NZ AIRPORTS

CIVIL AVIATION ACT 1990 AND AIRPORT AUTHORITIES ACT 1966 CONSULTATION DOCUMENT 2014: SUBMISSION TO MINISTRY OF TRANSPORT

31 OCTOBER 2014

INTRODUCTION

1. NZ Airports is pleased to have the opportunity to provide feedback to the Ministry of Transport ("**MoT**") on its Civil Aviation Act 1990 and Airport Authorities Act 1966 Consultation Document ("**consultation document**"). A number of members of NZ Airports have had direct input into this submission.[1]

2. NZ Airports has participated in MoT's engagement sessions on the consultation document, and focus groups that MoT has facilitated among interested parties in relation to particular issues. We appreciate the thorough and transparent process that the MoT has conducted in the course of this review.

3. NZ Airports supports the objectives of the review to refresh and improve the usability of the legislation, and to ensure its provisions are current and effective. We also support any initiatives aimed at promoting an effective, efficient, safe, secure, accessible and resilient aviation sector, in accordance with the Government's objective for the broader transport sector.

4. In this submission, NZ Airports has naturally focussed on proposals that are of most significance to its members and in respect of which it is, as a consequence of its members' collective comprehensive experience and expertise, able to provide the most informed input. Accordingly, not all of the aspects of the current regime that are discussed in the consultation document are covered in this submission. The result is that this submission focuses on matters of particular concern to NZ Airports and/or where our view may differ from MoT's.

5. However, we emphasise that this approach should not disguise the fact that we support many of the MoT proposals - even when we are silent on them. Indeed, if we do not address a topic in the consultation document, then we are happy for MoT to take that as a sign of our support and/or that we have no issues with the proposal.

EXECUTIVE SUMMARY

6. NZ Airports supports the objectives of this review.

[1] A complete list of all members can be found on the NZ Airports website at http://www.nzairports.co.nz/forum/

7. The issue of paramount importance to NZ Airports' members is the proposed repeal of section 4A of the Airport Authorities Act 1966 ("**AAA**"). NZ Airports strongly disagrees that this provision is in any way redundant:

   (a) The ability of airports to set charges as they see fit is an important 'circuit-breaker' in negotiations with users, and is balanced by the consultation obligation in section 4B. Together, sections 4A and 4B are fundamental to the statutory economic regulation of airports.

   (b) These sections have been the subject of judicial review proceedings and as a result their interpretation and application is well settled.

   (c) Repealing section 4A could have significant undesirable consequences of encouraging new contention and inefficiency (including litigation) for the processes for setting charges, which are now well established and understood.

8. We have also focused our attention on how international airline cooperation arrangements should be regulated (whether under the Commerce Act 1986 or under a revised version of the current regime under the Civil Aviation Act 1990 ("**CAA**")), as we see this as an important issue for the New Zealand economy. NZ Airports favours replacing Part 9 of the CAA with the general authorisation regime under the Commerce Act:

   (a) We consider that the Commerce Commission has the appropriate expertise to assess the complex matters of whether a proposed arrangement would result in a lessening of competition, and if so, whether the benefits that would flow from the arrangement outweigh the detriments.

   (b) We do not consider that there is a case for international aviation having its own sector-specific regime outside the Commerce Act. We recognise that there are unique airline market considerations that make airline collaborations necessary, but we believe with appropriate input from all stakeholders, such matters can be appropriately considered by the Commerce Commission under the Commerce Act regime.

9. The other key theme that informs our views on various topics is the need to ensure clear allocation of responsibility for aviation safety to participants. In particular, we would be concerned if a concept of shared responsibility gained traction under the CAA. Given the complex interactions between industry participants, it is important that they collaborate to promote safety, but on the basis of a clear understanding of their individual responsibility.

10. Our views on the topics addressed in this submission are summarised in the following table:

Topic	**Item number**	**NZ Airports' View**
Legislative structure	A1	Favour option 3, the status quo (ie, retain the AAA as a separate statute).
Purpose statements	A2	Agree that purpose statements could be introduced for both the CAA and AAA (or whichever legislative structure prevails) providing those purpose statements do not change established interpretations of substantive provisions.
Statutory functions	A3	Agree with proposals, and consider objectives should include a requirement that decision-makers promote safety and security, and ensure responsibility for safety is clearly allocated to relevant sector participants.

Topic	Item number	NZ Airports' View
Participant obligations	B2	Care should be taken if stating that responsibility for safety and security is 'shared' by all participants in the aviation system. NZ Airports would prefer that participants' individual obligations are clearly stated rather than being subject to a vague, over-arching duty of 'shared' responsibility
Rule-making	B9	Favour option 3, empower the Minister to delegate some rule-making powers to the Director, within certain parameters. A factor to consider when making rules should be whether the proposed rule clearly allocates responsibility for safety.
Amendments to Part 3	B10	Agree that sections 28 and 33(2)(f) can be amended to contain more generic language regarding the purposes for which Rules can be made. NZ Airports favours a move towards a risk-based approach to rule-making and regulation in general.
Accident and incident reporting	B11	Support a clearer statutory framework for incident reporting, consistent with ICAO standards. The Authority should be encouraged to be more proactive in communicating outcomes or action taken as a result of reports received, and the availability of confidentiality protections. Confidentiality needs to be balanced against the need for industry participants, such as airports, to receive information that will help them to address any safety issues.
Security	n/a	Support the objectives to ensure that aviation security powers are current and effective. The CAA should distinguish more clearly between the *functions* and *powers* of aviation security service providers. Effect should be given to section 79, which envisages that airports may undertake aviation security services, or alternatively the CAA should at least preserve the ability for aviation security services to become contestable in the future.
Search powers	B13	We are not convinced that the proposed new statutory powers are required and/or can be appropriately defined. However all powers must apply to all security officers (ie, not only AvSec). Powers must be clearly stated to be within the statutory functions of aviation security providers, to remove any uncertainty whether they are covered by the passenger charge (and therefore not the subject of any additional charges).
Security check procedures and airport identity cards	B15	Support the proposed amendments, subject to the powers to require production of ID, and to seize ID, being conferred on all security service providers (ie, not only AvSec). NZ Airports has proposed that relevant airports be approved to issue temporary airport identity cards.
Alternative terminal configurations	B16	Airports should be able to configure their terminals as they wish. Any legislative amendment should be to enable alternative configurations, rather than require them.
International air services licensing	D1-D5	Broadly supportive of the proposals to inject greater efficiency and simplicity into the authorisation process.
International air carriage competition	D6-D7	Favour replacing Part 9 of the CAA with the general authorisation regime under the Commerce Act.
Specified airport companies	E1	Favour option 3, a revenue threshold of $10 million based on identified airport activities.

Topic	Item number	NZ Airports' View
Redundant provisions	E2	Agree that sections 3BA and 4(2) could safely be repealed. Strongly disagree that section 4A is redundant.
Consultation on certain capex, and thresholds	E3 and E4	Only specified airports should be subject to the obligation to consult on capex. The threshold for consultation should be based on capex of 10% of identified airport assets (excluding land).
Termination of leases	E5	The power to terminate should not be changed.
Bylaw making power	E6	The power to make by-laws is still relevant and should not be removed. The current degree of oversight is appropriate.
Information disclosure and 'publicly available"	E7	Support the proposals.
Land vesting issues	n/a	Support a review of whether land ownership arrangements (eg, vesting airport land in local authorities) are an obstacle to efficiency.
Airways statutory monopoly	F1	Support contestability where feasible, particularly for approach control services in the event that aerodrome control services were provided by an airport. We do not support repeal of section 35, ie the Order in Council mechanism remains appropriate.
Fees, charges and levies	n/a	Amend CAA to clarify when a fee or charge can be imposed instead of a levy, and vice versa, and introduce stronger consultation obligations.

PART A - STATUTORY FRAMEWORK

Legislative structure (item A1)

11. The consultation document suggests that reform of the legislative structure of the AAA and CAA should be considered, and proposed three options, as follows:

    (a) Amalgamate the AAA and CAA to provide a consolidated framework for civil aviation regulation, but with overview sections to describe each part. This could improve the CAA's navigability, providing useful markers for delineating between the different frameworks for safety and security regulation and the economic regulation of airlines and airports;

    (b) Separate the provisions in the CAA into three separate Acts to further delineate between the frameworks for safety and security regulation, and separate economic regulation of airlines and air navigation services, and airports. This would provide concise legislation that distinguishes between regulatory frameworks in place for all participants, and those in place for specific subsectors; or

    (c) Retain the status quo but with enhancements to improve navigability **(NZ Airports' preferred option)**.

12. On balance, we support option 3, the status quo. Option 2 could also be workable, if the AAA is retained as a standalone Act. To explain:

    (a) We think it is preferable for legislation with distinct purposes and subject matter to be a separate Act. We think it makes legislation more accessible and clear. We are therefore not convinced that amalgamation of the AAA and CAA is necessary in the interests of improving access or navigability. In addition, since all legislation is available online free-of-charge, it is a straightforward matter for anyone to access the statutes and to cross-refer between one or more pieces of legislation.

    (b) The AAA has proven effectiveness as a standalone statute. It has a unique purpose and function that is directed towards the nature of the entities which own and operate airports in New Zealand. In our view, the AAA is more appropriately contained in a separate piece of legislation that reflects its more specialised focus and narrower application. We note that:

        (i) The provisions of the AAA govern the interaction of airport authorities with the Crown and local authorities, and set out the powers and obligations which control (among other things) the ability of airport authorities to acquire and manage land.

        (ii) The AAA confers a wide range of powers on airport companies, local authorities and other entities, which provide the necessary flexibility for these entities to carry out current airport operations and to safeguard future airport development.

    (c) Various sections of the AAA have been subjected to judicial interpretation and as a result their meaning and application is now relatively settled. As discussed later in this submission in respect of item E2, we do not support any structural changes to the legislation that could have the adverse and unintended consequence of leading to re-litigation of settled matters.

(d) For these reasons, the AAA is usefully kept separate from the largely safety-oriented CAA. The AAA applies to airports and the entities which operate airports only. In contrast, the CAA applies to all participants in the aviation industry.

13. We accept that some of the risk in amalgamating the AAA into the CAA could be addressed by taking care to preserve the AAA as a separate "Act within an Act", for example by including clear overviews and purpose statements to distinguish the AAA part from other parts. However, it would need to be made clear that such "enhancements" were only a guide and not to affect the interpretation of the substantive sections. We would urge similar caution if the status quo were maintained, but with "enhancements" for navigability.

14. If this approach was followed, then it is difficult to identify any benefits in moving the AAA. It would seem to require extra effort to effectively preserve the status quo, yet would still carry the risk of unintended consequences. As such, in our view amalgamation would be inefficient and not a good example of regulatory good practice.

15. Finally, we note that:

(a) We have no objection to an overview section or sections being introduced into the CAA, as proposed in paragraphs 19 and 24 of the consultation document, whether this be into an amalgamated CAA and AAA (not NZ Airports' preferred option), or into the CAA as distinct from the AAA (the status quo, our preferred option), subject to the comments above about overview sections being a guide only;

(b) We interpret Option 2 (separating the provisions in the CAA into three separate Acts) as meaning that the AAA would be left untouched as a separate Act. This would also preserve the integrity of the AAA and jurisprudence based on it, as well as reinforcing the safety and security focus of the CAA.

Purpose statement and objectives (item A2)

Purpose statements

16. MoT considers that both the AAA and CAA require a purpose statement to indicate the objectives of the legislation, and what the statutes are intended to achieve. MoT has proposed a number of concepts to reflect safety and security objectives, as well as economic objectives for airports and airlines.

