AIR NEW ZEALAND

Submission

Ministry of Transport

Civil Aviation Act 1990 and Airport Authorities Act 1966 Review

31 October 2014

Executive Summary

i. Air New Zealand welcomes the opportunity to participate in the review of the Civil Aviation Act 1990 and the Airport Authorities Act 1966. We applaud the Ministry of Transport for undertaking this valuable process. Furthermore, we recognise the complexity of the process, the diversity of the participants, the need to future proof this technology sensitive sector and the prime importance of safety and security in the system.

About Air New Zealand

ii. The Air New Zealand Group in New Zealand consists of Air New Zealand Ltd, Mt Cook Airlines Ltd, Air Nelson Ltd, Eagle Airways Ltd and Safe Air Ltd.

iii. As the only New Zealand registered carrier conducting jet and turbo prop operations, engineering and maintenance, training for aviation professionals and security operations, Air New Zealand has unparalleled exposure and interaction with aviation legislation in New Zealand.

iv. The airline has developed (over a 75 year period) deep industry expertise. Airline personnel frequently participate in regulatory panels on a variety of matters both domestically through the Civil Aviation Authority, but also internationally through the International Civil Aviation Organisation (ICAO) and the industry's global body, the International Air Transport Association (IATA).

v. As the consultation document notes, aviation is a highly regulated industry in terms of economic regulation as well as safety and security regulation. Many parts of Air New Zealand's commercial operations are reliant on the state conducting sovereign bilateral exchanges so that the airline may carry on its business. The degree and complexity to which sovereign interests and actions influence the international civil aviation sector is not matched by any other sector or industry.

vi. It is in Air New Zealand's strong interest to ensure this review sees the civil aviation system fit for purpose for the next 20 years of its operation and beyond.

Key themes

v. This submission should be read in the context of two key themes which Air New Zealand strongly supports.

vi. Firstly, the civil aviation system must have as its prime focus the maintenance and enhancement of safety; this must permeate throughout the system in all respects. This involves a true adoption of ICAO and industry developed concepts around Just Culture, risk based operations and the flexibility to adopt technological improvements with ease. It also requires a strong, respected and well-funded safety regulator in the form of the Civil Aviation Authority and the Director.

vii. Secondly, the legislative underpinning of the system in relation to economic regulation must reflect a modern market place, technological flexibility and private corporate ownership. The level of sophistication (regarding both commercial and system innovation) of the larger participants, such as airports and airlines, should also be recognised. Where these participants can contribute to the management and operation of the system they should have the legislative ability to do so.

viii. The second theme however, must be balanced against the realities of an international system which is still dominated by state actors and sovereign interests. Competition should be fostered, promoted and also measured against reciprocity and international comity in order to achieve the best outcomes for the New Zealand economy.

Key positions contained in this submission are summarised briefly below.

Part A: Statutory framework

ix. Support for a consolidated legislative framework under one Act for the civil aviation system including the Airport Authorities Act.

x. Support for the development of a clear purpose statement and objectives with the maintenance and enhancement of safety as the key driver of the system.

xi. Support for the retention and expansion of powers under of the Director of Civil Aviation.

Part B: Safety and security

xii. Support for the retention of the current medical certification framework.

xiii. The review of the Rule making process including the ability for the Director to make administrative and technical Rules with ease and efficiency. This also includes applying the philosophy outlined in the Swedevia McGregor Report 1988 so that Rules may be made and implemented quickly in order to meet this dynamic industry's needs.

xiv. The implementation and statutory recognition of a 'Just Culture' framework within the Act to enhance safety and address issues of trust and confidence for both the regulator and participants.

xv. Support for the enhancement of Avsec's powers in order to enhance safety (namely broader constabulary powers) and the opening up of contestability for some aviation security services to parties other than Avsec.

Part C: Carriage by air – airline liability.

xvi. Support for the continuation of liability regimes in international air carriage.

xvii. Support for the removal of the reverse evidential burden within the current domestic airline liability regime. Passenger rights are currently supported and protected by other legislation and common law remedies. If a regime is to remain in force Air New Zealand supports the status quo and education initiatives.

Part D: Airline licensing and competition.

xviii. A reduction in license processing times including through process improvements and the devolution of the Ministers' approval powers.

xix. Retention of the current regime in relation to charter services in order to maintain the credibility of bilateral agreements and to preserve flexibility regarding international reciprocity.

xx. Support for the need for change in the process of international alliance authorisations but the maintenance of the Ministry of Transport as the most appropriate and experienced regulatory body for such applications

Part E: Airports

xxi. Strong support for the removal of redundant provisions in the Airport Authorities Act 1966, specifically the removal of the right to "set prices as it [the airport] thinks fit" and general support for recalibration of thresholds triggering regulation and consultation (primarily based on passenger movements).

Part F: Other matters

xxii. Support for the maintenance of Airways' statutory monopoly.

xxiii. Support for a minor change to the recognition of the Cape Town Convention within the Act which would promote efficiency in financial processes.

About this document

xxiv. This submission follows the format set out in Appendix 1 of the consultation document. Where Air New Zealand have answered and/or commented on questions, those questions are reproduced in full. Where appropriate, the preferred option has been indicated with an 'x'. Please note that where a question was considered but Air New Zealand chose not to answer or comment, the question has been removed in its entirety.

xxv. For the purposes of this document, 'Act' refers to the Civil Aviation Act 1990 (unless stated otherwise). 'CAA' refers to the Civil Aviation Authority.

xxvi. Any queries or requests for more information regarding this submission should in the first instance be directed to**:**

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Part A: Statutory Framework

Question A1a: Which option do you support?

☒ **Option 1: Amalgamate the Civil Aviation Act and the Airport Authorities Act**

Option 2: Separate the provisions in the Civil Aviation Act into three separate Acts:

- an Act dealing with safety and security regulation
- an Act dealing with airline and air navigation services regulation
- an Act dealing with airport regulation

Option 3: Status Quo – Civil Aviation Act and Airport Authorities Act maintained.

Some other option (please describe):

1. Air New Zealand supports Option 1: Amalgamate the Civil Aviation Act and the Airport Authorities Act. There should be a single Act where all substantive aviation matters in New Zealand are found. It should be easily navigable, reflect a modern civil aviation system with many component and participants.

Item A2: Purpose statement and objectives

Question A2a: Do you support the concepts listed in Part A, paragraph 29 for inclusion in a purpose statement?

Subject area of the Act or Acts	Purpose	Do you support?
Safety and security related	To contribute to a safe and secure civil aviation system	**Yes**
Economic - airport related	To facilitate the operation of airports, while having due regard to airport users	**Yes**
Economic – airline related	To provide for the regulation of international New Zealand and foreign airlines with due regard to New Zealand's civil aviation safety and security regime and bilateral air services	**Yes**
	To enable airlines to engage in collaborative activity that enhances competition, while minimising the risk resulting from anti-competitive behaviour[1]	**Yes**
	To provide a framework for international and domestic airline liability that balances the rights of airlines and passengers	**Yes**

[1] Depending on the outcome of the review, international air carriage competition provisions may be moved out of transport legislation and into the Commerce Act 1986.

Question A2b: What other concepts do you think should be included in the purpose statement of the Act or Acts? (Please specify)

2. The enhancement of safety in civil aviation cannot be overstated. While the above may capture safety at a high level, Air New Zealand suggests an additional sentence reinforcing the importance of a safe and secure aviation system. For example:

   To contribute to a safe and secure civil aviation system, with the maintenance and enhancement of safety as the prime focus and not the allocation of blame.

3. This aligns with ICAO principles but equally should not limit prosecutorial powers necessary under the Act.

4. In addition (and as this review reflects) technology is a major driver of the civil aviation system and can change rapidly offering flexibility, efficiency and enhanced safety. Air New Zealand suggests that a recognition of technology be reflected in the purpose section as a legislative touch stone for decision makers. For example:

   To ensure the civil aviation system is fit for purpose in a modern aviation era and responsive to technological advancements in the sector.

Question A2c: Should the revision of statutory objectives align with the purpose of the Act or Acts?

5. Yes.

Question A2d: Do you support the revision of statutory objectives to include a requirement that decision-makers (for example, the Minister, the CAA, and the Secretary of Transport) be required to carry-out their functions in an effective and efficient manner?

6. Yes. As a commercial operator certainty and efficiency are critical enablers to much of Air New Zealand's activities. Clarity and effectiveness of decisions and decision making processes are equally important in a highly regulated 'safety first' industry. Specific recognition of these in the form of a legislative expectation is highly appropriate.

Item A3.4: Independent statutory powers

Question A3.4: Should independent statutory powers continue to reside with the Director of Civil Aviation?

7. Yes. Air New Zealand strongly supports the continuation of the current regime and supports the Ministry recommendation at Part A, paragraph 85 of the consultation document. The comments made by the Ministry in Option 1 on page 31 of the consultation document provide sufficient reasons for this retention.

General commentary on Directors' powers:

8. The Swedavia McGregor Report 1988 was the precursor for the replacement of the 1953 Regulations with the Civil Aviation Act 1990. The Swedavia McGregor Report was based on objectives that have

view been diluted over time. Previously, changes to the 1953 Regulations were required to go through Parliament. The Swedavia McGregor Report concluded that the power to change aviation operational "Rules" needed to be quicker and vested in the Minister.

9. The Civil Aviation Act 1990 allowed for the creation of Civil Aviation Rules (initially by 1995, then extended to 1997) and also created certain powers for the Director making the system more nimble and responsive. The bureaucratic process following submissions to the Ministry of a Notice of Proposed Rule Making (NPRM) and a Rule change have (in the past decade) made the system less nimble. At present this process does not meet the needs of the industry.

10. Many Rule changes are simple and/or purely technical. Such changes are often covered by an "omnibus rule".

11. For efficiency, a discretionary power to make simple administrative Civil Aviation Rule changes should be also vested in the Director.

Part B: Safety and security

Entry into the system

Medical Certification

Item B3: Certification pathways and stable conditions

Question B3a: Which option do you support?

Option 1: Status quo – two pathways for medical certification

Option 2: Develop a third pathway for medical certification for individuals affected by stable, long-term or fixed conditions.

☒ **Some other option** (please describe):

1. Air New Zealand is neutral on this issue.

2. For the 2012/13 financial year 748 out of 8348 applications were certified via the accredited medical conclusion (AMC) pathway. 280 of these 748 AMC applications were for fixed or stable medical conditions.

3. There are two options of how to administratively treat these stable medical conditions.

4. The first option is the introduction into the medical certification process equivalent to that of the US Federal Aviation Administration's Statement of Demonstrated Ability (SODA), as outlined in the consultation document.

5. The second option is that medical examiners use the provisions of the current legislation and submit AMCs for medical conditions that are of aeromedical significance only. Medical conditions that are stable, not progressive and have been assessed as 'fit' following an initial AMC can be viewed as being no longer of aeromedical significance. The example in the consultation document (the pilot who has lost a finger) would no longer be judged to have a medical condition of aeromedical significance unless there was a significant change to that condition or the pilot's operational environment. In this scenario future AMCs would no longer need to be submitted.

6. The SODA process may have an advantage by formalising the process for these 280 annual applications but has the disadvantage of adding further complexity to the certification system. This significant complexity would only potentially advantage a small number of pilots who represent little additional medical risk to the system.

7. To address this issue without large scale change or increased complexity the CAA could outline clear guidelines for medical examiners for the use of AMCs. This could reduce the number of AMCs for straight forward or routine conditions that may not meet the threshold for conditions of aeromedical significance.

Question B3b: What savings would likely occur from a third pathway to medical certification?

8. Air New Zealand suggests is that any savings would be small.

9. There is insufficient information about CAA costs directly attributable to AMC related medical certification.

10. There would be potential savings in the CAA's administration and medical officer time in not having to process an estimated 280 AMC applications per year.

