BOARD OF AIRLINE REPRESENTATIVES NEW ZEALAND

SUBMISSION FROM BARNZ ON CIVIL AVIATION ACT AND AIRPORT AUTHORITIES ACT CONSULTATION DOCUMENT

29 October 2014

BARNZ's interest in the Civil Aviation Act and Airport Authorities Act Review

BARNZ is an incorporated society whose members comprise nearly all airlines operating scheduled air services into or within New Zealand. BARNZ members require international air services licences from the Minister of Transport to operate to New Zealand, they require operational certification under the Civil Aviation Act to operate within New Zealand, they apply to the Ministry for approval of alliances, they have to meet all security requirements specified by the CAA, their staff have to meet the fit and proper persons test, they consult with airports under the Airport Authorities Act, they pay levies which comprise the bulk of CAA funding. In essence, BARNZ members are interested either directly or indirectly in almost every question posed by the MOT in its discussion document.

A STATUTORY FRAMEWORK

A1 Legislative Structure

The discussion document asks whether legislation addressing civil aviation regulation in NZ should continue to be contained in two separate acts, be merged into one act or split into three acts (addressing safety and security, airline and air navigation services regulation and finally airport regulation).

BARNZ does not hold a fixed view either way. The number of pieces of legislation is less important than the overall navigability, manageability, clarity and consistency of the various provisions as a cohesive whole to create NZ's civil aviation framework.

On the one hand, avoidance of repetition (and potential perceived conflict) would suggest one single act may be best.

On the other hand, manageability by stakeholders and avoidance of a large cumbersome piece of legislation may support splitting the legislation into logical groupings. If the legislation is split, then BARNZ supports option two, of three separate acts.

BARNZ is comfortable with the MOT treating the views of the Parliamentary Drafting Office as determinative on the issue of whether to combine all the legislation into one act or retain a degree of separation.

A2 Purpose statement and objectives

BARNZ supports the creation of a purpose statement (or purpose statements) for the new act or acts.

While BARNZ does not have any real objection to the concepts identified in paragraph 31 of the discussion document, they seem to us to be a list of what the Act is doing, rather than a statement of what the Act is intending to promote. The paragraph 31 concepts would not, for example, significantly guide the interpretation and application of the Act. Moreover, in our view, the important concepts of effectiveness and efficiency are missing. The concepts of efficiency and effectiveness are part of the sector wide outcomes for transport adopted by the MOT in 2012 and we believe they should be expressly incorporated into the proposed purpose statement.

BARNZ's preferred position would be for the purpose statement to more closely reflect the current objectives for transport generally. For example:

> *"the purpose is to promote an effective, efficient, safe, secure, accessible and resilient civil aviation system that supports the growth of the New Zealand economy, in order to deliver greater prosperity, security and opportunities for all New Zealanders and to meet New Zealand's obligations under international civil aviation agreements."*

The MOT proposes including a separate requirement that decision makers should be required to carry out their functions in an effective and efficient manner. BARNZ supports functions being carried out efficiently and effectively, but we question why the promotion of effective and efficient outcomes is not one of the over-all statutory objectives, which would avoid the need to have a specific direction regarding the carrying out of functions in an effective and efficient manner. The current proposal to limit effectiveness and efficiency to the carrying out of functions could arguably produce the perverse result of a decision to adopt an ineffective or inefficient solution being made using an effective or efficient process.

A3 Independent statutory powers

BARNZ supports independent statutory powers continuing to reside with the Director of Civil Aviation. The alternative proposed of transferring powers to the Board could, in BARNZ's opinion, result in less effective and less timely decision making.

B SAFETY AND SECURITY

B1 Provisions relating to fit and proper person assessment

BARNZ supports option 2 of aligning the fit and proper person test with other transport legislation. BARNZ supports the proposal for offences relating to controlled drugs being a mandatory consideration. We support the Director having the discretion to consider other offences, however we question whether there is not a wider group of serious offending that should also be specified as a mandatory consideration for the Director. This does not mean that such an offence automatically renders the person not fit and proper – but it does require that the circumstances of the offending, and its relevance to the aviation document being applied for, should be considered. We consider organised criminal offending and arms offences should be mandatory considerations.

B2 References to safety and security in the Civil Aviation Act

BARNZ supports the MOT's proposal to include the term 'security' in sections 17, 18 and 21 of the current Civil Aviation Act so as to ensure that the Director has explicit authority to make decisions or exercise powers in the interests of aviation security.

B3 Certification pathways for stable conditions

BARNZ supports the development of a third pathway for certification of stable (ie static or non-progressive) medical conditions so as to avoid the need to undergo the full AMC process in these cases. This proposal meets the need to ensure that regulation is efficient, reduces compliance costs and fits the Government's aim of 'better regulation, less regulation'.

B4 Recognition of overseas and other medical certificates

BARNZ supports the recognition of overseas medical certificates issued by States with a robust aviation medical certification programme. This proposal also reduces compliance costs, prevents duplication of regulatory requirements and fits the Government's aim of 'better regulation, less regulation'.

BARNZ does not support the Director providing oversight of the overseas medical certification process. That would eliminate any savings and would simply transfer costs from the applicant to the CAA (and ultimately airlines which pay the levies which meet the bulk of CAA funding requirements). Rather, the Director should rely on the issuing state over-seeing its own medical certification programme. However, this does underscore the importance of only allowing recognition of overseas medical certificates issued by States that the Director is confident have a robust aviation medical certification programme.

