

NZ AIRPORTS ASSOCIATION
SUBMISSION ON AIRWAYS CONSULTATION FRAMEWORK
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1. INTRODUCTION

- 1.1 Thank you for the opportunity for the NZ Airports Association (**NZ Airports**) to provide feedback on Airways' Proposed Revised Airways Service Framework (**Proposal**) and accompanying Consultation Paper.
- 1.2 As the representative for 42 of New Zealand airports, including all the international and regional airports serving airline operations, NZ Airports is an important stakeholder in any discussions or proposals regarding the future design and delivery of Air Navigation Services (**ANS**).¹
- 1.3 This submission is made on behalf of NZ Airports' airport members, listed below.² For the avoidance of doubt, it is expressly supported by the airports where aerodrome air traffic control operates (listed on the final page of this submission). It is limited to commenting on the basis and rationale for the Proposal, as well as broad policy concerns that are common to all airports. This submission does not comment on airports' potential commercial response to the Proposal, which is a matter for each airport to separately consider. Individual airports may also make separate submissions.
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2. EXECUTIVE SUMMARY

Overview of NZ Airports' position

- 2.1 Airways' Proposal is based on the premise that aerodrome traffic services are contestable, and should be treated differently to services over which it has a statutory monopoly (area control, approach control and flight information services). NZ Airports acknowledges that the statutory framework creates this distinction, but the reality is that contestability does not currently exist in practice. There is only one provider of ANS in New Zealand and that is Airways.
- 2.2 NZ Airports does not disagree that competition can deliver certain benefits and create efficient outcomes. However, New Zealand does not yet have the appropriate regulatory framework in place for contestability to work in practice. In particular, other providers must have the incentive and ability to provide services in New Zealand as part of a seamless ANS network, which they do not have at present.

¹ The umbrella term we use in this submission to describe all services that Airways currently provides, and which are listed in the table in page 9 of the Proposal.

² Ardmore Airport, Ashburton Airport, Auckland Airport, Bay of Islands Airport, Chatham Islands Airport, Christchurch Airport, Dunedin Airport, Gisborne Airport, Hamilton Airport, Hawkes Bay Airport, Hokitika Airport, Invercargill Airport, Kaikohe Airport, Kaitaia Airport, Kapiti Coast Airport, Marlborough Airport, Masterton Airport, Matamata Aerodrome, Motueka Airport, Nelson Airport, New Plymouth Airport, North Shore Airport, Oamaru Airport, Palmerston North Airport, Queenstown Airport, Rangiora Airfield, Rotorua Airport, Takaka Airport, Taupo Airport, Tauranga Airport, Timaru Airport, Wairoa Airport, Wanaka Airport, Wellington Airport, West Auckland Airport, Westport Airport, Whakatane Airport, Whanganui Airport, Whangarei Airport.

- 2.3 Given the absence of alternative providers, a key concern is that Airways' (natural and understandable) pursuit of commercial objectives is at odds with the regulatory regime's requirement for aerodrome traffic services to be provided at certain airports for safety reasons, and creates a risk that services to the regions will further disrupted.
- 2.4 The Government, rather than Airways, following consultation with stakeholders, must therefore determine how the provision of ANS should best be delivered in the future. The Ministry of Transport (**MoT**) has requested the Government to commence such a review. Airways' Proposal is therefore premature and while NZ Airports acknowledges that Airways may decide to proceed with its Proposal without airport or airlines' agreement, NZ Airports considers that decisions about how ANS is structured and provided (including potential contestability in the sector) would be more appropriately left to this process.

A seamless ANS network is critical for safety

- 2.5 ANS are critical to ensuring an acceptable level of safety of New Zealand's aviation sector, and Airways currently provides ANS to a high standard of safety. NZ Airport's strongly held view is that maintaining a seamless ANS network in the interests of safety, and not commercial objectives, should be the paramount consideration for Airways' review of its services framework. Airways has not provided sufficient comfort or details on how its new commercial focus on treating some services as contestable would not prejudice the existing ANS network.
- 2.6 The ANS network must be seamless for all users – it is an integrated network. In our view much work needs to be undertaken on the appropriate regulatory settings, and greater explanation of the changes Airways is willing to make to facilitate contestability is required, before the aviation sector can be confident that Airways' proposals will not undermine a seamless and therefore safe ANS network.

Allow the Government to conduct a first principles review

- 2.7 Airways' Proposal to reconfigure its pricing and commercial framework (**Commercial Framework**) for aerodrome traffic services, called "contestable services" in its Proposal, coincides with:
- (a) Extensive and ongoing regulatory processes (overseen by the Civil Aviation Authority (**CAA**)) in relation to the seven regional airports where Airways notified its intent to withdraw services for commercial reasons; and
 - (b) The MoT recommending to Ministers that a "first principles" review of ANS be undertaken because, among other things, Airways' commercial incentives are having an adverse impact on regional connectivity (e.g. where it proposes to reduce or withdraw services, or demand service fees that airports cannot afford).
- 2.8 If the Government is considering a comprehensive review of ANS due to the broad range of issues to be considered, then Airways is not the right party to propose material changes to service provision. In fact, it risks making the Government's job more difficult.
- 2.9 NZ Airports urges Airways to hold off making structural changes to its Commercial Framework until the Government has had a reasonable opportunity to determine the appropriate policy, regulatory and organisational settings for ANS in the future.

Airways' commercial incentives will cause more disruption to the regions

- 2.10 We are particularly concerned that the Proposal will create a greater risk of disruption to regional connectivity. Airways has already demonstrated a strong desire to withdraw from regional aerodrome services, and has been clear that it will only continue to provide aerodrome services that the CAA deems are required for safety reasons if the commercial terms are acceptable.

- 2.11 By requiring airports to pay for its contestable services, Airways would acquire greater commercial leverage in its dealings with regional airports in that it can more easily refuse to provide or reduce services if airports are unable to meet its commercial demands. As the MoT has pointed out in its briefing to Ministers, customers have no regulatory protection from Airways' monopoly position.