11. Possible savings would also accrue for applicants who have straight forward or routine medical conditions. These participants would have the benefit of a medical certificate being issued immediately after a medical examination (decreasing the potential for operational disruption). These participants would also benefit personally from this increased certainty.

Item B4: Provision for the recognition of overseas and other Medical Certificates

Question B4a: Should the Act allow the Director to recognise medical certificates issued by an ICAO contracting State?

Yes

Yes, but only those without any operational endorsements issued by States with a robust aviation medical certification regime

☒ **No**

12. No. Air New Zealand would not favour this change.

13. The potential benefits of mutual recognition of overseas medical certificates have been stated as:

- Reduced compliance costs for pilots operating internationally;
- Promotion of a bilateral approach to aviation medical certification; and
- Facilitation of NZ's pilot training industry (for trainees in countries without resident NZ Medical Examiners).

14. Air New Zealand can appreciate the desire to achieve international consistency in this area. However, we believe this to be unworkable in practice. Although states are all working within the same ICAO Annex 1 framework there is considerable variation and lack of harmonisation in the application of medical standards by regulators. For example New Zealand CAA medical standards and their application are similar to Australia's Civil Aviation Safety Authority (CASA) with the exception of colour vision standards (where their application is quite different from other comparable regulators e.g. CAA UK).

15. There would be difficulty in deciding the criteria to determine which overseas regulators would be acceptable to the Director for the purpose of issuing medical certificates for use in New Zealand.

16. There is a challenge in determining and providing a mechanism that an overseas regulator would use in order to advise the Director (and an operator) of a change of medical condition for a medical certificate holder. A New Zealand CAA medical examiner or airline medical officer (not a medical examiner under the overseas regulator) would find it administratively challenging to inform the overseas regulator that a certificate holder was unfit.

17. Protections for medical examiners and practitioners under the Act are also an issue. For example, the New Zealand Act provides protections for medical examiners and practitioners particularly for breaking confidentiality. These protections may or may apply under overseas regulations to New Zealand aviation medicine practitioners.

18. There is potential for a consistent single regulatory framework at a regional level. For example, an Australasian regulator with harmonised medical standards, medical certification systems and support within each state. However, this would need to be balanced against the complexities in managing consistency in quality and enforcement standards between states.

Question B4b: Should the Director of Civil Aviation or the State that has issued the medical certificate provide oversight?

20. Air New Zealand does not see this as an 'either/or' option. The issuing State must provide oversight of its medical examiners and medical certification system. The concern is the level of incentive for an overseas regulator to manage concerns about certificate holders who operate within New Zealand.

21. The Director also needs the ability to provide oversight and use the provisions in Part 2A to maintain the safety of the New Zealand civil aviation system.

22. The potential issues are:

- How the differences in potential actions by the respective regulators are managed;
- Who has ultimate authority in New Zealand; and
- The extent of an external regulator's powers outside its normal jurisdiction.

23. If the aim is to promote bilateral/multilateral approaches to aviation medical certification, as stated earlier, this should be considered within the framework of a larger regional regulator.

24. In the present regime, if this step was to be considered the Director should provide oversight and have final authority, in addition to the oversight provided by external regulators.

Question B4c: If you agree that the Director of Civil Aviation should provide oversight, what provisions in Part 2A of the Civil Aviation Act should apply?

25. Air New Zealand's review of the matter indicates significant issues in the absence of an agreed framework between regulators.

26. If it was decided to accept overseas medical certificates, provisions that apply to the issue of a New Zealand CAA medical certificate are not relevant and should not apply to overseas participants. Specifically these include Sections 27B, 27D, 27E, 27F, (parts of) 27G, 27J, 27K, 27L, 27M, 27Q.

27. Part 2A would need significant review. In summary:

    27.1 Section 27(A**) Interpretations** – Section needs to be redrafted so that interpretations can apply to holders of external medical certificates.

27.2 Section27(C**) Changes in medical condition of a licence holder** – Section needs to be redrafted to cover:

- Holders of external medical certificates (especially regarding the requirements for a certificate holder to advise the Director);
- Requirements for medical examiners and New Zealand registered medical practitioners to inform the Director; and
- The indemnity protections in the Act for medical examiners and practitioners.

27.3 There would need to be bilateral agreements that cover overseas regulatory authorities promptly informing the Director of any changes on the medical condition of a licence holder. As detailed below there are significant issues if there is disagreement between the Director and the issuing regulator over the significance of a licence holder's medical condition.

27.4 Section 27(G) **General directions and emergency directives** – General directions would not generally apply to overseas medical certificates, except where they are relevant to Section 27(C). The Director may need the ability to issue an emergency directive in the case of an urgent systemic issue related to the issuance of medical certificates by an overseas regulator.

27.5 Section 27(H) **Investigation of medical condition of licence holder** – The Director would require the powers in sections 1-4 to apply to overseas medical certificates. However, Section 27(H) (a) (iii) (the monitoring of aviation medical examiners) is the responsibility of the issuing overseas regulator.

27.6 The 60 day timeframe in Section 27(H)(2) relating to overseas medical certificates may not apply.

27.7 Section 27(I) – **Revocation, suspension, amendment, and surrender of medical certificates** – These powers (if exercised by the Director) would require rapid notification to the issuing regulator. This is an area of significant complexity especially if the New Zealand CAA and the issuing regulator disagreed over any actions taken by the Director. This would leave the licence holder in a difficult position and open both regulators to appeal and litigation.

27.8 Section 27(N) –**Delegation of Director's powers under this Part to medical practitioners who are employees of the Authority** – Section needs to be redrafted to extend delegated powers to the extent agreed to cover overseas medical practitioners with mutually recognised powers.

27.9 Section 27(O) –**Delegation of Director's powers under this Part to medical practitioners who are not employees of the Authority** – Section needs to be redrafted to extend delegated powers to the extent agreed to cover overseas medical practitioners with mutually recognised powers.

Item B5: Medical Convener

Question B5a: Which is your preferred option?

☒ **Option 1:** Status quo continue: Medical Convenor retained (Ministry of Transport preferred option)

Option 2: Status quo continues and a separate fee for the Medical Convener is charged to applicants

Option 3: Disestablish Medical Convener role

Other option: please describe

28. Air New Zealand supports Option 1: status quo, Medical Convenor retained and also note below an opportunity for enhancement of the system.

29. The reasons for this include those outlined in the consultation document in Part B, paragraph 96 of the consultation document.

30. An enhancement to the Medical Convenor (the Convenor) process would be the establishment of an expert panel convened to review complex cases. This would allow for the Convenor to access relevant medical experts to assist in making (or reviewing) decisions. It may also have the advantage of maintaining timely responses to these reviews.

Offences and penalties

Item B6: Penalty levels

Question B6a: Which is your preferred option?

☒ **Option 1:** Status quo – penalty levels remain unchanged

Option 2: Increase penalty levels

Other option: Please describe

31. Air New Zealand supports Option 1: status quo, penalty levels remain unchanged. There are a very low number of prosecutions currently.

Item B7: Acting without the necessary aviation document

Question B7: Which is your preferred option?

Option 1: Status quo

Option 2: Amend the provision to separate out the offences (Ministry of Transport preferred option)

☒ **Other option:** Please describe

32. Air New Zealand simply notes that it is important to establish evidence to prove the defendant had knowledge of their wrongdoing and this approach fits the Just Culture framework.

Appeals

Item B8: Appeals process

Question B8a: Should a specialist aviation panel or tribunal be established in addition to the current District Court process?

Yes

☒ **No**

33. No. Given the small volume of appeals there does not appear to be an issue.
Questions B8b: How much would you be prepared to pay for a panel review?

34. See above.

Rules and regulatory frameworks

Item B9: Rule making

Question B9a: What enhancements could be made to the rule-making process?

35. The Swedavia McGregor Report 1988 was the precursor for the replacement of the 1953 Regulations with the Civil Aviation Act 1990. The Swedavia McGregor Report was based on objectives and have been diluted over time. Previously, changes to the 1953 Regulations were required to go through Parliament. Swedavia McGregor Report concluded that the power to change aviation operational "Rules" needed to be quicker and vested in the Minister.

36. The Civil Aviation Act 1990 allowed for the creation of Civil Aviation Rules (initially by 1995, then extended to 1997) and also created certain powers for the Director, making the system more nimble and responsive. The bureaucratic process following submissions to the Ministry of a Notice of Proposed Rule Making (NPRM) and a Rule change have (in the past decade) made the system less nimble. At present this process does not meet the needs of the industry.

Question B9b: Which is your preferred option?

Option 1: Status quo – no change

Option 2: Power for Civil Aviation Authority Board (CAA Board) to make temporary rules

☒ **Option 3:** Power to enable the Minister to delegate some of his/her rule-making powers to the Director or CAA Board

Option 4: Creation of a new tertiary level of legislation (e.g. Standards)

Some other option: Please describe

37. Air New Zealand supports Option 3: Power to enable the Minister to delegate some of his/her rule-making powers to the Director or CAA Board.

Question B9c: If you prefer Option 3 (Delegation of some of the Minister's rule-making powers to the CAA Board or Director), what matters should the Director or CAA Board be delegated to make rules for?

38. Many Rule changes are simple and/or purely technical and often covered by an "omnibus rule". For efficiency a discretionary power to make simple administrative Civil Aviation Rule changes should be also vested in the Director.

Question B9d: Is a 'first principles' review of rule-making required to consider the out of scope options (paragraphs 183 – 187) in more detail?

☒ **Yes**

No

39. Yes. Air New Zealand believes a review is warranted but not at the expense of the implementation Option 3 (above) as soon as possible. Any review needs to look at the longer term future state which would require a significant project to be developed and executed.

Item B10: Possible amendments to Part 3

Question B10: What matters should the Minister take into account when making rules? Please specify and state your reasons.

40. Air New Zealand agrees a more generic statement would give flexibility to the Minister and be more conducive to a robust decision making process. For example a statement could include safety, security, economic development and environmental interests. Recent events have shown that it is not possible to predict what will occur in the future and flexibility in the system is therefore paramount.

Information management

Item B11: Accident and incident reporting

Question B11a: What are the barriers to fully reporting accidents and incidents to CAA?

41. The following comments relate to perceptions of industry participants, which include individuals. Information management and reporting rely primarily on individual action. Air New Zealand notes that it has confidence in the CAA as a credible regulator. The comments below are aimed at giving voice to some industry perceptions to ensure a robust review and consultation process, and ensure the development of a regime that results in 100 per cent of relevant incidents being reported. They are provided in good faith and without prejudice and reflect the nature of the many discussions Air New Zealand has had with regulators over recent years.

42. **The Act itself** - Unfortunately a significant section of the Act (particularly Part 5) is adversarial. There is more wording around offences than there is around the functions, powers and duties of the various participants within in the civil aviation system. This in itself tends to influence the behaviour of the regulator. The words in Part 5, Section 43 are not aligned with how a Just Culture regime applies.

43. **The lack of a Just Culture approach** - Part of the change within the global aviation industry to help increase the level of reporting over the past decade has been the introduction of Just Culture. At present, while the regulator openly talks about Just Culture or about adopting Just Culture, this is not reflected within its current operating framework.

Question B11b: What could be done to overcome the barriers in Question B11a?

44. **Protection of data** – Develop a new section on the protection of data, as per the proposed changes by ICAO to Annexes 6, 13 and 19 relating to the protection of safety information. It is recommended that this is incorporated specifically under Part 2 of the Act. The protection of data should also include the data within a flight data analysis programme.

45. In addition, a separate section should be developed under Part 2 of the Act that gives the Director further powers to prevent the release of safety data, when in his/her view the State Safety Programme (or reporting from the aviation community) could be compromised through the release of such safety data.

46. **Changes to Part 5, Section 43** – It is important that Part 5, Section 43 is amended to remove the word 'omission'. An omission is considered an element of human error under a Just Culture regime. The wording in Section 43 should also reflect those used in the proposed changes to the ICAO Annexes: gross negligence, wilful misconduct or with criminal intent.