17. In principle, NZ Airports supports including the high-level concepts listed in paragraph 31 of the consultation document in a purpose statement for the CAA. In particular:

(a) We agree that the purpose statement of the CAA should specifically refer to *civil aviation*, unlike for example the current objective in section 72AA, which refers to an integrated transport system as a whole;

(b) Public safety should be prioritised as a paramount purpose of the CAA, that overrides the interests of individual participants in the civil aviation system (as is the case in Australia);[2]

(c) The proposed statement for the CAA, to contribute to a safe and secure civil aviation system, could be improved by the addition of references to the concepts of continuous improvement and a risk-based approach to safety and security.

[2] See section 3A of the Australian statute, the Civil Aviation Act 1988 (Cth), which expressly provides that the "main object of this Act is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents."

18. For the AAA (or economic-related aspects of civil aviation legislation):

    (a) We support the concept of a new and modern purpose statement that reflects the aim and objectives of the AAA;

    (b) The concepts set out in the consultation document could be more inspiring and aspirational. For example, to facilitate the operation of airports as modern commercial enterprises that operate in a safe, secure, efficient and effective manner, which enhances and contributes to New Zealand's economic growth and development, while having due regard to airport users by promoting an innovative and responsive industry.

19. One note of caution is that there is a balance to be struck between including a purpose statement that clearly indicates to users of the Act what the statute is intended to achieve,[3] and including a purpose statement that dictates how powers are exercised and becomes a complex statutory test in itself (such as under Part 4 of the Commerce Act).

20. Even if the level of prescription of the Part 4 purpose statement were avoided, purpose statements serve an important function as a guide to the interpretation of individual statutory provisions. Introducing new purpose statements therefore carries the possibility that historic interpretations of the provisions of the CAA and AAA may become open to reinterpretation. As stated above, we would be opposed to any attempt to re-litigate settled interpretations of the AAA, in particular, based on the introduction of a new purpose statement**.**

21. However we think such issues should be manageable as part of the legislative drafting process, which we look forward to engaging on.

Objectives

22. The consultation document recommends that statutory objectives be:

    (a) Assigned to the Minister, the Civil Aviation Authority ("**Authority**") and the Secretary for Transport;

    (b) Linked to the relevant purposes that relate to the decision-makers functions.

23. We agree. Statutory objectives provide helpful statutory guidance and accountability for the exercise of statutory functions, powers and duties. In particular:

    (a) We support revising the statutory objectives to include a requirement that decision-makers are required to carry out their functions in an effective and efficient manner.[4]

    (b) The objectives should include a requirement that decision-makers promote safety and security, and ensure responsibility for safety is clearly allocated to relevant aviation sector participants. We note that the preamble to the current CAA states the Act is to "establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety." An objective to clearly allocate responsibility for safety could be particularly relevant, for example, when the Minister (or Director, as the case may be) is making Rules (we discuss this further below).

[3] Consultation document, paragraph 28.
[4] Consultation document, question A2d, page 21.

Statutory functions (item A3)

24. MoT proposes to:

(a) Consolidate a high-level description of the Minister's functions into one section of the CAA, and include "security" within the Minister's existing function "to promote civil aviation safety".

(b) Retain the Authority's regulatory functions (which are reasonably clear), subject to its proposal to amend section 72B(2)(d) to reflect that the Authority *has a discretion* to investigate and review civil aviation accidents and incidents, subject to the limitations in section 14(3) of the Transport Accident Investigation Commission Act 1990.

(c) Retain the status quo in relation to independent statutory powers, such that licensing and enforcement powers should remain vested in the Director as opposed to the Board. MoT considers that this will:

(i) Provide clear separation between the Board's governance and strategic role, and the operation and technical activities of the Authority; and

(ii) Maintain decision-making with an independent, expert adviser, credibly distancing Ministers from individual decision-making.

25. NZ Airports agrees with the consultation document's recommendations in relation to statutory functions. In particular, we agree with the proposals to:

(a) Consolidate a high-level description of the Minister's functions into one section of the CAA;[5]

(b) Include "security" in the Minister's existing function;[6]

(c) Amend section 72B(2)(d) to record that the Authority has a discretion to investigate and review accidents and incidents (subject to our comments on item B11 regarding communication by the Authority of its decisions whether to investigate or review); and

(d) Continue to vest section 72I powers in the Director. We agree that the Director is the more appropriate person to be making enforcement decisions in particular, and that the Board's focus should be on governance rather than operational decisions.

26. In addition, the statutory functions of aviation security service providers are not easily identified and could be more clearly set out in the same place. We address this under Part B below.

[5] Consultation document, paragraph 52.1
[6] Consultation document, paragraph 52.2

PART B - SAFETY AND SECURITY

In summary, NZ Airports believe that this review should take the opportunity to:

(a) Consider how the CAA can make greater provision for allocating industry responsibility for safety.

(b) Recognise airports' role in aviation security; and

(c) Recognise that public safety is of overriding importance in aviation and that this should be reflected in the statutory objectives.

Participant obligations

27. MoT proposes that:

(a) Where possible, obligations placed on participants in the system are consolidated into one Part of the Act, to make the provisions easier to follow; and

(b) The Act should explicitly state the shared responsibility for safety and security placed on all participants in the system.

28. We agree with the proposal that, where practicable, obligations placed on participants in the system should be consolidated into one Part of the CAA.[7]

29. However we are concerned about the concept of shared responsibility for safety and security. To explain:

(a) NZ Airports considers that in a sector with many participants having complex interactions, it is critical that there are clear and well-defined obligations for ensuring safety. While the proposals in the consultation document do provide some clarification of the roles of the various State actors, there is no mention of other participants in the civil aviation system and how their responsibilities might be better defined.

(b) While we agree that every participant in the system has a role to play in ensuring safety and security, our concern is that expressing this as a 'shared' responsibility is imprecise and could result in a situation where it is unclear exactly who has responsibility for managing a particular risk, if anyone. A better approach is to ensure that safety obligations of various participants are clearly established - which will normally be via Rules.

(c) In NZ Airports' view, it is important in the interests of certainty for individual participants' obligations to be clearly delineated. Any statement in the CAA that responsibility for safety and security is shared should be accompanied by a provision that makes it clear that if a participant has complied with its particularised obligations under the CAA or Rules then it will have discharged its 'share' of the responsibility. We wish to avoid a situation where a participant has not breached any *particular* obligation under the CAA or Rules, but still risks being held in breach on account of a vague, overarching duty of 'shared' responsibility.

[7] Consultation document, paragraph 44.

30. NZ Airports has corresponded with the Authority on this issue, regarding the extent to which the Act and Rules currently allow the Authority to adopt a regulatory approach under which aviation system participants have 'joint' responsibility for airspace safety. To provide some background and context to NZ Airports' concerns about an ill-defined joint or shared approach to safety, we attach to this submission a copy of our letter of 1 May 2014 to the Authority and its response of 10 June 2014, regarding responsibility for airspace safety.

31. Agreed points arising from that correspondence include:

    (a) The reference to 'joint' responsibility was not intended to create any overarching and undefined duty to maintain safety in airspace;

    (b) Risks should be managed by those participants best placed to do so, and any statement in the CAA or Rules that responsibility is 'joint' should not be used to imply new safety obligations on individual participants.

    (c) The extent of a participant's individual responsibility should be commensurate with the ability of that participant to take reasonable steps to manage any given risk to airspace safety.

32. NZ Airports considers that the same approach should be taken in respect to allocating responsibility for safety more generally under the CAA. This is particularly important in the context of rule-making, which we discuss further below (and was discussed above in relation to statutory objectives).

References to safety and security in the Act (item B2)

33. The consultation document points out that, at present, the Director's powers under the CAA are expressed in terms of the necessity to act in the interests of *safety*, and do not expressly refer to action being taken in the interests of *security*. To avoid doubt, MoT is proposing to include the term "security" in sections 17, 18 and 21 to ensure the Director has the explicit authority to use his/her powers in the interests of aviation security.

34. NZ Airports does not have a strong view with regard to the proposal to include the term 'security' in section 17, 18 and 21.

35. We nevertheless make the following observations that may be of assistance to MoT when considering the issue further:

    (a) Both safety and security are broad concepts, and it could be argued either way that 'safety' incorporates 'security' or that they are exclusive of one another, or indeed that they overlap. In practice, our view is that maintaining security is a material part of promoting safety.

    (b) However, adding the words "and security" to the above sections would strengthen any argument that, in the CAA context at least, the two concepts are treated as distinct.

    (c) We agree that it would assist to review the Act to ensure it is clear whether the concepts of safety and/or security apply under any relevant provision. For example:

(i) sections 80A-C each empower an aviation security officer to destroy or otherwise dispose of dangerous goods and other items or substances, where he or she has reasonable grounds to believe that they pose an imminent risk to "safety". If "security" is added to the Director's powers in sections 17, 18 and 21, then arguably it should also appear in sections 80A-C. Alternatively, it may be decided that aviation security officers should only have powers to take action to promote security; and

(ii) there is also a risk that adding the words 'and security' indicates that the word 'safety' is not intended to be interpreted as broad and all-encompassing, and may result in the word being interpreted more narrowly. This may require consideration of whether the use of the term "safety" alone is apt to define or constrain the limits of power under the Act.

36. An alternative would be to insert a non-exhaustive definition of "safety" into the CAA that clarifies that references to 'safety' include 'security'. This would achieve the goal of ensuring that the Director is empowered to take actions in the interests of security, while not indicating that the concept of 'safety' should necessarily be interpreted restrictively.

Rule making (item B9)

37. MoT considers that a lack of flexibility in the regulatory regime contributes to the lengthy rule development process. Consequently, MoT have proposed four options:

(a) Retain the status quo - where no changes will be made to the CAA and the recent amendment to rule-making powers and administrative enhancements will be given the opportunity to be fully realised;

(b) Empower the Board to make temporary Rules - where the Authority would have the ability to make temporary Rules for emerging issues that have safety or security implications, but do not meet the threshold of an emergency rule;

(c) Empower the Minister to delegate some of his/her rule-making powers to the Director or Authority **(NZ Airports' preferred option)** - where such delegation would be within certain parameters, for instance, Rules that:

(i) Are essential for New Zealand to comply with existing international obligations;

(ii) Require routine or editorial revisions to improve legislative clarity, intent or to fix errors; or

(iii) Are current industry practice.

(d) Create a new tertiary level of legislation (for example, Standards) - where the Board or Director will have the ability to make a tertiary legislation in specific circumstances.

38. NZ Airports agrees with the general view expressed in the consultation document and at engagement sessions that the rule-making process takes too long.[8] This is particularly undesirable in the aviation context, as the dynamic nature of the industry means that new technologies are developed and in some cases deployed before a safe operating framework can be drawn up and implemented**.** At a basic level, the triage process for prioritising Rules for development needs to be quicker, and industry has a role to play in this process.

39. However, we do not think this is a legislative problem. It is primarily an issue requiring improved processes and/or allocation of resources, rather than any legislative amendment.

40. That said, we appreciate that if the legislation provided more flexibility in the rule-making process, this could assist delivery of better outcomes (albeit that it would not solve the essential problem). In that context, we make the following points:

    (a) The ability to make temporary Rules (option 2) should improve responsiveness to some extent, and we would support the proposal[9] that any such Rules would have time limits placed on them, much as emergency Rules do now under section 35(5). However NZ Airports is of the view that the Board is not the appropriate body to make Rules, even of a temporary nature:

        (i) Not only does the Board not necessarily have the required technical/operational expertise, but currently we do not believe the Board is sufficiently resourced to undertake responsibility for rule-making.