B5 Medical convenor process

BARNZ supports the continuation of the medical convenor process.

However, BARNZ does not support the continuation of the status quo whereby the cost of the medical convenor process is met within the fee for all applicants for medical certification. The current approach means that there is no pricing signal to applicants using the medical convenor process of the costs of this process, as well as causing all applicants for medical certificates to contribute to the cost of the medical convenor process even though they may not use it.

BARNZ supports the proposal by the CAA in its recent review of the funding framework that applicants for the medical convenor process should pay the direct costs of this process (with the indirect costs of the medical unit being met by the various activity based levies).

B6 Penalty levels

BARNZ is concerned that some of the penalties at the lower and higher ends of the scale are now too low. BARNZ supports increasing penalty levels for both lower level and higher level offences. Offences in the middle of the range (such as disorderly or offensive conduct or not following crew instructions appear to still be appropriate at a $5000 fine).

In particular, acts that endanger the safety of the aircraft, which currently have penalties of up to two years imprisonment or a $10 000 fine, need revising. Given the risk to life of up to 500 passengers on the largest aircraft, BARNZ considers that these penalties are manifestly too low. The maximum sentence under s5 of the Aviation Crimes Act for causing damage to an aircraft which is likely to endanger the safety of the aircraft in flight is 14 years. Acts that endanger the safety of the aircraft (albeit that have been stopped before any actual damage of the aircraft) need to be subject to a proportionate sentence. We suggest a maximum penalty of between seven and ten years imprisonment.

The maximum level of fine of $10 000 is also manifestly too low – particularly compared with the cost to airlines and passengers of a diversion, which may involve hotel accommodation costs, meal allowances, crew changes, additional airport and air navigation service provider charges, additional fuel, catering and ground handling charges. IATA has been reported as indicating that the costs of a diversion can range from $10 000 to $200 000 depending upon the size of the aircraft, number of passengers on board and operational consequences such as delays, missed connections, flight cancellations and accommodation and meal costs for passengers.[1] In the same article Qantas was reported as indicating that a disruption on a Sydney to Tokyo flight forced to land in northern Australia incurred AUD125 000 in expenses.

BARNZ considers that the maximum level of fine should be equated to the maximum likely cost caused if the aircraft needs to be diverted. We suggest a $200 000 maximum fine for acts that endanger the safety of the aircraft.

[1] CBC, Unruly passengers can face hefty bills for flight diversions, 5 February 2013, http://www.cbc.ca/news/canada/unruly-passengers-can-face-hefty-bills-for-flight-diversions-1.1144398

Provision should also be made for the Judge to be able to order reparation to the airline in question.

At the other end of the scale, penalties for lessor conduct that is able to be addressed by infringement notices currently attract fines ranging from $500 to $1000. BARNZ supports increasing these fines as inflation has considerably eroded their deterrence factor. By way of reference the RBNZ inflation calculator indicates that from the first quarter of 1991 until today inflation has been 62.4%. In general terms, BARNZ supports the fines applicable under the infringement notice regime increasing by between 50% and 100%.

B7 Acting without the necessary aviation document

BARNZ supports changes being made to the legislation to address the potential ambiguity identified by the High Court in *Director of Civil Aviation Authority v Barr.*

B8 Appeals process

BARNZ does not support a specialist aviation panel or tribunal being established. There is not a sufficient volume of cases in New Zealand to justify the cost of a separate tribunal. Moreover, under the current arrangements for funding the CAA the majority (if not all) of the costs of any tribunal would likely be recovered from passenger levies imposed on airlines (nearly all of whom constitute BARNZ members) by the CAA. Those airlines, who would likely meet the cost of any new tribunal, are opposed to both the creation of a new tribunal and meeting its costs. The general appeal process existing under the District Court (and potentially High Court in the case of any appeals or judicial review proceedings) provide ample ability for dis-satisfied participants to appeal any decisions.

B9 Rule making

BARNZ members consider that the rule making process needs to be improved so that rules can be made faster. Lack of sufficient resourcing from crown funding for rule making may well be contributing to the length of time being taken for some rules to be developed. Given the dependence of New Zealand's economy on aviation for key export markets, BARNZ members consider that the Government needs to ensure that it appropriately funds the CAA's rule making programme, such that necessary rules are developed in a timely manner.

BARNZ supports changes to the rule making process that will provide greater regulatory flexibility (within defined parameters) and the ability for regulatory changes to be made in a more timely manner.

BARNZ members therefore support the proposal contained in option 2 for the CAA Board to be able to make temporary rules for emerging issues with safety or security implications, with the safeguards outlined in paragraphs 165 to 167 of the discussion paper.

BARNZ also supports option 3, namely introducing the ability for the Minister to delegate some of his or her rule-making functions to the Director of Civil Aviation or the CAA Board, subject to these rules being subject to Regulations Review Committee oversight. Whether or not this would enable rule changes to be made more quickly than those made by the Minister will to a large extent depend upon whether the rule making activities of the CAA are appropriately funded.

The discussion paper identified a fourth option, namely the creation of a new level of tertiary legislation such as Standards. BARNZ supports further investigation of this option, but at this early stage without knowing the relevant safeguards or what matters these standards would encompass, BARNZ is unable to definitively support it (or otherwise). This is linked to the further question of whether a separate review should be undertaken of whether all rule-making powers should be allocated to the Director. Again, BARNZ would support this work being undertaken but, at this early stage without knowing the relevant safeguards which this process would encompass, is unable to definitively support tertiary legislation (or otherwise).