47. **Adoption of Just Culture** – Incorporate a new section into the Act that introduces the principles of Just Culture into the investigation of aviation related accidents and incidents. This would also bring about a level of confidence within industry that would help overcome some of the barriers that currently exist to reporting.

48. Just Culture is not simply a statement, it is a pillar of Safety Management and should be a pillar in the State Safety Programme (SSP). It should be integral to all processes and correct application is essential. Personnel who are responsible to assess or investigate safety related events or are part of determining what outcome is appropriate to address human behaviours need working knowledge of how to identify human behaviour as well as how organisational influences can affect those behaviours. This requires a transparent model to be constructed, training provided and all stakeholders to follow the model. The application of Just culture should be transparent to the people involved in any event or incident.

49. **Risk Based vs Rule Based regulation** - In the future CAA need to make significant change if they are to have an SSP that will be able to effectively regulate the various Safety Management Systems that will be running within the country. To have a successful SSP they will need to adopt a risk based approach. The rule based regulatory type approach that currently exists in New Zealand needs to change. The principals of being a risk based regulator could be laid out in Section 6A of the Act. Documenting the change from rule to risk based would give the change visibility to industry and also influence CAA in how it goes about its regulatory duties. A risk based approach will provide better engagement with and from industry, not simply limited to the reporting of accidents and incidents. Part of that change should include the requirement to manage the risk of hazards within the aviation industry.

50. **An improved industry reporting system** - A voluntary reporting system should be introduced and promoted that enables industry (or any person for that matter e.g. tanker drivers that are on the ramps as much as aircraft) to report on safety issues or hazards that are not covered by the mandatory reporting requirements. There should also be a confidential reporting component to help complement the voluntary reporting system. There should be separation from the mandatory reporting system documentation and an easily accessible web portal used for voluntary reporting.

Item B12: Accessing personal information for fit and proper person assessments

Question B12a: What information does the Director need to undertake a fit and proper person assessment?

51. The Director needs sufficient background information to conduct a comprehensive check and a thorough risk assessment.

52. The current Ministry of Justice checks only reveal a list of offences for which the individual has been convicted of or has been granted access to diversion procedures (which requires them to acknowledge guilt). NZ Police hold a much wider array of information that could provide evidence of patterns of behaviour indicating a potential threat to aviation. However, Police checks are not currently undertaken. In addition, NZSIS conduct their own assessments however it is believed that in these instances the threshold is set reasonably high with regards to what constitutes a person posing a threat to aviation.

Question B12b: Should the Director be able to compel an organisation to provide information about a person in order to undertake a fit and proper person test?

☒ **Yes**

No

53. Yes - Robust checks should be undertaken to prevent persons entering the system with a dubious history or who have shown a pre-meditation to serious offending which has the potential to pose a risk to the security of the New Zealand aviation environment.

General comment on Transport Accident Investigation Commission (TAIC)

54. The Ministry has proposed an option to consolidate the Airport Authorities Act and the Civil Aviation Act into one statute. Air New Zealand supports the concept of civil aviation system under one piece of legislation as the most logical and efficient approach.

55. As part of the legislative consolidation mentioned above the Ministry should consider the position of TAIC as aviation accident investigator. There is merit in having a dedicated an independent aviation specific investigator. This would leave TAIC resource available to focus on its primary work of land based transport accidents and also allow for the prominence of aircraft expertise in aviation accident investigations.

56. Any changes to the civil aviation system as a result of this review should consider the creation of an independent aviation accident investigative body formed under a new piece of legislation. This new legislation would then encompass the entire civil aviation system in New Zealand.

57. Air New Zealand would be pleased to contribute and engage further on this matter.

Security

Item B13: Search powers

Question B13a: Should the Aviation Security Service (Avsec) be allowed to search unattended items in the landside part of the aerodrome?

☒ **Yes**

No

58. Yes – Air New Zealand agrees that Avsec should have the power to search unattended items. This needs to be balanced with resourcing requirements to ensure the expectation is practically achievable. Air New Zealand suggests Avsec powers extend to the terminal forecourt and landside areas within terminals.

Question B13b: Should Avsec be allowed to search vehicles, in the landside part of the aerodrome, using non-invasive tools such as Explosive Detector Dogs (EDD)?

☒ **Yes**

No

59. Yes - It is accepted that there is a need to respond to potential threats as soon as and on that basis Air New Zealand agrees that Avsec should be provided with the necessary powers to evaluate potential threats quickly and efficiently. However, as per comments above, the scope of the area expected to be patrolled should be limited for practical reasons.

60. It is noted that NZ Police has reduced staff stationed at New Zealand airports. This further justifies the need for Avsec to have the capability of quickly assessing vehicles and their occupants potentially posing a threat to aviation security and escalate to Police if required.

Question B13c: Do you support the use of EDD within a landside environment of an airport, including public car parks and airport terminals generally? In particular, do you consider it appropriate for EDD to be used around people, including non-passengers?

☒ **Yes**

No

61. Yes – Air New Zealand supports the use of EDD patrols within landside environments adjacent to airport operational areas and also around people (including non-passengers) for the following reasons:

    61.1 The purpose of such patrols is to protect intrusion into airport security areas and also to detect and prevent actions intended to threaten airport and airline operations (including persons using that aviation environment).

    61.2 The currently imposed security measures applied to persons and vehicles entering into airport air-side areas are designed to detect potential threats to the environment before permitting those persons and things access to it. The extension of Avsec's powers to search landside areas and persons are considered to be logical and appropriate. Such an extension of Avsec's powers is further justified in light of the quickly developing international and domestic security concerns.

General comment - Explosive Detector Dog Unit deployment

62. EDD units are an effective risk evaluation tool, however they should not be used as the sole response and evaluation method. Internationally EDD units have always been seen as *an aid to the physical search*, in the same way as Explosive Trace Detection is used.

63. An EDD's focus and attention can be easily affected for a variety of reasons. The fact that an EDD does not positively indicate on unattended or suspect items does not necessarily mean that IEDs or other dangerous materials are not concealed within the item.

64. Where it is known that items are owned or being carried by Air New Zealand passengers, wherever possible, Avsec should endeavour to have an Air New Zealand representative present for searches of checked baggage. Under CAA Rules the carrier is deemed to have accepted responsibility for those items.

B14 Dangerous Goods:

65. Air New Zealand supports the proposition that Avsec should have the lawful right to seize dangerous goods both prior to carriage on flights and when such goods are detected at the conclusion of flights.

66. There is frequent evidence of passengers attempting to carry dangerous goods, knowing that they are prohibited, thereby posing an unacceptable risk to air operations. The suggested extension to Avsec powers will serve to reinforce compliance with dangerous goods rules. The extended powers will also dissuade those intending to flaunt dangerous goods rules from travelling on aircraft. It is important that Avsec assume responsibility for the storage and/or disposal of dangerous goods after they have been seized.

Issue B15: Security check procedures and airport identity cards

Question 15: Do you have any comments regarding Security Check Determinations (sections 77F and G) and the Airport Identity Card regime?

67. Air New Zealand contributes to the production and management of identity cards for its own staff and contractors. Therefore it has a strong interest in ensuring the integrity of the system and its purpose of protecting the airside environment in which it operates.

68. Air New Zealand supports the proposition that the Act should include an offence relating to persons being in a security or security advanced area without authorisation. We are aware that the identity card requirements are occasionally flaunted, thereby putting at risk the security package protecting our operations. It is equally agreed that the propositions detailed in Part B, paragraphs 321.1 - 321.5 of the consultation document should be implemented.

General comments on Airport Identity Card regime.

69. The recent replacement of the Security Access Manager SAM identity card software system has proven to be poorly designed software not specifically developed for identity card production. Large numbers of issues arose on its release. While many improvements have been made, the process is not as effective it as could be and production is much slower than with the previous system.

70. Air New Zealand has a strong desire to develop its own identity card software which would require the service to be contestable. Clearly Air New Zealand would need to meet the strict CAA requirements to maintain the integrity of the system. If such a step was approved Air New Zealand would incorporate the automatic assignment of access control rights during the production process.

71. The Temporary Identity card process introduced by Avsec has proven to be equally arduous and attracted a charge for the first time. Air New Zealand believes that the airline could manage this process more effectively with less delays in the daily issuance of ID cards at a significantly reduced cost. This is important for the efficiency of aviation operations, particularly during emergencies and exercises where a large number of people need to be processed quickly.

72. Air New Zealand believes that such processes should be able to be produced by major industry participants who currently suffer from the ineffective systems used by Avsec as a result of constrained resources and legislative restrictions.

Item B16: Alternative terminal configurations

Question B16a: Should alternative airport designs or configurations be allowed in the future, for example, a common departure terminal?

☒ **Yes**

No

73. Yes – Alternative airport designs should be allowed to be considered in the future, however there are serious risks that need to be mitigated before considering common departure terminals.

74. The mixing of departing passengers and non-passengers will increase the total number of persons entering into the system requiring security screening, significantly increasing the resourcing requirement and hence the costs of the system. At present costs of screening are met through the passenger levy payable by airlines. Mixing of passengers and non-passengers would require a significant reform of the funding system to ensure that other participants in the sector are meeting their fair share of the costs of the system.

75. Experience has shown that non-passengers include retail and other service personnel, taxi drivers and other persons who elect to visit the airport for reasons other than travel.

76. This proposal will increase patronage to airports' shopping precincts. However, it will also increase risk to the aviation system by adding significantly more people into the airside environment, stretching the resources of security agencies. Those intending to test the security system will exploit the stretched resources and the confusion it perpetuates. As a result, there is greater opportunity for illegal substances and weapons to be passed between passengers and other persons.

77. ICAO Annex 17 Rules prevent the mixing of departing and arriving passengers. Auckland International Airport are considering sharing security screening resources between Domestic and International services in their future terminal developments with an innovative use of multi-doors feeding passengers into the screening point, whilst ensuring the separation of those services.

78. The United States Transportation Security Administration (TSA) require that passengers identified as 'selectees' be secondary screened and escorted directly onto their intended flights. Facilities will need to be available to enable that requirement to be met. The TSA also frequently place additional security requirements on airlines which must be implemented immediately. These will have a significant impact on airports if, for example, United States bound passengers to be segregated from all others (as they have done in the past in response to terrorist threats or incidents).

    Question B16b: If yes, how should processing costs be funded?

79. As noted above, if mixing of passengers and non-passengers were allowed there would need to be a fundamental review of the funding system to ensure all participants in the system and beneficiaries were meeting their fair share of costs.

    General Comment on the Contestability of Security Screening Services

80. The CAA has worked towards progressively restructuring Avsec for the purpose of improving efficiency and reducing expenditure. At the same time new charges have been implemented on identity card production and card issuance. Labour charges have increased in relation to the provision of ancillary services delivered by Avsec.

81. It is now appropriate to make those services contestable so that airlines and airports are able to challenge those costs and to engage alternative services capable of meeting the same service delivery and compliance standards.

82. Airline compliance with CAA Rules and related guidance material are encapsulated in Rule 108 for passenger services and Rule 109 for cargo services. Cargo screening services were made contestable with the introduction of Rule 109 in 2009. It is now appropriate to similarly make passengers security services equally contestable thereby enabling airlines to compare security delivery services against other professional service procedures.

83. Participants will then be able to truly balance the cost and equivalent security service equation from a variety of security service providers. Airlines would be more able to effectively manage their own costs at Security Designated Airports.

84. Air New Zealand has demonstrated its ability to drive innovation and design efficient, cost effective systems. With the recent changes to Avsec's charging regime, e.g. introduction of charges for temporary ID cards, inefficiencies in the system have been highlighted. Air New Zealand believes that it could manage such services more effectively at a lower cost. A legislative change is required in order to give other parties the chance to contest such services.

