558 NZPD 737a.
[26] "Qantas and NT Airports locked in stoush over airport charges" (5 September 2018) ABC News <www.abc.net.au/news/2018-09-04/qantas-fees-nt-airports-darwin-alice-springs-charges/10200132>.
[27] Patrick Hatch "Perth Airport takes Qantas to court over $11m in unpaid runway fees (17 December 2018) The Sydney Morning Herald <www.smh.com.au/business/companies/perth-airport-takes-qantas-to-court-over-11m-in-unpaid-runway-fees-20181217-p50msn.html>.

(a) As noted above, the Select Committee considering the 1997 Bill believed that a requirement to agree (rather than consult) would result in arbitration. It further stated that:

> Arbitration is useful to resolve disputes, but usually involves only two parties. The airlines' negotiation/compulsory arbitration proposal would involve a number of parties, with diverse interests and complex issues.
>
> ….
>
> The advice we received is that implementation of the proposed negotiation/compulsory arbitration system is not as simple as suggested nor is it likely to be practical. It also raises fundamental policy concerns because such an approach would be different to that adopted by the Government for other industry sectors.

(b) As the Commerce Commission has observed in the past: [28]

> In addition to the costs associated with consultation, the major airlines have demonstrated a willingness to withhold airport payments and to consider court action. The airports are unable (for safety reasons) to deny landing facilities to an aircraft. Litigation imposed substantial costs on an airport, both in terms of the expenses of lawyers and experts and in diverted management time. Both AIAL and WIAL have been involved in litigation with airlines in recent years.
>
> Clearly, airlines do have some power to impose, or to threaten to impose, costs on airport companies with whom they are in dispute.

(c) The High Court has observed: [29]

> The legislation contemplates that the airport company will consult then decide. If its duty to disclose is practically unlimited, and if it is unable to bring consultation to a close until the airline is satisfied, consultation will soon become negotiation, which almost by definition ends in agreement or stalemate. Air New Zealand was found to be alive to this dynamic when WIAL was heard in 1992 and the narrative in this case demonstrates that it remains so today.

(d) MBIE's recent advice to the Minister of Commerce states that "there is a potential risk with this proposed decision, as it could create greater uncertainty and subject parties to further litigation as airlines may seek to test the meaning of the new provision".[30] We agree that this risk is very real.

48. MBIE officials suggest that "this risk [of litigation] can be mitigated by including an explanatory note in the Bill which makes it clear that the intention is to remove a redundant clause and not to change the meaning of the airports' requirement to consult in section 4B".[31] The problem with that reasoning is that the Minister has expressly decided to remove section 4A to encourage commercial negotiations (see the discussion above). That is, there is a clear and express decision from a key lawmaker to change the basis of price-setting and remove a statutory price-setting power that is used regularly by all airports today.

---

[28] Commerce Commission "Final Report: Part IV Inquiry into Airfield Activities at Auckland, Wellington, and Christchurch International Airports", 1 August 2002, at [3.115] – [3.116.
[29] *Air New Zealand v Nelson Airport* CIV-2007-442-584, 16 June 2008, at [48].
[30] Ministry of Business Innovation and Enterprise "Briefing Paper for the Minister of Commerce", 23 January 2019, at [30].
[31] Ministry of Business Innovation and Enterprise "Briefing Paper for the Minister of Commerce", 23 January 2019, at [30].

49. Further, NZ Airports submits that if it was true that section 4A was being removed because it was redundant, then no such explanatory note would be required. The fact that MBIE has identified the risk of litigation, and that an explanatory note would be required, is strong evidence that section 4A serves an important purpose in providing certainty and stability in airport price setting, and is in no way redundant.

50. There is real risk that significant litigation will arise from the fundamental change in the legal basis for charge setting – to a position where agreements on price are required. Any uncertainty about the meaning of the airports' requirement to consult (as suggested by MBIE officials) will be irrelevant when agreement on prices is required. To explain:

    (a) The principles of proper consultation under section 4B have been clearly established following court proceedings. Importantly, section 4B in itself does not provide a statutory power to set charges.[32]

    (b) A statutory duty to consult should be linked to a statutory power to make a decision – as consultations are intended to improve the quality of statutory decision-making. Sections 4A and 4B were introduced together, and intended to work in tandem – the requirement to consult was introduced to balance the power to set charges; and vice versa.[33]

    (c) It is therefore illogical to impose a statutory consultation obligation under section 4B (or new section 204), if the statutory power to set charges in section 4A is taken away, and the intent is to require commercial negotiations. Effectively, this will be a requirement to consult on an agreement, which makes little sense.

    (d) The reality is that an airport can run a perfect consultation that adheres to all of the relevant legal principles, but airlines will still be legally entitled to refuse to enter an agreement on price.

51. History suggests that litigation costs and disruption will be high. Significant cost and resource have been expended on litigation to test the regime over the years, including a history of airlines refusing to pay charges. This includes:

    (a) Dating back to 2001, Air New Zealand refused to pay the charges to land at Auckland Airport, and sought to take Auckland Airport to the High Court over the consultation process for landing fees. The case settled out of Court.

    (b) In 2007, Air New Zealand refused to pay charges to fly into Nelson Airport, and commenced judicial review proceedings. Miller J began the judgment with the words "not for the first time, an airline seeks judicial review of landing charges set by an airport company".[34] In that case, Air New Zealand responded to Nelson Airport's pricing proposal complaining that it had an unrealised expectation of a revised pricing proposal, following discussions with the airport, and that its charging decision was procedurally unreasonable and substantively unfair.[35] It is appropriate that any legitimate procedural complaints are resolved through judicial review (as was the case in this instance), rather than a haphazard response of airlines simply refusing to pay.

---

[32] We note that when the 1997 Amendment Bill was introduced, the power to set charges would be in the Act, with consultation obligations to be contained in regulations. This clearly demonstrates that the power to set charges and consultation obligations are distinct. Ultimately, it was decided that the charge setting power (section 4A) and consultation obligations (sections 4B and 4C) should all be in the Act.
[33] (11 December 1986) 476 NZPD at 6173.
[34] *Air New Zealand Ltd v Nelson Airport Ltd* HC Nelson CIV 2007-442-584 at [1].
[35] *Air New Zealand Ltd v Nelson Airport Ltd* HC Nelson CIV 2007-442-584 at [9] and [66].

(c) Also for the 2007-2012 pricing period, airlines refused to pay and judicially reviewed the validity of charges set by Wellington Airport under section 4A. The case went to the Court of Appeal, where the airlines claims were unsuccessful, and the amount calculated in accordance with charges set under section 4A was deemed to be a debt recoverable by the airport.[36]

52. Importantly, these cases have clarified the meaning of section 4A, the requirements of consultation, and Parliament's intention that pricing matters for regulated businesses should be addressed through Part 4 of the Commerce Act and the role of the Commerce Commission under that Act, not through the courts. This clarity, combined with the introduction and implementation of Part 4 regulation, has led to a settled regulatory environment where:

(a) There have been no instances of airlines refusing to pay airport charges or judicially reviewing airport pricing decisions since 2008/2009 (which is just before the Part 4 regime took effect);

(b) There have been five price setting events under section 4A between the three major airports since the Part 4 regulatory regime came into practice. For each of those price setting events, airports have ultimately issued pricing decisions that were found to be in the long-term interest of consumers. The Commerce Commission, MBIE, Cabinet and Parliament have regularly recognised that the current regime for airport pricing and information disclosure regulation is working.

(i) For the second price setting event ("**PSE2**"), the Commission found that, for all airports that information disclosure regulation was: [37]

(aa) effective in limiting airport ability to extract excessive profits over time; and

(bb) effective in promoting incentives to innovate and to provide services at a quality that reflects consumer demand.'

(ii) Likewise, for the third price setting event ("**PSE3**"), the Commission found that the incentives from the information disclosure regime had strengthened over time, as both Christchurch and Auckland Airport's target returns had dropped significantly.

Regional airports will be victimised

53. The Commentary Document suggests that section 4A does not assist small airports. There is no evidence for this assertion, and based on views provided to NZ Airports by small airports, it is wrong.

54. The statutory framework (the combination of sections 4A and 4B) works extremely well for price setting at regional airports. It enables a consistent approach across airports, which is now stable and well understood, and has developed incrementally over time. Smaller airports are confident in their ability to determine investment requirements based on forecasting, and to present those plans to airlines for feedback. Equally, the incumbent airline understands and respects the process and framework, which conditions its engagement with the airports.

[36] *Air New Zealand* v *Wellington International Airport Ltd* [2009] NZCA 259.
[37] Commerce Commission "Report to the Ministers of Commerce and Transport on how effectively information disclosure regulation is promoting the purpose of Part 4 for Christchurch Airport ("**Section 56G Report**")", 13 February 2014, at [X2].

55. Without the statutory power, there is risk that airlines will feel empowered to refuse, or push back on, airport proposals to a greater extent than under current processes. Regional airports have already observed material differences in approach by airlines conditioned to the Australian negotiation regime. They are worried that strong negotiation tactics, which are not based on rational economic analysis, will become the norm if section 4A is removed.

56. The risk for all airport users is that involuntary disparity in treatment across airlines will arise (instead of the consistent approach achieved now), where those airlines with significant countervailing power are able to negotiate a lower charge or better terms of service, purely based on a power imbalance.[38]

57. Regional airports have particular concerns about capital expenditure. It is expected that airlines will support development to cater for today's requirements for themselves, but do not have the same incentives to contribute to investment for future projections that benefit multiple parties. Airport investment takes time, and they must not leave it too late to plan, design, and build infrastructure to meet the required capacity. As indicated above, this issue often comes to light in Australia, where projects are held up because airport customers will not agree to the investment required. This drags out the execution of a capital programme, complicating the process, and increasing the cost.

58. Accordingly, removing section 4A is particularly concerning for regional airports, given the dominance of the national carrier and the relative strength of the parties to negotiations. We agree with the Commentary Document's view that small airports face difficulties in setting prices, when having to negotiate with one major airline customer. As previously acknowledged by Cabinet, there is no evidence that regional airports have the ability to exercise market power, due to the position of Air New Zealand as the dominant airline operator.[39] Regional airports are particularly vulnerable to the withdrawal of services, given they are essentially dependant on a single airline.[40] In this context, as noted by a previous Government:[41]

> Low volume airports face particular risks when developing landing charges. The AAA allows airports to set charges as they see fit to enable them to operate as commercial undertakings.

59. This was also indicated in the Draft Report into the economic regulation of airports, recently released by the Australian Productivity Commission, which specifically provided that airlines can, and do, exert countervailing power on airport operators when they control a significant portion of the market.[42]

60. While section 4A might not be entirely effective at assisting small airports in countering this airline monopoly power, regional airports would be in an even weaker position to set charges and operate commercially if section 4A is removed.

It will be a retrograde step compared to other sectors

61. Following the *Transpower* case discussed above, Parliament took steps to remedy the difficulties and cost that would be encountered when an essential services provider such as Transpower faced the prospect of not being paid by its customers. In particular:

[38] Australian Government Productivity Commission "Economic Regulation of Airports – Draft Report, February 2019, at 67.
[39] EGI Min (09) 17 (14) Cabinet Economic Growth and Infrastructure Committee, *Minute of Decision,* 19 August 2009 at [2].
[40] Office of the Associate Minister of Transport "Report back on the nature and scope of any issues in relation to the economic regulation of regional airports", 2009 (report to the Chair of the Economic Growth and Infrastructure Committee) at [27].
[41] Office of the Associate Minister of Transport "Report back on the nature and scope of any issues in relation to the economic regulation of regional airports", 2009 (report to the Chair of the Economic Growth and Infrastructure Committee) at [29].
[42] Australian Government Productivity Commission "Economic Regulation of Airports – Draft Report, February 2019, at 8.