Options 2 and 3 are therefore BARNZ's preferred options at this time. BARNZ would support both of these changes being made to the rule making process as a result of the present review process.

B10	Possible amendments to Part 3 (matters taken into account when making rules)

The discussion document highlights several possible changes to the matters the Minister should take into account when making rules. Of these matters:

- BARNZ does not support the proposal to combine the matters in s33(2)(b) and (d) into one generic requirement to consider 'whether the proposed rule reduces the level of safety and security risk'. BARNZ considers that the present requirement in s33(2)(d) to have regard to the level of risk existing to aviation safety and security in New Zealand in general is extremely important. Without an express reference to consider the level of risk in New Zealand there is a danger that proposed changes would be judged against the effect on safety and security risk only in a general sense — as opposed to also taking into account whether the change is necessary in relation to the level of risk existing to safety and security in New Zealand. Retaining the current reference to the level of risk existing to aviation safety and security in New Zealand will ensure that the consideration of any change would be specific to the level of risk existing in New Zealand, which BARNZ considers is important.

- BARNZ supports the proposed simplification of section 33(2)(e).

- BARNZ supports reinserting the provision in section 34 providing for interested persons to have a reasonable time to make submissions during ordinary rule-making.

- BARNZ supports adding a requirement to consider the impact of implementing the measures for which the rule is proposed as suggested in paragraph 199.4. This recognises the fundamental principle of good regulation that the costs of implementing regulatory requirements must be proportionate to the risk being addressed by the rule and the resulting benefit.

- BARNZ does not consider that the other matters identified in paragraph 199 need to be specifically listed in the Act as matters which the Minister must consider. There already exists a generic ability for the Minister to consider any other matters he or she considers appropriate, and this will enable matters such as best international practice and other alternatives to be considered where appropriate.

B11 Accident and incident reporting

BARNZ offers no comment on this issue.

B12 Accessing personal information for fit and proper purpose assessments

BARNZ supports the Director having the power to compel organisations to make personal information available in relation to a person who has applied for a fit and proper person assessment. By making the application for a fit and proper person assessment the applicant has made a conscious decision to initiate a process that will involve the Director assessing their character. As such it is appropriate for the Director to be able to compel the provision of information where third party holders of information are reluctant to provide it without a legal requirement.

B13 Search powers

The discussion document is seeking comment on whether Avsec's search powers should be extended (or clarified) in a number of areas.

In short, BARNZ supports Avsec having powers to undertake searches (including by Explosive Detector Dogs or EDD) in landside areas that are directly related to aeronautical activities such as landside terminal areas, forecourt areas and landside areas immediately adjacent to the security boundary. Airports are however developing large commercial activities, and also (in some cases) have extensive public and staff car-parks. BARNZ does not support Avsec functions extending to these areas. Airport companies should engage private security staff or provide their own security staff for these non-aeronautical landside areas. Avsec's powers must be limited to aeronautical areas or areas immediately adjacent to aeronautical areas.

Answering the specific questions asked by the discussion document:

- BARNZ supports Avsec having the power to search unattended items in the landside part of terminal building, in the forecourt and drop-off areas immediately in front of or beside terminal buildings and the areas immediately outside the perimeter of the airfield, including with EDD. Avsec are usually present and often able to quickly and efficiently clear unattended items for the presence of explosives with EDD dogs. However, BARNZ does not support Avsec having an unlimited search power extending to all parts of the aerodrome.

- BARNZ supports Avsec having the power to search vehicles using non-invasive tools such as EDD in the forecourt and drop-off areas immediately in front of or beside terminal buildings and around the perimeter of the airfield, however BARNZ does not support this power extending to all parts of the aerodrome, such as car-parks that are not immediately adjacent to the terminal or airfield perimeter.

- BARNZ supports the use of EDD in aeronautical and aeronautically related areas at airports, including around non-passengers. EDD represents an efficient relatively non-intrusive method of quickly checking people and bags for traces of explosive. In BARNZ's view it is well understood and accepted by the public that airports are environments where it is necessary for there to be additional security measures above what would normally occur in other areas where the public congregate.

B14 Dangerous goods

The Discussion Document proposes amending s80A of the Civil Aviation Act to clarify that dangerous goods can be seized upon arrival and can be retained as evidence. BARNZ supports the general thrust of this change.

However, in the detail of the proposed amendment the MOT proposes that *'there would be no discretion for Avsec to return the goods to the relevant operator or delivery service'.* BARNZ has some reservations over this proposal to expressly remove the discretion Avsec has at the present time. Dangerous goods can be found at four stages in the process:

- Check-in – at which time the passenger is advised that they cannot be taken on the aircraft and either need to be disposed of safely, handed to a friend or relative for safe-keeping, left in the traveller's vehicle (if safe to do so), taken to a delivery service or some such mechanism;
- During hold baggage screening if the dangerous good is packed within checked-in luggage – at which time Avsec currently call the operator, and the passenger is usually contacted, and one of the options outlined above is selected;
- During screening of carry-on baggage if the dangerous good is being carried by the passenger – in which case the dangerous goods are disposed of;
- On arrival (either by Customs or MAF processing or by the airline reporting the matter).