85. It is accepted and expected that Avsec would retain some security oversight at security designated airports and for the provision of patrols, incident response and constabulary powers. In fact, with other parties able to offer transactional security services, Avsec could focus limited resource on aviation policing

Part C: Carriage by air – airline liability.

General comments on airline liability

Part 9A – International carriage by air

1. Air New Zealand is proud of the high standard of service it provides to all of its customers, including those who suffer from delay and disruption. A key part of Air New Zealand's Go Beyond strategy is to ensure that customers are at the core of our business. While Air New Zealand is confident that its own delay and disruption policies meet or exceed the standards set out in Part 9B of the Act, it does not consider that separate rules of liability for domestic carriage by air are necessary, and that general consumer law, together with the airline's own delay and disruption policy, is sufficient protection for consumers.

Part 9B – Domestic carriage by air

2. Air New Zealand does not consider that domestic carriage by air rules regarding liability are necessary, and that general consumer law, together with the airline's own delay and disruption policy are sufficient protections for consumers.

Objectives and Criteria

3. Part 9B of the Act contains provisions relating to airline liability for passenger delay in a domestic air services. The Ministry notes that the primary objective of such provisions is to ensure that the interests of passengers are fairly balanced against the interests of airlines.[2]

4. In assessing the provisions, we have borne in mind the following criteria identified in the Consultation Document:[3]

- consistency with international convention requirements;
- alignment with New Zealand's consumer protection framework;
- flexibility and durability;
- balancing rights of airlines against rights of passengers;
- providing net benefits.

[2] Consultation Document, Part C, at [4]
[3] Ibid, at [5].

5. Based on the European experience with EU Regulation 261/2004, it is our view that the provisions should also be considered in light of three additional criteria:

    - clarity (to ensure legal certainty);
    - proportionality (the provisions should not impose an unfair or disproportionate economic burden on the air transport industry);
    - fairness (costs of compliance should be shared appropriately); and
    - aviation safety.

Air New Zealand's approach to delay

6. Air New Zealand has an internal Delay/Disruption Policy as part of its Customer Recovery initiative that provides for entitlements rerouting and refunding passengers where there has been significant delay or disruption. This extends to the repatriation of delayed baggage, which in most cases is able to be delivered to passengers within 24 hours. As part of this policy, we will typically reimburse customers for any direct expenses they may have incurred as a result of an uncontrollable delay.

7. Maintaining a comprehensive Delay/Disruption Policy is in the commercial interest of Air New Zealand, and is a key part of its commitment to keep "customers at the core" and "be the customers' airline of choice when travelling to, from and within New Zealand". Air New Zealand has received claims citing Part 9B of the Act, although all of these claims have been resolved before any formal dispute has been initiated. The remarkably low number of claims being brought under the current Part 9B provisions, despite the onus of proof being in favour of passengers, suggests that passengers who have experienced delays or disruption on Air New Zealand's flights are satisfied with the airline's response.

8. Air New Zealand also provides passengers with a number of opportunities to mitigate any losses that they will suffer if the nature of their trip means that they will be significantly impacted by cancellation or delay. Air New Zealand's new domestic fare proposition allows customers to book fares that are flexible as to the time and date of departure. Air New Zealand also encourages passengers to buy travel insurance at the time of their booking. This insurance covers expenses for amendment costs, travel delay and resumption of journey, and in our view is more likely to achieve net benefits than the liability provisions under the Act are. Finally, Air New Zealand advises all passengers that valuable and fragile items, commercial goods and business documents should not be included as checked in baggage order to avoid damage or costly replacement.

Item C1: The necessity of specific domestic airline liability provisions

Question C1a: Should air carriers continue to be presumed liable for loss caused by delay in exchange for a limit on that liability?

Yes

☒ **No**

Presumption of liability

9. No - Air New Zealand does not view specific airline liability provisions as necessary. As the Ministry observes, the liability regime distinguishes air transport from all other modes of transport, reversing the onus of poof for the cause of any delay and applying it to business as well as general consumer travel. As a starting point, Air New Zealand believes that a particular liability regime that provides different standard to a particular industry should only be adopted if there are clear and obvious reasons for such a difference. For the reasons set out below, the Ministry discussion document does not provide for such clear and obvious reasons.

Distinction between air travel and other consumer goods

10. As noted by the Ministry, an historic reason for a distinction between air transport and other modes of transport was likely due to the cost involved in air travel. However, as the Ministry will be aware, the real cost of air travel (i.e. as a proportion of the average wage) has decreased significantly since the introduction of the Act, and Air New Zealand now offers close to a million regional seats for under $100 each year. In addition, air travel often compares favourably with other modes of transport for comparable journeys by train, bus, car and/or ferry (for example, a fare from Auckland to Wellington by air can often be cheaper than rail, car or bus alternatives).

11. The Ministry also suggests that the consequence of a delayed air journey will have a higher impact on passengers than a delayed bus due to the time taken and distance travelled. However, it is not the mode of travel that results in a higher impact, but the ultimate arrival time and the reason for the journey.

12. In many cases it may be that the impact of delayed or cancelled air travel will cause less of an impact than other modes of travel. For example, because of the frequency of services provided by Air New Zealand between Auckland and Wellington, the cancellation of a service might simply mean that a passenger is moved to the next available flight, whether direct to Wellington or indirect. The same traveller using a bus or train service may be delayed until the next day, given the frequency of services.

13. Similarly, the reasons provided by the Ministry for maintaining the domestic airline liability provisions do not appear to distinguish domestic air travel from any other consumer good. Many consumer goods are both higher cost than air travel and can have a bigger impact on consumers if they do not meet the standards set out in the Consumer Guarantees Act (e.g. electronic goods, cars, white ware). The deterrence effect cited by the Ministry (i.e. from court costs and the burden of proof) equally apply to these goods, although there is no suggestion that a separate liability regime should apply.

Business travellers

14. Air New Zealand does not believe there is any clear justification for allowing business travellers to benefit from the domestic carriage liability regime. The Ministry claims that the liability provisions are required in order to ensure that passengers are not deterred from seeking compensation because of court costs and the shift in the burden of proof. However, business travellers have the resources to pursue court action in the unlikely event that such action is necessary. Business travellers also have a greater ability to mitigate against the costs of delays, by purchasing flexible fares or insurance to protect against the risk of delay. For these reasons, business travellers should be excluded from the liability provisions.

Alignment with liability for international air carriage

15. Air New Zealand does not consider that alignment with international air carriage is a reasonable basis for maintaining domestic carriage liability. One of the primary drivers for the international carriage regime was to provide a uniformity and predictability of rules across different legal jurisdictions (this also appears to be one driver of EU Regulation 261/2004). This is not necessary for domestic carriage, as in the absence of Part 9B all passengers are protected by the Consumer Guarantees Act.

If the provisions are to remain, they should be amended

16. If the Ministry concludes that the provisions are to remain and presume the liability of carriers for loss caused by delay, the provisions must also provide for express exceptions to and limitations on that liability.

17. Currently, air carriers are not liable for damage caused by delay if the carrier can prove that the delay arose: by reason of meteorological conditions; compliance with instructions, advice, or information given by an air traffic control service, or obedience to orders or directions given by a lawful authority; or if the delay was made necessary by force majeure; or was necessary for the purposes of saving or attempting to save life.[4]

18. These exceptions do not cover those instances where the delay or disruption is otherwise beyond the carrier's control, such as delays caused by extra-ordinary passengers, infectious diseases, unexpected

[4] Civil Aviation Act 1990, s 91Z(2)

flight safety concerns including technical issues and equipment malfunctions relating to aircraft, runways or ground handling services, or personnel strikes (including airline, airport and authority staff). While safety is always the absolute priority of Air New Zealand, the Act should not incentivise carriers to avoid potential liability by operating when there are marginal technical or safety concerns.

19. Given the uniquely technically complex and highly regulated nature of the air transport service industry, and in light of the fourth criterion (balancing the airlines rights against those of passengers), it is fair that carriers be exempt from liability for delay caused by the resolution of technical problems. This issue has also been addressed by the Court of Justice of the European Union (CJEU) in *Wallentin-Hermann v Alitalia,*[5] where the CJEU considered that "air carriers are confronted, as a matter of course in the exercise of their activity, with various technical problems to which the operation of those aircraft gives rise." The CJEU accepted that aircraft are subject to regular checks which are "particularly strict, and which are part and parcel of the standard operating conditions of air transport undertakings". The Court regarded the resolution of technical problems as being "inherent in the normal exercise of an air carrier's activity".

20. The case above helpfully illustrates not only that technical maintenance of aircraft is inherent and expected in commercial air travel, but also that remediation of technical issues in the interest of safety is paramount. Furthermore, it is clear that this important function of air travel can and must occur at any time during operations.

21. Penalising airlines for performing a function inherent to their operations, the wider civil aviation system and in the interests of safety fails to recognise the nature of this unique sector. At its extremes such a failure undermines the very reasons for the breadth, depth and frequency of regulation which are a hallmark of the industry.

Question C1b: The Civil Aviation Act delay provisions relate to passenger delay. Should there be a presumption of fault for delay in the carriage of baggage as well?[6]

Yes

☒ **No**

22. No - For similar reasons to those set out above, Air New Zealand does not consider that there should be a presumption of fault for delay in the carriage of baggage. We believe the scale of loss resulting from delayed baggage in New Zealand domestic air transport services is not large enough to necessitate an extension of the domestic carrier liability provisions to cover delayed baggage.

[5] Case 549/07 *Wallentin-Hermann v Alitalia,* 2008.

[6] Note that the Carriage of Goods Act appears to cover the loss of or damage *to* baggage but not losses/damages resulting *from* delayed baggage. So the passenger would need to seek redress under the Consumer Guarantees Act.

Item C2: The effectiveness of specific domestic airline liability provisions

Question C2a: Which is your preferred option?

☒ **Option 1:** Status quo and potential educations measures developed (Ministry of Transport preferred option)

Option 2: Strengthen the consumer protection provisions in the Act

☒ **Other option:** Please describe

Stronger consumer protection provisions not required

23. We agree with the Ministry's view that the scale of loss or damage from delays is not large enough in New Zealand to justify strengthening the provisions of the Act. As set out above, Air New Zealand already provides options for customers to mitigate against unexpected events, and any increase in liability will simply increase airline's costs, at least some of which will be passed onto customers. We are aware that the EU Regulation 261/2004 provides passengers with greater protection than the current provisions in the Act, however motivation for EU Regulation 261/2004 appears to have arisen largely from the desire for a common compensation system throughout member states, and a need to impose a minimum level of customer service standards on the emerging low cost operators. Air New Zealand does not consider that the same level of protection is required in New Zealand.

24. It is also worth noting these regimes can have unintended and (one could argue) absurd consequences. Ryan Air for example applies a universal EU261 surcharge to all passengers using their services. While consumer protection is the driver of such regulation, airlines will pass this risk (and associated cost) onto end consumers. The ultimate outcome is that all consumers and the economic contribution of aviation (reliant on the stimulation of passenger volumes) are negatively impacted.

25. We also note the absence of any similar legislative provisions in Australia, Canada and South Africa. In Canada, certain limited rights are defined in a voluntary airline code of conduct, Flight Rights, administered by Transport Canada. A political initiative to introduce a more extensive (and legally binding) 'Air Passenger Bill of Rights' has not progressed.

26. The Ministry considers that the lack of claims arising from Part 9B of the Act is because carriers have generally been proactive in offering compensation and are incentivised by the provisions to do so. The Ministry is also concerned that consumers are not well informed of their rights under the Act, in particular Part 9B.

27. Competition in the New Zealand domestic air transport market has seen customer benefits through greater quality of service. It is in the commercial interests of carriers (particularly in a social media era) to provide gestures of goodwill or compensation to passengers, especially when emotions are high (as in the case of disruptions or cancelations). Customer satisfaction, competition and brand protection are a far greater incentive than presumed liability under the Act.