(a) The Electricity Industry Act 2010 includes provisions that:

(i) provide that the Electricity Industry Participation Code can require Transpower and industry participants to enter into transmission agreements; and

(ii) deem each connection agreement to include a clause that charges are accepted by customers if they have been set in accordance with the transmission pricing methodology.[43]

(b) The Finance and Expenditure Committee noted in its report on the Electricity Industry Bill that the section should be included specifically to avoid disputes (by distributors / customers) over the recovery of expenditure by Transpower.[44]

62. Section 4A is analogous to the Transpower pricing scheme. If prices are set in accordance with the relevant statutory process, then customers using the service should be legally bound to pay them without the need for agreement.

63. Compared to the steps taken by Parliament to remedy the *Transpower* case, it would be perverse for Parliament to remove section 4A such that the *Transpower* precedent would apply to airports. Put another way, section 4A is the existing "fix" for the *Transpower* precedent – and removing it will be a retrograde step that creates a material problem.

Competition law problems

64. By removing the airports' statutory power of decision-making (to set charges) and fundamentally changing the legal basis for pricing decisions, airlines (and BARNZ in particular) might be at risk of breaching the cartel provisions of the Commerce Act. That is, because airports and airlines would negotiate and agree charges on a commercial basis, any discussions between airlines, or joint consultation by airlines, would be caught by the prohibitions in the Commerce Act on contracts, arrangements, or understandings between competitors that have the purpose or effect of:

(a) fixing prices (s 30);

(b) restricting output (s 30);

(c) allocating markets (s 30); and / or

(d) substantially lessening competition in a market (s 27).

65. This would remove the ability of airlines to consult with one another in submitting on airport charges, or to appoint BARNZ to collectively represent them, as charges would move from being set by airports pursuant to a statutory regime (s 4A of the AAA), to being charges that are established pursuant to negotiations between the supplier (in this case the airport) and each customer (in this case, each airline).

66. While airlines may seek to argue that they are engaging in "joint buying" and, therefore, fall within the Commerce Act's section 33 exception, that would not resolve these Commerce Act issues given:

[43] Electricity Industry Act 2010, s 44.
[44] Finance and Expenditure Committee "Select Committee Report: Electricity Industry Bill", 9 June 2010, at 14.

(a) Section 33 only provides an exception for either a "collective acquisition" or a "collective negotiation". Each airline will purchase and use airport services individually, based on their own commercial strategy and fleet decisions. There is no single airline voice or decision maker in New Zealand, and it is therefore not apparent that any collective acquisition will be taking place. Furthermore, it would be up to each airport's discretion whether or not to engage in a collective negotiation.

(b) Even setting aside the above, section 33 only provides an exception to the prohibition on fixing prices, and would not provide airlines any protection from allegations that any collective consultation between them had the purpose or effect of restricting their purchasing of airport services (s 30), allocating which airport they deal with (s 30), or substantially lessening competition in the acquisition of services from a particular airport (s 27).

67. Indeed, BARNZ itself has previously recognised that it, and its members, would be unable to act collectively in commercial pricing matters: [45]

> BARNZ submitted that section 30 of the Commerce Act means members cannot act collectively in pricing matters. As a result, any countervailing power they have cannot be collectively acted upon or exercised. BARNZ presents a unified voice upon common issues, but does not direct or engage in unified action. This limits the airlines ability to act collectively.

68. Accordingly, any joint consultation among airlines in relation to airport charges would likely be in breach of the Commerce Act if section 4A of the AAA were to be removed. Given the very serious consequences for engaging in conduct that breaches the Commerce Act (including potential prison sentences from April 2021), it is inevitable that removing section 4A would mean that airlines would no longer authorise BARNZ to collectively represent a number of different airlines. The direct result will be that BARNZ is excluded from the price setting process.

The level of airport pricing will remain subject to material constraints

69. The Commentary Document refers to arguments from airlines that section 4A creates an environment where monopoly pricing by airports can occur.[46] That is incorrect:

(a) If an airport happened to be in a position to impose monopoly prices, that would be due to its market power and/or a lack of countervailing airline power. If monopoly pricing was a problem, it would arise whether or not section 4A exists.

(b) To more accurately state the airlines' concern - courts have found that section 4A and other provisions in the AAA do not provide a legislative mechanism to constrain the level of prices. Airlines likely omit to point out when lobbying that courts have adopted that position on the express basis that it is the role of the Commerce Commission under Part 4 of the Commerce Act to prevent monopoly pricing.

(c) In any event, the reality is that airlines materially overstate an airport's ability to determine the level of charges in practice.

[45] Commerce Commission "Final Report: Part IV Inquiry into Airfield Activities at Auckland, Wellington, and Christchurch International Airports", 1 August 2002, at [3.109].
[46] Commentary Document, at [118].

70. To be clear, NZ Airports does not believe that section 4A gives airports unconstrained power to set the level of charges (or create a monopoly power that does not otherwise exist), and we do not wish to retain it for that purpose. In particular:

(a) Airlines' countervailing power still exists as a restriction on airport pricing today (as it did when section 4A was introduced). The Commentary Document specifically mentions the constraints on small airports, which are subject to the market power of major airlines: [47]

> On its own, the provision has not proven effective in countering the difficulties faced by small airports which often have to negotiate with one major airline customer when seeking to change prices.

(b) Airports are required to meet strict consultation obligations under section 4B, and continue to take this responsibility seriously. Airports recognise that consultation provides valuable opportunities for airports to understand airline positions on charging and investment.

(c) Part 4 regulation, and the persuasive role of airlines in the charge setting process (which includes an opportunity to provide views on airport pricing directly to the regulator), are material constraints on profitability for airports subject to Part 4. In practice, and by design, regulation under Part 4, which promotes the long term interests of consumers ensures that airports do not extract excessive profits or invest inefficiently (among other things). Price setting and investment planning under the AAA is at a more granular level within the broader constraints imposed by Part 4 – and is where airports, with the benefit of airline feedback, can test and then finalise their investment plans and price structures. If airlines intend to require lowers returns and less investment than has been deemed appropriate under Part 4, then this risks outcomes that are not in the long term interests of consumers.

(d) Airports are very conscious of their obligations in relation to information disclosure, and the threat of additional regulation. This threat increased with the passing of the Commerce Amendment Act in 2018. This threat is working as a material constraint, and we direct MoT to evidence of this:

(i) In 2013 and 2014, the Commerce Commission reported on airports' first pricing decisions made under the new Part 4 regime. As we set out in more detail above, all three airports were found to be targeting returns within an acceptable range for that five-year pricing period.

(ii) The 2017 Cabinet Paper that looked at "Strengthening the Regulatory Regime for Major International Airports" reflected on these decisions and advice from officials, and stated that: [48]

> All three airports ultimately issued pricing and disclosure that largely met the Commission's expectations. Given this, officials have advised that they consider that information disclosure has largely worked well to date. The Commission's analysis has not revealed significant subsequent problems with airport profitability, investment or innovation. There is currently little evidence of a need to change the type of regulation which applies to airports.

[47] Commentary Document, at [116].
[48] Paper to the Cabinet Economic Growth and Infrastructure Committee "Part 4 of the Commerce Act 1986: Strengthening the Regulatory Regime for Major International Airports", 2017 at [17].

(iii) The Regulatory Impact Statement for the Commerce Amendment Bill 2018 noted that evidence indicated the current regulatory regime was working well. MBIE noted that:

> Airport charges form a small part of airlines' charges to customers, and are not significant compared to other forces (such as competition within the airline industry). Moreover, evidence indicates that the current regulatory regime is working well. The proposed changes are intended to ensure this current effectiveness is maintained.

(iv) More recently, in the Commerce Commission's review of PSE3 for Christchurch Airport, it found that:[49]

> Having considered the reasons and evidence provided by Christchurch Airport, we are satisfied that Christchurch Airport's target return on its priced services of 6.44% is reasonable and consistent with promoting the long-term benefit of consumers".

(v) Finally (and as we alluded to above), the Commerce Commission released a statement (following Auckland Airport's decision to discount its charges and effectively reduce its target return) acknowledging Auckland Airport's willingness to engage and respond positively with the Commission. The Commission noted that Auckland Airport's decision was a good outcome for consumers, and that:[50]

> In our view the incentives from the information disclosure regime have strengthened over time, as both Christchurch and Auckland airports' targeted returns are significantly lower than when the current regime was introduced.

71. The regulatory regime is working well. Airports ensure that airlines are well informed, and are given an opportunity to critically review and participate actively in consultation processes. Airlines continually seek to paint a picture that there is ongoing conflict and concern over charging, but we do not agree that this is the case. Moreover, as noted above, the airlines position is not borne out by evidence from the Commerce Commission or policy officials. Clearly, there will always be differences in views between airports and airlines, but the scale and materiality of those disagreements has significantly reduced since Part 4 was introduced and the evidence is clear the current regime is working well.

Interaction with Part 4

72. The Commentary Document mentions that the Commerce Amendment Act 2018 made some changes to Part 4, and then states:

> This, combined with the Commerce Act, puts in place a regime that more effectively addresses the issues and section 4A would create unnecessary overlap if retained.

73. This appears to be a response to the views of MBIE officials, who advised the Minister of Commerce that: [51]

[49] Commerce Commission "Review of Christchurch International Airport's pricing decisions and expected performance (July 2017 – June 2022)", 1 November 2018, at [75].
[50] Commerce Commission "Auckland Airport's pricing response welcomed" (20 March 2019) <https://comcom.govt.nz/news-and-media/bulletin/auckland-airports-pricing-response-welcomed>.
[51] Ministry of Business Innovation and Enterprise "Briefing to Minister of Commerce" 23 January 2019, at [32].

> One potential issue is whether the requirement for airports to consult on charges and certain capital expenditure in section 4B of the AA Act should still be required if negotiate/arbitrate regulation also applied under the Commerce Act. This could potentially lead to duplicative requirements if airports had to both consult with customers on airport charges as well as negotiate on the same charges.

74. It appears that MBIE officials did not comprehend that the overlap problem they anticipated could arise in the future would in fact arise immediately if section 4A is repealed. As described above, the effect of removing section 4A is to require agreement on prices. A statutory obligation to consult would therefore be duplicative and confusing. Sections 4A and 4B are inextricably linked.

75. In terms of the perceived overlap between Part 4 of the Commerce Act and section 4A of the AAA, even if this was an issue (which it is not), it is only relevant to three airports. It is therefore a poor reason for adversely disrupting the price setting regime for all airports.

76. In any event, we strongly disagree that there is a problematic overlap between section 4A and Part 4 of the Commerce Act. The provisions in fact work together to establish a cohesive regulatory framework. While section 4A was originally introduced to ensure that newly established airport companies would have control over pricing (instead of the Crown), subsequent legislative developments have made it clear that section 4A now serves a broader purpose – it is a material part of the statutory economic regulation framework for airports:

    (a) Officials advising the Select Committee on the Commerce Amendment Bill 2008 disagreed with submissions that section 4A of the Airport Authorities Act should be removed. They noted that the new information disclosure regime will impose disciplines on pricing behaviour, and that there would be a new provision making it clear that section 4A does not limit the application of regulation under Part 4.[52] The MoT recognised this relationship in the Consultation Document for the 2014 Civil Aviation Review, noting that sections 4A-4C and 9A-9D contain provisions that set out the relationship between the Airport Authorities Act and the Commerce Act.[53]

    (b) Accordingly, if the form of regulation under Part 4 is changed following the proper Commerce Commission processes (ie to negotiate-arbitrate or price control), section 4A will not impede this. MBIE officials, despite raising the overlap concerns described above, also advised the Minister of Commerce that the recent amendments to Part 4 of the Commerce Act are sufficient to enable further regulation to be imposed on specified airport services if, following a Commerce Commission inquiry, the current information disclosure regime is not effective at constraining their market power.[54]

    (c) Throughout the development of the information disclosure regime, the Commerce Commission was always clear that the AAA and Part 4 were complementary. Airports were free to set prices under the AAA, but information disclosure under Part 4 would influence and constrain their pricing decisions.[55]

[52] Ministry of Economic Development "Report on the Commerce Amendment Bill", 4 July 2008, at 50.
[53] Ministry of Transport*, Civil Aviation Act 1990 and Airport Authorities Act 1966 Consultation Document,* September 2014 at 139.
[54] Ministry of Business Innovation and Enterprise "Briefing to Minister of Commerce" 23 January 2019 at [37].
[55] Commerce Commission "Information Disclosure (Airport Services): Reasons Paper, 22 December 2010" at [x11], [2.41], and [5.49].