The rationale for change is not credible

- 2.12 NZ Airports is sceptical about the purported basis on which Airways is proposing to change its Commercial Framework. In particular:
- (a) There would be no material change to the basic nature and operational aspects of the various ANS Airways provides (that is no change to the **Services Framework**) other than individual and commercial pricing for 'contestable' services deployed at airports. It appears that in seeking to charge airports instead of aircraft operators, all the Proposal would achieve is to transfer pricing and revenue risk from Airways to airports and provide Airways with a greater ability to reduce or remove services (at smaller airports). In doing so, Airways may be anticipating that regional airport owners (local government in the case of many airports) will become funders of last resort in any future disruptions to aviation. That would be an inappropriate assumption on which to base the Services Framework.
 - (b) The concept of contestability has been provided for in the Civil Aviation Act 1990 (**Civil Aviation Act**) for three decades. The distinction that Airways is now seeking to make between statutory monopoly services and 'contestable' services is artificial in practice. It is therefore wrong to validate any commercial change on this statutory distinction. The nature of the service and customer is not changing. The only thing that is changing is Airways' unilateral view on who it wishes its customer to be (which is the opposite of the position it has imposed on the aviation community in the past).
 - (c) NZ Airports is unconvinced that Airways' proposal to charge airports rather than airlines for 'contestable' services will assist to promote competition. As a monopoly, Airways has no incentive to promote such competition and removing the airlines (and their countervailing power) as the direct customer would also remove any (limited) existing constraint that is placed on Airways' behaviour.

Further work by Government and the whole aviation sector is required

- 2.13 If Airways truly seeks contestability in ANS, then it (and the rest of the sector) needs to go boldly into the future by embracing a full review by the Government and any subsequent policy and regulatory change. **Appendix A** provides an indication of the sorts of steps and questions requiring resolution that should precede a genuine move towards competition. Few if any of these have been addressed in the Proposal.
- 2.14 We hope this submission provides Airways with pause for thought as to whether it is approaching the issue in the right way, and whether the timing is right. We encourage Airways to constructively engage with its stakeholders on improvements under the existing framework, rather than pursuing an untested approach that we anticipate will be met with considerable resistance across the aviation community.

The Service Framework can be improved

- 2.15 In the final section of this submission, we make some specific suggestions where the draft Service Framework can be improved.

3. SAFETY IS THE PARAMOUNT OBJECTIVE FOR ANS

3.1 Airways has asked what objectives should guide the development of its service and pricing frameworks.³

3.2 In this section we explain our views that:

- (a) Maintaining an acceptably safe and seamless ANS network must be a primary objective for the aviation community;
- (b) This is not something Airways is positioned to consider given its (understandable) commercial objectives, and a "first principles" Ministerial review is required;
- (c) A key focus of the review will be to ensure safe regional connectivity is maintained. Airways' proposal poses greater risks to regional connectivity;
- (d) Ministers' expectations do not justify the Proposal; and
- (e) Airways should therefore halt the Proposal so that the Ministerial review is not undermined.

A first principles review of ANS is required

3.3 The MoT, in a recent briefing paper to the Minister of Transport, Hon Michael Wood, stated the following:⁴

Air navigation services are critical to the safe operation of the aviation system and contribute significantly to New Zealand's economic prosperity. New Zealand needs an economically viable, safe and innovative air and space ecosystem which enables all users to operate seamlessly.

Given all of the issues ... around the regulatory settings, new technologies, funding of the system, and integration of air space, stakeholders have questioned whether it is time to review the settings.

3.4 The MoT's view is that the issues require a "first principles" Ministerial review "broad in scope", undertaken in consultation with all participants in the sector.⁵

3.5 NZ Airports strongly agrees.

Safety objective must be paramount

3.6 In any Ministerial review, NZ Airports will advocate that a primary focus must be on the maintenance of an acceptably safe and seamless ANS network.

3.7 NZ Airports observes that the vision, purpose, and strategy of Airways in its revised framework is rightly focused on safety first. However, what is absent from the Proposal is a discussion of how Airways will continue to deliver safe, reliable and efficient services on a nationwide basis as part of an integrated system. In particular, NZ Airports seeks comfort from Airways that processes are in place to ensure that it can work with new providers (should they enter the market) without introducing an unacceptable level of risk.

³ Consultation Paper, Question 3.

⁴ Ministry of Transport's briefing to the Minister of Transport, "Air Navigation Services and Regional Connectivity", 9 February 2021 (**February MoT Briefing Paper**), [102] and [103].

⁵ February MoT Briefing Paper, [102] and [104].

- 3.8 Also, it is not clear how Airways' objectives of assisting safe and efficient air travel is better met with the proposed Commercial Framework restructuring. This objective can be met under the existing commercial framework, and it is difficult to see how the charging of airports for services rather than charging airlines for the same services will make any difference to how those services are provided in accordance with strict regulatory requirements (which will not change).
- 3.9 NZ Airports understands that Airways believes the Proposal meets Airways' commercial objectives, but requests that Airways provide a more detailed explanation of how it intends to maintain a safe, integrated national air traffic network under its revised framework.

Airways' commercial objectives are understandable, but problematic

- 3.10 It has clearly been a challenging time for the entire aviation sector with COVID-19 and a significant drop in air travel volumes experienced across the globe. Our member airports rely on passenger volumes and air traffic activity to generate revenue. Faced with a significant revenue reduction, we therefore understand that Airways wishes to explore whether changes to its Commercial Framework are necessary and appropriate to ensure its business is sustainable.
- 3.11 However, it cannot be ignored that the MoT has highlighted significant issues with the current ANS settings, and that "while many of the things that Airways are doing are sensible for its business and the SOE model ... it is causing some issues in the system".⁶
- 3.12 Airways' statutory objectives as an SOE to operate as a successful business and be profitable have clearly been at the heart of Airways' recent strategies, such as the decision to withdraw from providing airfield power and lighting at aerodromes (also known as **PLEXIT**) and the decision to remove (or seek to enter new commercial arrangements to recover the costs of) air navigation services at some regional aerodromes.
- 3.13 This seems to be part of the problem identified by the MoT, which has indicated "a key issue to consider is whether Airways has the right incentives through the SOE model to consistently support broad transport system outcomes".⁷ Airways' proposal to reconfigure its Commercial Framework (and the way it sets prices) is therefore driven by objectives and incentives that have been identified by Ministers' key advisers as a potential problem for broader air navigation.