28. We accept that passengers may be unaware of their rights under the Act and, if the provisions are to remain, agree with the Ministry's preferred option to maintain the status quo and explore potential educational measures. However, we are of the view that Air New Zealand's Delay/Disruption Policy

provides adequate redress for passengers affected by flight disruptions or cancelations such that even well informed passengers would seldom rely on their rights under the Act.

Item C3: The limit on liability for damage caused by delay

Question C3a: Which is your preferred option?

Option 1: Status quo – liability is capped at an amount representing 10 times the sum paid for the carriage

☒ **Option 2:** Revise the domestic liability limit for damage caused by delay

Other option: Please describe

29. Air New Zealand supports Option 2: Revise the domestic liability for damage caused by delay.

30. The provisions expose airlines to potential liability that is far greater than the fares passengers pay for their domestic tickets. Like any other operating cost, this cost is likely to be passed on to passengers through higher fares, which is inconsistent with the criterion of net benefits. Therefore, Air New Zealand's preferred option is to revise the liability limit for damage caused by delay in domestic carriage.

31. The current limit is equal to 10 times the sum paid for the domestic fare, which, depending on the route can range from $50 to $900 (i.e. liability of $500 to $9000).[7] By comparison, the liability limit for international air carriage is $8,508.04.[8] Given that international tickets can potentially cost well in excess of all domestic fares, we consider the liability limit for domestic carriage to be unreasonable.

32. Reducing the liability limit in the provisions from 10 times the domestic fare paid, to 5 times the domestic fare paid is consistent with the provisions' objectives and the criteria of fairness and reasonableness. This reduction would mean that a delayed flight from Invercargill to Kaitaia costing $900 (one way) would result in a maximum liability to the airline of $4,500 which, in our view, is ample compensation.

Question C3b: If you selected Option 2 for Question C3a, what do you consider would be an appropriate liability limit for domestic air carriage and why?

33. As above

[7] Consultation Document, page 108.

[8] The Montreal Convention limits liability for international carriage at 4,694SDR, which equates to approximately €5399 or $NZ8508.04.

Part D: Airline licensing and competition

International air services licensing

Item D1: Commercial non-scheduled services

Question D1a: Which is your preferred option?

☒ **Option 1:** Status quo – the Act continues not to specify the precise scope of 'non-scheduled services'

Option 2: Remove the need for case-by-case authorisation for services that do not follow a systematic pattern and provide explicitly for authorisation of supplementary services or a systematic series of flights (Ministry of Transport preferred option)

Some other option (please describe):

1. Air New Zealand supports Option 1: the status quo – the Act continues not to specify the precise scope of 'non-scheduled services'.

2. Air New Zealand notes that in many instances other jurisdictions have different criteria in the decision making process for the authorisation of charters. These can include whether there is an existing service, capacity, whether the charter operates in both directions and whether there is reciprocity between the states involved.

3. While the desire to simplify the process is understandable, it is unfortunately not reflective of the current global civil aviation environment.

4. Furthermore, the Ministry may not want to voluntarily limit its ability to deny a charter service. We note that there may be situations where although a carrier meets the criteria the Ministry applies in practice, there are other reasons the Government may not wish to authorise services.

5. From an operator's perspective (albeit New Zealand registered) Air New Zealand does not find the current process for charter authorisation cumbersome or an administrative burden.

6. Air New Zealand strongly opposes the concept of creating a new category of schedulised charters. We note that Paragraph 25, Part D of the Ministry's document states that "operators who do not hold a license may seek to offer a series of flights to meet seasonal demand". In the majority of cases, operations of this nature would have the circumvention of bilateral air service agreements as their main purpose. This is particularly so where these are offered to the public generally. It is also not reciprocal and would detract from the further expansion (and deepening) of New Zealand's global air connectivity through new and enhanced air service agreements.

7. It is likely there would be market distortion as there is high potential for 'capacity dumping'. None of the standard constraints in some bilateral agreements (commercially responsive services) exist.

Question D1b: Do you agree with the proposal to remove the need for authorisation of services that do not follow a systematic pattern?

Yes

☒ **No**

8. No - For the reasons outlined above.

Question D1c: If you answered yes to Question D1b, which approach to determining what is systematic do you prefer?

☒ **Approach 1:** use the same threshold for authorisation by the Secretary as is used for requiring an foreign air operator certificate (that is, more than two take-offs or landings within New Zealand in any consecutive 28 day period, or more than eight take-offs or landings within New Zealand in any consecutive 365 day period)

Approach 2: explicitly define systematic as some other number of services on the same route over a particular time.

9. Notwithstanding the above comments, Approach 1 is preferable.

Question D1d: If you selected Approach 2, how should the term systematic be defined?

10. Air New Zealand does not support a revised definition of 'systematic'.

Item D2: Allocation decisions for New Zealand international airlines

Question D2: Which is your preferred option?

Option 1: Status quo – the Minister of Transport continues to consider licensing decisions for New Zealand airlines that involve allocating both limited and unlimited rights

Option 2: Status quo and Secretary to consider licensing decisions for New Zealand airlines involving unlimited rights under delegation

☒ **Option 3:** Amend the Act to allow the Secretary to consider licensing decisions for New Zealand airlines involving unlimited rights (Ministry of Transport preferred option)

Some other option (please describe):

11. Air New Zealand supports Option 3: Amend the Act to allow the Secretary to consider licensing decisions for New Zealand airlines involving unlimited rights.

12. The need for the Minister to be involved in the allocation of these rights appears redundant. The licensing process should be simplified as far as possible.

Item D3: Public notice

Question D3a: Which is your preferred option?

Option 1: Status quo – the Act provides for a 21 day submission period when an application for a new, amended or renewed scheduled international air service licence by a New Zealand airline is received.

☒ **Option 2:** Amendment to the Act to:

- reduce the 21 day submission period, for example, to 14 days or 10 days
- require notice to be given only when limited air services rights for routes or capacity are being allocated.

(Ministry of Transport preferred option)

Some other option (please describe):

13. Air New Zealand supports Option 2: Amendment to the Act to reduce the 21 day submission period (10 days) and require notice only where air services rights are limited. The need for notification of unlimited rights appears redundant.

Question D3b: What is the appropriate submission period to balance the desirability of allowing third parties to make representations with reducing delay for airlines that are planning and implementing services?

14. As per the above, Air New Zealand supports the Ministry's suggested 10 day notice period for limited rights.

Item D4: Transferring licences

Question D4: Which is your preferred option?

Option 1: Status quo – Sections 87K and 87Y retained.

☒ **Option 2:** Repeal sections 87K and 87Y, and amend sections 87J,87Q and 87X (Ministry of Transport preferred option)

Some other option (please describe):

15. Air New Zealand supports Option 2: Repeal of sections listed as it appears these sections are now redundant.

Item D5: Airline operations from countries with which New Zealand does not have an Air Services Agreement

Question D5: Which is your preferred option?

Option 1: Status quo – the Act continues to provide for the licensing of foreign international airlines of countries with which New Zealand does not have an Air Services Agreement or similar arrangement (Ministry of Transport preferred option)

Option 2: Repeal – the Act ceases to provide for the licensing of foreign international airlines of countries with which New Zealand does not have an Air Services Agreement or similar arrangement

☒ **Some other option** (please describe):

16. Air New Zealand supports an additional option that retains the status quo and extends the right to New Zealand based carriers. It is useful for all carriers to have the ability to be licensed in New Zealand where an agreement has been negotiated and signed, but is not yet in effect. This is not specific to foreign carriers. In practice, an operator could only use the rights once both state parties had given effect to the agreement. However, a New Zealand license being issued where rights were awaiting implementation by the other state party or administrative procedures in New Zealand would increase the efficiency of the process.

17. Air New Zealand notes that this particular situation has arisen in relation to operating codeshare services on Singapore Airlines into markets where bilateral rights have been agreed but not yet implemented. The inability of the Minister to grant a license in these circumstances is an additional and unnecessary step.

International air carriage competition

18. Air New Zealand had made substantive comment on the appropriate regime, regulatory authority and other matter in Annex 1, attached. Below is a summary of key positions as they relate to questions in the consultation document.

Item D6: Authorisation of contracts, arrangements and understandings between airlines

Question D6a: Which is your preferred option?

☒ **Option 1:** Amended Civil Aviation Act regime – amend the existing provisions to explicitly require an assessment of costs and benefits, specify the process for making a decision, and provide for conditions to be attached to any approval

Option 2: Commerce Act – the authorisation of contracts, arrangements and understandings between airlines will be considered and made under the Commerce Act

Some other option (please describe):

19. Air New Zealand prefers Option 1: Amended Civil Aviation Act regime for assessing of international air services. Please refer to Annex 1 for extensive comment.

Question D6b: How do the two options meet the criteria in paragraph 96?

20. **Option 1:** provided an amended Part 9 incorporates the framework proposed, it will meet all of the criteria in paragraph 96.

21. **Option 2:** for the reasons set out above, the Commerce Act authorisation regime:

- does not adequately take account of New Zealand's international air services obligations and other acknowledged benefits of international alliances;
- results in substantial cost to both the government and applicants
- contains no explicit time frame for the decision making process; and
- creates an uncertainty of outcome that is likely to chill legitimate commercial activity.

Question D6c: What are the costs, benefits, and risks of the two options?

22. **Option 1:** as set out above, an amended Part 9 would provide a clear framework against which alliances can be assessed, providing greater certainty to applicants. It also allows for the Ministry to consider alliances within the broader regulatory, trade and political context of international aviation. It also draws on the Ministry's depth of knowledge and experience in relation to international aviation industry.

23. **Option 2:** the Commerce Act provides no additional benefit to the current Part 9 process. Compared to an amended Part 9 process, Option 2 will result in greater uncertainty regarding the timing and nature

of any decision, little appreciation for the regulatory and political environment within which airlines operate, increase costs for both government and applicants, and chill legitimate commercial activity.

Question D6d: Under each option, how do you envisage the decision-making process working? (For example, under Option 1 who would undertake the competition analysis and what information gathering powers would be required to undertake this analysis?)

24. **Option 1:** Air New Zealand envisages an amended Part 9 which formally recognises many of the processes which the Ministry is already undertaking under the current Part 9. Air New Zealand believes that a more formal procedure is critical to provide greater certainty to the Part 9 process, including clear assessment criteria, a timeframe for considering applications, transparent consultation with relevant third parties and the ability for the Ministry to formally discuss with applicants the possibility of remedies and conditions to resolve outstanding concerns.

25. **Option 2:** Air New Zealand does not envisage the decision-making process working effectively under Option 2, in the absence of a change to the regime to allow for a broader public interest assessment and an explicit time frame for decision.

Item D7: Commission Regimes (section 89)

Question D7: Which is your preferred option?

Option 1: Status quo – the Act provides for a Commission Regime to be issued and retains the current Commission Regimes

Option 2: Repeal and reissue – the Act provides for a Commission Regime to be issued and revises the current Commission Regime

☒ **Option 3:** Complete repeal – repeal the existing Commission Regime and section 89 (Ministry of Transport preferred option)

Some other option (please describe):

26. Air New Zealand supports Option 3: complete repeal given the redundancy of the provision.

Item D8: Authorisation of unilateral tariffs by the Minister

Question D8: Which is your preferred option?

Option 1: Status quo – the Act continues to provide for authorisation of single airline tariffs

☒ **Option 2:** Amended provision – replace section 90 with a provision similar to regulation 19A(4) of the Australian Air Navigation Regulations 1947 (Ministry of Transport preferred option)

Option 3: Complete repeal – the Act ceases to provide for authorisation of single airline tariffs

Some other option (please describe):

27. Air New Zealand supports Option 2: amended provision. This recognises the largely redundant nature of the provision, while taking into account current requirements under existing bilateral agreements.

Part E: Airports

Item E1: Specified airport companies

Question E1a: Which is your preferred option?