        (ii) Further, we do not consider that the rational of separating rule-maker from enforcer is sound. The Board is part of the Authority (as is the Director) and is responsible for its performance - including enforcement responsibilities. It is not a separate entity.

        (iii) It would be inconsistent with option 3, which proposes that rule-making authority be delegated to the Director.

    (b) We consider that option 3 (enabling the Minister to delegate some rule-making powers to the Director) would also generate some efficiencies. The parameters set out in the consultation document provide a good starting point for determining which Rules would be appropriate for fast-tracking in this way. We agree that this option recognises the pressures on Ministerial time and that the Director is well placed to assess the need for, and development of, changes to technical requirements. We considered whether it was desirable to replace Ministerial approval of all Rules with that of the Director, but concluded that, in general, it reflected good practice for the Minister to retain this power in relation to the more significant regulatory developments.

    (c) Regarding option 4, we do not support creating a new tertiary level of legislation in the form of Standards. While we note that this is a feature of the regulatory framework in Australia, in our view it would add complexity to a system that can already be challenging to navigate. A drawback to introducing an additional level of prescription in the form of Standards, rather than the current more outcomes-based approach to Rule development, is that Standards are less responsive and require more monitoring and revision. They can end up requiring more exemptions, which then become a default 4th layer of prescription, lacking in transparency. NZ Airports also has concerns over the extent to which industry could end up funding the

[8] Consultation document, paragraph 145.
[9] Consultation document, paragraphs 166-167.

development and maintenance of the '3rd layer', as Crown funding for Rule development is already at a very low level and a constraint on the existing Rules development process.

41. Instead of option 4, we suggest that consideration be given to making further use of Advisory Circulars ("**ACs**"), including more clearly splitting them into Acceptable Means of Compliance and more general Guidance Material. Currently an AC states it provides information for both purposes, however it is not always obvious whether information is in the nature of general advice, or a more technical specification that operates effectively as a standard of compliance acceptable to the Director. In this context, the CAA could:

(a) Clarify that the Director has power to issue ACs that establish technical compliance with the Rules, eg in circumstances where the Rules provide Director with some enforcement discretion. This is already the case where the Minister has delegated particular powers to the Director, and where a Rule itself states that the Director can determine acceptable compliance. However a general provision to this effect in the CAA would be useful, and would promote greater transparency around any standards of acceptable compliance.

(b) Set out a process for developing ACs. The involvement of industry in the development of ACs contributes to the usefulness and currency of these documents**.**

42. NZ Airports would be in favour of a 'first principles' review of rule-making to consider in more detail the out of scope options outlined in the consultation paper.[10] The Rules should be subject to a high-level review to ensure they reflect international best practice.

Possible amendments to Part 3 (item B10)

43. MoT has proposed the following:

(a) The removal of sections 28 and 33(2)(f), which establish the purposes for which the Minister can make Rules. These provisions were introduced to the CAA to give effect to the objectives of the New Zealand Transport Strategy. The MoT explains that these provisions will be replaced with more generic language that will enable the Minister to make Rules for safety, security, economic development and environmental purposes (for example);

(b) Consistent with good regulatory practice, amend section 33 (matters to be taken into account when making Rules) to provide greater clarity. For example, including more simplified obligations for the Minister to have regard to "whether the proposed rule reduces the level of safety and security risk" and "the need to maintain and improve aviation safety and security".[11]

44. NZ Airports has no objection to these proposals. Consistent with the discussion on allocation of safety responsibilities above, we also consider that as part of considering whether the proposed rule reduces the level of safety and security risk and/or whether it will maintain and improve aviation safety and security, the Minister should be specifically required to have regard to whether the proposed Rule clearly allocates obligations for safety to the industry participants that are best placed to manage those risks.

[10] Consultation document, question B9d, page 70.
[11] Consultation document, paragraph 194.

45. We consider that section 33 should include the aspects of good regulatory practice described in paragraph 199 of the consultation document, rather than relying on less formal guidance material, to ensure that these aspects are taken into account when Rules are developed. A good analogy is the process for making or amending the Electricity Industry Participation Code under the Electricity Industry Act 2010. Key features are:

    (a) Publication of a proposed amendment and regulatory statement for consultation;

    (b) The regulatory statement to include:

        (i) A statement of objectives;

        (ii) Evaluation of the costs and benefits of the proposed amendment; and

        (iii) Evaluation of the alternative means of achieving the objectives.

    (c) An ability not to comply with (b)(ii) and (iii) for technical and non-controversial amendments or where there is widespread support for it;

    (d) An ability to make urgent amendments without complying with the above process; and

    (e) A requirement to establish a consultation charter that sets out processes for amendments, including consultation.

46. NZ Airports favours a move towards a risk-based approach to rule-making and regulation in general. We note that section 28(2) already permits Rules to apply "generally or with respect to different classes of aircraft, aerodromes, aeronautical products, aeronautical procedures, or aviation related services." This provision provides a basis for applying Rules differently to different classes of aircraft etc, on the basis of risk. If section 28 were removed and replaced (as foreshadowed in paragraph 194 of the consultation document) then in our view section 28(2) should be retained, since it provides a foundation for taking a risk-based approach to regulation.

Accident and incident reporting (item B11)

47. The consultation document queries what barriers exist to fully reporting on accidents and incidents, as well as what options could be implemented to create an environment of free and open disclosure of information. Three options are presented:

    (a) An amendment to the CAA to provide legislative recognition for the approach taken by the Authority within its existing Regulatory Operating Model and associated policies. In this way, the Authority would retain the ability to investigate all occurrences, and have the flexibility to determine the most appropriate form of intervention (ie enforcement or administrative action) if considered necessary;

    (b) The inclusion of a *mens rea* threshold element to the offences contained in sections 43, 43A and 44. However, MoT considers that strict liability offences compel participants to take the necessary precautions to ensure their conduct does not endanger the public, and that any requirement of an *intent* to commit the offence could undermine that purpose; and

    (c) The incorporation of aspects of the ICAO proposals, that attempt to distinguish between the appropriate and inappropriate use of safety information.

48. NZ Airports acknowledges the importance of all aviation system participants fulfilling their obligations to report on the details of accidents and incidents. We consider that reporting incidents, and then learning from them, is a critical way for the sector to constantly improve safety. Although good reporting practice depends largely on culture and human nature, it is important that the Act provides a framework that encourages reporting to the greatest extent possible. In terms of potential barriers to reporting:

    (a) No doubt the prospect of enforcement action is a deterrent for some individuals, and also institutions. While the Authority may *prefer* not to take action against those who fully report incidents, the fact that offences are set out in the Act and the regulator has discretion to take action is likely to be a sufficient deterrent in some cases. However, NZ Airports recognises that legislation needs to strike a balance between protecting those who make full disclosure, and requiring accountability where there has been a failure to ensure public safety;

    (b) A perceived lack of communication and transparency by the Authority in response to incident reports could also be an issue. When canvassing members for views on this issue, a view was expressed multiple times that there was little transparency in terms of what the Authority did with the information once an incident report was made, and that there was no point in making reports if they were simply filed away and no information about the decisions or outcome of any investigation was forthcoming. Further, members were concerned that a key opportunity to support continuous improvement is being lost if incidents are not benchmarked against each other, and with no mechanism in the reporting framework for airports to learn from mistakes made at other airports. Given that airports have responsibilities in respect of both ground and airspace safety, it is important that they are able to access this type of information. Since industry participants may be reluctant to share this information with others, the CAA has a role to play in receiving and disseminating accident and incident information, subject to confidentiality concerns; and

    (c) The possibility that information submitted to the Authority in confidence could nevertheless be released subsequently under the Official Information Act 1982 may also be of concern. We discuss this below.

49. We note that ICAO is currently proposing amendments to Annex 19 of the Chicago Convention that would very tightly constrain the release of information provided by way of mandatory or voluntary incident or accident reports. ICAO's assumption is that by keeping incident reports confidential, it encourages reporting and provides the opportunity to learn the lessons that flow from the resulting investigations. NZ Airports accepts that approach, but notes that one purpose for which information should be released is to ensure industry participants have the ability to take steps to improve safety procedures where relevant.

50. We fully support the CAA being amended to set out a more clear and transparent statutory framework for incident reporting. In our view, consistent with ICAO standards, key features of the legislative scheme should be:

    (a) A requirement for mandatory reporting;

    (b) A clearly established purpose for requiring incident reporting - namely, promoting and improving aviation safety;

    (c) A requirement that the information is provided and received in confidence;

(d) Clear parameters around how that information can be used in accordance with the statutory purpose by the Authority, and conversely, what it cannot be used for. This would include provisions regarding when the information can or should be disclosed to the Transport Accident Investigation Commission, and to participants who are in a position to take steps to improve safety procedures; and

(e) A specific provision for when the reported information can be used to take enforcement action against individuals. This would involve defining an exception to the normal rule that reported information will not be used to take enforcement action. Applicable standards are likely to be akin to wilful breach, gross negligence or criminal intent. [12]

51. We further note that, in both Australia and the UK, there are statutory restrictions on how information submitted under mandatory and voluntary reporting protocols can be used in order to protect the person making that disclosure. For example, the Australian Transport Safety Bureau ("**ATSB**") may only disclose restricted information (which includes statements made in the course of an investigation, and voluntary reports) that contains personal information in circumstances prescribed by regulation.[13] The only purposes for which the ATSB may disclose such information are:[14]

(a) Transport safety data sharing;

(b) Reporting or investigation of a transport safety matter; or

(c) Conducting a coronial inquiry.

52. In our view, if a clearer and more focussed statutory regime is established, then this should encourage the Authority to play a more proactive role in providing reports on actions following the receipt of reports. Feedback of this nature is valuable as it gives those reporting the comfort that their disclosures have been received and considered properly, which in turn will encourage them to keep making the required disclosure. There may be confidentiality concerns in providing information about the outcome of a process, but these can usually be addressed by providing appropriately redacted information.

53. In addition, if the Authority were to provide aggregated information about the numbers and types of reports received, this might reinforce to the wider industry the importance of making such reports, as well as highlighting the nature and extent of disclosure that the Authority expects to be made.

Confidentiality of information

54. The Authority is subject to the Official Information Act 1982 ("**OIA**"). We have considered whether a further barrier to incident reporting might be the possibility that information submitted to the Authority in confidence could nevertheless be released subsequently in response to an OIA request.

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[12] We note that the outcome of an accident or incident (eg, a fatality or injury) is independent of the intent or culpability of the participant(s). Wilful breaches of safety provisions may not result in injury or damage, but may still be serious breaches that justify enforcement action, and conversely a relatively trivial or well-intentioned action may by chance have disastrous results, but not reach the threshold for further enforcement action. An acknowledgment in the CAA that there is not a direct relationship between outcome and enforcement action may also assist in overcoming barriers to reporting.

[13] Transport Safety Investigation Act 2003 (Cth), section 61.

[14] Transport Safety Investigation Regulations, reg 5.8.

55. This issue was recently considered by the Federal Court of Canada in the matter *Porter Airlines v Canada (Attorney-General)*.[15] In that case, an airline was required by regulations to submit to Transport Canada information regarding its Safety Management System ("SMS"). A request was made to Transport Canada under the Canadian equivalent of the OIA in relation to its oversight of the regulations, and particularly with respect to the SMS developed and implemented by the airline. The Federal Court decided that, while the SMS information provided by the airline on a confidential basis should be excluded from the information provided, Transport Canada was obliged to release its own conclusions with respect to the information.