Regional connectivity would be further compromised

- 3.14 NZ Airports does not criticise Airways' imperative to act commercially, but it wishes to highlight that there is an unhelpful tension between airports having an obligation to ensure Airways provides services for regulatory safety purposes, and the affordability of those services, particularly in respect of smaller airports with less traffic. The Proposal will not solve this, nor the other issues identified by the MoT and experienced first-hand by the sector. To the contrary, NZ Airports is concerned that these significant issues will be exacerbated if Airways moves forward with the Proposal.
- 3.15 As the MoT has identified, some smaller airports already struggle to afford essential services, which is compromising regional air connectivity.
- 3.16 Regional air connectivity is important, and the MoT agrees:⁸

⁶ February MoT Briefing Paper, [37].

⁷ Ministry of Transport's briefing to the Minister of Transport, "Airways – Structure and Incentives", 31 October 2019 (**October MoT Briefing Paper**), [18].

⁸ Ministry of Transport's briefing to the Minister of Transport, "Options for supporting regional air connectivity", 15 April 2019 (**April MoT Briefing Paper**), [31] and [33].

A network of airports to support air connectivity throughout the country is a fundamental part of our national transport infrastructure ...

The most pressing issue for small regional airports is that they are struggling to maintain infrastructure or respond to increased demand.

- 3.17 There is a material risk that a move to individual contracts aggravates this problem.

Expectations of Airways' shareholders do not justify the Proposal

- 3.18 Airways cites the Ministers' letters of expectations as one of the reasons for initiating the review of its Services Framework. The latest letter has not been released publicly or as part of the consultation so we must take Airways' interpretation at its word. That said, Airways has not suggested that the letter directs it to restructure its Commercial Framework.
- 3.19 NZ Airports acknowledges that Airways must take account of the expectations of its shareholders. In this regard, Ministers have emphasised that Airways' primary objective is "to ensure that aircraft and passengers in controlled airspace reach their destination safely and efficiently". NZ Airports agrees entirely with this objective.
- 3.20 We also note that "Ministers recorded their expectation that Airways would provide air traffic management services to regional airports where the CAA determines them to be necessary."⁹ On its face, this expectation is inconsistent with Airways' view that it is free to negotiate commercial terms with such airports – with the strong implication being that it will not provide the service if the terms are unacceptable.
- 3.21 Airways indicates it has been tasked to focus on "the ongoing viability of their business" and "decrease its financial risk exposure and exercise financial responsibility in utilising Crown financial support". On this basis, Airways proposes to add to its core mission of safety with "appropriateness and affordability". In our view, Airways cannot itself determine what is appropriate for ANS – that is properly the role of the CAA. Airways must also carry out its review within the existing legislative and regulatory framework – the Ministers' expectations do not alter this framework. In any event, we do not consider that appropriateness and affordability would materially change by switching the paying customer of its services to airports.

4. CONTESTABILITY PROVIDES NO BASIS FOR CHANGE

- 4.1 Airways has asked whether we agree with the proposal to distinguish between contestable services and statutory monopoly services.¹⁰ NZ Airports does not disagree with contestability as a concept *per se*; it does, however, disagree that contestability exists in practice.
- 4.2 In this section we explain why we do not consider contestability provides a legitimate rationale for the Proposal. Essentially:
- (a) The statutory distinction Airways seeks to rely on has existed for three decades, and does not in itself require or justify Airways' commercial proposals;
 - (b) Airways' characterisation of existing aerodrome service arrangements as being for the business or commercial interests of airports is incorrect, and does not provide evidence of contestability; and
 - (c) If contestability is to be genuinely provided, then further policy work by government agencies and policymakers is required. Airways has provided no detail on changes

⁹ Consultation Paper, [17].

¹⁰ Consultation Paper, [59].

it will make to promote contestability and is asking to be trusted that all the necessary changes would in fact eventuate.

Airways' Proposal

4.3 As we understand Airways' Proposal:

- (a) The basic nature and operational aspects of the various ANS it provides would not materially change (or put another way, there would be no material changes to the Service Framework).
- (b) The Commercial Framework would be structurally changed, by treating 'contestable' services as being purchased and paid for by airports on a commercial basis (compared to the current situation where aircraft operators pay for these services in the same way as they do for statutory monopoly services).
- (c) Airways will continue to supply statutory monopoly services to its customers (presumably the aircraft operators), in accordance with its Pricing Framework and Standard Terms (to be consulted on separately).
- (d) On the other hand, Airways will supply those services where it does not have a statutory monopoly directly to airport customers (i.e. not aircraft operators) pursuant to commercially negotiated pricing arrangements. This means that non-monopoly services would be excluded from the pricing framework, such that the price of those services would be negotiated on a case-by-case basis.¹¹

Legislative framework does not support the Proposal

4.4 We acknowledge the legal distinction between services as made by Airways. Section 99 of the Civil Aviation Act provides that Airways has a statutory monopoly over certain aviation services: area control, approach control and flight information services. It therefore follows that other air traffic control services; aerodrome control services and aerodrome flight information services, are 'contestable' services. In Airways' view, "customers could self-supply them or purchase them from competing operators".¹²

4.5 However, as we discuss below, there is no contestability in practice. One reason for this is that the statutory monopoly over some services effectively inhibits competition for the services not subject to that monopoly. The Parliamentary history (summarised in the timeline in **Appendix B**), demonstrates that it was understood that removing the statutory monopoly in its entirety, and having the right regulatory framework in place, was important to promote genuine contestability:

- (a) In 1991 Cabinet decided that once Civil Aviation Rules were in place to provide certifications for organisations wanting to provide air traffic services, the Airways statutory monopoly should be repealed through an amendment to the Civil Aviation Act. Consequently, the Civil Aviation Amendment Act 1992 was enacted, which provides for the repeal of Airways' statutory monopoly (i.e., repeal of section 99 of the Civil Aviation Act) through an Order in Council.¹³ The intention at the time was indeed to provide a mechanism to enable contestability in the provision of services that Airways has a statutory monopoly over (i.e. area control services, approach control services, and flight information services).¹⁴

¹¹ Consultation Paper, [50] to [53].