(d) In the Commission's review of Christchurch Airport's price setting event in 2014 (the first time the Commission reviewed airport pricing decisions under the new regime), it noted that section 4A and the Part 4 regime were designed to co-exist, and that this intention was evidenced by the inclusion of section 4A(4), which states that the AAA does not limit the application of regulation under Part 4.[56] The Commission clearly stated that:[57]

> while airports can set prices as they see fit, information disclosure is intended to have an impact on those prices. As such, we do not consider that section 4A of the AAA is incompatible with the information disclosure regime as the two operate for distinct purposes, or that the Part 4 purpose is subordinate to section 4A.

(e) Cabinet's decision in 2015 to retain the information disclosure regime (following an MBIE review) and the decision to introduce enhancements via the Commerce Amendment Act 2018 were both founded on a view that the Part 4 regime was working well. There was no suggestion that section 4A of the AAA was problematic.

77. Rather than resolving any alleged 'overlap', NZ Airports strongly believes that the proposed isolated change to section 4A would *cause* significant disruption to Part 4 regulation:

(a) *It would undermine the conceptual framework for information disclosure regulation.* Recently, the Commerce Act was amended to clarify the process for changing the form of Part 4 regulation, if required. This process confirmed that Information Disclosure was the appropriate form of regulation for airports at this stage. This position is shared by authorities in New Zealand and in Australia - the Australian Productivity Commission recently published a draft report on its Inquiry into Economic Regulation of airports, which found that a negotiate-arbitrate framework would have substantial perverse effects that would harm the efficiency of the sector and negatively affect passengers.[58] In particular, the report found that the process could be time-consuming, financially-costly and hold up investments that could increase capacity.[59] The proposal to remove section 4A (and require agreement or 'commercial negotiation' to set charges) effectively bypasses the Commerce Act process and introduces a negotiate/arbitrate regime by stealth. We do not believe the Government intended this outcome when it made the decision to remove section 4A.

(b) *It would disrupt the operation of provisions in Part 4 of the Commerce Act, and section 4B of the Airport Authorities Act.* In the MoT's previous consultation on the Civil Aviation Review, it was expressly noted that any changes to the Airport Authorities Act should not interfere with Part 4 regulation or impose additional regulation of airport pricing.[60] The (then) Associate Minister of Transport, Hon Michael Woodhouse specifically stated that the review "will not be used as a vehicle for imposing additional regulation of airport pricing". The MoT's information page about the review also specified that:

---

[56] Commerce Commission "Report to the Ministers of Commerce and Transport on how effectively information disclosure regulation is promoting the purpose of Part 4 for Christchurch Airport", 13 February 2014, at [A19] – [A20].
[57] Commerce Commission "Report to the Ministers of Commerce and Transport on how effectively information disclosure regulation is promoting the purpose of Part 4 for Christchurch Airport", 13 February 2014, at [A24].
[58] Australian Government Productivity Commission "Economic Regulation of Airports – Draft Report, February 2019, at 25.
[59] Australian Government Productivity Commission "Economic Regulation of Airports – Draft Report, February 2019, at 25.
[60] This was stated by the Associate Minister of Transport, Michael Woodhouse, in a speech to the NZ Airports Association on 26 June 2013 <www.transport.govt.nz/legislation/acts/civilaviationactreviewqanda/>.

> The review of the Airport Authorities Act will include looking at the provisions relating to charges and information disclosure. However, it is not the intention to use this review as a vehicle for imposing additional airport pricing regulation.
>
> The draft Bill clearly breaches this intent.

(c) *On a technical level, removing section 4A would disrupt the workability of certain provisions of Part 4*. This is because some of the key disclosure obligations (required under information disclosure regulation) are predicated on there being a "price setting event" under section 4A and "standard charges" set on a particular date that apply to all airport users. Where there is no section 4A, there is no "price setting event" and no "standard charges", and the disclosure obligations become unworkable.

Alternative proposal

78. In the event that the Government decides that a change to section 4A is required despite all of the risks we have identified above, it should focus on the "offending" words "as they see fit". As above, airports do not require this wording to be kept, so long as the statutory power to set charges remains.

79. This would reduce the risk that section 4A is perceived to give airports more power than they actually have, without fundamentally changing the nature of aeronautical pricing and/or interfering with economic regulation of airports under Part 4.

80. The proposal also carries forward the express provision in current section 4A that makes it clear that Part 4 of the Commerce Act prevails. We consider that this adequately allows the MoT to cater for any adjustments to airport regulation made according to the Commerce Act in future (ie. negotiate-arbitrate, or price control).

81. Section 204 of the draft Bill could be amended as follows:

> **204 Airport companies must consult concerning charges**
>
> <u>(1A) Subject to this section, an airport company may set charges for the use of the airport operated or managed by it, or associated services or facilities, , which may be charged to persons or classes of persons owning or operating aircraft, or to persons or classes of persons using or otherwise enjoying the benefit of the airport, services, or facilities, or to any other persons.</u>
>
> (1) Every airport company must consult with every substantial customer in respect of any charge payable by that substantial customer to the airport company in respect of any or all identified aerodrome activities—
>
> (a) before fixing or altering the amount of that charge; and
>
> (b) within 5 years after fixing or altering the amount of that charge.
>
> (2) An airport company must consult with every substantial customer in respect of any direct charge payable to the airport company by any passenger in respect of any or all identified aerodrome activities—
>
> (a) before fixing or altering the amount of that charge; and
>
> (b) within 5 years after fixing or altering the amount of that charge.

(3) Despite subsections (1) and (2), an airport company to which subsection (1) or (2) applies is not required to consult under this section in respect of any charge with a substantial customer who has consented in writing (and not withdrawn that consent) to not being consulted under this section in respect of that charge.

(4) This section does not limit the application of regulation under Part 4 of the Commerce Act 1986.

Capex consultation thresholds

82. The Bill would make two changes to current capital expenditure consultation requirements:

(a) All airports would be required to consult on capital expenditure above the threshold (currently, only specified airport companies must consult); and

(b) A new stepped threshold would be introduced, based on passenger movements and value of expenditure (currently, the threshold is 20% of capex).

Only specified airports companies should be required to consult on capex

83. In our submission on the Civil Aviation Review, NZ Airports stated that in an environment where the Government was seeking to encourage better and less regulation, we saw no justification for expanding the capital expenditure consultation obligations to all airports. In particular:

(a) The Consultation Document did not identify any practical problems with the current approach.

(b) Capital expenditure that will have an impact on prices will in most cases form part of the consultation on prices and/or the airports will discuss proposals with their customers in any event.

(c) The distinction between the requirement for all airports to consult on pricing and the capital expenditure consultation obligation only applying to specified airports was deliberately chosen by Parliament, on the basis that "for provincial airports with revenue below $10 million, such a level of consultation is unnecessary given the countervailing market power of airlines".[61] There is nothing to suggest this dynamic is now different.

(d) It will therefore impose a regulatory cost on airports, with no identified benefit.

84. The Commentary Document now states that the change is "to mitigate the risk that airport companies undertake capital expenditure to increase profit, without providing additional services or facilities that are wanted or sufficiently valued by airport users".[62]

85. In response, NZ Airports submits that:

(a) There is no evidence that this risk actually exists. The Commerce Commission found, in its review of Auckland Airports PSE3 decision, that there was no evidence of historic under or over investment at Auckland Airport:[63]

[61] Transport Committee "Airport Authorities Amendment Bill" [1996], at iii.
[62] Commentary Document, at 14.
[63] Commerce Commission "Review of Auckland International Airport's pricing decisions and expected performance (July 2017 – June 2022)", 1 November 2018, at [184]-[185].

> Planned and actual investment is generally occurring at an appropriate time, with delays and reprioritisations justified on the basis that they were consulted on and received broad agreement by most airlines.

(b) Similarly, in its review of Christchurch Airport, the Commission found that:[64]

> Our review of Christchurch Airport's historic expenditure compared to forecast capital spend over PSE3 does not provide evidence of planned under- or over-investment. Nor do we see evidence of a strategy to gain from delaying projects or setting forecasts that are more likely to overstate rather than understate actual expenditure.

(c) A more real risk is that a dominant airline customer would have the ability to constrain appropriate investment to cement its own position in the market (for example by opposing airport development that would cater for additional airlines and services).

(d) Any perceived risk of gearing investment decisions around profitability are more likely to have been mitigated with the development of Part 4 regulation. That is, Part 4 disclosures about capex planning, and the Commission's reviews of those plans, provide useful tools and guidance for airports that are not subject to Part 4 themselves.

(e) The risk identified in the Commentary Document assumes that airport investment decisions are all about airlines. This is not the case – airports are important players in regional economic and social development, and passenger / regional interests should not be subject to effective veto by self-interested airlines.

(f) All the points made above still hold. In particular, the reasons for limiting capital expenditure consultation obligations to specified airport companies only remain as valid now as they were when first introduced.

Thresholds for consultation

86. NZ Airports acknowledges that the existing consultation threshold has not changed in a number of years, such that it is now too low for the three main international airports. As a result, airports already consult on projects valued significantly below the statutory threshold.

87. We believe the threshold should be the greater of 10% of non-land aeronautical assets or $30 million.

88. As also discussed above, capital expenditure is inseparable from price setting, as capital expenditure is a key cost recovered by aeronautical charges. Our concern is that by removing section 4A and requiring agreement on prices, the Bill will effectively require airports and airlines to agree on capital expenditure. This will be unworkable in practice and, as for the price-setting itself, make consultation obligations redundant.

89. Airports invest significant time, energy and resource into trying to reach agreement with their customers on capex projects. Airlines have a lot of industry knowledge and input that can be helpful in determining strong and sustainable infrastructure solutions. Airports actively seek the views of airlines, and take them into account when making investment decisions. However, as is the case in determining airline charges, it is not always possible to agree,

[64] Commerce Commission "Review of Christchurch International Airport's pricing decisions and expected performance (July 2017 – June 2022)", 1 November 2018, at [X34].

particularly given the diverse (and sometimes conflicting) interests of airlines, across companies, and over time.

90. Airports will continue to consult on material infrastructure projects. However, the requirement to consult must not turn into a requirement to achieve agreement. This would come with serious risk of empowering individual airlines (particularly incumbent airlines) to prevent investment in development that would deliver additional capacity, encourage competition among airlines, and benefit all airport users, based on airline's own desires or requests. These are often the same investment decisions that airports are already frequently criticised for not making in a timely manner.

Section 4(3) - requirement to act as a "commercial undertaking"

91. The Bill proposes to remove section 4(3) of the AAA, which states that airports must be operated or managed as a commercial undertaking.

92. We understand that, like other proposed repeals, this removal is proposed on the basis that the requirement is obsolete or redundant.

93. NZ Airports disagrees, and is strongly in favour of retaining a requirement for airport authorities to operate or manage the airport as a "commercial undertaking", subject to an exception for small airports that cannot meet this standard. It appears that the proposed removal is a product of an earlier misunderstanding of NZ Airports' position.

What does section 4(3) require?

94. The Airport Authorities Amendment Bill 1986 was introduced to clarify the role and function of airports. The Minister of Civil Aviation, Hon Richard Prebble, stated that the intent was to ensure that airports make the most efficient use of their resources. The Bill was intended to circumvent the procedural and substantive obstacles faced by the then joint venture airports. The Minister noted that effect of section 4(3) was to introduce an expectation for airports to operate commercially ("efficient and businesslike"), while recognising that local or central government might want an airport company to provide facilities or to pursue objectives for reasons that were not commercially justified:[65]

> In that case, local government or central government may negotiate with an airport company for the provision of any non-commercial services, with compensation being agreed between the company and the party requesting that service.