56. If a similar approach were applied in New Zealand, confidential aspects of incident reports could be withheld under the OIA, however the Authority's conclusions in relation to those reports (eg, whether or not to take further action) could potentially be publicly released (depending on the assessment of how the OIA applied in each case).

57. In our view, there would be good grounds for withholding reported information under the OIA, including that it was subject to an obligation of confidence, and future provision of information would be prejudiced if it was released. This should go some way to alleviating concerns participants may have about making full disclosure to the Authority, in addition to the current provision in rule Part 12.61 that a person submitting information may request confidentiality.

58. Nevertheless, the Authority should be encouraged to publicise the availability of confidentiality protections, for example on its website and on occurrence reporting forms. Confidentiality could be further protected by a provision in the CAA obliging the Authority to treat information as confidential (ie, the person providing the information should not have to request confidentiality, it should attach automatically).

Security

59. The consultation document proposes changes to Part 8 of the Act (Aviation security) to clarify provisions regarding search powers, retention and seizure of Dangerous Goods, and matters associated with the Airport Identity Card regime. MoT further considers that the current wording and layout of Part 8 is complex and should be revised.

60. NZ Airports supports the intent to clarify the security provisions, but makes the following comments on some of the specific proposals, and explains why it believes further changes are required.

Security functions and powers

61. Currently, the Act does not clearly describe what the scope of the security function is. In particular:

(a) Section 80 sets out the powers, functions and duties of the Aviation Security Service ("**AvSec"**). Accordingly, it does not clearly differentiate between functions and duties, and the powers available to fulfil those duties;

(b) Sections 80A to 80H contain various powers and duties of security officers; and

[15] 2014 FC 392.

(c) Section 81 prescribes that providers of aviation security services other than AvSec have the functions and duties as set out in the Rules. Those aviation security service providers may designate aviation security officers, who may exercise all the powers of an aviation security officer, with the exception of the power to arrest or detain any person. This is confusing, because "aviation security officers" are defined to mean employees of the Aviation Security Service.

(d) Rule 140.11(a)(1) sets out the functions and duties of aerodromes that hold an aviation security service certificate. These include:

(i) passenger, crew and baggage screening;

(ii) searches of aircraft;

(iii) aerodrome security patrols; and

(iv) screening and searching of any person, item, substance or vehicle that is present in, or about to enter, a security enhanced area.

Although Rule 140.11(a)(1) does not confer a power to seize items, as set out above, the security officers employed by an aerodrome would have powers under sections 80A to 80H.

62. Accordingly, although confusing and complex, it appears that (broadly speaking) the Act and Rules would allow aerodromes to provide the same operational security services currently undertaken by AvSec (subject to the current restrictions on contestability discussed below).

63. NZ Airports supports the objectives identified at paragraph 266 of the consultation paper, to ensure that aviation security powers are current and effective, and support a secure civil aviation system.

64. In that context, we consider that there should be:

(a) A clearer distinction between the functions and powers of aviation security service providers; and

(b) Less confusion and complexity by removing the distinction in the Act between the powers of Avsec and other aviation security service providers.

65. NZ Airports submits that it would be preferable for:

(a) The functions and duties of providers of aviation security services to be clearly set out in one section of the CAA. These functions and duties should apply to all potential providers of these services, and not only to AvSec (see our comments later in this submission regarding contestability of security service provision). In this way:

(i) The scope and extent of "core" aviation security services (the costs of which are levied on passengers) would be clearly defined in the Act. Presently, there can be confusion regarding what is or is not an aviation security service (such as controlling vehicle access to security areas); and

(ii) The Rules could establish additional detailed functions, but within the scope of the service established under the Act. It should not be the case that the Rules can define the scope of security services.

(b) A separate section of the Act to set out how aviation security officers can be appointed, and the powers they have to fulfil the functions of the security service provider who employs them. This would avoid the current confusing situation of the service providers having separate (ill-defined) powers when the entity itself does not exercise those powers in practice (security officers do).

66. Under the above approach, NZ Airports submits that the following should be within the statutory functions of aviation security service providers:

(a) Crew, passenger and baggage screening and searching;

(b) Foot and mobile patrols airside; and

(c) Screening airport staff, retail staff and goods (eg duty free) entering sterile areas.

67. As discussed below, it less clear that matters such as landside foot patrols and vetting unattended baggage and vehicles should be within the statutory security function.

Contestability in service provision

68. The consultation document notes that section 76 of the CAA makes Avsec jointly responsible with the New Zealand Police for preventing aviation crime at Security Designated Aerodromes.[16] In fact, section 76 states that this joint responsibility is that of the Police and "any authorised provider of aviation security services". Section 79(1) goes on to provide that aviation security services may be provided at an aerodrome by:

(a) AvSec; or

(b) The operator of that aerodrome.

69. However, pursuant to Ministerial Gazette Notice 3702 made under section 79A of the Act, only Avsec can be granted an aviation document to provide aviation security services at security designated aerodromes, effectively conveying a monopoly to AvSec for the provision of these services at such aerodromes.

70. It is worth recalling that, when legislation was passed enabling the transfer of security staff from the Ministry of Transport to the Civil Aviation Authority, whether or not the Aviation Security Service should provide services was a contentious matter in Parliament. Opposition MPs were persuaded by a joint submission from airlines, airports and Airways that airport companies should be responsible for aviation security services. *Hansard* does not clearly record the Government's reason for retaining a national service, but it does record opposition MPs making the point that the Swedavia-McGregor report strongly recommended that airports be responsible for aviation security services, which "happens in the vast majority of Western democratic countries".[17]

71. The Swedavia-McGregor report had recommended that:

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

[16] Consultation document, paragraph 249.
[17] Hansard. Vol 536, 22 June 1993 at 15998 (Geoff Braybrooke).

(b) It should not itself carry out operational functions. A particular concern was that AvSec should not monitor itself.[18]

72. NZ Airports remains firmly of the view that the provision of security services at security designated aerodromes should be contestable, and that those airports wanting to undertake these functions should be authorised to do so, as section 79 envisages that they may (subject to section 79(3), which provides aerodrome operators providing these services must comply with the relevant prescribed requirements and standards).

73. At the very least, the statutory framework must preserve the ability for these services to become contestable in the future. Our suggestions above are consistent with that position.

74. The consultation document does not consider whether AvSec should continue to be the sole provider of aviation security services, but we understand that the issue is considered by MoT to be out of scope for this review.

75. In our view, the fact that airports are currently unable to even apply for authorisation to carry out functions that the CAA contemplates that they can carry out is of material concern and should be addressed in a review that has an objective of improving efficiency. There is potential for airports to achieve significant efficiency gains by undertaking various security functions, as these functions can be incorporated into existing airport systems.

76. In contrast to AvSec, and by way of analogy, Airways Corporation does have a statutory monopoly to provide certain air traffic services.[19] The consultation document concludes that the repeal of Airways' monopoly was outside the review's scope, and proposes that the monopoly be strengthened by repealing the provision in section 35 that the monopoly status can be removed by Order in Council. The rationale is given on page 160:

> Parliament should make this decision, given its significance and the critical role that air traffic services play in maintaining a safe aviation system. It would be more appropriate to remove Airways' monopoly status through an Act of Parliament if this status was to be removed at any time in the future.

77. Applying this logic, it could equally be argued that a monopoly should not be conferred by a Gazette Notice on one provider of aviation security services, when an Act of Parliament contemplates that other parties may also be authorised to provide these services.

Search powers (item B13)

78. The consultation document proposes to amend search powers in relation to:

(a) Items found in a section 80(ab) search;

(b) Unattended items;

(c) Vehicles; and

(d) Patrol with explosive detector dogs.

[18] Swedavia-McGregor Report, Review of Civil Aviation Safety Regulations and the Resources, Structure and Functions of the New Zealand Ministry of Transport Civil Aviation Division (April 1988), at page 143.
[19] Section 99 of the CAA

Section 80(ab)

79. We note that the consultation document states that sections 80A-C allow Avsec to do certain things with items found during the course of screening and searching, while no equivalent provision is made for things identified in searches undertaken under section 80(ab). This is a good example of the current lack of clarity we describe above, namely:

(a) Section 80(ab) relates to Avsec, not security officers. It is not clear whether section 80(ab) is a function, power or duty of Avsec; and

(b) Sections 80A to C concern powers of aviation security officers - and not Avsec itself. It is possible that the security officers are not employed by Avsec.

80. As set out above, we believe many of the issues identified by MoT could be addressed by having a clear delineation between functions of security service providers, and the powers of security officers they employ.

Unattended items and vehicles, and patrol with EDD

81. The proposal is for AvSec to have power to deal with unattended items and vehicles in landside areas. Again, in our view the issue is whether security officers (whether employed by Avsec or another provider) should have those powers.

82. We note that, during its recent consultation on the services it provides, AvSec advised stakeholders that it already undertook landside foot patrols and vetting of unattended items (including explosives detection by dogs), and that it proposed to seek clarification that this was part of its "core" function, to be covered by the passenger charge.

83. NZ Airports is not opposed to the concept of security officers (but not just Avsec itself) having powers to undertake security services to some extent beyond secure or sterile areas. That would mean that:

(a) Police could still exercise their powers if Avsec is not available or does not provide services at an airport; and

(b) Security officers employed by airports could undertake the function when contestability is introduced.

84. However, we are not convinced that any statutory powers can be appropriately defined. In particular:

(a) "Landside" potentially covers a very large area, much of which cannot reasonably be said to pose a risk to aviation security. Given that Police have powers in relation to such areas, and bylaws may grant additional powers in relation to landside areas, we do not see there is a case for granting powers that potentially expand the "geographic" coverage of aviation security services to a material degree. On the other hand, there appears to be no problem under existing arrangements where AvSec provides such services as a matter of practice under existing statutory powers and recovers costs via the passenger charge. In other words, by seeking to clarify existing powers, further uncertainty may be introduced regarding the scope of the "new" powers.

(b) Given that the proposed clarified powers and responsibilities of security officers will be within the core statutory functions of aviation security providers and therefore be for the benefit of passenger safety, it will be important that the statutory power is appropriately constrained to that purpose. In particular, it will be important to avoid a situation where AvSec interprets its powers to patrol broadly, but seeks to impose additional charges on airports for exercising these powers on the basis that they are not services provided for the benefit of passengers.

Security check procedures and airport identity cards (item B15)

85. While MoT is not proposing significant changes to security check and identification procedures, it does consider that there are inconsistencies with the way the system is currently set out in the Act and Rules. Accordingly, the following amendments are proposed:

(a) Require people in security enhanced areas to produce, on request by authorised employees of the Authority, including Avsec, airport identity cards ("**AICs**") or other identity documents (ie, to clarify who 'authorised persons' are);

(b) Give Avsec authority to seize airport identity cards or other identity documents in limited circumstances, for example, when such cards or documents are:

(i) Being used in breach of either the CAA or the Rules;

(ii) Being used in circumstances in which the holders' authorisation to enter a secure area has been withdrawn; or

(iii) Expired.

(c) Make it an offence to be in a security enhanced area without authorisation;

(d) Define the term 'airport identity card'; and

(e) Address the minor inconsistencies in terminology between the CAA and the Rules as necessary.

86. NZ Airports supports the above proposed amendments and clarifications, subject to the powers to require production of ID, and to seize ID, being conferred on all aviation security service providers - not just Avsec.