¹² Consultation Paper, [3].

¹³ Civil Aviation Amendment Act 1992, s 35.

¹⁴ Civil Aviation Amendment Bill 1992 (No. 2) (Select Committee Report) (**Select Committee Report**), [19].

- (b) Accordingly, from a statutory perspective, Parliament was in principle open to the idea that all services provided by Airways should be contestable. The MoT's view at the time was that contestability in the context of suppliers of air traffic services can only ever be "partial" because "it would be dangerous and unsafe in the Ministry's opinion if two suppliers were empowered to provide air traffic control for one airspace during one period".¹⁵ Therefore the intention was that contestability would relate to competition for the provision of "a single or monopolistic service at any given time such as aerodrome traffic control or aerodrome flight information services".¹⁶ The Ministry believed that it was important to signal to Airways that contestability, to the extent practicable, is desired.¹⁷
- (c) In its commentary on the submissions on the 1992 Civil Aviation Amendment Bill, the MoT stated that "the correct regulatory regime would need to be in place, to ensure that safety is not threatened, before contestability could occur".¹⁸
- (d) This theme was reiterated in the MoT's feedback to the Select Committee, noting that "it is important that the Rules governing the activity are established before the statutory monopoly is removed thus ensuring, to the maximum extent, the safety of the operation".¹⁹ The official's view was therefore that the Order in Council to remove the Airways Corporation monopoly would not be implemented until new Civil Aviation Rules were in place.²⁰

4.6 It is apparent from the legislative history that **Parliament stopped short of removing Airways' statutory monopoly and opening the door to contestability as it acknowledged that the regulatory framework was not yet fit-for-purpose.** More importantly, the MoT and Parliament held fears for safety if contestability was pursued without the appropriate frameworks in place. It is NZ Airports' view is that a key reason for not issuing the Order in Council was uncertainty and lack of planning around how different ANS providers would seamlessly interact, and a realisation that the entire ANS service would need to be open to contestability to make the sector attractive to new entrants.

Contestability does not exist in reality

4.7 NZ Airports is deeply concerned that the distinction that Airways has drawn between statutory monopoly and contestable services is an artificial one in practice and it should not form the basis of a differential pricing framework dependent on the types of services provided. The statutory distinction has existed for three decades, with no visible signs of contestability.

4.8 The OECD defines a contestable market as one where the following conditions are satisfied:²¹

- (a) There are no barriers to entry or exit;
- (b) All firms, both incumbent and potential entrants, have access to the same production technology;
- (c) There is perfect information on prices, available to all consumers and firms; and
- (d) Entrants can enter and exit before incumbents can adjust prices.

¹⁵ Civil Aviation Amendment (No.2) Bill 1992 – Ministry Report and Recommendations and Analysis of Submissions 1 June 1992 (**Analysis of Submissions**), p 60.

¹⁶ Analysis of Submissions, p 60.

¹⁷ Select Committee Report, above n 3, [19]; Analysis of Submissions, p 60.

¹⁸ Analysis of Submissions, p 60.

¹⁹ Select Committee Report, [19].

²⁰ Select Committee Report, [19].

²¹ OECD Glossary of Statistical Terms, <https://stats.oecd.org/glossary/detail.asp?ID=3178>.

- 4.9 NZ Airports contends that none of these criteria are met for the services that Airways currently provides (perhaps with the exception of airfield power and lighting, discussed further below). In particular, as recognised by the MoT, "the barriers to any competitor entering this market are high and to date there has been no competition for services".²² These barriers include the fact that any competing service providers would need to obtain new certificates under the Civil Aviation Rules, and negotiate and closely cooperate with Airways in order to meet the safety requirements required for certification.
- 4.10 Further, there are a range of significant prerequisites – many of which involve Airways – that would need to be resolved before a safe and successful transition to a new entrant could be achieved. An indicative list is at **Appendix A** of this submission. It is therefore inaccurate for Airways to say these services are contestable on the basis that operators are able to freely supply "if necessary, with certification from the CAA".²³
- 4.11 Where Airways has negotiated with airports recently on service provision, pricing information has not been available to all consumers and firms. This suggests that criteria (c) for competition to exist will be difficult to achieve in the future. We also note a similar approach to non-disclosing information where Airways has declined to provide information for aeronautical safety studies carried out by third parties.²⁴ Arguably, such information could be considered ANS 'production technology' in criteria (b) above.
- 4.12 Barriers to entry could be reduced to some extent by removing the statutory monopoly on other air traffic services. As set out above, Ministers have the availability of a straight-forward Order in Council to bring into force legislation to repeal Airways' statutory monopoly, but that has not been done in the 29 years since the amending legislation was passed as that change has not been seen as desirable or sufficiently high priority.
- 4.13 In summary, and as Airways note in the Consultation Paper, "currently no other Air Navigation Providers have entered the market".²⁵ This state of affairs covers the entire 30-year timeframe the current contestability regime has existed. Accordingly, we do not consider that the distinction between these services can now be an appropriate basis for charging customers differently based on whether statutory monopoly or contestable services are provided. Historically, Airways has also insisted on the opposite approach and wanted to charge airlines itself.

Existence of Services Agreements is not evidence of contestability

- 4.14 The existence of services agreements between Airways and the airports in New Zealand (the history of which is summarised in **Appendix B**) does not mean that the 'contestable' services provided for under those agreements are delivered to airports on commercial terms. It is worth noting that those agreements also include approach services, for which Airways has always held a statutory monopoly.
- 4.15 In its Consultation Paper, Airways asserts that "contestable services are purchased by airports to support their business"²⁶, "we have contracts with airports that describe the contestable services we provide at that airport"²⁷, and that these agreements "... requir[e] airports to pay for the services they receive under contracts".²⁸ While it is correct that the agreements oblige Airways to provide services at each airport, NZ Airports submits that these statements mischaracterise the existing relationship and the nature of these services agreements between

²² February MoT Briefing Paper, [34].