Option 1: Status quo – specified airport companies are defined as an airport company that in its last accounting period received revenue exceeding $10 million.

Option 2: Revise the threshold – specified airport companies are defined as an airport company that in its last accounting period received revenue exceeding $15 million.

Option 3: Amend the threshold to be based on revenue from identified airport activities – for example, specified airport companies are defined as an airport company that in its last accounting period received revenue from identified airport activities exceeding $10 million.

☒ **Option 4:** Amend the threshold from annual revenue to passenger movements – for example, airport company that in its last accounting period had in excess of one-million passenger movements (Ministry of Transport preferred option)

Some other option (please describe):

1. Air New Zealand support Option 4: Amend the threshold from annual revenue to passenger movements.

2. The distinction between "airport companies" and "specified airport companies" was introduced in an effort to provide greater oversight of airport companies which were considered to have considerably more ability to exercise monopoly powers to the detriment of consumers. Specified airport companies were therefore required to provide greater disclosure of information regarding their financial and operational performance and to consult in respect of capital expenditure above a determined threshold.

3. The information disclosure regime arising from this distinction has proven to be flawed, resulting in the new information disclosure regime for Auckland, Christchurch and Wellington airports contained in Part 4 of the Commerce Act. The Ministry notes that in addition to the three major airports, Queenstown and Dunedin airports also meet the threshold for specified airport companies and as such are subject to the additional disclosure and consultation requirements of the Airport Authorities Act.

4. In terms of this more detailed disclosure Air New Zealand considers it is incumbent on the Ministry of Transport to review the disclosures being made and to continually assess whether this regulation is serving its purpose. If this assessment is not being done Air New Zealand considers the basis of the disclosures should be shifted to also be under the Commerce Act, where a regulator will actively monitor and assess airport performance.

5. Air New Zealand also considers the statutory requirement for consultation on capital expenditure should be extended to cover all airports. The necessity for consultation at smaller airports may indeed be even greater than at larger airports given the potential impact on consumers of increased charges resulting from an expanded capital base at these locations.

6. The Ministry has put forward a number of options for the threshold at which an airport company becomes "specified", ranging from the status quo ($10 million annual revenue) to basing it on passenger throughput. Air New Zealand does not consider that a revenue based standard remains appropriate as this does not necessarily reflect the extent of market power an airport may be able to exercise. Consumers do not have a choice of airport at locations around the country and airports are able to

exercise market power across all services they provide, from landing charges to office rentals to car parking charges.

7. The decision to extend more stringent disclosure requirements should therefore be based on the extent to which potential harm may be caused to consumers through exercise of market power. In this regard the Ministry's proposal to establish a one million annual passenger threshold appears appropriate.

8. Having reached this threshold, an airport should remain subject to the more stringent disclosure requirements.

Question E1b: Is changing the threshold for a 'specified airport company' the most effective way to distinguish between airports that are in a position to exercise significant market power and those which are not?

☒ **Yes**

No

9. Yes. See above for detail.

Item E2: Redundant provisions

Question E2a: What impact, if any, would removing section 3BA have?

Question E2b: Do you support repealing section 3BA?

Yes

☒ **No**

Section 3BA - disclosure of charges

10. No. The Ministry considers this requirement to no longer be necessary given supposed commercial incentives to disclose charges. Air New Zealand disagrees that this provision is redundant.

11. Airports are increasingly applying incentive regimes in an effort to attract new entrants into markets. This impacts on existing operators who are often not eligible for these incentives for the simple fact that they are existing operators. While Air New Zealand is not opposed to such arrangements as they are a feature of a more commercial approach, the availability of such arrangements should be transparent.

12. Continuing disclosure of standard charges, and any incentive regimes available, will help to ensure all operators are aware of the charging regime in place. Such disclosure will also increase transparency for other interested parties, e.g. passengers, who would otherwise potentially not have the ability to access this information.

Question E2c: What impact, if any, would removing sections 4(2) and 4A have for airports that are not regulated under the Commerce Act 1986?

Section 4(2) – borrowing money etc.

13. The Ministry notes that it is commonly understood that airport companies can undertake the same activity as any other company, subject to the Companies Act 1993, including the ability to borrow money and acquire, hold and dispose of property.

14. Air New Zealand agrees that section 4(2) is redundant and should be repealed.

Section 4A – setting charges

15. The Ministry notes that section 4A was included in the Airport Authorities Act in 1986 at a time when airport companies "were new and untested". Airports were therefore provided a power to set charges as they think fit so to ensure they were able to operate "commercially". The Ministry considers that this section is no longer necessary as airports are able to rely on the Companies Act to operate as commercial undertakings consistent with the section 4(3) requirement of the Airport Authorities Act.

16. Air New Zealand agrees that section 4A of the Act is redundant and airports should not continue to enjoy a unique and unfettered right to set charges once they have concluded a process of consultation. Removal of this power, in conjunction with the establishment of clear principles underpinning pricing decisions (discussed below) will enable airports and airlines to engage commercially on a level playing field and focus on pricing outcomes which meet the needs of all stakeholders.

17. A key flaw in the Airport Authorities Act has been the absence of any guiding criteria to assess whether an airport is acting commercially and indeed any yardstick against which acting commercially can be assessed. It should be noted that this requirement to operate commercially has been described also as a requirement on an airport to obtain the best possible return on its assets as permitted by law. In the absence of any specific regulation, the New Zealand regime relies on competition to prevent businesses abusing monopoly powers and extracting excessive profits. However, airports are not subject to strong competitive constraints.

18. This requirement to act commercially therefore creates very real potential for an airport to abuse its monopoly position. Air New Zealand considers that as well as removing section 4A, the Ministry should also consider establishing criteria against which the reasonableness of charges might be assessed. One option to achieve this could simply be to reference section 52A of the Commerce Act which establishes the principles against which the Commerce Commission assesses pricing outcomes at airports currently subject to information disclosure regulation under the Commerce Act.

Question E2d: Do you support repealing sections 4(2) and 4A for airports that are not regulated under the Commerce Act 1986?

☒ **Yes**

No

19. Yes. See above for explanation.

Item E3: Consultation on certain capital expenditure

Question E3a: Which is your preferred option?

Option 1: Status quo - specified airport companies are required to consult substantial customers before approving certain capital expenditures

☒ **Option 2:** Require all airport companies to consult on certain capital expenditures (Ministry of Transport preferred option)

Some other option (please describe):

20. Air New Zealand supports Option 2: Require all airport companies to consult on capital expenditure.

21. The requirement to consult on capital expenditure is currently limited to specified airport companies. The Ministry rightly notes that such consultation is relevant because it gives users an opportunity to have a say on services and facilities available and the value of airport assets has an impact on the level of airport charges.

22. Depending on the current asset base and the level of activity at an airport, what might appear to be a small amount of capital expenditure can have a significant impact on airport charges. For example, current investments of less than $2 million at two regional airports are impacting per passenger costs at those airports by between 30% and 80% (variation due to passenger volumes). Consultation in respect of this investment has ensured that the scope of the works being undertaken is fit for purpose, efficient and has the support of airport users. This has assisted those airports in securing the agreement of Air New Zealand to bear those increased costs.

23. While it may be argued that this demonstrates that no change is required as airports are consulting, Air New Zealand submits that it is inappropriate to leave it open to airports to consult or not, as they see fit. In an environment where an increase in assets results in a need to increase charges to recover the costs of those investments, airports should be required to consult with users as a matter of course. While it may seem like sensible commercial practice it is not always the case that such consultation occurs.

Question E3b: Under the status quo, to what extent do airport companies that are not 'specified' consult on capital expenditure? Please give examples.

24. See above.

Question E3c: What would be the costs and benefits of expanding this provision to cover all airport companies?

25. See above.

Item E4: Threshold for consultation on certain capital expenditure

Options for amending the threshold for consultation on certain capital expenditures

Passenger volumes **OR** **Annual revenue**		**Option 1**	**Option 2**	**Option 3**
< 1 million	< $10 million	> $5 million	10% of identified airport assets (excluding land)	The lower of 30% of identified airport assets or $30 million
> 1 million but < 3 million	> $10 million but < $50 million	> $10 million		
> 3 million	> $50 million	> $30 million		

Question E4: Which is your preferred option?

☒ **Option 1:** Stepped thresholds

Option 2: 10 percent of identified airport assets (excluding land)

Option 3: The lower of 30 percent of identified airport assets or $30 million

Some other option (please describe):

26. Air New Zealand supports Option 1: stepped thresholds.

27. As the Ministry notes the existing threshold for consultation by specified airport companies was established in 1998 and is no longer appropriate given capital expenditure and inflation since that time. For example, in the case of Auckland Airport, the current threshold is only triggered in respect of capital expenditure in excess of approximately $260 million (albeit in practice Auckland Airport consults in respect of capital expenditure at levels well below this figure).

Question E4b: If you prefer Option 1, where do you consider the thresholds for consultation should be set and why?

28. Air New Zealand considers that the thresholds identified in Option 1 of Figure E1, based on annual passenger volumes appear to be logical and practical. Air New Zealand agrees that a defined dollar amount or proportion of assets may not be appropriate across all airports given the very wide range of activity and valuations at airports across New Zealand.

Item E5: Termination of leases without compensation or recourse for compensation

Question E5: Which is your preferred option?

Option 1: Status quo - airport authorities may terminate a lease at any time if the property is required for the "purposes of the airport", and lessees may not seek redress through the Courts for damages or compensation, except where compensation is provided for under the lease.

Option 2: Amend the Act to clarify the reasons for which airport authorities can terminate leases without compensation or recourse for compensation

☒ **Some other option** (please describe):

29. Section 6 of the Airport Authorities Act 1966 currently allows for the granting of leases over parts of an airport, subject to certain conditions associated with maintaining the safe and efficient operation of the airport. Section 6(4) provides that, except where provided for in a lease, no right of redress or compensation is available in the event a lease is terminated during its term if the property covered by the lease is required for the purposes of the airport. Options considered by the Ministry are to retain the status quo or to clarify what "purposes of the airport" might be.

30. The Ministry notes that the status quo allows for airports to exercise their power in a manner that may be "unfair and inconsistent with normal commercial arrangements". Air New Zealand submits that the Act should be silent on the issue of compensation in the event of lease termination and instead leave this to normal commercial arrangements. Inclusion of the section 6(4) provision ensures that airports have no incentive to consider normal compensation or redress provisions in leases and indeed airports would not be acting in their best interests if they were to include these.

31. Lease holders can, and do, make significant investments in facilities on airports which facilitate the provision and enhancement of their customers' experience. The potential for these investments to be written off without compensation is not normal commercial practice.

Question E5b: Are there any other issues with section 6 of the Airport Authorities Act that you think should be addressed? If so, what options do you propose to address the issue(s)?

Item E6: Bylaw making powers

Question E6a: Which is your preferred option?

Option 1: Status quo – the existing bylaw making powers of airport companies, airport authorities, and local authorities are retained

Option 2: Repeal some bylaw making powers

☒ **Some other option** (please describe):

32. Local authorities and airport authorities currently have the power to make by-laws covering certain aspects as set out in section 9(1) of the Airport Authorities Act. As noted by the Ministry, only 9 of the 21 airport companies have made bylaws and no airport authorities that are not airport companies have made bylaws.

33. Given that airports which have not made bylaws do appear to be able to undertake all the activities necessary to manage their facilities in accordance with relevant statutory requirements it is questionable whether this power to make bylaws remains necessary. As the Ministry notes, "If certain bylaws are necessary for the safe operation of airports, they could be set through regulations to ensure consistency across all airports."

34. Air New Zealand supports the view that any such bylaws should be consistent across airports, which may not be the case where bylaws are able to be made on an individual basis by airports.