87. However, a more significant issue for airports is the ability to issue AICs, specifically temporary AICs. NZ Airports has submitted to the Director a proposal to enable airports that wish to carry out this function to become authorised to do so.[20]

88. Currently under section 84(2), no person other than a Police or AvSec officer may enter a security area or a security enhanced area unless they are wearing an AIC *and* are authorised by the Director or "the airport manager or other person having control of the area". This provision already confers on airports a degree of control over access to security area, and should be retained.

[20] The Director may issue identity cards under Rule 19.357(a). Currently, AvSec issues airport identity cards and temporary cards under delegation and approvals from the Director.

89. The scope of NZ Airports' proposal is for airports to be able to issue temporary AICs, for a maximum duration of 7 days. Temporary cards would be issued to visitors to an airport (who require an AIC holder escort) and to permanent AIC holders whose AvSec-issued cards are lost/stolen or expired (no escort required).

90. The airports interested in becoming authorised to carry out this function consider that they could do so to the same standard as AvSec or even higher, with greater levels of cost-efficiency and customer service compared to current processes, while meeting relevant regulatory requirements.

91. NZ Airports is awaiting the Director's decision with respect to this proposal. If the Director agrees in principle, the next step will be to develop a national framework to allow individual airports to be approved to issue temporary AICs.

92. If the proposal does advance, then NZ Airports suggests the following addition to the amendments to the CAA proposed in paragraph 321:

(a) Authorised employees of an airport approved to issue temporary AICs should also be able to require people produce AICs or other identity documents; and

(b) Approved airports should also be able to seize temporary AICs in the limited circumstances outlined.

Alternative terminal configurations (item B16)

93. While MoT has not formed a final view on the merits or otherwise of a Common Departure Terminal ("**CDT**") or on alternative configurations, it considers that a CDT would enable both departing passengers and non-passengers, as well as both domestic and international passengers, to mix in a 'common' area from check-in to boarding. MoT has acknowledged that:

(a) Processes would need to be developed to prevent the post-screening transfer of goods between non-passengers and passengers (for example, duty-free goods, cash);

(b) It would require passengers (on domestic aircraft of 90 seats or less) who are not currently screened to be screened;

(c) It would require legislative amendment; and

(d) It may create inconsistencies in practice between airports.

94. NZ Airports believes in principle that an airport should be able to configure its terminal(s) as it wishes, including a CDT if that is how an airport wishes to operate. Any legislative amendment should be made to *enable* such alternative configurations, rather than *requiring* an airport to implement them.

95. While we agree that various processes would need to be developed (to prevent the post-screening transfer of restricted items, among other things), we consider that there would be considerable scope for efficiency gains by reducing duplication and centralising facilities such as screening points.

96. In summary, CDTs are a feature of many airports around the world, and NZ Airports is in principle in favour of it being possible for airports in this country to operate under this model if they so wish. That should be a decision for individual airports. What is effective and efficient operation in one airport may well not translate into a similar operation in another as a consequence of a multitude of factors, including size, location and nature of flights. However, to the extent that the current requirements of the CAA are inconsistent with such a model, we would support legislative amendment to enable alternative terminal configurations.

97. NZ Airports would be happy to be part of any working group established to consider further how CDTs could be implemented, and how any additional processing costs could be funded. However we do not think these are matters that need to be resolved under this review.

PART D - INTERNATIONAL AIR SERVICES LICENSING AND COMPETITION

International air services licensing (items D1 to D5)

98. MoT is of the view that the process for assessing air services licence applications under Part 8A of the Act is essentially sound, however, it considers that it can be protracted given the Act does not fully distinguish between licensing decisions that involve an allocation of scarce rights and those that do not.

99. NZ Airports fully supports any amendments designed to inject greater efficiency and simplicity into the authorisation process.

100. Key in this respect is achieving air services agreements that liberalise routes and/or capacity to the greatest extent possible, such that there is less need to allocate scarce rights to international airlines. As the MoT is aware, NZ Airports is a strong supporter of open-sky agreements and related policies.

101. Regarding the options proposed by MoT, NZ Airports comments as follows:

(a) We are comfortable with the proposed three tier approval/authorisation regime, namely:

(i) Non-systematic services requiring confirmation from the Secretary that they meet safety and security requirements;

(ii) Other non-licensed services requiring authorisation from the Secretary; and

(iii) Scheduled services operated pursuant to a licence.

(b) We support the proposal to extend to the Secretary the power of decision for licensing applications involving the allocation of unlimited rights. We do not have any preference as to the mechanism for extending this power to the Secretary, whether by delegation under the State Sector Act 1988 (option 2) or by amending the CAA (option 3, which MoT prefers). For NZ Airports, the key consideration is that an efficient process is in place to encourage growth in the international air services market;

(c) We are comfortable with the three proposals in MoT's preferred option 2 regarding the public notice required when an application for a new, amended or renewed scheduled international air service licence is received. That is, the submission period can be reduced to 14 days, and notice should only be required (in the *Gazette* and MoT website) when an allocation of scarce routes and/or capacity is involved;

(d) We have no objection to repealing sections 87K and 87Y, given that they have not been used in the last 20 years, and situations where a transfer of a licence might occur are able to be accommodated under other provisions. We also agree that the name of the operator should be included as a term or condition of the licence that can be varied; and

(e) NZ Airports agrees that section 87L should be retained for the licensing of foreign international airlines of countries with which New Zealand does not have an Air Services Agreement or similar arrangement. The example given in the consultation document, where this section was used to effectively grant a temporary licence while an Air Services Agreement was still being negotiated, shows that this provision is a useful and responsive feature of the air licensing regime. In general, NZ Airports favours provisions that would reduce barriers to the international air services market, provided carriers can satisfy safety and other compliance criteria.

International air carriage competition (items D6-D7)

102. The MoT has identified numerous problems with the existing regime for authorisation of international airline collaborations (which NZ Airports agrees with). It has therefore presented two potential options to reform the regime:

(a) Improving the Civil Aviation Act regime; or

(b) Shifting to a general Commerce Act regime (with no aviation industry specific considerations) **(NZ Airports' preferred option)**.

103. MoT does not consider the status quo to be an option, and does not support a Commerce Act regime with aviation specific considerations.

Summary of NZ Airports' position

104. NZ Airports' preferred option is to replace Part 9 of the CAA with a Commerce Act only regime. Specifically, this option would:

(a) Require all elements of proposed alliances, which involve issues of national significance, to be subject to established, rigorous and transparent processes and tests under the Commerce Act;

(b) Utilise the competition expertise of the Commerce Commission;

(c) Promote consistency across all industries through a single competition regulator applying a single competition framework;

(d) Implement the Productivity Commission's recommendations; and

(e) Align New Zealand's approach with the current Australian practice.

105. Our reading of paragraph 6.1 of Air New Zealand's submission to the Commerce Committee on the Commerce (Cartels and Other Matters) Amendment Bill is that the current regime should be amended to make it akin to the Commerce Act authorisation regime. Paragraph 105 of the consultation paper suggests similar amendments if the CAA regime is to be improved.

106. NZ Airports agrees that if a CAA regime is to be retained, then the statutory process should be the same as the Commerce Act authorisation statutory process (including in respect of consultation, issuing draft decisions, and allowing conditions of authorisation to be imposed). However we agree with the MoT's observation during the focus group session that, in circumstances where the Civil Aviation regime looks like the Commerce Act regime, it is more difficult to justify having a separate regime.

107. Accordingly, a key challenge in developing a new CAA regime will be to formulate a substantive "public benefits" test that is different to the test applied under the Commerce Act. Given our view that the test and process available under the Commerce Act is appropriate, we have not provided any views on that issue in this submission.

Commerce Act regime

108. NZ Airports appreciates that due to the regulatory framework governing international aviation, airline collaborations are necessary to ensure airlines can have global reach. We also understand the benefits of airline collaborations that promote international connectivity.

109. However, at their heart, airline collaborations involve potentially anti-competitive provisions. That is why they need to be authorised and thereby exempted from the application of the provisions in the Commerce Act that prohibit anti-competitive conduct.

110. The authorisation process under the Commerce Act reflects the well understood principle that on some occasions an arrangement that may include some anti-competitive provisions can nevertheless be a beneficial arrangement overall. That is, the public interest is best served by the collaboration rather than the competition that would occur in the absence of the arrangement. NZ Airports believes that international airline collaborations are a good example of where this can be the case.

111. The key is to robustly test on a case-by-case basis that the public benefits of the proposed collaboration will outweigh any detriments that will result. The Productivity Commission found that the Commerce Act process is likely to provide a more comprehensive assessment of the costs and benefits of trade practices, and would benefit from specialist expertise and resources such as guidelines, economic and legal staff who specialise in competition assessments, and good relationships with overseas regulators.[21]

112. NZ Airports agrees that the Commerce Act authorisation process provides the relevant framework and test for the Commerce Commission to assess proposed airline collaborations:

(a) A key task is to understand and seek to quantify any lessening in competition that would result or would be likely to result from the proposed arrangement; and

(b) A decision must then be made whether the benefits to the New Zealand public that will flow from the arrangement outweigh the lessening in competition. In NZ Airports view, the Commerce Act allows the Commission to take a wide range of benefits into account, and to exercise qualitative judgement when quantification is difficult or not possible.

113. The consultation document identifies some potential disadvantages in subjecting international aviation to the standard Commerce Act regime. It is also clear from previous Air New Zealand submissions that it is strongly against a Commerce Act regime.

114. We understand that the Ministry has concerns that the test under section 61(6) of the Commerce Act, which requires the Commission to consider whether the benefit to the public would outweigh any lessening in competition, may be inappropriate and/or may not be optimally applied in the airline collaboration context.

115. NZ Airports acknowledges that the Minister, acting on the advice of MoT, has the necessary skills and experience to authorise airline collaborations, and that there is some attraction in having an "aviation expert" regulator making the decision.

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[21] Productivity Commission, *International Freight Transport Services Inquiry - Final Report* (April 2012), at page 248.

116. In NZ Airports' view, the choice of regimes is not about choosing between regulators. Indeed, an optimal process would be one that allows the MoT and the Commerce Commission to contribute their respective expertise and knowledge to each decision. Accordingly, choosing the best regime is a question of regulatory best practice.

117. Given that the authorisation regime under the Commerce Act applies to every other market in New Zealand, it appears to us that to justify establishing a new separate regime for airline collaborations, it must be established that there is something materially unique about the airline sector that means there are identifiable benefits if it is subjected to a separate regime (or costs in subjecting it to the Commerce Act regime). In our view, this will be difficult to establish given that:

(a) The fact that there is a good rationale for international airline collaboration, and that benefits flow from them, makes them candidates for the Commerce Act authorisation regime. It is not a reason for taking airlines outside the Commerce Act regime. In particular, the importance of international air transport to an isolated country like New Zealand makes it important that airline collaborations are subject to the same scrutiny as potentially anti-competitive arrangements in all other industries;

(b) All markets are unique, including in relation to the regulation they may be subject to. To sustain a position that airline collaborations should not be subject to the same competition regime as every other industry, it would need to be shown that there is a material distinguishing factor that would result in disproportionate costs (for New Zealand as a whole) if they were subject to the Commerce Act regime; and

(c) The fact that section 88 is currently available is not a material factor in the analysis. All parties appear to accept that section 88 is a product of history, and was not designed to deal with the types of arrangements that it is now used to authorise.[22] That is, the status quo has no special standing, and a positive case needs to be made for unique treatment of airline collaborations.