BARNZ would not want to see Avsec lose the discretion they currently have to return the dangerous goods to the passenger via the operator or a delivery service – so long as they are legal and safe other than when being carried on an aircraft. There are many dangerous goods which are perfectly legal for the public to own – albeit they should not be carried on an aircraft, for example, portable camp stoves and fireworks. BARNZ accepts that the decision as to whether to return the goods to the relevant operator or delivery service should be at the discretion of Avsec, and we believe that this discretion should continue to exist for the benefit of passengers and should not be mandatorily removed by legislation.

B15 Security check procedures and airport identity cards

The discussion document proposes a number of amendments in relation to security checks and airport identity cards.

BARNZ supports the proposals to:

- Require people in security areas and security enhanced areas to provide airport ID cards upon request by CAA authorised employees (although we also wonder if the airport manager should also be authorised to require the production of airport ID cards);
- Give Avsec the authority to seize airport ID cards if they are expired, being used in circumstances where the holder's authorisation to enter a secure area has been withdrawn or are being used in breach of the Civil Aviation Act or rules (although in this last case we consider that an appeal or review process will need to be established as the seizure of the ID card may well effectively result in the person having their employment terminated); and
- Define the term airport identity card.

We support making it an offence to be in a security enhanced area without authorisation, but note that it will be important to ensure that what constitutes authorisation (or the absence of authorisation) is carefully defined.

Finally, BARNZ also considers that the right to issue temporary ID passes needs to be expanded so that airport managers are delegated the power to issue temporary ID passes (provided they introduce approved procedures and checks). The current process at most airports of only Avsec having the power to issue such passes (often with limited office hours) is highly inefficient for airlines.

We also consider that applicants for temporary passes should be able to apply on line in advance, so that upon arrival it is simply a matter of the applicant and their escort's IDs being checked and the pass being issued.

B16 Alternative terminal configurations

The discussion document seeks comment on whether alternative airport designs or configurations should be permitted which allow passengers and non-passengers and international and domestic passengers to mix in a common post screening area.

At present, airlines are levied the costs of provision of aviation security services at all airports on the basis of a levy per departing passenger. The costs levied on airlines include the costs of screening duty free retail goods, which is strongly opposed by BARNZ. A dual-till regulatory environment exists in New Zealand, whereby airports are able to retain all profits earned from complementary retail and car-parking activities. The direct corollary of a dual-till environment is that the costs of providing retail and car-parking activities must be met by the airport, and not incorporated into charges to airlines or the travelling public. The current situation of Avsec charging airlines the costs

of it screening duty free goods for airport concession holders is therefore fundamentally inconsistent with the dual-till regulatory regime currently in place in New Zealand.

The concept of a common terminal area for non-passengers post screening would require significantly more people, staff, service providers (such as taxi drivers and retail workers) and goods to be security screened. For example, all of the provisions for food and beverage outlets would need to be security screened. Every burger bun, bottle of water or fizzy drink, subway roll or packet of sushi would need to be security screened. Every staff member of those retail outlets would need to be security screened. If the screening was to international standards, LAGS requirements would be imposed on domestic passengers as well as non-passengers, even though neither of those groups would be expecting to be screened to that level or be subject to any regulatory requirement mandating that they be screened to that level. Moreover, all of that LAGs waste would need to be disposed of as secure waste – at airline cost.

Given that airlines meet virtually all of the nearly $80m annual cost of provision of aviation security services by Avsec, BARNZ represented airlines are fundamentally opposed to the concept of terminals which mix departing passengers and non-passengers and which would require all those entering the terminal (whether passengers or not) to be screened. The issues outlined at paragraph 333 of the paper, in BARNZ's view, mean that a common post screening terminal for passengers and non-passengers is too problematic and expensive and inefficient for the aeronautical processing needs of passengers and airlines.

The option of a partially mixed terminal for international and domestic passengers post screening is something BARNZ would be more interested in exploring. Broadly speaking there are two options that may be worth considering:

- Designing a two stage screening process in the terminal layout, with all passengers entering the common departures area being screened to the domestic level (with no LAGS restrictions), and then international passengers passing through a further screening point to meet international screening standards (primarily LAGS at present in New Zealand but possibly also full body scanners going forward). This design exists at Coolangatta Airport on the Gold Coast and seems to work well from the perspective of passengers. It enables the main airside food and beverage and retail area to be used by both international and domestic passengers. BARNZ supports the legislation permitting this type of terminal design, provided that retail activities meet any costs of screening retail goods and food and beverage items as well as any of their staff requiring security screening.

- Screening all passengers to the highest security requirements, which at present is international LAGS screening (but could in the future be full body scanners if they are required for international passengers). BARNZ understands that this is occurring at some airports in Europe with the latest screening equipment not requiring physical separation of LAGS. However, at the present point in time, with the current screening technology available in New Zealand, BARNZ would not support domestic passengers being screened to international standards. Passengers would need to dispose of any LAGS – even though this is not a domestic security requirement. It would add considerable cost to the domestic screening process. It would add considerable time to domestic security processing –

particularly due to the LAGS component. Domestic passengers complete their check-in, baggage drop, security checks and boarding all within half an hour of departure. Any change which unnecessarily increased the processing time for domestic passengers would not be welcomed by those passengers. If full body screening became an international requirement, it would place an even greater imposition on the domestic passenger – and considerably increase the footprint of the security screening area. The present review of the Civil Aviation Act is a 'once every twenty years review'. BARNZ therefore supports the legislation being future-proofed and providing a path by which common-use international and domestic security areas could be introduced in the future if economical technological solutions become available. However, there are significant civil liberty issues in requiring domestic passengers to be screened to international standards, and therefore, if this possibility was provided for within the legislation, then BARNZ considers that a requirement for Ministerial approval should be built into the Act with approval needed before an airport could construct a terminal requiring domestic passengers to be screened to international standards. Again, the costs of screening retail goods and food and beverage stock (and staff) would need to be met either by the airports or the retail operators – not the airlines.