35. If bylaw making powers are to be retained, there should continue to be appropriate levels of oversight and review of those. Air New Zealand supports the proposition that if required, bylaws made by airport authorities that are not local authorities should continue to be subject to approval by the Governor General by Order in Council. In the case of local authorities, the Minister of Transport should at least be able to revoke bylaws. For all bylaws, regardless of which entity is making them, there should be a defined process for making them - including consultation with relevant stakeholders - clear criteria which they should meet and a dispute resolution mechanism where the parties are not able to agree on the form of the bylaws.

Question E6b: For what purposes do you consider it necessary for local authorities, airport authorities, and airport companies to have bylaw making powers, and why?

36. See above.

Question E6c: If airport authorities did not have bylaw making powers, how would or could they manage the matters covered by section 9(1)(a-ff) of the Airport Authorities Act?

37. See above.

Question E6d: If bylaw making powers are retained, what is the appropriate level of oversight for local authorities, airport authorities and airport companies seeking to make bylaws?

38. See above.

Item E7: Information disclosure and specifying what "publicly available" means.

Question E7a: What are the costs and benefits of the current information disclosure regime under section 9A of the Act?

39. See below.

Question E7b: Which is your preferred option?

Option 1: Status quo – the Act does not specify what "publically available" means in section 9A

☒ **Option 2:** Specifying what publicly available means in section 9A (Ministry of Transport preferred option)

Some other option (please describe):

40. Air New Zealand supports the Ministry's identified Option 2: specifying what publicly available means in section 9A and considers the Land Transport Management Act example provides useful guidance as to how this could be achieved. The timely and ready availability of this information will help to ensure that all interested parties have the ability to monitor airport performance and ensure that airport companies are operating in an even-handed and efficient manner.

41. Airports are currently required to make certain information publicly available. As the Ministry notes, this information may not always be freely and immediately available.

Part F: Other matters

Item F1: Airways' statutory monopoly

Section 35 of the Civil Aviation Amendment Act 1992 provides for the repeal of Airways' statutory monopoly on a date to be appointed by the Governor-General by Order in Council.

We recommend:

- repeal of Section 35 of the Civil Aviation Amendment Act 1992; and
- the retention of Section 99 of the Civil Aviation Act 1990 (which provides for Airways to be the sole provider of area control services, approach control services, and flight information services).

Question F1: Do you agree with our recommendation?

☒ Yes

No

1. Yes - Air New Zealand agrees with this recommendation.

2. The Civil Aviation Act currently provides that Airways NZ is the sole provider of area control, approach control and flight information services, albeit that this statutory monopoly is able to be repealed through Order-in-Council issued by the Governor-General. Aerodrome control and aerodrome flight information services are open to contestable provision.

3. The Ministry is proposing that this ability to repeal Airways' statutory monopoly by Order-in-Council be removed and Airways retain its status as the sole provider of area control, approach control and flight information services.

4. As noted by the Ministry, "consideration of a robust analysis of safety and economic implications, including consultation with the industry, should precede any decision to repeal section 99 of the Civil Aviation Act 1990". Air New Zealand wholeheartedly agrees with this notion. An efficient and safe air transport network is critical to New Zealand's ongoing economic fortunes and any changes to the current structure should only proceed after comprehensive review of the options including potential impacts on the system and the ongoing ability to fund required innovations.

Item F2: International Conventions

The Convention on International Interests in Mobile Equipment 2001 (the Capetown Convention).

5. Air New Zealand recognises that the Capetown Convention allows for participants to choose between registration of assets on the Personal Property Securities Register (PPSR under the PPSA) and the International Register of Mobile Assets (IRMA).

6. In order to give full effect however to the Convention, where a party chooses to register on the IRMA, the PPSA should not apply and this should be explicitly stated in the Act. This would have the practical effect of removing any uncertainty for financiers that their interests require dual registration on both the PPSR and the IRMA.

7. At present financiers are registering interests on both registers. This dual registration does not provide and additional benefits to them and any suggestion that PPSR registration offers additional protections

(above the IRMA) defeats the purpose for which New Zealand developed, signed and ratified the Capetown Convention.

8. In addition, the term 'owner' used in the Act (and Rules) to describe a person lawfully entitled to possession for 28 days or longer should be substituted for a more appropriate term such as 'operator'. Given the prevalence of leasing arrangements in the industry, this minor change would reduce confusion particularly in relation to international financiers.

Item F3: Length of time before the Director can revoke an aviation document because of unpaid fees or charges

Question F3: Which is your preferred option?

Option 1: Status quo – the Director of Civil Aviation may revoke an aviation document if the related fee or charge is overdue by six months

Option 2: Reduce the threshold from six to four months

☒ **Some other option** (please describe):

9. Air New Zealand has no preference provider that either Option contains at least one reminder and one notice of revocation prior to the revocation date.

Item F4: Power to stop supplying services until overdue fees and charges have been paid

Question F4: Which is your preferred option?

Option 1: Status quo – Section 41(4) the Civil Aviation Act provides for the CAA, the Director and other persons to decline to process an application or provide a service under the Act until the appropriate fee or charge has been paid (or arrangements for payment made).

☒ **Option 2:** Amend section 41(4) to clarify its intention – to explicitly provide for the CAA, the Director and other persons to decline to process an application or provide a service under the Act until the appropriate fee or charge or outstanding debt has been paid (or arrangements for payment made).

Some other option (please describe):

10. Air New Zealand supports Option 2: Amend section, provided the applicant receives clear communications from CAA as to the reasons the application is not being processed.

Item F5: The Civil Aviation Authority's ability to audit operators that collect levies

Question F5: Which is your preferred option?

Option 1: Status quo – the Act does not allow the CAA to require an audit of operators from which it collects levies.

☒ **Option 2: Amend section 42B to include a power for the CAA to require an audit of operators from which it collects levies at the CAA's own cost**

Some other option (please describe):

11. Air New Zealand supports Option 2: Amend Section 42B. It is important that CAA has the powers (for example, during an investigation) to be able to conduct an audit.

ANNEX 1 – Part D

1. Airline licensing and competition

1.1. Air NZ agrees with the Ministry's objective "to support a modern and efficient decision-making framework for addressing international air transport competition issues". We also agree with its overall assessment that the current criteria for considering these issues does not reflect best practice or take account of modern international air cargo arrangements.

1.2. To summarise Air NZ's position, Air NZ has every confidence in the work undertaken by the Ministry of Transport when assessing applications under Part 9. However Air NZ believes that there are a number of areas where the Part 9 process could be significantly improved for the benefit of applicants, the Ministry and travellers to and from New Zealand.

1.3. Air NZ strongly supports Option 1 as described by the Ministry, which allows for the amendment of the Civil Aviation Act to ensure that the regulatory regime provides for sustainable air services to give effect to a broad, global air connectivity strategy for New Zealand and long term benefits to New Zealand consumers. This regime should recognise:

a) the national interest in building sustainable air transport links between New Zealand and major international markets, including key trading partners;
b) international comity and the unique nature of the international market for air services. In Air NZ's view, this requires the contemplation of diplomatic, trade, international legal and market distortion considerations;
c) a commercially competitive environment for international air services; and
d) recognition of the need for speed and efficiency to meet changing commercial opportunities.

1.4. Air NZ submits that, as the responsible decision marker, the MOT starting point for any assessment of the responsible decision maker regarding international air transport competition.

1.5. We set out below some observations on the importance of alliances to New Zealand's air connectivity and the environment in which these alliances are negotiated, and each of the options presented by the Ministry.

2. Distinct characteristics of the international aviation industry

2.1. While international aviation is a truly global industry, the international aviation industry is highly regulated, highly competitive, and operates on extremely thin margins. The regulation of the international aviation industry is well summarised in the Ministry's recent detailed analysis of the

proposed Air NZ/Singapore Airlines alliance ("**NZ/SQ Report**"), which for ease of reference is repeated below:[9]

> 24. Despite being perhaps the most obviously global of all industries, the international air transport industry does not operate as a free market. International aviation is highly regulated by a network of thousands of bilateral air services agreements negotiated between governments. These agreements set out the parameters under which scheduled international services can be operated, including (among other things) the amount of capacity that can be provided, the airports that can be served, and the ownership and control criteria which determines whether an airline qualifies to make use of the rights granted by the agreement.
>
> 25. These bilateral agreements have had a profound effect on the global structure of international airlines. Restrictions on foreign ownership requiring airlines to be "substantially owned and effectively controlled" by nationals of their home State mean that cross-border mergers between airlines are rare. Airlines from smaller markets are further restricted by a lack of access to global equity markets. At the same time, restrictions on market access limit an airlines' ability to expand into new markets. As a consequence, the industry is characterised by an abundance of airlines, with around 1,400 commercial airlines operating globally, and in most markets, limited competition between them. The largest airline in the world (Delta) has a global market share of just seven percent, while the 240 airlines which are members of the International Air Transport Association (IATA) have a collective market share of 84 percent. In contrast, in global shipping (itself a relatively dispersed industry), the top 10 shipping liners have a combined market share of over 60 percent, with the largest shipping liner holding an 18 percent market share.

2.2. As the excerpt above highlights, bilateral air service agreements impose varying constraints on the ability of airlines to compete beyond their home markets. New Zealand has an "open skies" policy to international aviation, which has resulted in a range of international carriers operating into New Zealand, including across the Tasman, making routes to/from and within New Zealand some of the most liberal in the world. However, as the Ministry recognises, many overseas aviation markets are entrenched in a sovereign approach to international aviation with a high degree of state ownership of airlines and protectionist regulatory regimes, offering limited operational rights to foreign airlines. Foreign airlines cannot simply commence operations into these markets without local government approval (whether formal or informal), the same government who often has an ownership stake or other interest in the national airline.

2.3. It is within the restrictive nature of the international air services market that alliances have evolved. In particular, alliances provide for each party airline in the alliance to share the benefits each experiences in their respective home markets. Airlines alliances are therefore a key tool in breaking

[9] Ministry of Transport, *Detailed analysis to support the report to the Minister of Transport: Application by Air New Zealand and Singapore Airlines for authorisation of a Strategic Alliance Agreement,* 28 August 2014 ("**NZ/SQ Report**") at [24 – 25].

down barriers to global air travel and air freight, and in the New Zealand context provide access for Air NZ that it could not hope to obtain absent an alliance. The Ministry recognised the importance of maintaining New Zealand's air links to international markets in its report on the proposed Air New Zealand/Cathay Pacific alliance ("**NZ/CX Report**"). Maintaining a national presence in such a key Asian market as Hong Kong resulted in benefits to the New Zealand national interest.[10]

3. Alliances are critical to New Zealand's sustainable air connectivity

3.1. The need for consolidation within a highly fragmented industry, together with the regulatory context described above, explains to a large extent the reason why alliances, rather than mergers, have been a feature of the international aviation market. Airlines have had to manage national ownership rules in an environment where customers are demanding a global travel network. Strategic alliances with the world's leading airlines provide New Zealanders with access to a global network of destinations and airline benefits.

3.2. Alliances are a particularly important part of Air NZ's growth strategy, whereby Air NZ has committed to focussing its operations on Pacific Rim markets offering high-growth and strong, existing flows with direct flights. In pursuing this growth strategy from New Zealand, a 'geographical end point' for air services, Air NZ does not benefit from the geographical and population advantages enjoyed by countries such as those in South East Asia and the Middle East. The need for a network, together with restrictions on operating rights, means that without access to the networks of other home carriers Air NZ is overly reliant on point-to-point traffic to sustain any new Pacific Rim routes. Alliances with home country carriers provide Air NZ with access to passenger flows from throughout the home carrier's network, which is critical to the sustainability of Pacific Rim routes. An alliance also allows Air NZ to offer its customers access to all (or a significant part of) the home carrier's network, without having to undertake the substantial financial risks of operating to all of these destinations.