²³ Consultation Paper, [31(b)].

²⁴ For example, the Invercargill Airport Aeronautical Study on Aerodrome Aircraft Traffic Management, 8 December 2020 carried out for Invercargill Airport by consultants Astral and r2a. At footnote 4 it is noted: "Unfortunately, Airways declined to provide some information that would have been useful to the study on the grounds of confidentiality".

²⁵ Consultation Paper, [3].

²⁶ Consultation Paper, [6].

²⁷ Consultation Paper, [12].

²⁸ Consultation Paper, [26].

airports and Airways by suggesting that those services have always been treated as a commercial arrangement between Airways and airports. This is not the case.

- 4.16 As Airways is aware, its current pricing framework has aircraft operators paying its fees for aerodrome traffic services. These services agreements are not typically entered so that airports are obliged to compensate Airways for these services, but are focussed on establishing enforceable service standards. The underlying commercial arrangement remains between Airways and the users of ANS (i.e. airlines and other aircraft operators).
- 4.17 The need for formal services agreements was instigated by airports, not because the services needed to be provided pursuant to contract or on commercial terms, but for the following reasons:
- (a) The only previously existing document underpinning the delivery of Airways' services at airports was an old form of Letter of Agreement which did not "provide a sound basis for the ongoing delivery of critical services at appropriate levels of quality and reliability".²⁹
 - (b) The Letters of Agreement did not provide the CAA with any assurance that airports were meeting the requirement in Part 139 of the Civil Aviation Rules to ensure the provision of air traffic management services when such a service was required by the Director of Civil Aviation. The CAA had signalled that Part 139 compliance by airports required a better arrangement to meet their expectations.
 - (c) Airways had withdrawn services from some smaller airports and wished to withdraw from others and so it was identified that a services agreement would provide both a basis and a process around managing exit from services.
- 4.18 The reality is that (with minor exceptions) aerodrome traffic services are only provided when required by the CAA in the interests of safety. It is a regulatory requirement. The regulatory obligation to ensure the service is provided is placed on the aerodrome rather than Airways because it is the logical party if ANS contestability becomes a reality in the future. That does not change the fact that, from a regulatory perspective, the service is provided for the benefit of, and due to the risks created by, aircraft operations. It is therefore wrong to suggest that the services are purchased by airports to support their business.
- 4.19 The relationship between Airways and airports is better described by Airways in the current (2012) Service Framework document where Airways' four distinct customer groups are identified. These are airlines and commercial aircraft operators, general aviation, the NZ Defence Force and airports. In relation to airports, Airways says:³⁰

Airports are required to have aerodrome and visual aid services (depending on the features of the aerodrome) in place. It is the airport operator that appoints Airways to provide those services...

Airways charges three of these customer groups directly for air navigation services. While airport operators choose to appoint us to provide Aerodrome Air Traffic Management (ATM) and Visual Navigation Aid Services, normally they do not pay for these services.

²⁹ Acknowledged in the Joint Letter to Airways and Members of the NZ Airports announcing the introduction of services agreements.

³⁰ "Airways Service Framework 2012 and Beyond", p 9: <https://www.airways.co.nz/assets/Uploads/Airways-Service-Framework-Feb-2019.pdf>

Facilitating genuine contestability requires further policy work

- 4.20 NZ Airports is aware that actual competition for ANS exists in some other jurisdictions.³¹ We note that the Government of Norway decided in 2015 that the provision of ANS should be opened to competition. In that instance, however, in-depth reports were commissioned to assess which services are best suited to competition, how competition should be phased in over time, and the conditions required to facilitate competition.³² These studies were conducted and published long before competition in ANS was declared to exist. There are also unique considerations at play, e.g., the Norwegian government subsidises certain domestic routes and therefore it arguably has a direct interest, in addition to a public interest one.
- 4.21 Declaring 'competition' exists, and that the underlying conditions that enable competition to also exist, was never the sole prerogative of the existing ANS provider in those jurisdictions.
- 4.22 What the Norwegian example highlights above everything else is that the New Zealand aviation sector has shallow experience in this area. If it is agreed that promoting competition in ANS is desirable, a deep understanding of the highly complex issues involved is essential (some of which are outlined in **Appendix A**).
- 4.23 There needs to be a genuine in-depth study on whether contestability can work in New Zealand, given its size and number of airports, for example. Part of that work will involve understanding why competition has not emerged over the last 30 years, and Airways' role in that outcome.
- 4.24 If the decision is to take new and additional steps to promote contestability, there then needs to be a suitable regulatory framework in place beforehand that ensures an acceptable level of safety is met. NZ Airports does not wish to engage on the pros and cons of ANS contestability in this submission. Its point is simply that there is currently no competition in the provision of ANS in New Zealand.
- 4.25 The current 2021 Civil Aviation Bill is due to be introduced to Parliament very shortly, and it remains an open question whether and to what extent air traffic control services should be contestable (albeit the exposure draft of the Bill proposed to retain Airways' existing statutory monopoly). NZ Airports maintains that the review proposed by MoT, and potentially the Civil Aviation Bill itself, is the appropriate forum for a debate around the benefits and detriments of contestability in the provision of these essential services and it is necessary to wait until the final outcome has been determined before Airways decides to change its Commercial Framework on this basis.

5. CHARGING AIRPORTS (RATHER THAN AIRCRAFT OPERATORS) DOES NOT PROMOTE COMPETITION

- 5.1 Airways has asked whether we support the direct charging to airports for aerodrome services, and whether we agree that contestable services should be excluded from the Commercial Framework.³³ We do not support direct charging and do not agree with contestable services being excluded.
- 5.2 As explained in the section above, we do not think Airways has a sound rationale for its Proposal. In this section, we explain our views that:

³¹ Other examples include, to certain degrees, Germany, Spain, Sweden and the UK.

