31 October 2014

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Submissions
Ministry of Transport
PO Box 3175
Wellington 6140

SUBMISSION ON CIVIL AVIATION ACT 1990 AND AIRPORTS AUTHORITIES ACT 1966 CONSULTATION DOCUMENT

1 Thank you for the opportunity to comment on the Ministry's consultation paper (the **Consultation Paper**) concerning proposed changes to the Civil Aviation Act 1990 (**CAA**) and Airports Authorities Act 1966 (**AAA**).

2 We are pleased that the Ministry intends to preserve the fundamental principles of both Acts. We agree that the current legislative provisions governing civil aviation in New Zealand are generally effective and functional. We welcome the Ministry's approach to refreshing the legislation and ensuring that its provisions are current and effective.

3 The New Zealand Airports Association (**NZAA**) has provided a submission responding to each of the issues set out in the Consultation Paper. Wellington International Airport Ltd (**WIAL**) has provided input to the NZAA submission and is supportive of its content. Accordingly, in this submission, we have provided feedback on a narrow range of issues only. Where we have not provided comment on a particular issue, our views can be taken to generally align with those expressed by NZAA.

4 Our key submissions are summarised below:

4.1 **WIAL strongly opposes the repeal of s 4A of the AAA.** We think that s 4A is a critical provision that clarifies the airports' powers in setting charges. Repeal would open the door for litigation over the prices set by airports. This is not an intended outcome of the reform and if it happened would amount to a fundamental shift in the policy of the Act.

4.2 **WIAL does not think that it is necessary to amend s 6(3) of the AAA.** The termination of leases within the terms of s 6(3) and (4) is at times a necessary part of our business, usually to facilitate growth. However, in any instance there will always be room to argue termination is not needed for the safe and efficient operation of the airport (the test proposed in the Consultation Paper). The Ministry's proposals will hinder desirable activities by the airports (such as expansion to accommodate new airlines) and provide incumbents with avenues to obstruct and delay.

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4.3 **WIAL supports the inclusion of a purpose statement, but there is a risk that it will cause unintended consequences for settled jurisprudence concerning the interpretation of the Acts.** We recommend that the purpose statement is accompanied by a clarifying provision or a clear policy statement specifying that it is intended to affirm current jurisprudence.

4.4 **WIAL agrees that the current process for authorising contracts, arrangements and understandings between airlines is not effective**. We support the introduction of an authorisation process that remedies the problems of the status quo. In particular:

(a) The process should include an assessment of the competition costs and benefits of a particular proposal by an expert body;

(b) The process should be transparent and certain; and

(c) The regulator charged with determining an application for authorisation should be empowered with the ability to impose conditions.

4.5 WIAL thinks that the Aviation Security Service (Avsec) monopoly on aviation security services should be removed and this change included in the Ministry's policy proposals.

5 Our complete responses to the above selected issues are attached as **Appendix One**.

[redacted]

APPENDIX ONE: RESPONSE TO THE MINISTRY'S CONSULTATION PAPER ON SELECTED ISSUES

Repeal of sections 4(2) and 4A of the AAA

A1 Item E2 of the Consultation Paper contemplates the repeal of s 4A of the AAA, which provides the ability of airports to set charges as they think fit. We strongly disagree with the removal of this provision from the AAA. We think that the proposal could have widespread consequences for the interpretation of airports' power to set prices.

A2 The Consultation Paper suggests that s 4A is now redundant, because it is well understood that airports are empowered to manage their airports as commercial undertakings, as companies registered under the Companies Act.[1]

A3 This may not be the case. The common law requires a provider of essential services to supply services at fair and reasonable price. The Court of Appeal in *Vector Limited v Transpower New Zealand Limited* has confirmed that this doctrine of prime necessity forms part of the common law of New Zealand but statutory provisions regulating the prices of essential services generally preclude the ordinary operation of the doctrine.[2]

A4 However, repealing s 4A will provide an avenue for argument that the position has reverted to the common law doctrine. The practical position is that without s 4A an airport could find itself "off contract" with airlines, and in response to setting prices facing either prime necessity litigation or, if instead the Commerce Act applies, litigation under section 36 for supply, price, or both.