95. When the AAA was amended in 1996/97, section 4(3) was retained.

96. The requirement for airports to act as a "commercial undertaking" was considered by the Court of Appeal in *Air New Zealand v Wellington International Airport Ltd*, in 2009. The Court found that the provision requires airports to *attempt* to operate profitability, which is inherent in the notion of operating as a commercial undertaking. This involves airports following generally accepted commercial practices and disciplines, for example, by understanding their underlying cost structures and creating cost centres.[66]

97. Operating as a "commercial undertaking" is therefore not an absolute or strict duty, and may differ depending on the circumstances of each airport. It does not, and should not, mean that *all* airports are required to maximise their returns at *all* times.

[65] (3 June 1997) 471 NZPD 1849.
[66] *Air New Zealand* v *Wellington International Airport Ltd* [2009] NZCA 259, at [41].

Section 4(3) remains important

98. Thirty years on, while the 'new' airport entities are now well established, it remains the case that a statutory requirement to operate commercially helps to promote efficiency in the airport sector. Nothing has suddenly changed that would make section 4(3) redundant or obsolete.

99. To the contrary, we believe it is important to retain a provision that provides a clear direction on how airport authorities are intended to operate in a unique environment:

(a) In the *Air New Zealand* case above, the Court of Appeal noted that section 4(3) was introduced in the same year as the State-Owned Enterprises Act 1986 and two years prior to the Port Companies Act 1988, which included requirements for entities under those acts to "operate as a successful business". The Court equated this requirement to operating "as a commercial undertaking" under section 4(3).

(b) Accordingly, airports are not the only entities currently recognised as having unique characteristics, which require their own legislation. Ordinary rules of company law apply to state owned enterprises, and to port companies. However, like airports, in recognition that the ordinary powers are not sufficiently prescriptive, the Companies Act is supplemented by powers to reflect the unique nature of the entity, and their own unique circumstances. There is no proposal to remove the relevant provisions of the State-Owned Enterprises Act 1986 or Port Companies Act 1988, and nor should there be. If the provisions were removed in these Acts, it would raise the question of how Parliament now intended for those companies to operate, which mirrors the query we are currently asking about airports.

(c) There is no basis to adopt a different approach for airport authorities. They remain distinct, like ports. Removing section 4(3) will naturally raise questions about whether Parliament intends for airport authorities to operate in a different manner and send unintended signals to their owners which include local councils. Given their important role in tourism and trade in the regions, it might be understood (incorrectly) that regional airports that connect New Zealand internally are expected to operate in a non-commercial manner if that is required to provide support to our regions and local communities.

100. Section 4(3) also provides a baseline for regional airport's engagement with customers that hold significant market power. Although it does not give an airport power to direct or require specific outcomes, combined with section 4A it does provide a platform for regional airports to resist customer demands that would see them operating in a non-commercial manner if accepted. Put another way, removing both section 4A and 4(3) will significantly weaken the commercial position of regional airports.

The case of small regional airports

101. In early 2019 NZ Airports wrote to the Minister of Transport to signal that we would take the opportunity of the Civil Aviation Bill to ask for misaligned policy settings affecting small airports to be changed. At no time did we consider this should include the removal of the commercial mandate in section 4(3), which we understood from the MoT's 2014 discussion document would remain unchanged.

102. However, we do not consider that the directive in section 4(3) is appropriately applied to *all* airports. As reported in the media, some smaller regional airports are struggling to operate in a commercially viable manner, and cannot realistically start each year with an expectation

of operating profitably. The current policy framework for these airports – broadly those with less than 200,000 passengers per year – therefore does not recognise practical realities, and is unfair to a number of regions.

103. We consider that there is an identifiable group of small airports, that should be carved out of the general mandate in 4(3), leaving the policy and its beneficial outcomes in place for airports that are commercially self-sustaining.

104. There are three fundamental problems:

(a) The volume of air traffic through small regional airports does not allow them to operate as commercial undertakings, yet this is a statutory requirement under the AAA. It is inappropriate to maintain a policy setting that cannot be implemented in reality.

(b) Small regional airports operate at a loss, which is a burden placed on their local government owners. This part of the national transport system should, as is the case with roads, be supported by a national funding system which ensures sustainable, safe minimum standards and facilities.

(c) There is an essential unfairness in the Government's dealings with small airports, in that five of them are co-owned by the Crown in Joint Venture arrangements. This provides those five a valuable degree of financial support, while other comparable small airports have no such support and rely on subsidies from their Council owners and small ratepayer bases. The Joint Venture model itself, established in the 1950s, is overdue to be updated.

105. We think the right solution for smaller regional airports has two components:

(a) The first is to recognise in legislation the class of airports that (because of the fundamentals of their scale and circumstances) cannot realistically operate on a commercial basis. This would require an exemption from section 4(3), which could be achieved through a simple additional clause in the Civil Aviation Bill. We set out our proposed drafting below.

(b) The second is to establish a national funding system capable of sustaining core airport infrastructure and safety standards.

- *A national funding system*

106. Airports recognise that the Provincial Growth Fund ("**PGF**") is currently a valuable avenue for support, and a small number of airports have already attracted grants or loans. However, the PGF primarily targets opportunities for additional growth and improved resilience in the next year or two, whereas significant expenditure to maintain infrastructure and safety standards (eg re-surfacing the existing runways) is an ongoing requirement for decades ahead.

107. In our 2017 position paper *Connecting the Long White Cloud* we included an additional sum of $13 million over five years in the knowledge that regional airlines may also need support or underwriting to maintain services. [67] We have not attempted to develop this aspect of transport policy here.

108. However, we strongly believe that good transport policy requires a sustainable fund for the long term, with the goals of air connectivity and resilience for small communities. Preliminary

[67] New Zealand Airports Association "Connecting the Long White Cloud", July 2017, at 18.

estimates put the funding requirement at about $21 million over five years – not a large sum compared to the benefits of keeping the towns connected by air, or compared to road spending that provides access between the same towns and cities.

109. The new framework therefore needs to specifically empower the Ministers of Transport and Finance to allocate (or re-allocate) appropriate funds to airports that meet criteria under the new policy (similar to the enabling power in clause 198 of the Bill). This means that it would be open to the Government to withdraw from the existing joint venture airport arrangements, the proposed sustainable fund would provide a more modern, sustainable and fair approach, and would allow the joint venture councils to consider a change with confidence about future funding.

110. A new policy framework would enable qualifying aerodromes to be identified (and reconsidered from time to time) and would allow the Minister to be assured that:

(a) a suitable operational standard is targeted and achieved (e.g. catering for appropriate aircraft types and passenger numbers);

(b) good governance and management practices are adopted and reported;

(c) a level playing field among airports and communities is established; and

(d) a local contribution to airport operating costs is considered.

111. The proposed new framework would not be imposed on those airports (and their owners) that may prefer a wholly local solution, as airports would need to apply to enter the new framework.

- *New provision in the Bill for identifying and funding non-commercial airports*

112. The establishment of a group of airports not bound by section 4(3) can be achieved by inserting clauses in the Bill, along these lines:

> (1) The Minister may, following an application by an airport, declare by notice in the *Gazette* that the airport is exempt from [former section 4(3)], and is instead required to operate with the objective of maintaining air transport links for the economic and social well-being of the community it serves.
>
> (2) Any airport wishing to be considered by the Minister under (1) may make an application to the Minister, and the Minister may establish guidance for this purpose.
>
> (3) Before exercising the power under subsection (1) , the Minister must consider the following matters to the extent they are relevant:
>
> (a) community, regional and national transport and resilience needs
>
> (b) the scale and type of air operations using or likely to use the airport
>
> (c) the structures, operational areas, facilities, passenger amenities, systems and safety requirements provided or to be provided at the airport to serve air transport
>
> (d) the governance structure of the airport

(e) capital spending and asset management plans

(f) the accounting records and financial outcomes of the airport

(e) any proposed local contribution to the operating costs of the aerodrome including from aerodrome user charges and other revenue.

(f) any other matter that the Minister considers is relevant.

(4) The Minister and the Minister of Finance may provide funds from a Crown Bank Account (out of money appropriated by Parliament for the purpose) sufficient to enable the safe and reliable operation, maintenance and development of each listed aerodrome for a period specified by the Ministers, which shall normally be a period of ten years and may be renewed, and may attach conditions and criteria to the provision of funds.

113. To conclude, in accordance with Treasury's paper on Best Practice Regulation, regulatory changes should be targeted to solve specific issues. This requires careful consideration of the potential impact of the change and the risk of unintended consequences.[68] In this case, section 4(3) is not a regulatory "problem" that requires a solution, but provides a basis for sound and efficient management of airports, with a proven history.

114. In the case of smaller airports that cannot aspire to normal commercial outcomes, the proposed new policy enables the Minister of Transport to act in the interests of transport connectivity, community well-being and resilience. This addresses the problem of the current unfair financial imposition on small regional communities to fund parts of the national air transport system, and could reduce the disparity between the five small airports co-owned by the Government and local councils, and airports with no such Government ownership.

Authorisation of Airline Alliances

Summary

115. The Bill proposes to retain the current Ministerial authorisation regime, with some enhancements to make the process more transparent and to ensure interested parties have an opportunity to provide relevant information.

116. NZ Airports acknowledges that appropriate airline alliances are a necessary feature of an efficient international aviation market, promoting global reach and international connectivity for travellers to and from New Zealand. However, given New Zealand's open skies policy andthe well-accepted potential for any proposed alliance to reduce route competition and harm consumers, they must be carefully scrutinised to ensure that there is likely to be a net benefit.

117. Having reviewed the advice provided to the Minister on this issue, we fail to understand how it was reasonably possible for Ministers to make a final decision against subjecting airline alliances to the authorisation regime under the Commerce Act. It is clear that:

(a) The MoT advised that there was no justification for aviation being the only sector not covered by the economy wide competition regime.[69]

[68] The Treasury New Zealand "Best Practice Regulation: Principles and Assessments", February 2015, at 80.
[69] Briefing to Minister of Transport "Civil Aviation Bill: Economic Issues", 29 February 2018, at 9.

(b) Treasury advised that maintaining a specific regime under the Civil Aviation Act was out of step with international best practice, and the advice of the OECD and NZ Productivity Commission, and that is preferred approach is that the Commerce Commission be granted responsibility for administering airline alliances. The Commission can adequately take into account New Zealand's broader international interests, to the extent they are relevant.[70]

(c) The Commerce Commission supported transitioning the aviation sector to a competition regime that is governed by the Commerce Act.[71]

(d) MBIE's preferred approach is to have all sectors subject to the Commerce Act regime, unless a strong case is made why a sector should have different treatment.[72]

118. The Cabinet Papers and Regulatory Impact Statements provide no evidence that "wider aero-political" considerations or air service agreements are factors that can justify the maintenance of a specific aviation authorisation regime.

119. Accordingly, NZ Airports:

(a) strongly believes (like all relevant Ministries and independent regulators) that the Commerce Commission should consider whether to authorise airline alliances, applying the existing authorisation test under the Commerce Act;

(b) submits that, as an alternative (which is significantly inferior to our preferred option), the Bill should be amended so that:

(i) There is a requirement for the Minister to obtain and consider a report from the Commerce Commission on the proposed alliance.

(ii) The criteria for approval make it clear that the Minister must be satisfied that the proposed alliance will provide a net public benefit - ie there are public benefits that outweigh the costs of reduced competition (which is the test for all other sectors under the Commerce Act). Currently, the Bill refers to the purposes of the Act as a substantive test for authorisations, which does not provide clear or appropriate guidance for when an authorisation can or should be approved.