³² Helios' "Study into Air Navigation Services to be opened to Competition in Norway", Part 1 dated 13 November 2015 and Part 2 dated 29 January 2016, prepared for the Norwegian Ministry of Transport and Communications.

³³ Consultation Paper, Question 5.

- (a) Rather than promoting competition, there is a risk that the Proposal will increase Airways' ability to exert market power.
- (b) The Proposal itself demonstrates the exercise of market power:
 - (i) Airways' intent is to transfer price risk to airports, particularly smaller regional airports; and
 - (ii) A unilateral decision to change its customer is not consistent with workable competition.
- (c) Airways (like any other business) has no incentive to take commercial and practical steps to promote competition with itself.

There is a risk of increased market power for Airways

5.3 The Consultation Paper indicates that Airways is interested in supplying services in the most "pro-competitive"³⁴ way. However, we are concerned that, to the contrary, it is more likely that Airways' Proposal will strengthen its ANS market power:

- (a) It is unusual business practice for any commercial entity to seek to expose itself to greater competition. NZ Airports is sceptical that this is an outcome Airways truly desires.
- (b) The proposal to charge airports does not change the services that Airways would provide. Airways will continue to provide what are currently monopoly services and, as such, there will continue to be no effective constraints on its pricing. This will not change by making airports the payer. As described above airports would not have a genuine choice of refusing or choosing who could provide the service.
- (c) The Proposal will remove the very minimal constraint that negotiating with airlines currently provides. Given the structure of the NZ airline industry, Airways would no longer have a single large airline with a nationwide service to negotiate with. Airways would instead be negotiating with multiple airports of a range of sizes and with varying degrees of commercial resources.
- (d) The MoT has seen Airways showing "signs of rent seeking behaviour in its pricing decisions, and leveraging its monopoly to expand into new services".³⁵ There are therefore no obvious benefits for the system (and airports and airlines in particular) if Airways is still able to take advantage of its monopoly position by being inflexible as to how the services are provided³⁶ or charge excessive prices to deliver services at a particular location.
- (e) An air service to a geographic location is dependent on both aerodrome and approach control being available. A commercial or operational disconnect between two providers for that location compromises regional connectivity, especially given it is the smaller airports which tend to suffer the most under commercial negotiations. As recognised by the MoT, "if Airways reduces the services it provides it can be difficult to fill the gap".³⁷

³⁴ Consultation Paper, [21].

³⁵ October MoT Briefing Paper, [4.4] and [28] to [32].

³⁶ There are examples of Airways not always being able to provide air traffic control for the hours or locations required. There are examples of scheduled air traffic control not being provided as planned and flights needing to be re-routed or cancelled. Examples include the staffing issues at Napier airport, and shutdowns at Queenstown airport for several hours (as referred to in the October MoT Briefing Paper, [21]).

³⁷ February MoT Briefing Paper, [35].

- (f) Airways retains a statutory monopoly on approach control services. Services agreements establish a change-management process in an attempt to minimise disruption in the event Airways wished to withdraw or alter the services,³⁸ but Airways has no obligation to continue providing services. Airways openly states "the CAA does not impose an obligation on us to supply the statutory monopoly services, but we supply those services recognising that we are the only provider permitted to do so". This statement nevertheless conflicts with Airways' commercial stance on, for example, provision of the ground-based navigation aids that have been determined by a government technical panel to be the minimum necessary to form New Zealand's required backup navigation system, which would in turn enable using GPS as the primary means of air navigation.
- (g) Airways' view also indicates that there are wider competition concerns: if this is Airways' position in relation to the statutory monopoly services, what would be its position in relation to so-called contestable ones? As discussed above, we are concerned that Airways will be more willing to withdraw service provision.

The proposal itself is an exercise of market power

- 5.4 We are also concerned that Airways is seeking to use its market power to achieve its desired commercial outcomes, which conflicts with its position that it seeks to promote competition.
- 5.5 Airways is purporting to unilaterally decide that aircraft operators are no longer its commercial customer but, in their place, airports are. It is expected in competitive markets for customers to be able to choose who their supplier is, not the other way around.
- 5.6 NZ Airports cannot see how the structural changes to the Commercial Framework can create efficiencies or promote contestability. We contend that all the Proposal does is transfer pricing and revenue risk from Airways to airports. One way of analysing the proposed changes is that, firstly, Airways would avoid having to negotiate a number of services and prices with airlines and the General Aviation sector – both of which are knowledgeable, demanding and sometimes vocal customers³⁹ - and would pass that role on to airports which have little part in determining the services or costs. Secondly, in the event of another significant downturn in aviation activity Airways' expectation is that airports would, somehow, continue to pay for its services while the actual users could not.

Airways has not considered the existing barriers to competition

- 5.7 In attributing much of the change to its Commercial Framework as establishing a "pro-competitive" basis for services, the consultation documents do not address the real steps required to enable effective competition, or to establish the appropriate scope and pre-requisites.
- 5.8 We do not see that contestability of aerodrome services can be implemented in practice under current settings, without addressing the types of issues outlined in **Appendix A**.
- 5.9 In any event, it would be highly inappropriate for Airways to be the architects and decision-makers of system change along these lines. The danger in the current proposal is that incremental changes proposed by one party would be likely to pre-judge or pre-determine outcomes in narrow way, potentially at the cost of system-wide benefits for New Zealand.
- 5.10 A key example relates to approach services (which are categorised as "Base" statutory monopoly services) versus aerodrome services (which are categorised as contestable services).