To summarise:

- BARNZ does not support a terminal design with non-passengers being permitted to enter the security areas of terminal buildings;
- BARNZ supports the legislation permitting a terminal design where international and domestic passengers share space post screening to a domestic standard with international passengers subsequently going through a second screening point to meet international security standards – provided the airport or retailers meet the cost of security screening retail goods and food and beverage stock;
- BARNZ supports the legislation providing a future process of Ministerial approval for terminal designs requiring domestic passengers being screened to international standards. However, BARNZ would not support the legislation allowing the airports to construct a terminal requiring domestic passengers to be screened to international standards, without some form of Ministerial oversight in order to safeguard the interests of passengers. Again, the airport or retailers would need to meet the cost of security screening retail goods and food and beverage stock.

C CARRIAGE BY AIR – AIRLINE LIABILITY

C1 The necessity of specific domestic airline liability provisions

BARNZ supports the continuation of presumed liability for delay (other than in specified cases) subject to a cap on that liability.

BARNZ does not support adding a presumption of fault for delay in the carriage of baggage. Baggage delays can occur for a number of reasons outside the fault of the airline, such as breakdowns to

airport hold baggage systems, security issues, load factors due to changes to weather, failure of the bag in question, etc. Delayed baggage will normally be able to be delivered relatively quickly, therefore a presumption of fault is not necessary. Claims under contract or the Consumer Guarantees Act are available where this is not the case.

C2 The effectiveness of specific domestic airline liability provisions

BARNZ supports the status quo being maintained for the domestic airline liability consumer protection provisions, with supplementary educational materials developed either by the Ministry of Transport or the Ministry of Consumer Affairs. Such materials should include material available on the internet and smart phones, as well as printed material available at airports and Citizen Advice Bureaus. The material (particularly that available on the internet) should be available in a range of languages.

C3 The limit on liability for damage caused by delay

BARNZ considers that the current limit of ten times the amount of the air fare is appropriate.

D AIRLINE LICENSING AND COMPETITION

D1 Commercial non-scheduled services

The Discussion Document proposes removing the need for non-systematic commercial flights to be authorised by the Ministry, and instead requiring simply that these flights be notified to the Secretary with confirmation that safety and security requirements have been met.

BARNZ supports this proposal for change (option 2). It meets the Government's aim of smarter regulation, and reduces compliance costs in an appropriate circumstance.

BARNZ supports the same definition being used for 'systematic' across all aviation requirements. Whether this is the current threshold applied by the Secretary for a foreign air operator certificate being necessary as described in paragraph 36.1 or a new revised threshold is less important to BARNZ than the principle that consistency should exist across regulatory requirements.

D2 Allocation decisions for New Zealand international airlines

The Discussion Document proposes moving licensing decisions made under ASAs where there is no limit on the number of flights (and hence no decision involving the allocation of limited rights) from

the Minister to the Secretary for Transport (option 3). BARNZ supports this proposed change as representing a sensible reduction in administrative burden on the Minister.

D3	Public notice provisions for application of scheduled international air service licence

The Discussion Document proposes reducing the public notice period for applications for a new, amended or renewed scheduled international air service licence by a New Zealand airline from 21 working days to 10 or 14 working days. BARNZ supports the reduction in time to either of these periods.

BARNZ also supports the additional change alluded to of web-site notification to supplement the gazette.

The Discussion Document also proposes only requiring the notice to be given when limited air service rights are being allocated. BARNZ does not have any objection to this change as it aligns with the proposal above to transfer the decision-making power to the Secretary where there is no limit on the number of flights under the particular ASA.

D4	Transferring scheduled international air service licences

The Discussion Document proposes that the provision allowing the transfer of scheduled international air service licences between operators be repealed as it has not been used in the last twenty years. BARNZ does not object to this proposal.

D5	Airline operations from countries with which NZ does not have an Air Services Agreement

The Discussion Document proposes retaining the provision for the licensing of foreign international airlines of countries with which New Zealand does not have an ASA as it allows for flexibility and speed in situations of urgency, where an ASA cannot be established with sufficient speed.

BARNZ supports retaining this flexibility.

D6	Authorisation of contracts, arrangements and understandings between airlines

The Discussion Document puts forward two options with respect to determination of applications for airline alliances and code share agreements:

- Retain Part 9 which places the decision making power with the Ministry, but amend it to set out procedural requirements, require a cost benefit analysis focussing on the public interest where competition is reduced and enable conditions to be attached to any approval; or

- Repeal Part 9 and transfer the decision making power to the Commerce Commission under general competition law.

BARNZ's preference is for the decision making power to remain with the Ministry under Part 9, albeit with the various improvements outlined by the discussion document. International aviation does not exist in a wholly free market environment. Rights to operate services to a number of countries are limited under international ASAs. A purely efficiency based approach as required under the general provisions of the Commerce Act may not fully take into account the peculiar constraints imposed by international foreign governments on international aviation. Moreover, the Ministry is the body holding the expert aeronautical/political knowledge. Any shortcomings in economic capability possessed internally by the Ministry can be resolved through the engagement of an expert economic consultant.