A5 This risk could have real practical consequences. As an example, in 2007 and 2008 WIAL constructed the Runway End Safety Area (RESA) to the south and north of its existing runway. These extensions ensured that WIAL preserved the existing operational functionality of its runway while complying with the increased Civil Aviation safety requirements. The total cost for construction of the two RESA's was $33m.

A6 At the time Air New Zealand opposed these works. If we had been uncertain about our ability to recover this investment through our prices, the works would not have gone ahead. In addition, the absence of this investment would have meant WIAL would have been unable to accommodate the market growth that has subsequently occurred. The introduction by Pacific Blue and Qantas of its B737-800 aircraft would have been more difficult because the increased payload restrictions (ie reduction in the number of tickets that could be sold to ensure aircraft do not exceed weight allowances for the runway length) from a shorter runway would have reduced the viability of the services with these aircraft.

A7 The impact on the consumer would have been significant in this scenario with fewer people enjoying the opportunity to fly on the routes where competition exists and fares would be higher than they are today.

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[1] Consultation Paper, s 47.

[2] [1999] 3 NZLR 646. See also *Air New Zealand v Wellington International Airport Limited* [2009] NZCA 259.

A8 Standing back, this illustrates that s 4A is a fundamental element of the package of legislation that regulates price setting by airports (i.e., airports are subject to information disclosure and consultation obligations, and in return may price as they see fit). Repealing s 4A and opening up litigation over price would amount to a fundamental shift in the policy of the AAA.

A9 WIAL has little appetite for the uncertainty and expense of litigation in relation to provisions that have already been the subject of extensive litigation, and for which the jurisprudential principles have now been settled. We think that s 4A is far from superfluous. It serves as an important clarification about the airports' ability to set prices that prevents costly and time consuming litigation.

Termination of leases without compensation or recourse for compensation

A10 Item E5 of the Consultation Paper proposes amending the provisions that enable airports to terminate leases without compensation. The proposed amendment would allow airports to recover compensation unless the termination takes place "*for the purposes of the safe and efficient operation of the airport*".

A11 We do not consider that there is significant benefit in aligning the ability to terminate leases in line with the 'safe and efficient operation' threshold in s 6(1). Under that provision airports cannot enter into commercial leases that affect the safe and efficient operation of the airport. Amending s 6(4) to the same threshold would mean termination would only be possible if the lessee was contemplating a change in use, or where unforeseen impacts of the lease upon the safe and efficient operation of the airport had arisen.

A12 We agree that the current threshold for termination is broad. However, we think that it is desirable for an airport to be able to terminate a lease without compensation in many circumstances that do not fall within the purposes proposed in the Consultation Paper.

A13 Airport expansion is a common reason for the termination of a lease by an airport. There will always be room to argue this would not be captured by a "safe and efficient operation" exception. We think that it is in the public interest for airports to retain the ability to enable other airlines to enter the market quickly and easily. The primary beneficiaries of the proposed amendments are incumbent airlines leasing airport space who prefer to retain their competitive advantage. Requiring airports to compensate for the termination of such leases disincentivises airports to expand and free up space for new competitors and provides airlines with ammunition to delay and disrupt the proceedings.

A14 In addition:

- Leasing arrangements are generally negotiated with commercial parties who are aware of the provisions of the AAA and the consequences of s 6(4);
- Section 6(4) provides the default position only; it does not suppress the power of parties to a leasing arrangement to bargain for the provision of compensation within a lease;
- Airports are reliant upon airlines and other leasing parties to make a profit and do not hold the entirety of the bargaining power. In most circumstances, airports are prepared to consider compensatory provisions in leasing arrangements;

- The provision has not given rise to significant problems. We do not terminate leases lightly, and only contemplate it where it is commercially necessary and in accordance with the provisions of s 6(3). The Ministry itself has indicated that there have been few complaints about the conduct of airports in relation to lease issues. There is no problem to be solved, but the proposed solution will make it harder to introduce airline competition and growth. We consider that the matter is better regulated between individual commercial parties.

A15 For these reasons, we think that the status quo, where the default position is that airports may terminate leases if the property is required "for the purposes of the airport", is the more desirable position. At a minimum, we consider that an expanded category of permitted purposes should be incorporated if any change is proposed by the Ministry.