³⁸ This has not always been achieved. See for example: <https://www.scoop.co.nz/stories/PO2004/S00082/air-traffic-control-closure-sends-covid-19-shockwaves-through-regional-airports.htm>

³⁹ See for example <https://australianaviation.com.au/2019/06/iata-critical-of-airways-new-zealand-fee-rises/>

- 5.11 This distinction would be a concern for airports, as third party providers would need to closely and constantly engage with Airways' air traffic management system that the MoT believes "Airways is highly incentivised to protect as it derives its commercial benefit from it".⁴⁰
- 5.12 If there were another provider of aerodrome services, and airports opted to use that service, NZ Airports would be concerned that Airways would have the incentive to protect its incumbency or punish that decision. For example, by making it difficult for that alternative provider to connect with Airways' operationally essential approach services (although Airways would be at risk of breaching competition law in such cases). The legal and operational uncertainty could have a chilling effect on airports' willingness to contract with any potential competitor to Airways.
- 5.13 A more practical question is how Airways would propose to draw the line between the two services. At present, flights are under Airways' control the entire journey. Questions which flow from this include how Airways would propose to separately price aerodrome services, and how it would allocate costs e.g., would it include one set of costs under approach services, and then allocate a separate set of costs under aerodrome services? Would Airways' pricing enable its charges for aerodrome services to be "competitive" by allocating costs to approach services?
- 5.14 While the existing Civil Aviation Rules (in particular, 172.67 and 172.59) facilitate integration of a new operator, they do not go far enough to ensure the necessary cooperation required and they do not capture the additional layer of complexity that would occur if there are different providers of aerodrome services.⁴¹

6. SPECIFIC COMMENTS ON THE PROPOSED FRAMEWORK

Safety

- 6.1 The reference in Schedule 1 (Airport Categories) to "CAA designation based on latest aeronautical study" is inappropriate. How the CAA as the Airspace Authority for New Zealand determines the Air Navigation Services required in the vicinity is outside the scope of Airways' Service Framework.
- 6.2 NZ Airports has questioned without success the CAA on its recent expectations of airports in relation to responsibilities for airspace safety. The assumption that airports should undertake aeronautical studies of risk in airspace is not well-founded.
- 6.3 In any case, the CAA designation does not appear to have been translated into a meaningful aspect of the Aerodrome Category table in Schedule 1 (and it is noted that apart from the table header this table is substantially the same as the 2012 Service Framework).
- 6.4 The Service Framework should embrace and commit Airways to be an active participant in any aeronautical study that is addressing airspace that has been subject to control or management as part of Airways' services. NZ Airports has been surprised and disappointed at Airways' reluctance to share data and aeronautical experience in at least two of the recent aeronautical studies that have been undertaken in response to Airways' decisions last year to withdraw services from seven airport locations.⁴²

⁴⁰ February MoT Briefing Paper, [34].

⁴¹ For example, it may be advisable to have arms-length requirements, as found in the Electricity Industry Act 2010 in relation to electricity distribution and generation/retailing businesses.

⁴² Invercargill Airport Ltd Aeronautical Study on Aerodrome Aircraft Traffic Management, 8 December 2020, and Rotorua Airport Aeronautical Study on Aerodrome Aircraft Traffic Management, 12 February 2021.

Inflexibility of delivery

- 6.5 There is a key role for airports in determining the most appropriate means of delivering Airways' services given those services are delivered on airport premises. However, the Proposal appears inflexible in this regard. For example, the detail in Schedule 6, specifying hours and numbers of shifts is inappropriate in a framework document. The means of delivering hours of service appear to be possibly driven by current labour agreement or contract arrangements. The Service Framework should leave scope for the means of delivery to be responsive to the local needs or activity. In the case of Aerodrome Air Traffic Management Service (Schedule 6), Aerodrome Visual Navigation Aid Service (Schedule 7) and Approach Service (Schedule 2) the specification of service should involve the airport operator.
- 6.6 These points were also made by NZ Airports in response to consultation on the 2012 Service Framework. It is disappointing to see the proposed framework perpetuating the same inflexibility.
- 6.7 Including this level of detail in the Services Framework is not consistent with Airways' intention to have individual agreements with airports. In that eventuality such detail would be better contained in those individual agreements, tailored to suit each airport's requirements.

Inclusion of PLEXIT

- 6.8 Airways has confirmed that it plans to exit its airfield power and lighting business (or PLEXIT) on the basis that these services do not naturally fit with Airways core delivery of services.
- 6.9 However, on page 9 of the Proposed Framework, the table of "Airways Services", and the description at Schedule 7, suggest that the airfield power and lighting business is part of Airways' services framework. Despite this, Airways has indicated separately to NZ Airports that airfield power and lighting are not part of this consultation. NZ Airports agrees that the exit from providing these services should be run as a separate process, given they will not be part of Airways' offering going forward.
- 6.10 This begs the question: if the services in Schedule 6 are intended to be negotiated separately with each airport, why it is included in the services framework?

Performance Indicators – Target Service Levels

- 6.11 The proposed Service Framework persists with 'Service Availability' calculated based on the total actual hours of service availability on a 12-month rolling average.
- 6.12 In line with earlier submissions on Airways' pricing, NZ Airports seeks a better form of reporting service availability.
- 6.13 NZ Airports has no objection to the use of a rolling/moving average as a means of highlighting overall trends, but this measure is quite inadequate for disclosing the true picture of failure to deliver services, which has been the case in the recent past. While in part this can (and will) be addressed through the key performance indicators incorporated in service agreements between individual airports and Airways that will be negotiated, NZ Airports submits that national public reporting (and formal accountability reporting) of Airways' service performance needs to be more meaningful and timelier in disclosing its performance.
- 6.14 To that end the following are suggested as additional performance metrics, with associated targets:
- (a) The maximum aggregate period of time at any controlled airport in a reporting period where normal ATC was not available and a contingency service or no service prevailed; and

- (b) The aggregated period of time across all controlled airports in a reporting period where normal ATC was not available and a contingency service or no service prevailed.

Instrument Flight Procedures

- 6.15 References to Instrument Flight Procedures (**IFP**) in the proposal are inconsistent. For example, page 18 states “Airways develops and maintains navigation procedures (Instrument Flight Procedures or IFP) to support the navigation systems network (as described in the Air Navigation Plan). These procedures facilitate an IFR aircraft’s safe transition through every stage of flight.” Notwithstanding that this reference is in Schedule 3 (En-Route Domestic Services), the framework implies that IFP are provided for all phases of flight.
- 6.16 However, at present Airways provides IFP within its pricing to airlines when it suits Airways commercially. When it does not suit Airways, the IFP must be separately purchased as it is excluded from Airways’ offerings. It is not clear, for example, whether IFP are proposed in the Framework to be bundled with the Base services when it suits Airways.