D7 Commission regimes

BARNZ supports the proposed repeal of the current process for approving a commission regime (option 3). We agree this is a remnant of a now outdated marketing approach.

D8 Authorisation of unilateral tariffs by the Minister

The Discussion Document contains several options for addressing the retention, amendment or repeal of the current provisions for the Minister to authorise tariffs.

As noted in the Discussion Document, some ASAs still require the authorisation of tariffs. BARNZ therefore supports the Ministry's preferred position in option 2 of allowing tariffs to be filed, with approval being deemed to be provided unless the Secretary objects within a specified time. This enables airlines to meet any obligations under ASAs while avoiding the Ministry becoming embroiled in an approval process which is at odds with New Zealand's underlying free market approach.

E AIRPORT AUTHORITIES ACT

E1 Threshold for specified airport companies

The Discussion Document proposes amending the threshold for an airport becoming a specified airport from one of $10m revenue (from both aeronautical and non-aeronautical activities) to a passenger based threshold. The Ministry considers that a passenger based threshold is immune from inflation and is also a better indicator of aeronautical activity.

The information disclosure and capital expenditure consultation obligations contained in the AAA are triggered by an airport becoming a specified airport. Consequently any increase in the threshold for specified airports reduces the ambit of these regulatory features.

Subject to the comments below on the level of threshold, BARNZ does not object to the threshold for specified airports being recast as a passenger based threshold.

BARNZ sees the question of the appropriate level of the threshold as being linked to the question of whether the obligation to consult over capital expenditure is extended to all airports (albeit triggered at different levels of investment). If the capital expenditure consultation obligation is extended to all airports, then the only matter triggered by the movement to a specified airport company will be information disclosure. In this case BARNZ agrees that a one million passenger threshold is appropriate. If, however, the capital expenditure consultation obligation is not extended to all airports, then BARNZ considers that a passenger threshold of 500 000 should be applied.

If the threshold is moved to a passenger based one, then we consider that the Ministry should give consideration to including some form of mechanism to prevent an airport moving in and out of the categorisation of specified airport company if its volumes are hovering around the threshold. For example, this could be achieved by specifying the threshold as a rolling average of passenger volumes over the previous three years. Alternatively, it could be achieved be by providing that if any airport exceeded the threshold at any time during the previous three years then it retains the specified airport status. And there may be other options.

E2	Redundant provisions – section 3BA

Section 3BA requires the disclosure of passenger and aircraft related charges. The Discussion Document proposes deleting this requirement on the basis that airport companies have a commercial incentive to disclose charges upon request, and the Official Information Act also provides a means for this information to be sought.

BARNZ does not support the removal of the obligation to disclose charges. Disclosing charges improves transparency for the travelling public. It does not impose any material cost on airports and means that interested community members, users of airport facilities and others have ready access to the information without needing to specifically request it and potentially follow up with a time-consuming OIA request.

E2	Redundant provisions – section 4(2)

Section 4(2) allows airport companies to borrow money and acquire, hold and dispose of property as they see fit. The Discussion Document proposes deleting this requirement due to the fact that airport companies have all the powers which other incorporated companies have, therefore it is unnecessary to specifically set out these rights. BARNZ agrees and supports the repeal of s4(2).

E2 Redundant provisions – section 4A

Section 4A provides that airport companies have the right to set charges as they think fit. The Discussion Document proposes deleting this requirement on the basis that the powers conferred upon companies generally under the Companies Act to undertake any business or activity and to do any act renders this provision unnecessary.

BARNZ supports the repeal of section 4A. The ability of airport companies to set charges as they think fit under section 4A creates an environment in which monopoly pricing by airports can occur. The High Court and Court of Appeal have held that the Airport Authorities Act as currently drafted places a virtually unconstrained ability on airports to set charges and that there is no right for airlines (or others) to challenge the charges set via a judicial review process on the grounds of unreasonableness due to presence of monopoly rents. Section 4A gives airports the right to recover unilaterally imposed charges for a piece of essential monopoly infrastructure via summary judgment proceedings with no meaningful grounds of defence. The presence of section 4A means that it is not necessary to prove the existence of a contract or agreement.

BARNZ has not been able to find other examples in New Zealand of the statutory granting to a private company of the right to set charges as it thinks fit. All other statutory charge setting powers that BARNZ came across contained a set of guiding principles which must be adhered to, and against which the exercise of the power can be tested.

While BARNZ supports the repeal of section 4A we consider that the AAA needs to contain principles guiding how airport charges should be set. BARNZ supports the purpose statement in section 52A of the Commerce Act being used as a starting point for the principles which should be applied by airports when setting airport charges.

E3 Consultation on certain capital expenditure

BARNZ supports the second option of requiring all airport companies to consult on certain capital expenditure. Indeed, BARNZ considers that this obligation should extend to all airports – even if they are not airport companies.

Consultation with users over significant capital expenditure adds considerable value to the decision making process. The airport is able to test its proposal – not only in terms of whether the project itself reflects the needs of users and is seen as necessary, but also with respect to the operational design, the aeronautical functionality and future proofing for changes in technology and aircraft design. Airlines possess considerable expertise in this area. Airlines may have suggestions that the airports have not considered and can bring a fresh perspective to the evaluation process.