Purpose statement and objectives

A16 Item A2 of the Consultation Paper discusses the value of a purpose statement for civil aviation legislation and considers the concepts that could be included in such a provision.

A17 Like the NZAA, we support the introduction of a purpose statement. We agree that purpose statements are an effective tool of modern legislation and should be considered for inclusion in civil aviation legislation. However, we are concerned that without clarification, the proposed purpose statement may have unintended consequences. These consequences should be mitigated where possible.

A18 In particular:

- Section 5 of the Interpretation Act requires that the meaning of an enactment must be ascertained from its text and in the light of its purpose;

- A new purpose statement is a new matter to be taken into consideration in interpreting the statutory provisions, and a new lens through which the Act must be read. It casts into doubt the interpretation of the current AAA provisions, even if those provisions were unchanged following the review process;

- So, there is a real risk that this amendment will motivate parties to re-litigate questions of interpretation that have already been considered extensively by the Court. We are particularly concerned about the impact of a purpose statement in relation to the provisions of the AAA, which has been the subject of disruptive and costly litigation in the past two decades. This litigation has only recently subsided as a result of settled and well-established jurisprudence; and

- We do not think that it is desirable to open the door to another round of litigation. We think that the Ministry should avoid uncertainty unless the purpose of a particular reform is clearly to change the status quo.

A19 The instances of airline litigation following consultation have been well publicised for many airports in New Zealand, with the associated costs being significant. In the case of WIAL, following the last major change in regulatory regime in 1997, we undertook consultation and set prices in 1997, 2002 and 2007. The full process involved significant consultation and litigation costs of several million

dollars. We assume that other airports and airlines will have incurred similar costs resulting in an expensive and uncertain period of time for the industry. It is significant that for our most recent consultations in 2012 and 2014 WIAL has not experienced litigation, which we consider is reflective of a more settled period of regulation. The Ministry must be very sure that any changes it proposes do not create fresh incentives for litigation.

A20 For those reasons, we recommend that the new purpose statement be accompanied by a clear statement of policy that the purpose statement is generally intended to capture and affirm the current arrangements and underlying jurisprudence. Alternatively, this could be incorporated into the relevant Act's purpose provision.

Process for authorising contracts, arrangements and understandings between airlines

A21 Item D6 reviews the current process for authorising contracts, arrangements and understandings between airlines. We agree with the Ministry's overview of the difficulties of the current process and with the objectives for the process set out by the Productivity Commission.

A22 We support the introduction of an authorisation process that remedies the problems of the status quo. In particular, the Ministry should ensure that:

- The new process includes an assessment of the competition costs and benefits of a particular proposal by an expert body;
- The process should be transparent and certain, enabling all relevant and interested parties to provide their views and to be kept informed throughout the process; and
- The regulator charged with determining an application for authorisation should be empowered with the ability to impose conditions.

Contestability of aviation security services

A23 Section 79(1) of the CAA provides that aviation security services may be provided by Avsec or the operator of an aerodrome. However, Ministerial Gazette Notice 3702 provides that only Avsec can be granted an aviation document to provide aviation security.

A24 NZAA has submitted that the provision of security services at airports should be contestable, and that airports should be able to take on this function themselves if they wish to do so. WIAL supports this proposal.

A25 The maintenance of effective aviation security is a matter of material national significance. We would not suggest changing the status quo if we thought it was at the expense of a robust aviation security system. However, we do consider that real benefits for airports, airlines and the public will result from opening up the services provided by Avsec to competition:

- **Improved incentives to deliver quality and innovation**: Avsec currently has a monopoly on aviation security and has limited incentives to ensure that it continues to provide quality services. However, under NZAA's proposal, Avsec must continue to provide quality, innovative services or lose its contract to a competitor. There will be a real incentive to curtail

breaches of aviation security. Airports will be provided with meaningful recourse where security services are not provided to an acceptable standard;

- **Improved cost outcomes**: Avsec is not subject to a significant level of competitive scrutiny for the prices that it charges for its security services. We consider that NZAA's proposals will ensure that the prices charged for security services are competitive. If the airport or another provider can provide security services at a lower cost without compromising on statutory obligations, they should be able to contest the security services contract. Cost reductions will be passed on to airlines and consumers.