(iii) There is an obligation for the Minister to monitor an alliance to ensure that he or she continues to be satisfied that it provides a net public benefit.

Context

120. As with many other aspects of aviation, airline routes, capacity, and arrangements are constantly in a state of flux, having to adapt to changing commercial pressures, while operating in a global market. In practice, authorisations to date have been granted without a fixed end date, conditions, or opportunities for review. The consequences for competition in the market, and for route development, can therefore be significant, particularly when considered alongside non-authorised partnerships (such as codesharing, global alliances, or frequent flyer partnerships). For example, airports have noticed that the granting of

[70] 2016 Cabinet Paper at [130] – [132].
[71] 2016 Cabinet Paper at [133] – [134].
[72] 2016 Cabinet Paper at [136].

alliances, such as those between Air New Zealand and its partners (Air China, Singapore Airlines, United Airlines, and Cathay Pacific), can result in a reduction in routes and capacity, and a net detriment to passengers. This is exacerbated when the cumulative impact of authorised alliances is taken into account.

121. The starting point in considering an authorisation should therefore be a presumption that the alliance is anti-competitive, until the regulator is satisfied otherwise. This will ensure that reasoning is robust, and that alliances are only authorised if there is actual evidence that it will produce net benefits to the aviation market - including by increasing route options, and decreasing costs to passengers.

122. Given the consumer interest at stake, over the years we have been troubled by the lack of transparency in the authorisation process. The MoT does not issue draft decisions, and submitters are not informed of the basis for, and evidence underpinning, final decisions, which makes New Zealand somewhat of an outlier. To become informed, submitters make requests under the Official Information Act, but typically receive heavily redacted submissions and ministerial briefings in response.

123. It feels to us that decisions are made on the basis of information applicants choose to supply (rather that the decision-maker embarking on independent investigations), and the reasoning for an authorisation can be obscure. Whatever authorisation process is finally chosen, it is essential that transparency is improved.

Commerce Commission is the expert competition regulator – for all markets

124. NZ Airports' strongly preferred position is that the Commerce Commission decides whether an authorisation should be granted, applying the standard authorisation test under the Commerce Act. Section 61(6) of that Act provides that the Commission shall not grant an authorisation unless it is satisfied that the arrangement:

> will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result therefrom.

125. The Commerce Commission has over many years, developed a framework to apply this test to various markets – all of which will have market-specific features. The matters that it is required to consider for each authorisation application will vary depending on the circumstances and nature of the market in question. Recent cases have made it clear that the Commission can take into account a diverse range of qualitative (ie non quantifiable) benefits or detriments (including, for example, media plurality and health benefits of breastfeeding). Any fear that the Commission will only consider economic or financial factors when considering aviation alliances is misplaced.

126. We understand that New Zealand's network of international air service agreements are relevant to an assessment of whether a proposed alliance will provide a benefit to the public. There is therefore good reason for having an 'aviation expert' regulator contributing to the decision. Given the constructive work that MFAT and MoT do in negotiating and executing international air services agreements (and the confidential information they hold about the existing framework and how it may change), it makes sense that they are involved.

127. However, at their heart, airline collaborations involve potentially anti-competitive behaviour. In effect, authorising an alliance amounts to granting exemptions from the application of certain provisions of the Commerce Act. This is on the understanding that there are some situations whereby an arrangement that may include some anti-competitive provisions can

nevertheless be a beneficial arrangement overall. That is, the public interest is best served by the collaboration rather than the competition that would occur in the absence of the arrangement.

128. The Commerce Commission applies this authorisation process to every market in New Zealand, other than airline alliances. We see the only reason for subjecting the airline sector to a separate regulator and a separate regime would be where there is something materially unique about it. This is not the case.

129. The first step in deciding whether to authorise an alliance is to understand and quantify the lessening in competition that would result. The Commerce Commission is best placed to consider the effect of any alliance on the market and consumers. We, like the Productivity Commission, believe that an advantage of the Commerce Act regime is that the Commerce Commission can apply its specialist competition and cost/benefit analysis expertise to authorisations across sectors in a consistent manner. It is true that airline collaborations will involve market-specific issues (as all markets do). It will therefore be incumbent on all stakeholders, including airports, airlines and MoT, to provide information to the Commission so that it is appropriately informed on all relevant matters - including matters of qualitative assessment.

130. The Commission's role as investigator should also help to reduce the current adversarial nature of the submission process, and encourage interested parties to provide evidence to inform the Commission's decision under a well-established framework.

131. We do not see any reason why the Commerce Commission is not capable of considering aviation market factors, especially if it is assisted by input from MoT. In other industries, it is common for the Commerce Commission to reach out to another Government agency for further information, where that agency may have greater knowledge of an industry for which the Commerce Commission is required to make a determination. The Commerce Commission's authorisation guidelines make it clear that a wide range of benefits to New Zealand will be taken into account,[73] and that the Commission will exercise qualitative judgment when necessary.[74]

132. The Commerce Commission has already advised the Productivity Commission that it could take into account international civil aviation obligations in a Commerce Act authorisation process, if they were described in a submission. It would assess the net national benefits of fulfilling these international obligations to varying extents.[75]

133. This is exactly the case in Australia, where the Australian Competition and Consumer Commission ("**ACCC**") has the ultimate decision making power in assessing and approving airline alliances. The ACCC undertakes its evaluation in accordance with the relevant net public benefit tests set out in the Competition and Consumer Act 2010 (Cth). In broad terms, the ACCC is required to identify and assess the likely public benefits and detriments, including those constituted by any lessening of competition, and weigh the two.[76] This is no different to the Commission's process for assessing a merger in any other industry. The Ministry of Transport's Australian equivalent, the Department of Infrastructure and Transport,

[73] The Commission notes that "we regard a public benefit as any gain to the public of New Zealand that would result from the proposed transaction regardless of the market in which that benefit occurs or whom in New Zealand it benefits" – see Commerce Commission "Authorisation Guidelines" July 2013, at [37].
[74] The Commission states that "where we cannot quantify a benefit or detriment, we make a qualitative judgment as to the importance of that benefit or detriment relative to the quantified benefits and detriments – see "Authorisation Guidelines" at [52].
[75] Productivity Commission "International Freight Transport Services Inquiry - Final Report" (April 2012), at 250.
[76] Australian Competition and Consumer Commission "Determination: Applications for authorisation lodged by Virgin Australia Airlines Pty Ltd, Air New Zealand Limited and Others in respect of an airline alliance between the applicants", 3 September 2013 (A91362 & A91363), at [2].

makes submissions to the ACCC about the alliance (which would likely include context regarding international air services agreements).[77]

Given that many alliances involve Trans-Tasman routes that require authorisation in both New Zealand and Australia, it makes very good sense for the authorisation regimes to be the same for each country.

The argument for Ministerial approval is weak and lacks evidence

134. It appears that the perceived need for the Minister to take account of New Zealand's broader international interests is the only reason to prefer a specific authorisation regime for aviation.[78] NZ Airports agrees with the MoT, the Treasury, MBIE, the Commerce Commission, the Productivity Commission and the OECD that this is a weak justification, and that any such factors can and will be appropriately addressed under the Commerce Act authorisation process. In particular:

(a) The New Zealand Government pursues an open skies policy, which NZ Airports supports, and which means that route and capacity restrictions are far less frequent under New Zealand's international air services agreements.[79] We are not aware of any airline alliance that has been entered on the basis that it provides a means to comply with relevant air services agreements.

(b) For any broader foreign relations or "aero-political" considerations, there would be every opportunity for the Ministry of Transport and Ministry of Foreign Affairs and Trade to make submissions to the Commission.[80]

135. In summary, NZ Airports cannot understand how or why the Minister has ignored the advice of all relevant Ministries and independent regulators on this matter.

Improvements to the Bill's proposal

136. If, despite our submission, a specific aviation sector authorisation regime is retained, then the following improvements to the draft Bill are required:

(a) the Minister should be required to obtain and consider a report by the Commerce Commission on the lessening in competition that would result from the proposed alliance, and whether there are benefits to the public that outweigh that harm (for the reasons described above).

(b) there should be a clearer, more appropriate test for granting or denying an airline alliance – equivalent to the test for granting authorisations under the Commerce Act (set out above). This would mean that:

(i) The starting point would be whether the proposed alliance is likely to substantially lessen competition in a market, by comparing the likely state of competition if the alliance is granted, with the likely state of competition if it does not go ahead.

[77] Australian Competition and Consumer Commission "Determination: Applications for authorisation lodged by Virgin Australia Airlines Pty Ltd, Air New Zealand Limited and Others in respect of an airline alliance between the applicants", 3 September 2013 (A91362 & A91363), at [42].
[78] 2019 Cabinet Paper, at [155].
[79] A point made by the MoT in its advice to the Minister - see Ministry of Transport "Briefing and Draft Cabinet Paper: Civil Aviation Bill – agreement to new policy proposals before Cabinet consideration", 25 October 2018, at 42; and Ministry of Transport "Aide Memoire: Authorisation of Airline Alliances", 28 January 2019.
[80] Ministry of Transport "Aide Memoire: Authorisation of Airline Alliances", 28 January 2019, at 22.

(ii) Where it is found that there will be a lessening of competition in the market, an authorisation could only be granted if it is likely to result in a benefit to the public that outweighs the lessening in competition.

(iii) The Minister should also be directed to consider aviation specific factors, including:

(aa) air service agreements and broader international connectivity; and

(bb) the broader alliance picture (rather than reviewing each alliance in isolation) and impacts thereof.

137. These changes are required because, as it stands, the Bill requires the Minister to consider the purposes of the Bill. Those purposes provide no relevant guidance on how to assess whether an airline alliance is in the public interest.

138. Further, to ensure all relevant information is provided to the decision-maker, and to provide for ongoing monitoring of whether alliances remain in the public interest, the authorising body (whether it be MoT, the Commerce Commission, or both) must have additional powers and duties as follows:

(a) *In considering whether to grant an alliance,* the regulator should be granted the power to specifically request information from carriers. Currently, the regulator makes its decision based on the information it receives from airlines making the application. However, the airlines have discretion as to what information they will provide to the regulator in this process. We do not consider that this allows the regulator to make a sufficiently informed response. We note that if the Commerce Act applied to the application for authorisation, then the Commerce Commission has powers to require information to be produced;

(b) *In granting an alliance*, the regulator should be able to impose conditions including in relation to the term of the alliance, and minimum quality or quantity standards for the carriers to meet. We note, for example, that in renewing the Qantas-Emirates alliance in 2017, the ACCC was concerned that the alliance was likely to significantly impact competition on one route (Sydney to Christchurch). To address this concern, the ACCC imposed capacity conditions, which aimed to impose a limit on the airlines' ability to increase prices through reducing capacity.[81] This included an empowerment for the ACCC to, at any time, set a minimum level of capacity on the route. It would be prudent for the New Zealand regulator to be empowered to do the same to protect the interests of New Zealanders.

(c) *On an ongoing basis*, the regulator should have the power, and the obligation, to monitor performance and remain satisfied that the alliance continues to be in the public interest (or revoke the authorisation). The exercise of this power might look something like the ACCC's approach in the Qantas-Emirates alliance discussed above, whereby the airlines were required to provide the ACCC with regular reports on seats and passengers flown, fares and route profitability.

(d) *At its conclusion,* the regulator should have the power, and the obligation, to conduct a review of the alliance and its implications. This is on the basis that it would provide guidance to future decision-makers including, specifically, in relation

[81] Australian Competition and Consumer Commission "ACCC proposes to re-authorise Qantas Emirates alliance", 16 February 2018 <www.accc.gov.au/media-release/accc-proposes-to-re-authorise-qantas-emirates-alliance>.

to the counterfactual of a similar alliance application. We note, for example, that when the Air New Zealand-Virgin Alliance ended in 2018, both Airlines moved to grow capacity – with Air New Zealand announcing two new trans-Tasman routes, plus an additional 15 percent seat capacity on all its Tasman routes.[82] This was clearly a result of increased competition in the market, and ultimately provided benefits to customers. This is clear evidence of a counterfactual - that is, a trans-Tasman market without an alliance authorisation.