Consultation with users also places an external discipline on airports to clearly set out the parameters of a project and evaluate its costs and benefits. A well-managed airport will be doing this in any event – internally for management and the board. In this case, consultation over capex should add very little cost as all of the materials and reports should already be in existence (or would have to be by the time the matter came before the board). There should therefore be little additional cost other than management time.

The benefits, on the other hand, can be considerable. At one end of the spectrum, consultation can provide feedback which results in an unneeded project not proceeding (as occurred with a proposal in 2008 by Auckland Airport to construct additional arrivals processing space upstairs prior to the Rugby World Cup; and as did not occur when Invercargill Airport extended its runway in anticipation of international operations which never eventuated). It is much better for an airport to have the knowledge that the project is not considered necessary by its users (or at least not at the present time) prior to its spending millions of dollars. At the other end of the spectrum the airport can learn that the project is wholly supported and its design hits the mark operationally, which gives it confidence to proceed with the investment. Most commonly in BARNZ's experience, the consultation results in a modification of the design to fit aeronautical needs and processing requirements. The airport obtains the benefit of airline expertise in aircraft operational requirements and passenger processing needs at no direct cost to it, other than the investment of its own management time in conducting a consultation process.

Consultation over significant capital expenditure also provides an opportunity for the impact of that project on aeronautical charges to be explored at the same time, rather than at the (customarily) five yearly reviews of charges by which point a project over which there has not been consultation may have already been commenced, if not completed.

E4	Threshold for consultation on certain capital expenditure

BARNZ prefers option 1, of thresholds of $5m, $10m and $30m for small, medium and large airports as it were.

Monetary or percentage threshold?

BARNZ considers that a monetary threshold is the clearest most unambiguous threshold, able to be assessed without any additional work or information by all parties. BARNZ acknowledges that these thresholds may be affected by inflation over the long term, but this would not be material for at least ten years, and is relatively easily able to be fixed through a simple amendment attached to an omnibus bill or to other amendments of the civil aviation legislation which, in practice, occur every few years in any event. The thresholds would therefore be able to be updated any time the civil aviation legislation was being amended.

The percentages applied to identified airport assets are significantly more problematic. Issues such as whether an airport has revalued its assets or not and whether an airport owns or leases its land cause inconsistent thresholds across similar sized airports. For example, Nelson Airport which leases the majority (if not all) of its land would have a threshold of less than $1m whereas airports such as Dunedin or Hamilton would have thresholds of approximately $4.5m under option 2. Under option 3 the differences become more pronounced with Nelson Airport having a likely threshold of less than $3m while Dunedin Airport would be $14m and Hamilton would be $20m (although the latter is based on total assets, not aeronautical assets, due to the latter not being disclosed). Nelson Airport has close to the same passenger volume as Dunedin Airport and more than double that of Hamilton Airport, however options 2 and 3 would result in it having a materially lower consultation threshold.

Moreover, at present, only specified airport companies have to separate assets into identified airport activities. The percentage proposals in options 2 and 3 are all based on identified assets and would require all airports to go through the exercise of creating an identified airport activity register, together with the difficulties of allocating joint and common assets between the two sides of the business. This exercise would create considerable administrative compliance costs – for no practical benefit given the existence of the much simpler option of setting a clear objective monetary threshold. In addition – airlines and other interested parties do not have the information necessary to assess what the capital expenditure consultation threshold would be for each of the airports.

In short, the proposed percentage approach would result in anomalous results as well as creating significant additional financial compliance costs due to the need for every airport company to create an identified airport activity asset register. A percentage threshold applied to identified airport activity assets would represent an unnecessarily complex piece of regulation – for no perceivable benefit given the existence of the simpler alternative.

Level of monetary threshold

BARNZ is comfortable with the $5m, $10m and $30m thresholds proposed. We consider that these will provide appropriate triggers for each of the three groups of airports which will trigger consultation where appropriate in the circumstances of that airport (and likely impact on charges) without requiring consultation to occur too often.

The $5m threshold for smaller airports was originally put forward by BARNZ on the basis that it would capture any material terminal extensions and any runway overlay. Runway overlays need to occur approximately every ten to fifteen years. The most recent runway overlay project which BARNZ is aware of was by Hamilton Airport last year at a cost of $3.5m. The threshold would therefore be too high for some runway overlays. Nevertheless, BARNZ considers that $5m represents an appropriate point at which to require consultation by airports with less than 1 million passengers annually. For small airports the $5m threshold looks to be higher in all cases we assessed than the outcome under option 2 (of 10% of identified assets (excluding land)), but lower in many (but not all) cases than the thresholds produced under option 3 (of 30% of identified airport assets).

The $10m threshold for airports between one and three million passengers also looks appropriate. Currently only Queenstown Airport would fall into this category. The $10m threshold is higher than the $6m threshold that would result under option 2 for Queenstown Airport, but lower than the $26m threshold that would result under option 3. Dunedin Airport is the next closest airport to this category. A $10m threshold would similarly be higher than the $4.5m threshold produced under option 2, but less than the $14m threshold produced under option 3 at the current asset levels disclosed by Dunedin Airport. We consider $10m an appropriate threshold. It would capture significant additions to the terminal building or a new hard-stand for a jet aircraft.