118. The following table summarises arguments that have been made against the Commerce Act only regime, and NZ Airports' response:

Argument	**NZ Airports comment**
International obligations must be addressed.	NZ Airports accepts that international obligations establish a framework that makes alliances necessary for global connectivity. However it is not clear that this means that the standard Commerce Act authorisation process cannot apply. To explain: (a) We accept that the ASA framework can be relevant to the cost/benefit assessment. For example, any restrictions (current and future) can impact competitive dynamics (current and future) on any given route; (b) However, like the Australian Competition and Consumer Comission ("**ACCC**"), the Commerce Commission should be capable of assessing the impact of any relevant ASAs (for example,

[22] See, for example, paragraph 85 of the Consultation Paper: "The provisions do not generally reflect international best practice, or take into account the realities of modern international carriage arrangements". The Productivity Commission also noted that "the international air services market and the international regulatory framework for air services have changed significantly since the current competition regime was established" (Productivity Commission, *International Freight Transport Services Inquiry - Final Report* (April 2012), at page 243).

Argument	NZ Airports comment
	whether they create a barrier for new entrants) - especially if it is assisted by information provided by interested parties, including the MoT; and (c) To the extent that MoT's confidential knowledge of how ASAs may evolve in the future is relevant, it is difficult to envisage such knowledge being a significantly material and frequent factor to an extent that it justifies a separate regime for airline collaborations - especially when the commercial incentives of airlines are likely to be the key determinant of entry/exit on any particular route. That is, if in any given case MoT's confidential knowledge of how forthcoming changes to an ASA may impact on a proposed alliance could materially affect the authorisation decision, then it would be better to figure out a way to confidentially provide that information to the Commission if needed - rather than use it as a reason for developing an entirely new regime.
Commerce Act authorisation process is costly and restrictive	If cost is a problem, it is a problem for all industries. It is not a reason to give special treatment to airlines. The Productivity Commission made this point. As discussed below, the Productivity Commission also pointed out that the additional costs should result in more robust and extensive analysis. Any concerns with the cost of the Commerce Act processes needs to be tested in light of the fact that, for many applications, there will a be parallel regulatory process in the jurisdiction of the proposed alliance partner, which may potentially generate cost savings in terms of the same or similar expert evidence being able to be presented in both jurisdictions. Further, as MoT has pointed out, with the new collaborative activities clearance regime, it should be possible to isolate and target those matters that require authorisation (compared to those that can be addressed under the quicker and cheaper clearance regime). Finally, there is no reason to think that transition to a new regime would impose costs in itself (eg by requiring new authorisations for existing collaborations). Parliament frequently provides that authorisations under an abolished regime may be treated as authorisations under the new regime (until they expire). NZ Airports would support such grandfathering.
MoT has relevant expertise that may impact on the way benefits are valued. In particular, the MoT has specialist knowledge of the ASA framework and how it may change in the foreseeable future.	There is no doubt that MoT has aviation expertise, and that its knowledge of the existing ASA framework, and how it may change, has been important in previous authorisations. However, as set out above, we are not convinced that this factor is sufficiently material to justify a separate regime. On the other hand, there is no reason to think that the Commerce Commission is not capable of considering aviation market factors, especially if it is assisted by MoT submissions. There also appears to be some concern that the

Argument	NZ Airports comment
	Commission will be reluctant or unable to assess certain benefits of any proposed alliance and/or that it will take counterintuitive approaches to assessing public benefit. Put another way, there is concern about whether and how the Commission will assess qualitative benefits, particularly when benefits are difficult to quantify and the qualitative assessment could be material to whether an authorisation is granted. NZ Airports believes these concerns are misplaced: (a) The Commerce Commission's authorisation guidelines make it clear that a wide range of benefits to New Zealand will be taken into account,[23] and that the Commission will exercise qualitative judgment when necessary;[24] (b) It will often be the case that another Government agency will have greater knowledge of an industry for which the Commission is required to make a determination; (c) It will also be the case that the Commission may be challenged by the need to undertake qualitative assessment for other industries; and (d) We, like the Productivity Commission, believe that an advantage of the Commerce Act regime is that the Commerce Commission can apply its specialist competition and cost/benefit analysis expertise to authorisations across sectors in a consistent manner. It is true that airline collaborations will involve unique issues (as all markets do). It will therefore be incumbent on all stakeholders, including airports, airlines and MoT, to provide information to the Commission so that it is appropriately informed on all relevant matters - including matters of qualitative assessment.

119. It is notable that the Productivity Commission recommended that the government should consider a Commerce Act only regime. We also note that the Productivity Commission pointed out that it was focussed on freight, and that impact on passengers would also need to be reviewed. However NZ Airports has not seen any evidence as part of this process that suggests passenger interests change the analysis.

120. The following table summarises NZ Airports' comments on how the Commerce Act only regime satisfies the Productivity Commission's criteria for assessing a new regime:

[23] The Commission notes that "we regard a public benefit as any gain to the public of New Zealand that would result from the proposed transaction regardless of the market in which that benefit occurs or whom in New Zealand it benefits" - *Authorisation Guidelines*, at paragraph 37.

[24] The Commission states that "where we cannot quantify a benefit or detriment, we make a qualitative judgment as to the importance of that benefit or detriment relative to the quantified benefits and detriments.

Criterion	NZ Airports' Comment
Ensuring the authorisation process for trade practices is based on a comprehensive analysis of the costs and benefits of trade practices.	This is exactly what the Commerce Act authorisation regime requires, and the Commission is experienced at applying this test.
Ensuring the authorisation process has sufficient regard to New Zealand's international air services obligations.	As discussed above it remains unclear to what extent the international air services framework will have a material impact on a cost/benefit analysis. In any event, there is nothing to suggest that the Commission could not take such matters into account, as the ACCC does.[25]
Ensuring the authorisation process is transparent and provides applicants and stakeholders with sufficient opportunities to make their case.	The Commerce Act authorisation process meets this standard.
Minimising the direct cost to government and affected parties.	The Productivity Commission noted that the Commerce Act authorisation process would be more costly. However it also noted those costs are justified, because they are due to the extra time the Commerce Commission takes to analyse the competition issues and consult with stakeholders. This is more likely to result in more comprehensive and thorough analysis. NZ Airports agrees.
Minimising the indirect cost of chilled commercial activity (eg efficiency-enhancing commercial activity that is not undertaken because of a concern by businesses that it would fall foul of the competition regime).	Air New Zealand has submitted that it may be deterred from entering alliances under a Commerce Act only regime. This position seems to be inconsistent with their position that international alliances are critical to airlines' business model. Given that airlines continue to submit applications for authorisation of cooperation arrangements to the ACCC, it seems that there is no evidence of any chilling effect on such commercial activity in Australia, despite the fact that the ACCC has on occasion declined such applications. We appreciate that, if in the future the Commission declined an application and that decision was also upheld by the courts, then Air New Zealand may be less inclined to pursue alliances from that point. Equally, however, it may seek to address the issues that caused decision-makers to determine that the proposed alliance would not have a public benefit that outweighed any lessening in competition.

[25] The Commerce Commission has advised the Productivity Commission that it could take into account international civil aviation obligations in a Commerce Act authorisation process, if they were described in a submission. It would assess the net national benefits of fulfilling these international obligations to varying extents. See Productivity Commission, *International Freight Transport Services Inquiry - Final Report* (April 2012), at page 250.

PART E - AIRPORT AUTHORITIES ACT

121. We refer to our comments above in Part A regarding the appropriate statutory framework, and where we think the AAA fits in that framework. The following addresses the specific issues raised in the consultation document.

Specified airport companies (item E1)

122. The consultation document agrees that the distinction between specified and other airport companies should remain, but queries what the most appropriate measure is for distinguishing between them. Four options are proposed:

(a) Status quo - $10 million revenue threshold;

(b) A higher revenue threshold of $15 million;

(c) Revenue threshold of $10 million based on identified airport activities only **(NZ Airports' preferred option)**; or

(d) Threshold of 1 million annual passenger movements.

123. As the document points out, the purpose of the distinction is to identify those airports that have a greater degree of market power. In that context, we make the following observations:

(a) Although the current $10 million threshold is dated, there is no evidence that it is producing the wrong outcomes in practice. For example, there is no suggestion that more airports should be "specified airports";

(b) Any statutory criteria will inevitably be "rough and ready" in nature, as acknowledged by MoT. Airport markets are complex, and whether or not airports are able to exercise market power will depend on a variety of factors. For example, improvements in road travel times can affect airport markets and passenger choices;

(c) The majority of airports in New Zealand have a substantial customer who has a monopoly on airline services to that airport. Not only are those airports subject to the market power of that customer, they are acutely aware of the high costs for passengers wishing to fly to the regions on non-competitive routes. Given the airports' interest in attracting passengers and supporting regional economies, this is a material factor in the setting of charges; and

(d) Although not relevant to the scope of this review, the susceptibility of smaller centres to the commercial decisions of a dominant airline, and the increasing use of air travel for social purposes such as links to essential medical services are why NZ Airports strongly supports further policy work being undertaken on the "social routes" concept. We think it is important for regional economic and social development for the Government to consider ways of supporting sustainable regional air services. It is commonplace for other countries (including Australia, the European Community, the United States and Canada) to have a framework to ensure the continuity of air services to regional centres at certain levels of frequency, cost and quality.

124. Against that background, NZ Airports submits that:

(a) The third option is best - a revenue threshold of $10 million based on identified airport activities. We note that under this option, Auckland, Wellington, Christchurch and Queenstown international airports would continue to be specified airport companies. Option three recognises that airport companies are often complex businesses with multiple revenue streams, and that it is only the non-contestable activities that are potentially subject to a greater degree of scrutiny under this legislation. That is, given that specified airport companies are subject to more stringent regulation for their identified activities, it is illogical for the regulatory threshold to include non-identified activities; and

(b) The MoT's preference for option 4 is not based on strong grounds. We do not see why passenger movements are a better measure of aeronautical activity than revenue from those aeronautical activities and/or that it is a logical threshold for greater regulatory scrutiny. In particular, passenger movements are not a material consideration when assessing whether airports are exercising market power. If MoT nevertheless decides to adopt this option, the definition of "passenger" will be important. NZ Airports submits that it will need to exclude charter, general aviation and military activities.

Redundant provisions (item E2)

125. The consultation paper suggests that the following sections of the AAA might be redundant and could therefore be repealed in the interests of providing clear and concise legislation:

(a) Section 3BA, which requires airports to disclose aircraft-related charges;

(b) Section 4(2), which empowers airports to borrow money and acquire, hold and dispose of property as they think fit; and

(c) Section 4A, which empowers airport companies to set such charges as they think fit. MoT does not propose any changes to section 4B, which imposes a consultation requirement on airport companies when fixing or altering the amount of a charge. The consultation document suggests that sections 4(2) and 4A may be redundant because airport companies can undertake the same activities as any other company, subject to the Companies Act 1993, any other enactment, and the general law. Further, the document states that section 4A can be removed without affecting the consultation requirements in section 4B, which will be retained.

126. NZ Airports agrees that section 3BA and 4(2) could safely be repealed. As the consultation document indicates,[26] airports have a commercial incentive to disclose aircraft related charges, so the provision requiring them to do so is not necessary. Even if section 4(2) were repealed, airports would still have the power to borrow money and deal in property as they think fit by virtue of the general powers under the Companies Act 1993. However, for the reasons discussed below, the same cannot be said of section 4A.