Land ownership, use, and acquisition

Lease termination

139. The draft Bill would remove the power for airports to terminate leases, as currently provided for in section 6 of the AAA. The draft Bill would retain provisions that prevent airports from entering leases that affect the safe operation of aircraft (section 207).

140. NZ Airports opposes this proposed change. We are particularly concerned that:

(a) no explanation has been provided for this proposal - section 6 has simply been included in the list of "obsolete" provisions. We have not located any analysis in the Cabinet Papers or RIS that demonstrates section 6 is "obsolete" or redundant (which is not surprising given the opposite is in fact that case); and

(b) during the 2014 Review, the MoT only proposed to provide greater clarity about the circumstances in which airports could terminate leases without compensation. The draft Bill changes this position without any further analysis or explanation.

141. Put simply, section 6 was included in the AAA to reflect the unique circumstances of airports as long-term land owners – and those circumstance have not changed in any way. We therefore strongly disagree that the power to terminate leases is obsolete or redundant.

142. Airports will provide specific case studies in their separate submissions to demonstrate that section 6 is used and therefore has real and practical importance. Airports are often required to react to unexpected regulatory change, and need the flexibility to adjust airport layout and infrastructure in order to do so. This may require the termination of leases in order to repurpose the affected area for airport purposes. It is important that this change is achieved swiftly, particularly if the regulatory change is required to improve safety or security outcomes. For example:

(a) in 2011 Christchurch Airport was required to extend its runway end safety areas to comply with the CAA Rules. The new layout had implications for Christchurch Airport's planning environment, and it was required to secure an early termination of its lease with Harewood Golf Club, construct new local roads to transfer to the local authority and navigate the road stopping procedures under the Local Government Act. It was given the requisite ability to do so (and to comply with the CAA) through the backstop provided in its lease as consequence of section 6 of the AAA.

(b) There is a prospect that terminal reconfigurations are required to comply with new security screening requirements. To effectively create requisite space to comply with any new requirements, the early termination of existing leases will be required.

[82] Nikki Mandow "Inside Air NZ's divorce from Virgin", 12 April 2018 <www.newsroom.co.nz/2018/04/11/104128/air-nz-virgin-split-a-tale-of-two-cultures#>.

Time will be of the essence to comply with those requirements. The absence of this ability may undermine airports ability to deliver this important initiative.

143. Airports are long-term property owners – they do not develop land for the purpose of selling it. They have long term planning horizons for the use of land over time accompanied by well developed master planning processes often reflected in district and regional plans. Modern commercial airports grow over time, and must continually plan to cater for that growth. Not just for themselves but also for their communities.

(a) A key feature of this long term planning involves leasing land to users of the airports, often on a long-term basis, for commercial purposes when it is not yet required for aeronautical purposes. Often, a commercial use is an "interim" use. This allows airports to efficiently use land for the greater economic good - ie the inefficient alternative is to keep land vacant in case it is needed for airport purposes, or to enter shorter term leases only. The ability to terminate if required therefore encourages a longer term vision for land. Short term leases might provide certainty but would discourage long term infrastructure investment.

(b) Airports are not in the habit of entering leases that will interfere with the safe operation of aircraft and/or hinder aeronautical development.

(c) Similarly, airports very rarely resort to using the statutory power to terminate leases. It is in an airport's commercial interests to maintain a stable and certain leasing environment that supports investment by all parties who operate in the airport precinct. Such interests would be undermined by frequent ill-conceived use of the power to terminate. The Commentary Document does not refer to any instances of complaint against airports for terminating leases, and we understand that there were no submissions to that effect in the 2014 Civil Aviation Review. We do not see that there is a problem that requires solving.

(d) However, given the long-term duration of many leases, and the ever-changing nature and timing of airport development in the face of growth that cannot be anticipated with certainty, airports need to have a backstop option of terminating leases to allow for efficient airport development.

(e) Section 6 provides that important backstop - to allow airports to exercise control over development and expansion that is in the interests of all users of the airport. Where airports expand their facilities to cater for aeronautical growth, incumbent operators who hold leases over areas required for expansion are naturally incentivised to resist activity that harms their economic interests.

144. It appears that the rationale for section 6 has not been adequately considered. There are two limbs to section 6:

(a) the restriction on entering leases that interfere with the safe and efficient operation of the airport; and

(b) the ability to terminate leases that interfere with airport operations, due to (unforecast) airport purposes.

145. The Bill proposes to keep the first limb of the provision (albeit amended to narrow the restriction), while removing the second. We consider this to be inconsistent and illogical. The restriction on entry and the ability to terminate are both equally necessary to enable the safe and secure provision of airport services in an environment subject to rapid and

unforeseen regulatory change, and to promote efficient use of land in that changing airport environment over time.

146. We also suspect that the right to terminate under section 6(3) has been inappropriately conflated with the statutory provisions regarding payment of compensation upon termination under section 6(4) to 6(6). The compensation provisions are important for the workability of section 6, but are rarely an issue in practice:

(a) Leases can and do include provisions for any compensation for improvements on early termination and/or it will be a matter for negotiation at the time.

(b) However, the purpose of section 6(4) and 6(5) is to limit compensation to improvements effected by the lease during the term of the lease. That is, it is consistent with the scheme of section 6 for lessees to be compensated for investment they have made, but it would undermine the purpose of providing for efficient airport purposes if compensation also covered, for example, a lessee's lost opportunity.

147. Further, many existing leases were entered on the basis that the provision would continue to exist. Any legislative change would significantly interfere with the contractual relationship, resulting in uncertainty and significant costs. At the very least, removal of the provision should be grandfathered so that the change only applies to new leases entered after the Bill comes into force.

148. In conclusion, there has been no change in circumstances that could justify removal of the statutory power to terminate leases - the circumstances for which it was designed continue to exist.

The section 6(8) exemption - subdivisions

149. Section 6(8) of the AAA provides that certain provisions applying to leases (and "subdivisions") in other legislation shall not apply to the subdivision of any airport.[83] The effect of section 6(8) is to exclude the application of provisions that would give local authorities and Ministers control over leases for terms greater than 35 years, and roads serving such premises.

150. Again, section 6(8) is not obsolete or redundant. It continues to serve a very important purpose. NZ Airports is concerned that if the relevant provision in other legislation were to apply in the future, then there could be serious adverse consequences for airport investment and development.

151. We therefore strongly oppose removal of section 6(8) from the AAA and submit it should be included in the new Civil Aviation Bill.

152. At a high level, the effect of section 6(8) is as follows:

(a) Ordinarily, section 218(1) of the Resource Management Act 1991 ("**RMA**") provides that the division of land by way of a lease for a term of more than 35 years constitutes subdivision of that land. The effect of this is that, where a lease is entered into for a tenure that is longer than 35 years, the lessor must comply with the requirements for subdivisions set out in the RMA, which include, among other things, the requirement to obtain a resource consent before granting the lease.[84]

[83] Public Works Act 1981, parts 8-12; Local Government Act 1974, part 21; Resource Management Act 1991, s11 and part 10.
[84] Resource Management Act, s 11.

The purpose of this requirement is to prevent avoidance of subdivision requirements via the granting of long-term leases.

(b) Ordinarily under Part 21 of the Local Government Act 1974 ("**LGA**"), prior permission from the local authority is required before any private road or private way is created, and the local authority is entitled to impose conditions on these consents.[85] However this does not apply to roads that serve a subdivision consented under the RMA. Given that leases for over 35 years are excluded from the RMA, it is also necessary to specifically exclude the application of Part 21.

(c) Most of Parts 8 to 10 of the Public Works Act 1981 are now repealed, but there are still provisions dealing with declaration and stopping of roads. These provisions are excluded by section 6(8).

153. The above is a logical position. The nature of airport operations (and associated land use) is different from other planning contexts. It is imperative for airports to maintain control over property within the airport precinct to ensure that they control movements in and around the airport. Granting leases on airport property is therefore not equivalent to developers using leasing powers to work around the subdivision consent requirements in the RMA.

154. The provision is achieving its objectives in practice. A significant number of leases on airport land are for terms longer than 35 years.

155. In conclusion, there has been no explanation why the incentive to enter long-term leases should be removed. The proposed change would materially change the existing legal position, and would have a significant adverse impact for airport planning and development.

Bylaw-making powers

Scope of bylaw-making powers

156. NZ Airports supports the decision to maintain most of the bylaw making powers under the AAA. The power to make bylaws is important and remains relevant to airports, as it is the most effective way of regulating public access to airport property.

157. We recognise that airport companies do not currently have the power to make bylaws under the provisions that are proposed for removal. We are also aware that airport authorities (that are not airport companies) have not made bylaws for these purposes.

Interaction with the Land Transport Act

158. Our concern, however, is that the Bill proposes to remove section 9(7), which deems a bylaw relating to traffic and parking regulation, made by an airport company under the AAA, to be a bylaw made by a road controlling authority ("**RCA**") under the Land Transport Act 1998 ("**LTA**"). The key impact of this provision is that the bylaw made under the AAA can be enforced as a bylaw under the LTA, including by enforcement officers appointed by the airport authority.[86] This provision is not obsolete or redundant.

159. We understand that, in most instances, given airports own much of the roading networks on their land, they are deemed to be an RCA for the purposes of the LTA. As an RCA, airports are therefore empowered under section 22AB of the LTA to make bylaws for the purposes

[85] Local Government Act, s 348(1).
[86] Land Transport Act, ss 113 and 139.

set out in that section. However, any bylaw made by an Airport Authority under section 22AB is subject to the same approval process under sections 9(3) and 9(4) of the AAA.[87]

160. Accordingly, there is a seamless integration between the making and enforcement of traffic regulation bylaws under the AAA and LTA.

161. By removing section 9, the Bill would ruin this seamless integration, and have practical adverse consequences, as follows:

(a) We understand that airports with traffic regulation bylaws will have made them under section 9 of the AAA;

(b) Under the Bill, they would no longer be deemed to be made under the LTA, which means that enforcement provisions of the LTA will no longer apply to airport bylaws. NZ Airports is particularly concerned, for example, that:

(i) Enforcement officers will no longer be empowered to enforce bylaws designed for the operational efficiency, safety and security of roads within the landside environment of an airport, under section 113 of the LTA – including by obtaining information from drivers; inspecting, testing or moving vehicles; or directing traffic to remove obstructions or promote safety.[88]

(ii) Enforcement officers will no longer be able to issue infringement notices against those who have committed an infringement offence.

(c) Airports are currently using these powers to efficiently manage traffic safety and security within the landside environment of an airport – especially in peak times – so there could be adverse practical consequences for passengers and freighters if those schemes can no longer be enforced.

162. No detail has been provided on why this provision is proposed to be removed. It is certainly not obsolete or redundant, and must be retained.

[87] Land Transport Act, s 22AD.
[88] Land Transport Act, s 113.

D: AVIATION SECURITY

Aviation security services

163. We appreciate that the Bill seeks to clarify some of the powers, functions and duties of the Aviation Security Service ("**AvSec**").

164. However, it does not seek to clarify the scope of "aviation security services", which risks maintaining current uncertainty in determining who can (and should) provide security services at the airport. By way of example, some years ago the Civil Aviation Authority directed that screening at vehicle checkpoints was not a core "aviation security service" and therefore would only be provided by AvSec if contracted for by airports.

165. The problem is that "aviation security services" is defined by reference to AvSec's functions and duties in section 128 of the Bill. Statutory functions and duties of an entity are necessarily high level, and do not provide adequate clarity as a legislative definition for aviation security services.

166. Rule 140 requires that a certificated aviation security provider has procedures in place to meet the requirements of Appendix A of that Rule, and to comply with Appendix A on an ongoing basis. Appendix A of Rule 140 provides a very clear scope of activities that encompass "aviation security services".