Other oversights in the Proposal

- 6.17 Other services that Airways supplies on a national – not local - basis, such as NOTAM services,⁴³ ADS-B surveillance infrastructure,⁴⁴ and non-cooperative surveillance (radar) all seem to fall into a similar grey unaddressed category that is entirely to the commercial benefit of Airways.
- 6.18 This lack of clarity regarding NOTAMs is a problem for airports when those systems do not deliver on, for example, the CAA’s expectations of airports to undertake runway condition reporting and communicate those to aircraft, because there is no obligation on Airways to facilitate such a service.
- 6.19 The activities by Airways noted in paragraph 6.17 are all areas that the MoT’s first principles review must address, instead of those activities being driven by Airways’ commercial priorities.

New Zealand Airports Association 16 June 2021

Support for this submission expressly includes the following airports where aerodrome air traffic control operates:

| | | |
|----------------------|----------------------|--------------------------|
| Auckland Airport | Invercargill Airport | Nelson Airport |
| Christchurch Airport | Rotorua Airport | Palmerston North Airport |
| Dunedin Airport | Gisborne Airport | Hamilton Airport |
| Hawkes Bay Airport | Wellington Airport | Tauranga Airport |
| New Plymouth Airport | Queenstown Airport | Marlborough Airport |

⁴³ Notice to Airmen is a notice filed with an aviation authority to alert pilots of potential hazards along a flight route or at a location that could affect the safety of the flight.

⁴⁴ Automatic Dependent Surveillance-Broadcast is a surveillance technology in which an aircraft determines its position via satellite navigation or other sensors and periodically broadcasts it, enabling it to be tracked.

APPENDIX A

Indicative Guide: Pre-requisites for Contestability in Air Navigation Services

[See following pages]

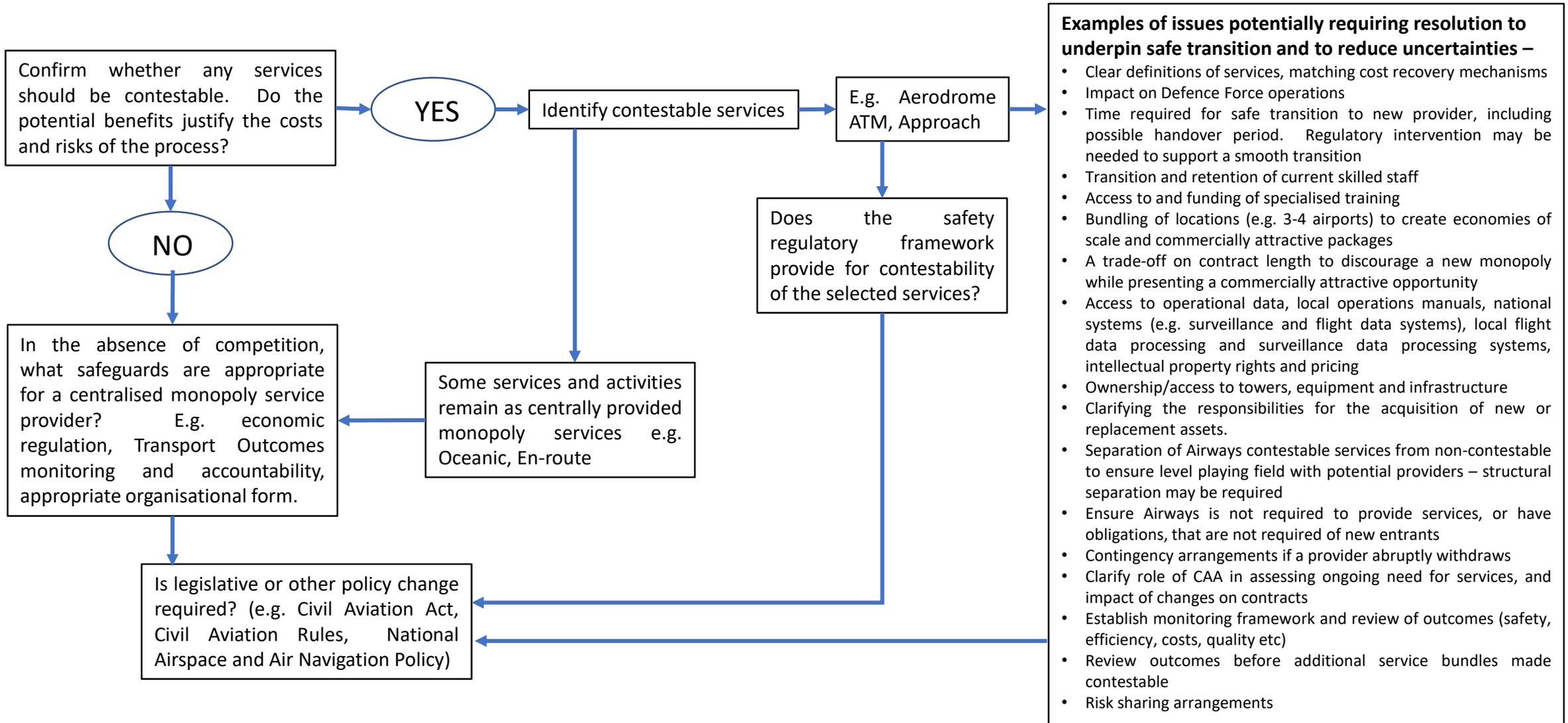
APPENDIX B

Timeline of Legislative History and Airways Services Framework

[See following pages]

Potential policy issues and pre-requisites for contestable air navigation services

This is an indicative list of steps and issues requiring resolution to ensure that any future contestable services are safe, reliable and of good quality, and that any transition to new providers is conducted appropriately. Resolving these questions would also reduce risks and uncertainties for the current provider and potential new bidders, increasing the attractiveness of each tender package and reducing risk-related costs.



Legislative, Policy and Airways Services Framework Timeline