127. NZ Airports firmly disagrees that section 4A is redundant, and strongly opposes its repeal. In particular:

(a) Section 4A is a material part of the economic regulation of airports and clarifies that the statutory power to set charges is balanced by an obligation to consult (under section 4B). Sections 4A and 4B are inextricably linked, so repealing one would affect the other;

[26] Consultation document, page 143.

(b) MoT appears to be proposing that the setting of charges should be a matter of contracting, rather than pursuant to the exercise of a statutory power. Repealing section 4A would therefore signify a fundamental change to the current statutory basis for setting charges, and therefore cannot be characterised as removal of a redundant provision; and

(c) The change would also carry the risk of unintended consequences.

128. The following elaborates on these concerns.

Background to sections 4A and 4B

129. The consultation document states that the power for airports to set prices "as they think fit" was inserted when airport companies were new, to confirm that they could exercise the powers necessary to operate airports independent of the Crown.

130. The power of airports to charge and set fees as they think fit was introduced by the Airport Authorities Amendment Act 1986. That Act inserted into the AAA the following section 4(2), which was the precursor to the current sections 4A and 4B:

> Every airport company may... after consultation with airlines which use the airport, charge and set such fees, charges, and dues as it from time to time thinks fit for the use of the airport operated or managed by it...

131. Parliamentary debate at the time the Airport Authorities Amendment Bill was introduced indicates that the powers in section 4 arose "out of the recognition of confusion about the role and function of airports." The structure created by these new provisions enabled a more efficient and businesslike approach to be adopted. It was described as a "bold move" that was "overdue" as the charges were set in another place and did not relate to the needs of the airport.[27]

132. The consultation document therefore correctly concludes that the power to set charges " as it thinks fit" was introduced to be clear that newly established airport companies were to have control over pricing (instead of the Crown). However, subsequent and significant legislative developments make it clear that section 4A now serves a broader purpose - it is a material part of the statutory economic regulation framework for airports.

Airport Authorities Amendment Act 1997

133. The Airport Authorities Amendment Act 1997 separated the charge-setting power and consultation obligation into separate sections, introduced a requirement to consult every five years, and introduced consultation obligations in relation to certain capital expenditure.

134. This, and subsequent developments, demonstrate that:

(a) Parliament decided that section 4A was necessary, despite the fact that the Companies Act 1993 had been enacted some years earlier. Accordingly, the suggestion in the consultation paper that section 16 of the Companies Act provides an adequate basis for the power to set prices is illogical, given that the current section 4A was deliberately retained by Parliament in 1997;

[27] Airport Authorities Amendment Bill 1986 (128) (3 June 1986) 471 NZPD 1848

(b) The consultation document raises the concern that users of the legislation may assume section 4A confers greater pricing powers than airports otherwise have. This concern is without basis. As discussed below, sections 4A and 4B have been subject to extensive judicial scrutiny, such that the constraints they impose on airport pricing decisions are now well understood;

(c) Parliament was clear that the power to price as airports think fit, balanced with the obligation of consultation, was the right regime.[28] The ability for airports to "price as they see fit" is a "circuit breaker" when agreement cannot be reached following consultation with airport users. It is therefore clear that the obligation to consult contained in section 4B is inextricably linked to the statutory power in section 4A to set charges. The purpose of consultation is to ensure that the exercise of statutory power is based on quality information, and that the likely implications of a decision are well understood before action is taken;[29] and

(d) This is particularly important for regional airports, where the power to set prices is an important tool to allow them to operate as commercial undertakings. As previously acknowledged by Cabinet, there is no evidence that regional airports have the ability to exercise market power, due to the position of Air New Zealand as the dominant airline operator.[30] Regional airports are particularly vulnerable to the withdrawal of services, given they are essentially dependant on a single airline.[31] In this context, as previously noted by the Government:

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

135. Further, the statutory regime means that airport pricing decisions are subject to judicial review, which may not be the case if pricing becomes a commercial matter only (we return to this below).

136. By removing the statutory power of decision-making (to set charges), the basis for pricing decisions will be fundamentally changed, and an unusual, untested and complicated regime will exist. That is, airports would be free to negotiate and set charges on a commercial basis, yet subject to administrative law obligations to consult. That is likely to create much confusion - and encourage litigation - regarding which aspects of airports' decision-making are subject to judicial review.

Case law

137. The current AAA economic regulation regime is now well understood and supported by a body of case law, including Court of Appeal authority, which is instructive and informative about the meaning of the statutory requirements in sections 4A and 4B. In particular:

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[28] Airport Authorities Amendment Bill 1997(23-2) (7 December 1995) 552 NZPD 10508.

[29] See generally, M Smith, *New Zealand Judicial Review Handbook*, Wellington 2011, chapter 47**.**

[30] Cabinet Economic Growth and Infrastructure Committee, *Minute of Decision,* 19 August 2009 (EGI Min (09) 17 (14) at paragraph 2.

[31] Office of the Associate Minister of Transport *Report back on the nature and scope of any issues in relation to the economic regulation of regional airports,* 2009 (report to the Chair of the Economic Growth and Infrastructure Committee) at paragraph 27.

(a) In the Court of Appeal case of *Air New Zealand* v *Wellington International Airport*,[32] section 4A was used as an interpretive aid for section 4(3). More generally, there are few cases that discuss 4A without also discussing sections 4 and 4B, which further illustrates that 4A and 4B are inextricably linked and together form a coherent statutory scheme; and

(b) As recently as 2013 the High Court stated that sections 4A and 4(3) (the obligation to operate as a commercial undertaking) were the two significant changes to the Airport Authorities Act in 1986, and that section 4A "continues to empower" an airport to set such charges as it from time to time thinks fit for the use of the airport or the services or facilities associated with it.[33]

138. It is worth noting that the degree of certainty that these decisions provide has come at a high cost to both airports and airlines in terms of legal fees, time and other resources.

Unintended consequences of removal

139. NZ Airports is concerned that removing section 4A would carry the risk of unintended consequences (and therefore considers that section 4A is not redundant). For example:

(a) There may be an impact on the availability of judicial review:

(i) The ability to bring judicial review proceedings grants airlines and other customers the ability to directly challenge aspects of substance in relation to airport charges set under section 4A. There have been numerous judicial review proceedings involving the international and other airports. There have been examples of judicial review upholding concerns with substantive decisions. For example, Air New Zealand brought proceedings against Nelson Airport in 2008, arguing that the airport's charges decision was unreasonable and substantively unfair.[34] Air New Zealand was successful in one aspect of its challenge, with the High Court concluding that no reasonable airport in Nelson's position would have made the decision that it did. That aspect of the pricing decision was set aside, and Nelson Airport was ordered to reconsider its charges to that extent; and

(ii) This administrative law protection may be lost if section 4A is removed such that setting charges is purely a commercial exercise.

(b) There may be an incentive to test the new regime by way of litigation:

(i) Courts interpret legislative provisions in light of their context, and that includes the legislative history. Every word of an Act must be read "in the context of the other words of the section in which it appears; the part of the Act in which it is situated; and the scheme of the Act as a whole."[35] Therefore, any changes (including repeal) made to a statute will be relevant to the interpretation of its provisions;

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[32] *Air New Zealand* v *Wellington International Airport* [2009] NZCA 259 at [7-8].
[33] *Wellington International Airport ltd v Commerce Commission* 2013 NZHC 3289 at [453]
[34] *Air New Zealand Ltd v Nelson Airport Ltd* HC Nelson CIV 2007-442-584 at [66].
[35] Legislation Advisory Committee Guidelines, *Guidelines on Process and Content of Legislation 2001 edition and amendments*, (May 2001), at page 64.

(ii) It is possible that in the future the repeal of section 4A would be interpreted as indicating that airports should have less control than they currently do over pricing. We think that this is greater than the risk of parties assuming that section 4A provides airports with greater powers over pricing than they would otherwise have. While the consultation document claims that section 4A is redundant, in reality its repeal would encourage arguments from interested parties that the removal of the section has some significance. This would risk creating confusion and encouraging re-litigation of well-established judicial interpretation of the existing position - in turn re-opening previously resolved issues and encouraging renewed contention and uncertainty; and

(iii) If section 4A were repealed, it might be possible to discourage re-litigation by including clear statements in Parliamentary material (such as the Explanatory Note to any amendment Bill, and the relevant Select Committee Report) that removing section 4A was not meant to and does not change an airports' power to set prices. However, the fact that such statements would be necessary to discourage re-litigation (and would certainly not guarantee that litigation would not proceed regardless) not only begs the question of why the provision should be removed at all, but also indicates that section 4A is not redundant. Rather, it serves an important purpose.

(c) It may be difficult to form pricing contracts:

(i) Although it is unclear, the consultation document appears to proceed on the basis that pricing will become a contractual matter between airports and customers;

(ii) As noted above, we believe that the MoT may not be aware of how thorough the price-setting process is following consultation. Today's case law, borne out of section 4A, has resulted in a very high level of transparency regarding how airports propose to set prices, the feedback from airlines expressing a range of views, and the rationale for how those views are balanced when prices are finally set. For airports with multiple airline customers, airlines inevitably have different views on what airport priorities should be, depending on what at any particular time fits best with the airline's own strategies and commercial imperatives. It is in this context that airports seek to develop the most efficient forecasts. It is simply impractical to expect that an airport could provide a standard contract and pricing regime to airlines that would be acceptable to all. Each airline would inevitably seek to optimise for its own business model, undermining a central forecast;

(iii) However as providers of essential services, it is not feasible for airports to withhold their services if airlines refuse to accept the "offered" price. On one hand, case law states that if a customer takes the service yet clearly rejects the terms on which it was offered, no contract for price is formed (and principles such as *quantum meruit* must be relied upon);[36] and

[36] *Transpower Ltd v Meridian Energy Ltd* [2001] 3 NZLR 700at [63].

(iv) On the other hand, if a charge is set in accordance with section 4A, then the uncertainty and cost associated with determining a price under the principle of *quantum meruit* is avoided. If airlines use the airport services, then they will be obliged to pay the charge legitimately set in accordance with section 4A.[37]

140. This discussion illustrates that section 4A is used to determine legal matters that MoT may not yet have turned its mind to, and that it is not correct to assume that section 4A is redundant - removing it would be impractical and could create accidental and inconvenient changes in other areas of law.

141. The pricing environment for regional airports in particular has been so difficult in recent years, in the face of airline commercial pressures and legal challenges (threatened and actual), that NZ Airports had 'best practice' guidelines prepared for price-setting and consultation by its members. The processes are fair and rigorous. Since these guidelines were made available to members the challenges have all but disappeared, but the fact that such management practices are necessary illustrates the high potential for negative outcomes from destabilising the underlying legal framework.

142. Finally, NZ Airports believes that in recent years there has been less focus on debating the extent of the power under section 4A, and more focus and willingness on the part of airports and airlines to work towards a shared understanding of how the AAA can operate more effectively with respect to the consultation process. This has also been observed by MoT officials.[38] This willingness of airports and airlines to work together continues to increase, as all parties recognise there are areas of mutual benefit in the delivery of New Zealand's aviation system. As such, it is now common for alignment to be reached on large aspects of price-setting.[39]

143. The current regime is working well. Airports have had to adjust to significant regulatory change in recent years, and the information disclosure regime is only now bedding down. It would be a shame, and extremely costly, if removing section 4A resulted in re-invigorated and non-productive debate about the extent of an airport's power to set prices.