167. We therefore submit that the statutory definition of "aviation security services" should be as follows:

> **aviation security services** means activities that any authorised aviation security service provider is required to perform pursuant to operational requirements that such providers are required to comply with in accordance with Rules made under this Act".

Powers of AvSec

168. Subject to the clarification sought above and the proviso below, we are comfortable with the provisions in the Bill that clarify the search and seizure powers of aviation security officers.

169. The proviso is that we consider some of the provisions that establish search, screening and seizure powers of security officers should be clarified to ensure that the "geographic" extent of Avsec's powers is sufficiently clear. For example:

(a) Under section 131(c) and (d), a security officer may screen any person "before" the person enters a sterile area or security enhanced area. On the other hand, under section 131(a), a security officer may screen a passenger or crew member in an area that is "reasonably proximate to a sterile" area" or "set aside for the purpose of passengers or crew to present their baggage…..":

(b) Under section 132, searches of crew members or passengers can take place anywhere "at an aerodrome". The same applies to vehicles and unattended items. Searches of other persons can take place "before" the person enters a sterile area or security enhanced area.

170. The definition of aerodrome (or airport under our preferred position below) is broad, and we do not think it is intended to confer such broad geographic powers on AvSec. We understand that this reflects the drafting in the existing legislation, but see the review as an

opportunity to modernise and clarify the drafting (in accordance with the original intent of the review) to more accurately prescribe where AvSec can carry out its functions. For example:

(a) The screening of passengers and crew members under section 131(a) should be in an area that, is reasonably proximate to a sterile area, ***and*** is set aside for that purpose (ie it should not be ***"or"***).

(b) It should be clarified that the other powers to screen a "person or thing" does not include passengers and crew members, and can only take place **"immediately before"** they enter the sterile or security enhanced area.

(c) The powers to search under section 132 should be aligned with the screening provisions under section 131. In particular, searching of passengers or crew members should take place in the area set aside for screening, or in the sterile or security enhanced areas (ie not the entire airport / aerodrome).

171. We are comfortable that AvSec is empowered to search vehicles. However, further to the discussion above, it is not clear under the Bill whether a search of a landside vehicle is included within the definition of "aviation security service". The functions and duties of AvSec under section 128 appear not to cover vehicle searches.

172. In our view, if the drafting is clarified to reflect an intent that AvSec has a monopoly over vehicle searches, then it must be equally clear that it does not have a broader monopoly over landside security. That is unclear at the moment. Section 128 says a function and duty of AvSec is to carry out "aerodrome security patrols". On its face, that would prevent any other security firm from carrying out landside security patrols, which cannot (and should not) be the intention. General security services are often undertaken at airports by security firms (or the airport itself) and this should remain the case.

173. As above, we recommend that the provisions that govern AvSec's powers and functions are carefully reviewed to ensure that the scope of its security services are clearly defined, and that it is not granted a monopoly where contestable service provision is appropriate.

AvSec's Institutional Arrangements

Requirement for an aviation document

174. The Bill proposes to:

(a) remove the requirement for AvSec to hold an aviation document. The Commentary Documents states that this is to remove the conflict of interest in having the Director of the Civil Aviation Authority as the regulator of AvSec.

(b) empower the Director to require AvSec to meet requirements prescribed in the rules for holders of aviation security services document, and exercise any power in relation to AvSec that can be exercised in relation to holders of aviation security services documents.

175. We do not understand this proposal. In our view:

(a) The CAA will still need to determine what requirements under the Rules apply to AvSec, and audit AvSec's compliance with those requirements and standards. We do not see how this will resolve the conflict of interest issue that has been identified.

(b) No other person is eligible to hold a security service document while AvSec has a monopoly, so it is a fiction to seek to apply rules that apply to other providers to AvSec.

(c) As currently drafted, the Bill provides too much discretion and too little guidance to the Director on the extent to which he or she must require AvSec to comply with relevant standards. In that sense, it is a retrograde step from the current requirements.

(d) If other providers were permitted to provide services, it appears inconsistent that AvSec would not be required to hold a security aviation document, but other providers would.

176. To properly resolve the conflicts of interest issue, NZ Airports submits that a better solution is for the Director to be replaced with an independent 'Commissioner' or 'Inspector', who could exercise necessary powers to regulate AvSec. Another option would be to maintain the Director's responsibilities, but implement periodic external audits, as suggested by the Commentary Document.[89] Under either option, the Bill must more explicitly place a statutory obligation on AvSec to comply with standards established by the rules, and an obligation on the Director to establish those standards (which could be existing rules).

Contestability of service provision

177. Section 79(1) of the Act (and proposed section 124 of the Bill) provides that aviation security services may be provided at an aerodrome by AvSec or by the operator of that aerodrome.

178. The Bill adds that an airline could also provide aviation security services, and NZ Airports sees some merit in a role for airlines. However, we consider that the provision should be clarified, as follows:

(a) Currently, the Minister is required to consult with the Director, and AvSec before assigning an aviation security provider. In the event that an airline is being considered, the Minister should be required to consult with the Director, AvSec, and the relevant aerodrome, before making a decision granting that airline the right to provide aviation security at that aerodrome. Security processes have a significant impact on overall passenger flows, timeliness and airport layout – all of which affect the service provided by an airport. It would be inappropriate to permit a third party to have such influence over operations without hearing from the airports affected.

(b) There should be a requirement for the Director to impose conditions necessary to ensure the service is provided fairly and efficiently for all affected users of the airport. For example, it is not inconceivable that at airline could provide the service in a way that favours itself at the expense of competitors.

179. According to the Ministerial Gazette Notice 3702 made under section 79A of the Act, only AvSec can be granted an aviation document to provide aviation security services at security designated aerodromes. AvSec therefore has a monopoly on the provision of aviation security services. As discussed above, this makes it very important for the Bill to clearly define the scope of aviation security services.

[89] Commentary Document, at 44.

180. NZ Airports supports contestability in the provision of security services at security designated aerodromes. We do not support the framework under which an Act of Parliament contemplates that other parties may be authorised to provide aviation security services, but also authorises a Gazette Notice to grant a statutory monopoly.

181. On the introduction of section 79, some members of Parliament noted that airports should be responsible for aviation security services, which "happens in the vast majority of Western democratic countries".[90] This position was founded in the Swedavia-McGregor report, which recommended that:

(a) the aviation safety authority should set standards and monitor adherence to them; but

(a) it should not itself carry out operational functions. A particular concern was that AvSec should not monitor itself.[91]

182. If the power to make a *Gazette Notice* conferring a monopoly on AvSec is maintained, then the Bill should include specific legislative criteria directing how this power is to be exercised. The Minister should also be required to set out his or her reasons for conferring the monopoly (eg why the statutory criteria are met). There should also be a requirement to consider, at least every 5 years, whether the *Gazette Notice* should be revoked.

183. If the Government is unable to articulate appropriate criteria for inclusion in the Bill, then this would support our view that the approach of granting AvSec an arbitrary monopoly needs to be reconsidered.

184. Allowing airports (and others) to take on certain security functions would create opportunities for the system to work more efficiently, and potentially encourage higher standards of service provision.

Dangerous Goods

185. NZ Airports supports any opportunity to further clarify the roles and responsibilities between participants in the aviation sector, and think this is particularly important when it comes to matters of security. The legislation currently requires Avsec to remove dangerous goods from passenger baggage, but is silent on Avsec's responsibility in relation to the goods when removed. While Avsec is permitted to undertake a number of actions (set out in section 140(4)), it does not require anything of them.

186. A practice has developed at airports that allocates responsibilities and process for dealing with dangerous goods, to various participants working in the sector. The issue is that, although practically sound, the legislation does not reflect this position, as it restricts what Avsec may do with the items, when removed from passenger bags.

187. We therefore propose that the power in section 140(4)(b) be expanded to allow delivery to an airline, a delivery service, *or to an aerodrome*. Given that airports have a responsibility to provide the screening infrastructure for Avsec to work within, it is logical that the permission is extended in this way.

[90] (22 June 1993) 536 NZPD at 15998.
[91] Swedavia-McGregor Report "Review of Civil Aviation Safety Regulations and the Resources, Structure and Functions of the New Zealand Ministry of Transport Civil Aviation Division", April 1988, at 143.

Alternative Terminal Configurations

188. We welcome the proposal in the Bill that gives the Director, on application by an airport for any proposed aerodrome layout, the power to allow a person or class of persons to enter or remain in security areas (section 115 of the Bill).

189. This should provide some flexibility to implement alternative terminal configurations, without undue restriction by security requirements. Airports look forward to constructively engaging with the Director on proposals that will improve efficient use of space for movement of passengers, without compromising security.

190. We are comfortable that this proposal would require the Director to be confident that the alternative design, suggested by the airport, continues to meet the security outcomes required under legislation.

New Security Designation Framework

191. The Bill will implement Cabinet's decision to distinguish between Tier 1 and Tier 2 security designations. We do not oppose this, but we think some caution must be exercised in the interests of good security.

192. It is unclear to NZ Airports how the decision on classifications (Tier 1, Tier 2 etc) is to be made. Section 113 of the exposure draft requires the Minister to make the designation, having regard to the main and additional purposes of the Act. We do not consider that the purposes of the Act provide the Minister with sufficient direction to make this decision.

193. It may be more appropriate that the levels of designation and the corresponding security requirements should not be specified in the Act. The Ministry should consider providing the framework and authority to determine these matters in the Act, but the detail should only be more widely available where there is a "need to know". If the more cautious approach is adopted, the reference to Tier 1 and Tier 2 in the interpretation may be inappropriate.

194. Similarly, the wording in proposed section 113 should empower the Gazetting of security designated aerodromes and provide for the criteria and details to be set down elsewhere, such as the National Security Plan or other appropriate document.

195. Similarly, the Bill does not make it clear how it is intended that security services will be provided at Tier 2 airports. Although the Bill indicates that the Minister is responsible for ensuring security services are provided at Tier 1 airports, there is no corresponding direction for security services at Tier 2 airports. We would be concerned if exceptions to AvSec's monopoly were only granted in situations where it does not have sufficient resource to provide the necessary services. This is most likely to occur at Tier 2 airports, who may have the greatest need for AvSec's services.

196. In a future environment in which security requirements may be imposed at a wider range of airports, it is desirable that a flexible approach to designation is enabled, so that security is fit-for-purpose and responsive to risk. For example, a “hard” boundary criterion for Tier 1 of all aircraft of 90 seats or more may not make sense at an airport where there is a majority of aircraft of between 30 and 90 seats, and perhaps only two movements of a 90+ seat aircraft per day. The Act should provide for appropriate flexibility to suit the range of airports and flight operations in New Zealand, and allow for future modifications.

E: LEGISLATIVE FRAMEWORK

Single Act

197. In our submission on the Civil Aviation Review in 2014, we indicated our preference that legislation with distinct purposes and subject matter to be maintained as separate Acts, as we considered that this would make the legislation more accessible and clear. We are therefore disappointed that the Bill proposes to amalgamate the Civil Aviation Act with the Airport Authorities Act.

198. We remain of the view that although both Acts deal with the aviation industry, they have two very different purposes, apply to different entities and contain materially different content. This is reflected on page 7 of the Commentary Document:

(a) The AAA applies only to the owners and operators of airports, and gives them functions and powers to establish and operate airports;

(b) the CAA applies to all participants in the aviation sector, and covers all aspects relevant to the safe and efficient operation of the aviation system.

199. We also note that the Civil Aviation Act was passed in 1990, so it could readily have incorporated the AAA at that time if that had been considered appropriate.

200. In conclusion, there have been no developments or change in circumstances since the two Acts were enacted that now makes it appropriate to merge them.

Better purpose statements

201. If it is decided to retain a single Act, then it is very important that:

(a) the purpose and content of the AAA provisions are distinguished from the remainder of the Act; and

(b) more broadly, that there is clear guidance and purpose for distinct sections within the Act. For example, there should be a specific purpose for the Part dealing with authorisation of airline alliances, which is not adequately captured by the general purposes of the Act.