The $30m threshold for airports with more than three million passengers is a threshold which has previously been agreed as appropriate by BARNZ and NZ Airports for Auckland, Wellington and Christchurch Airports. This threshold would not capture runway overlays or the construction of an additional hardstand or new sections of taxiway such as Taxiway Lima at Auckland Airport. It would not capture smaller incremental additions to terminal buildings such as the recent domestic terminal

works at Auckland Airport which will cost about $27m or the current extensions to the international baggage reclaim area at Auckland Airport. It would, however, capture significant extensions to terminal buildings such as the first two gates of Pier B which cost $50m, an additional two gates for Pier B, , or a new 1200m runway at Auckland airport or the works on the South-western Pier at Wellington Airport. The $30m threshold represents an appropriate balance between regular projects at these airports which can be consulted on at the time of pricing with less formal consultation as construction becomes imminent and larger projects which warrant a dedicated consultation process.

E5	Termination of leases without compensation or recourse for compensation

The provision in section 6(4) allowing airports to terminate leases without compensation is an anomaly which does not reflect ordinary commercial practice. BARNZ considers that significantly greater clarity needs to be provided around when this right can be exercised, the process by which it is exercised and that a cheap quick appeal or review right needs to be provided for. BARNZ considers that an airport should only be able to invoke this power where the Director of the CAA has certified that the lease is interfering with (or will interfere with) the safe and efficient operation of the airport. The matter should not be left to the subjective determination by the airport, which is not a disinterested party.

BARNZ also considers that there is a significant gap within the section 6 requirements in relation to security activities within terminal buildings. The operational requirements of security activities have considerably increased since the Airport Authorities Act was drafted. Today, the regulatory requirements around security are a key aspect in terminal design and operation. Security requirements have necessitated the separation of arriving and departing international passengers, the installation of hold baggage screening equipment, the screening of passengers and carry-on baggage – sometimes twice. Space around the airside boundary in the terminal building is at a premium. There is a direct conflict between the aeronautical processing needs of Avsec and Customs and the airports' desire to maximise retail space and have that retail space directly in the passengers' path as they exit the security processing area. BARNZ is aware of one instance where retail interests vetoed a request by Avsec and the airlines for additional space to spread out the security screening machines to allow more space for passenger processing and divestment/revestment before and after screening.

Given the increased prominence of security needs at airports which has developed over recent years (and is continuing to develop), BARNZ considers that a provision similar to that provided for in s6(7) (requiring the airport to consult with and have regard to the directions of the CAA in relation to erection of buildings and equipment under leases) is required in relation to any lease proposed to be entered into adjacent to current or future border processing areas. Section 6 should be amended to expressly require airports to consult with and have regard to feedback or directions from Avsec, Customs, MAF and Immigration NZ before leasing space in terminal buildings adjacent to passenger processing areas.

E6 Bylaw making powers

The Discussion Document asks whether the current by-law making powers should be retained, partially repealed or totally repealed. BARNZ is not aware of any abuse of the current by-law making power or any disquiet over the process by which by-laws are made or the extent of the by-law making powers. Our preference is for the status-quo to remain.

E7 Information disclosure

BARNZ strongly supports the continuation of information disclosure requirements for specified airports. Transparency is important for both direct users of the airports and also indirect users and other interested parties. We agree that not requiring smaller airports, which do not meet the threshold for being a specified airport, to prepare these disclosures is appropriate. When Auckland, Wellington and Christchurch Airports were disclosing information under the AAA then BARNZ regularly used this information (and we now use the information disclosed under Part 4 of the Commerce Act).

BARNZ supports clarifying that making the information publicly available means making it readily accessible on the relevant person's website. Websites are the primary source of information for most people today and it makes sense to require publication on the airport's website.

F OTHER MATTERS

F1 Airways statutory monopoly

The Discussion Document proposes repealing section 35 of the Civil Aviation Amendment Act 1992 which provides for the repeal of Airways' statutory monopoly on a date appointed by the Governor-General by Order in Council. Given that this power has existed for 22 years without being exercised, BARNZ agrees that it is probably inappropriate for it to continue to exist, and that any decision to remove Airways' monopoly status should be via a reconsideration by Parliament, rather than relying on an option put in place by parliament 22 years ago.

F3 Revocation of aviation document for unpaid fees or charges

BARNZ supports the proposal in option 2 to reduce the amount of time for which fees have to remain unpaid before the Director can revoke an aviation document from six months to four months.

F4	Power to stop supplying services for unpaid fees and charges

BARNZ supports the proposal in option 2 clarifying that the ability under s41(4) of the CAA to not supply services due to unpaid fees and charges extends to already outstanding debt for previously provided services.

F5	CAA's ability to audit operators that collect levies

BARNZ supports amending section 42B to include a power for the CAA to require an audit of operators from which it collects levies.

The MOT proposes that such audits should be at the CAA's cost. BARNZ considers this is only appropriate if the audit shows that there was no material inaccuracy of the returned data. If a material inaccuracy was discovered as a result of the audit, then the operator should have to meet the cost of the audit.

F6	Fees and charges for medical costs

The Discussion Document asks whether s38(1)(ba) should be amended to clarify that the phrase 'costs directly associated with' CAA functions allows fees and charges to include indirect costs such as CAA overheads.

The Regulations Review Committee held earlier this year that s38(1)(ba) allowed fees and charges to recover relevant corporate overheads (ie indirect costs) associated with providing the service in question. The proposed amendment therefore seems unnecessary as the matter has been clarified by the Regulations Review Committee. Nevertheless, if the Ministry considers that the amendment would be prudent then BARNZ has no objection.