Consultation on certain capital expenditure, and thresholds (items E3 and E4)

144. The MoT is considering whether to:

(a) Make all airports subject to the requirement to consult on certain capital expenditure; and

(b) Change the threshold for consultation.

145. NZ Airports' position is that:

(a) Only specified airports should be subject to the obligation to consult on capital expenditure;

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[37] See, for example, *Air New Zealand* v *Wellington International Airport Ltd*, HC, 24 September 1992, CA 829/92. In that case, airlines had refused to pay landing charges and judicially reviewed the validity of the charges under section 4A. Once the claims were unsuccessful, it was not disputed that the amount calculated in accordance with charges set under section 4A was a debt recoverable by the airport.

[38] Office of the Associate Minister of Transport *Report back on the nature and scope of any issues in relation to the economic regulation of regional airports*, 2009 (report to the Chair of the Economic Growth and Infrastructure Committee) at [34].

[39] Further information about how prices for aeronautical services are set and the process transparently tested can be found in the price setting disclosures that specified airports must make under the Commerce Act.

(b) The threshold for consultation on capital expenditure should:

(i) Vary in absolute terms in order to be cost efficient;

(ii) Exclude land as it is not relevant to measurement of the size of capital expenditure projects; and

(iii) Be based on 10% of identified airport assets, excluding land (option 2). We disagree that that this option is too low for very large international airports.[40] However, if there were concerns that a 10% threshold would not be effective then further consideration could be given to whether a "higher of" formulation of 10% or $30 million would be reasonable.

146. In an environment where the Government is seeking to encourage better and less regulation, we see no justification for expanding the capital expenditure consultation obligations to all airports. In particular:

(a) The consultation document does not identify any practical problems with the current approach;

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

(c) The distinction between the requirement for all airports to consult on pricing and the capital expenditure consultation obligation only applying to specified airports was deliberately chosen by Parliament, on the basis that "for provincial airports with revenue below $10 million, such a level of consultation is unnecessary given the countervailing market power of airlines".[41] There is nothing to suggest this dynamic is now different; and

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

147. Regarding the threshold for consultation, NZ Airports, together with BARNZ, has previously engaged with the MoT on this issue, calling for an industry-wide approach in a joint letter to MoT in November 2010.

148. In conclusion:

(a) In practice, those airports subject to the obligation to consult with their customers on all material capital expenditure do so - whether as part of pricing consultation or separately during the pricing period;

(b) We accept the need for change of a historic threshold that is no longer apt in practice;

(c) It is nevertheless difficult to identify a suitable new threshold, although we submit that it would be sensible to remove land from the threshold calculation; and

[40] Consultation document, page 148.
[41] Airport Authorities Amendment Bill 1997(137-2) (Select Committee report) at (iii).

(d) The threshold should be proportional rather than a flat figure, as this takes into account differences in the scale of airports and so is more likely to result in efficient and enduring regulation. NZ Airports recommends a 10% threshold for consultation based on the non-land asset values for the three main airports. By way of indication, a 10% threshold would currently result in the consultation obligation being triggered at approximately $75 million for Auckland Airport, $28 million for Wellington Airport and $30 million for Christchurch Airport. This materially reduces the threshold for consultation. For example the threshold for consultation for Auckland Airport would fall by $150 million from $225 million to approximately $75 million.

Termination of leases without compensation or recourse for compensation (item E5)

149. The consultation document states that the ability of airports to terminate leases under section 6 of the AAA is not in question, but that there could be a benefit in providing greater clarity about the circumstances in which airports can terminate leases without compensation.

150. An option proposed is to clarify that termination must be for the safe and efficient operation of the airport, which is consistent with the power to grant leases in the first place under section 6(1) of the AAA.

151. NZ Airports acknowledges that section 6(1) currently provides that leases may be granted for any purpose that will not interfere with the safe ***and*** efficient operation of the airport. However, NZ Airports submits that:

(a) It does not follow that the power to terminate must be on the same terms. Clearly, if circumstances change such that the statutory power to enter the lease is no longer satisfied, then airports must have the power to terminate the lease. However the power to terminate as currently included in the Act is framed more broadly and simply to be if the property is required "for the purposes of the airport". It must be assumed that this choice of language by Parliament was deliberate;

(b) No problems with the existing wording have been identified (this could be because as a matter of practice, compensation provisions will be included in the lease). We do not agree that the current wording is unclear, especially in light of case law (in the context of the Public Works Act 1981) that has confirmed that the entire area of land described in the Auckland Airport Act 1987 continues to be held by Auckland International Airport Ltd for 'airport purposes');[42]

(c) Any narrowing of the power to terminate leases would not be helpful for airports, which rely of this power to cater for expansion. Where airports expand their facilities to cater for growth, incumbent operators often hold leases over areas required for expansion and these operators are strongly incentivised to resist activity which may directly enable competitors to become established nearby. The existing provisions of the Act ensure that this type of blocking activity is prevented from unduly delaying necessary development; and

(d) Accordingly, the status quo is the best option.

152. We would also have concerns with the proposal[43] that both existing and new leaseholders could seek compensation, if termination was for purposes other than the safe and efficient operation of the airport. To retrospectively insert new terms into an existing lease is undesirable in terms of both good regulatory practice and legislative drafting principles.

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[42] *McElroy v Auckland International Airport Ltd* [2009] NZCA 621 at [74].
[43] Consultation document, page 150.

Bylaw making power (item E6)

153. The consultation document questions whether the by-law making powers are still relevant, and queries whether the powers in the Act could be reduced or removed.

154. Feedback from NZ Airports' members is that:

(a) The power to make by-laws is important and remains relevant; and

(b) The degree of oversight - ie Ministerial approval and/or Order in Council - is appropriate.

155. The consultation paper suggests that if a by-law power remains, then perhaps they could be set through regulations to ensure consistency across all airports.

156. NZ Airports does not see how this will be different to the current process whereby airport company by-laws must be approved by the Governor-General by Order in Council. In particular:

(a) Under either a regulation or Order in Council process, the Minister and his/her officials will have an opportunity to test the appropriateness of the proposed Rules; and

(b) The purpose of the power is to allow for the making of laws particular to each airport, to suit their circumstances. So although we agree that consistency in standard and process is required, it does not follow that consistency in substance of the Rules is desirable.

Information disclosure and "publicly available" (item E7)

157. The consultation document proposes to clarify what "publicly available" means in the context of information disclosure.

158. NZ Airports supports the proposal.

Land vesting issues

159. NZ Airports notes that the consultation document is silent on the interrelationship between the AAA and the Public Works Act 1981.

160. Generally speaking, the relevant provisions are permissive (or enabling), namely:

(a) Under section 3A(6), the Crown or local authority may transfer land (and other property) to an airport company;

(b) Sections 40 to 42 of the Public Works Act do not apply to such transfer, but those provisions to apply to land as if the airport company were the Crown (eg airport companies are subject to the offer back regime);

(c) Land subject to the Reserves Act 1977 can also be transferred (sections 3A(7A) to 3A(7C); and

(d) Airports managed or operated by an airport authority that is not a local authority are deemed to be a Government work for the purposes of the Public Works Act 1981.

161. This scheme is important, and NZ Airports supports its retention. It recognises that if airport companies are to be efficient and operate as commercial enterprises, then they need the ability to own and control the land.

162. However, it is not mandatory for land to be transferred to airport companies, meaning a variety of ownership arrangements have been used in practice. For example, the Nelson Airport land (a Crown reserve) was vested in Nelson City Council to be held in trust for the region. Nelson City Council is a shareholder in Nelson Airport Ltd, together with Tasman District Council. The land is leased to Nelson Airport Ltd, but with numerous restrictions on development and leases to airport customers. Accordingly, in this case, the efficiencies envisaged by the Act via vesting of land directly in the airport company are not being achieved.

163. Although perhaps not a legislative issue to be covered in this review, NZ Airports would support a further review of whether land ownership arrangements are an obstacle to achieving efficiency in regional airports. A particular focus could be whether land made available by the Crown is maximising its potential contribution to the economic growth of the region.

PART F - OTHER MATTERS

Airways statutory monopoly (item F1)

164. MoT considers that a review of Airway's statutory monopoly is not within the scope of the review. However, MoT proposes repealing section 35 (which provides for the repeal of Airways' statutory monopoly on a date to be appointed by Order in Council) of the Act, and retaining section 99 (which provides for Airways to be the sole provider of area control services, approach control services, and flight information services). MoT believes that any repeal of the monopoly should be by an act of Parliament.

165. NZ Airports supports contestability where feasible. Airways' current monopoly as it applies to area control services and flight information services is sensible, but we believe there are additional factors to consider in relation to approach services. Approach services are closely tied to specific airport locations, the aerodrome control services, and the overall capacity and service quality provided by the airport.

166. We note that section 99(2) excludes the following services from Airways' monopoly, meaning that these services are in theory contestable:

(a) Aerodrome control services; and

(b) Aerodrome flight information services.

167. Currently aerodrome control services are provided under contract by Airways NZ, but in the future there is no reason to think that the relevant airport itself or an alternative contractor would not be viable options. In such a case, it may also make the best operational, safety and commercial sense for the approach service to be provided by the aerodrome control organisation.

168. NZ Airports therefore recommends that approach control services be moved from section 99(1)(b) into section 99(2), so that there is flexibility for providers other than Airways to provide these services, particularly in conjunction with aerodrome control services.

169. NZ Airports considers that the current Order in Council mechanism remains appropriate. The proposal to remove the power for the monopoly to be ended by way of Order in Council seems like a step backwards as Parliament has already decided that, if and when the Government considers the right circumstances arise, the monopoly can be removed. We do not see how circumstances have changed such that factors are now present such that only Parliament can make that decision.

Fees, charges and levies

170. MoT considers that the matters concerning the level at which fees, levies and charges have been set, and who should pay, as set out in the Regulations, is outside of the scope of the review.

171. NZ Airports accepts that position. However, we do think that the Act can be amended to:

(a) Better provide for the circumstances in which a fee or charge can be imposed instead of levies (and vice versa). Currently, there is significant overlap of the purposes for which each can be set, but no guidance as to what method should be used. This is a legislative drafting issue upon which we can submit further in due course; and

(b) Introduce stronger consultation obligations.

172. It is helpful to bear in mind the distinction between fees and charges on one hand, and levies on the other. The Authority has statutory authority under Part 4 of the Act to charge fees for services that it is obliged to provide. Fees should be set at no more than the amount necessary to recover the cost of providing that service. A levy however has more in common with a tax. It is usually compulsory to pay a levy, and levies charged to a certain group or industry are usually applied for a particular purpose.[44]

173. It is important, therefore, that the relevant provisions of the Act clearly establish the statutory authority under which the Authority may charge fees, and the purpose(s) to which levies may be applied.

174. However, under the Act as it stands, the broadly similar purposes for which fees and levies may currently be charged[45] do not assist in maintaining the distinction between what is a fee or charge, and what is a levy. Our understanding, consistent with the Controller and Auditor-General's good practice guide, is that fees are charged as part of a transaction in consideration for goods or services provided by a public entity, whereas levies may be applied to fund regulatory functions.

175. Consideration should be given to better reflecting these principles in the relevant provisions of the Act, to help ensure clarity and the setting of fees and levies on a fair and efficient basis.

[44] Controller and Auditor-General, *Charging fees for public sector goods and services*, June 2008, paragraphs 1.1-1.10 and 2.3.

[45] See section 42A(1) of the CAA re levies "for the purposes of enabling the Authority to carry out its functions" and section 38(1)(c) re fees and charges "Generally for the purposes of civil aviation."