202. NZ Airports considers that the best way to achieve this is through tailored overviews and purpose statements for different parts of the Act. This is good, modern, legislative drafting practice, which was a key purpose of the review.

203. Purpose statements in legislation are not just high-level guidance, but have real practical application as tools for interpreting statutes. In application and enforcement, Courts and regulators are required, under the Interpretation Act, to ascertain the meaning of an enactment from its text *and in the light of its purpose*.[92] Accordingly, this will guide the behaviour of those subject to the legislation, particularly where it is unclear what needs to be done (or omitted to be done) to achieve compliance. Purpose statements need to be clear and directive, particularly where they are specifically referred to in certain provisions as a requisite consideration in decision-making.

[92] Interpretation Act 1999, s 4(1).

General purpose statement

204. The current overarching purpose statement is therefore problematic. Various empowering provisions in the Bill do not currently provide clear, specific and appropriate guidance, but refer to the generic statements. We note, for example, that in determining whether to grant an authorisation to an airline alliance, the Minister is required to take into account the main and additional purposes of the Act.[93] The main and additional purposes in the Act (set out in sections 3 and 4 of the Bill) are not specific enough to guide the Minister, or to give participants any indication as to whether an authorisation might be granted.

205. We agree that the overarching or "main" purpose of the act should have an overriding emphasis on ensuring public safety, but we consider that the "additional" purposes should incorporate some or all of the following elements:

(a) to clearly allocate responsibility for safety among sector participants;

(b) to support a dynamic and innovative industry;

(c) to implement effective and efficient regulation;

(d) to be aware of, and cater for other transport sectors; and

(e) to create an aviation industry that operates sustainability.

Specific purpose statements

206. We recommend that MoT further consider whether it would be beneficial to provide additional purpose statements for Parts (and some Subparts) within the Act – akin to section 76 of the Bill. We have two specific recommendations:

(a) For Part 8 (provisions currently found in the AAA), a purpose statement along the following lines:

> To purpose of this Part is to:
>
> (a) facilitate the operation and development of airports as modern commercial enterprises that operate in an efficient and effective manner;
>
> (b) enhance and contribute to New Zealand's economic growth and development while having regard to airport users' interest in the promotion of an innovative and responsive industry.

(b) For Subpart 2 of Part 7 (International air carriage competition), we recommend a purpose statement along the following lines:

> The purpose of this Subpart is to promote competition in international air carriage markets for the long-term benefit of consumers within New Zealand.
>
> This mirrors the purpose statement under section 1A of the Commerce Act 1986, which applies to all other sectors and industries that seek an authorisation for an arrangement that may reduce competition.

[93] Civil Aviation Bill 2019, s 189(2).

"Airport" v "Aerodrome"

207. The Bill proposes to remove use of the word "airport" (as currently defined in the AAA), and replace it with "aerodrome" (as currently used in the Civil Aviation Act, but not used in the AAA). Substantively, the definition of "aerodrome" under the Bill is similar to "airport" under the AAA. We understand why it was thought convenient to have a single definition of aerodrome under merged legislation, but it will cause interpretation difficulties and may have unintended consequences (and is an illustration of why it would be better to maintain separate Acts).

208. Other legislation specifically refers to "airports" as defined in the AAA. For example, section 166(g) of the RMA states that a network utility operator is "an airport authority, as defined by the Airport Authorities Act 1966 for the purposes of operating an ***airport*** as defined by that Act."

209. While the definitions are similar, they are viewed by many stakeholders as legally different and highly contextual. More broadly, in the Public Works Act and planning contexts, there has been historic debate over whether "aerodrome" is a narrower concept than "airport".

210. Accordingly, if Part 8 of the Bill is retained (ie not a separate Act), then it will need to include a definition of "airport" that applies for the purpose of Part 8, which replicates the current definition in the AAA. All references to "aerodrome" in Part 8 should be changed to "airport". It will also remain necessary to ensure all relevant references to the AAA's definition of "airport" in other Acts are located and amended to refer to the new definition of "airport" in Part 8.

F: NEW MATTERS FOR INCLUSION IN THE BILL

Data collection

211. We recommend that new provisions are included in the Bill to provide the MoT with power to collect and publish data regarding air services. This would serve three key purposes:

(a) MoT could use this information to direct policy toward achieving a high-functioning and well-operating market. If the information was available to other government agencies, such as those in the critical tourism sector, then they would be better placed to advise on policy goals such as regional dispersal of travellers by air.

(b) Regular aviation information publications from an official source (the MoT) would provide transparency to the travelling public on the activity levels and trends, reliability, and costs of air travel, which are of high public interest.

(c) Detailed statistical reports and information would also assist airports and other industry participants to better plan routes, manage capacity, and provide a more effective service.

212. Such powers would not be unusual from an international perspective. In fact, the absence of such a function sets New Zealand apart from many aviation sectors globally, who implement this type of monitoring and reporting.

213. We note, for example, that the Australian Department of Infrastructure, Transport, Cities and Regional Development ("**BITRE**") publishes monthly and annual data and reports on domestic and international aviation statistics including airline activity, domestic on time performance, domestic airfares index, airfreight, airport traffic, general aviation activity, aviation fuel sales and air distances.[94] BITRE's authority to collect this data is set out in Part 2 of the Australian Air Navigation Regulation 2016.

214. BITRE is not just empowered, but expressly directed, to collect the data as part of an all of Government objective to achieve efficiencies in an increasingly data-centric world. The Australian Government recognises that publishing appropriately anonymised government data will stimulate innovation and enable economic outcomes. Data is deemed to be a strategic national resource that holds considerable value for growing the economy, improving service delivery and transforming policy outcomes for the Nation.[95] This is the impetus for the Australian Government's Public Data Policy Statement, announced on 7 December 2015, which guides Government entities to (among other things):

(a) make non-sensitive data open by default to contribute to greater innovation and productivity improvements across all sectors of the Australian economy;

(b) make high-value data available for use by the public, industry and academia, in a manner that is enduring and frequently updated using high quality standards; and

(c) ensure all new systems support discoverability, interoperability, data and information accessibility and cost-effective access to facilitate access to data.

[94] Department of Infrastructure, Transport, Cities and Regional Development "Aviation Statistics" (last updated 15 February 2015) <www.bitre.gov.au/statistics/aviation/index.aspx>.
[95] Hon Malcolm Turnbull MP "Public Data Policy Statement", 7 December 2015, <www.pmc.gov.au/sites/default/files/publications/aust_govt_public_data_policy_statement_1.pdf>.

215. It is out of this direction that, not just BITRE, but all Australian Government entities, actively publish data and information, for use by industry participants and the broader public. The same provisions could, and should, be implemented in New Zealand, to achieve similar outcomes.

216. NZ Airports strongly submits that the Bill should include provisions that enable aviation data collection, collation and publication. The Australian BITRE model provides an excellent example that New Zealand should follow, in the public interest.

Official information exemption

217. NZ Airports considers that the Bill provides a good opportunity to address other inefficiencies in the aviation industry. Much of the change proposed is predicated on the rationale that airport authorities are now more modern than when the AAA was introduced – ie they should no longer be considered "divisions" of local authorities and / or treated differently from other companies.

218. We therefore invite the Government to consider whether it is timely to exclude ***all*** airport companies from the Official Information Act 1982 ("**OIA**") and the Local Government Official Information Act 1987 ("**LGOIMA**").

219. Airports are subject to official information requests because they are:

(a) airport companies with a majority of shares held by the Crown and/or local authorities (and therefore subject to the OIA); and/or

(b) council-controlled organisations ("**CCOs**") (and therefore subject to LGOIMA).[96]

220. So, whether or not an airport company is covered depends on its ownership structure. We think that there should be a consistent approach for all airport companies. This is particularly the case given that all airport companies subject to the OIA and LGOIMA are subject to statement of intent and annual reporting requirements under the LGA, and all airport companies are subject to a separate information disclosure regime under the AAA or Part 4 of the Commerce Act. This means that:

(a) The continuous and frequent disclosure requirements serve to ensure that the public are well informed of airport plans, decisions, and performance outcomes.

(b) Being subject to the OIA and LGOIMA does not add to the transparency and accountability that already exists, but certainly adds to administrative burden and cost, which can impede the efficiency objectives of the AAA.

(c) Airports can be required to invest significant time and resource in providing information in a digestible form. Smaller airports are resource constrained – both in terms of financial, and human capital. It is important that the limited resources are invested productively, to build access to more remote areas of New Zealand, and to support regional economic development.

(d) Shareholding local authorities hold information about an airport company's decision-making and performance, which is subject to LGOIMA.

[96] Section 74 of the LGA applies the LGOIMA regime to 'council-controlled organisations' as if that organisation were a local authority. Council controlled organisations are defined in section 6 of the LGA and includes companies in which equity securities carrying 50% or more of the voting rights are held or controlled, directly or indirectly, by 1 or more local authorities.

221. We also believe that airports should be treated in the same way as port companies:

(a) Port companies that are majority owned by local authorities are not CCOs (and therefore not subject to LGOIMA), because of an express exclusion set out in section 6(4) of the LGA.

(b) Unlike airport companies, they are not expressly included in the OIA;

(c) In 2012, Parliament considered removing this exclusion, and subjecting port companies to information requests made under the LGOIMA. The Bill was defeated in its first reading in the House because it was feared that opening up port companies to official information requests would undermine their ability to operate as efficient businesses. Decisions would be made on political grounds as opposed to "sound commercial grounds".[97] The House placed a particular emphasis on New Zealand's geographical location, being a small country distant from major markets. As such, it was considered vital that our transport infrastructure is as efficient and effective as possible, as National MP Nicky Wagner noted:[98]

> The health, the wealth, and the well-being of our country are absolutely predicated on us selling our produce overseas. So any legislation that adds barriers or makes it difficult for exporters to compete internationally cheats- yes, cheats- everyone in our community. Adding another layer of bureaucracy will only add more costs and reduce the efficiency of our ports. Every exporter and every importer will suffer, and society as a whole will pay the price of less funds coming into our country and increased prices in our stores.

(d) These concerns are equally applicable to (and have been realised by) airports, who often face significant burden in generating responses. It is inconsistent that, in some instances airports are treated as de facto (central and local) government departments; and in some instances as regular companies under the Companies Act, depending on the issue at hand. In this context, the distinction between airports and ports appears arbitrary.

222. We therefore advocate in favour of including a provision in the Bill that excludes airport companies from the OIA and LGOIMA. This would align the regulation of airports under the OIA and LGOIMA to that of ports.

Airways Monopoly Services

223. Section 31 of the Bill is substantively the same as current section 99 of the Civil Aviation Act, which provides that Airways is the sole provider of area control, approach control, and flight information services. Aerodrome control services are specifically excluded from this restriction. Under Rule 139, aerodromes are responsible for providing aerodrome control

[97] (19 September 2012) 684 NZPD 5427.
[98] (19 September 2012) 684 NZPD 5427.

services when such services are required by the Director. In practice, Airways is contracted to provide aerodrome control services.

224. NZ Airports submits that section 31 of the Bill should be amended to allow for the Minister to make approach control services contestable – in the same way that the Minister can make AvSec services contestable by notice in the *Gazette*. We believe this is desirable because:

(a) A commercially viable business proposition for the provision of contestable services may require the combined provision of aerodrome control services and approach control services.

(b) We do not see a rationale for making a distinction between approach and aerodrome control services – indeed, it is not easy to identify where the separation is in practice. On the other hand, it seems clear that combined, approach and aerodrome control services would cover the control of aircraft arriving or departing at the aerodrome where the control service is based.

(c) Such contestable provision could provide airport customers with improved efficiencies.

(d) New Zealand needs to keep pace with new technologies that are being developed internationally. An offshore provider may therefore have insight into systems and processes that could deliver strong outcomes in New Zealand, and should be encouraged to do so.