3.3. Alliances generally entail a greater level of coordination than simple codeshare or interline agreements. Coordination may extend to capacity, pricing, schedules and revenue or profit sharing on overlapping routes. Such cooperation is generally required to ensure that both parties have a shared incentive to ensure the sustainability of the alliance routes, re-time flights to avoid wing-tip flying and achieve a number of other consumer benefits as a result of the alliance.

3.4. Alliance agreements are not particular to New Zealand or to Air NZ, but have become an important feature of the aviation industry, as airlines attempt to expand own networks, without losing the ability to provide their customers with access to a range of destinations. The Ministry has

[10] Ministry of Transport, Report on the Air New Zealand – Cathay Pacific Alliance, 18 October 2012 at paragraph

consistently recognised the value of alliance arrangements, evidenced by the number which have been approved in New Zealand in recent years. These include Air NZ's alliances with Singapore Airlines, Virgin Australia and Cathay Pacific, and the alliance between Qantas and Emirates. A number of post-action studies have recognised the net economic benefit that alliances can provide.[11]

4. Option 1 is Air New Zealand's preferred option

4.1. Air NZ supports Option 1 as being best able to achieve the goals set out in paragraph 96 of the Consultation Document. The Ministry is the incumbent decision maker regarding competition issues in relation to international air transport competition. At the time of its introduction, Parliament was of the view that the Commerce Commission was not the appropriate decision maker for international air transport agreement, and that for the reasons articulated above a separate regime was appropriate.

4.2. Despite changes to the type of airline agreements which the Ministry is required to consider, the regulatory, political and diplomatic environment within which these agreements are formed has not altered substantially. Therefore, Air NZ is of the firm view that the starting point for any review of Part 9 is that the Ministry is the appropriate body to consider international air transport arrangements, and change should not be made unless there are compelling reasons for it. As set out in the Consultation Document, there has been no suggestion that the Ministry has made any 'wrong' decision.

The Ministry is the national centre of excellence for international aviation

4.3. As set out in paragraph 1.2, Air NZ believes that the Ministry is the appropriate body to review alliance authorisation applications, with both the experience and industry knowledge to undertake a comprehensive analysis that achieves the correct balance between assessing the costs and benefits of trade practices whilst having sufficient regard to New Zealand's international air services needs and obligations.

4.4. The Ministry is New Zealand's centre of excellence in international aviation. As well as building up an extensive knowledge of alliances through the authorisation process to date, the Ministry has considerable expertise in all aspects of the aviation industry, including the role of international arrangements and bilateral agreements, regulation of international air services, the different levels of cooperation between airlines and the principal drivers for each, the complexity of airline fare structures and revenue streams and the key drivers of airline businesses. This knowledge was not

[11] See, for example, study commissioned by Competition Commission Singapore, *Market Study on the Airline Industry*, 11 February 2014 and US Department of Transport, *Transatlantic Deregulation, The Alliance Network Effect*, October 2000.

acquired simply through the authorisation process, but through the range of functions that the Ministry undertakes in exercising its statutory functions in the airline industry.

4.5. Option 1 also fits within the broad scope of the Ministry's objectives and responsibilities. As set out in the Ministry's Statement of Intent, the Ministry has a "broad responsibility to provide advice across the whole of the transport system and the regulatory framework that supports it".[12] More specifically the Ministry is tasked with representing New Zealand's aviation interests internationally, and reducing barriers to entry into overseas markets.[13] Its goals include better quality transport regulation and frameworks, and more open and efficient transport markets. The approval of alliance arrangements falls squarely within the Ministry's responsibilities and can play a key part in achieving the Ministry's aims. The Ministry's particular skills and expertise, and the intricacies of the international aviation industry, is reflected in the Ministry having other roles that may naturally sit with other regulatory bodies in respect of other industries. For example, the negotiation of international air service agreements are negotiated by the Ministry, despite the Ministry of Foreign Affairs and Trade generally negotiating free trade agreements and other treaties.

Option 1 achieves the correct balance between a commercially competitive environment and the national interest in building sustainable air transport links between New Zealand and major markets.

4.6. The nature of the international aviation industry is extremely complex, with international legal, diplomatic and market distortion issues all part of the complex negotiations required to secure access to international markets. Alliances are a key part of the policy toolkit required to gain access to international markets, addressing the nationality-based impediments to international markets and acting as an impetus for initiating further liberalisation of international air travel. The benefits of alliances for New Zealanders' connectivity to global markets cannot be measured simply through the narrow economic framework in the Commerce Act.

4.7. The view of alliances as a key tool in air services liberalisation is consistent with other overseas regulators, including the US and Japan. The US approach in particular is similar to the New Zealand regime, which recognises that while the Department for Justice ("**DOJ**") is responsible for enforcing antitrust laws across all industries, including the aviation industry, it is the Department of Transport ("**DOT**") that has authority to make limited grants of antitrust immunity in relation to certain forms of airlines conduct. This is despite the DOJ being generally regarded as the world's leading competition authority, and one of the more "purist" in its application of competition principles. The DOT has a similar public interest standard to that currently applied by the Ministry under Part 9. The DOT process has generally been regarded as a key policy tool in assisting with

[12] Ministry of Transport, *Statement of Intent 2014 – 2018,* at page 6.
[13] Ibid at page 19.

the US desired liberalisation of the international aviation market, breaking down barriers to competitive entry in to international airline markets.[14]

4.8. While New Zealand's 'Open Skies' policy has allowed a number of foreign carriers to deploy substantial capacity to/from New Zealand (some on a marginally costed bais), Air NZ is not advocating for any move away from this approach. This is because Air NZ accepts that such a policy is in the interests of "NZ Inc" – a point the Ministry has consistently made clear, most recently in the NZ/SQ Report. However, the diplomatic and regulatory context within which these decisions are made is clearly relevant to the consideration of alliances and other forms of cooperation, which do not fit within the narrow criteria for authorisations set out in the Commerce Act 1986 (described further below).

An amended Part 9 can meet all of the Ministry's authorisation criteria

4.9. In paragraph 99 the Ministry has correctly identified the issues with the status quo. At the time the Commerce Act was introduced it was recognised that a balance needed to be struck between the unique features of the aviation industry and the wider benefits of free and open competition. However, because the importance of the IATA system has fallen away in favour of free market principles, certain aspects of the Part 9 framework are no longer needed. Air NZ's view is that the process for assessing the various arrangements should be codified in an amended Part 9.

4.10. Air NZ agrees with the general observation that the Minister has not made any obviously 'wrong' decisions on alliances to date. However, we also agree that a formal framework is required to both support the Ministry's work and provide and clear and transparent framework for all industry participants. Broadly speaking, our suggested amendments to Part 9 of the Act are similar to those suggested by the Ministry, and are described further below.

- *A clear criteria for assessment*

4.12. The current Part 9A provides a general discretion for the Minister to grant (or refuse) authorisation of an alliance arrangement. In practice, the Ministry has consistently applied a criteria focussed on the public benefits of the proposed arrangement.[15] While the overall test should still be whether the arrangement is in the New Zealand public interest, an amended Part 9A should provide a list of factors which the Ministry should consider in its assessment. This will provide the Ministry with an explicit statutory basis for the public interest test, and the factors it needs to consider, while allowing for the Ministry to place different weigh on the various factors in reaching its final recommendation. Relevant factors should include:

[14] See, for example, Dean/Shane, *Alliances, Immunity, and the Future of Aviation*, The Air & Space Lawyer, Volume 22, 4 November 2010, and Sanchez, *An Institutional Defense of Antitrust Immunity for International Airline Alliances* 62 Cath. U. L Rev. 139 2012-2013.
[15] Paragraph 11 of the NZ/SQ Report sets out the criteria the Ministry has used in previous alliance authorisations.

a) the long term connectivity of New Zealand to international markets;

b) the financial sustainability of air services to and from New Zealand;

c) a sustainable competitive environment among airlines;

d) the benefits and detriment to consumers, and any efficiencies, that will result from implementation of the proposed arrangement; and

e) any other public benefit and detriments that the Minister considers appropriate in relation to the particular authorisation.

4.13. The overriding considerations in section 88(3) (consistency with international obligations), (4)(b) (commission regimes) and (5) (international comity) should be retained, given the importance of these factors.

- *Grant and variation of authorisations*

4.14. As the Ministry notes, Part 9 does not allow for conditions to be imposed on authorisations, and the Ministry currently relies on the parties to the arrangement to amend the agreement to ensure that it meets the Ministry's public benefit test. This prevents the Ministry from having an open dialogue with the parties regarding conditions which could resolve any outstanding issues the Ministry has with a proposed arrangement. The proposed amended Part 9 expressly allows for the Minister to grant an authorisation for a set period of time, and/or subject to such conditions as the Minister considers necessary to secure the public interest arising from the arrangement.

- *Consultation and information gathering*

4.15. Air NZ believes that the Ministry is already very conscious of the need for transparency and consultation with third parties. This includes, in relation to the recent NZ/SQ Report, the Ministry publishing a public version of the applicants' submission, asking third parties for their views on the proposed merger, and publishing public versions of the resulting submissions. The Ministry also worked with the applicants to provide for a limited confidential consultation with certain third parties on a commercially sensitive aspect of the alliance. Finally, the Ministry published public versions (with commercially sensitive information redacted) of all of its decision documents shortly after the authorisation had been granted.

4.16. Air NZ agrees with the Ministry that a clearly defined process for consultation and greater transparency should be explicitly provided for in an amended Part 9. This should include requiring parties to provide public versions of its application and submissions at the time these are filed, and granting the Ministry with the powers to consult on the application or any proposed conditions.

- *Time period for authorisations*

4.17. The nature of the airline industry requires a number of activities to be undertaken before a new route can be operated. Flight schedules must be registered for each IATA season [x months/weeks in advance], airport slots secured (a biannual event) and joint pricing agreed. For new routes, operating certificates and business registrations in the destination country must be secured. All of these activities must generally be completed before any flights go on sale, which itself requires a substantial lead time in minimising the risk of commencing operations with unsustainable load factors. For these reasons, delays or uncertainties regarding the timing of the authorisation process can result in significant financial and operational risks for the proposed alliance. Therefore, it is important that parties have some certainty over the period within with an application for authorisation will be determined.

4.18. The current Part 9 does not include any timetable within which the Ministry must consider applications for authorisation. For the reasons set out above, Air NZ considers that any amended Part 9 should include some imperative on the Minister and the Ministry to make a decision within a certain timeframe. While we would prefer a set time limit for the Minister to make a decision, if this is not practicable we suggest that a time limit is appropriate for the Ministry to report to the Minister, following which the Ministers should be required to reach a decision "as soon as reasonably practicable".[16] Limited extensions to the Ministry's process could be granted in exceptional circumstances, such as where the Ministry is considering applying conditions to the authorisation or where the airlines have not provided information within the time requested by the Ministry.

4.19. A clear timeframe for decisions under an amended Part 9 contrasts with that under the current Commerce Act regime. As the Commerce Act allows for unlimited extensions of the authorisation timetable (a party failing to agree to an extension would result, in practical terms, in the authorisation being deemed declined because the Commission would not be "satisfied" the alliance met the regulatory hurdle) there is no explicit time frame within which authorisations must be completed. Authorisation decisions have therefore varied significantly, from 4.5 months to a number of years.

5. Option 2: Air New Zealand does not meet the criteria identified by the Ministry

5.1. If Option 2 is adopted, almost all alliances would be restrictive trade practices requiring formal NZCC approval – whether it be an "authorisation" on net public benefit ground or a formal "clearance" on the basis the NZCC's concluded that the alliance (a) was a collaborative activity (as defined and assuming the Commerce (Cartels and Other Matters) Bill is passed) and (b) was not likely to give rise to a substantial lessening of competition (**SLC**) in any market. In relation to a

[16] See, for example, the approval of rules relating to licenced building practitioners under section 360 the Building Act 2004.

clearance it is also relevant to note that an alliance which related to a number of markets could not be "cleared" if it gave rise to a SLC in a single market, even if overall it was in the public interest, or even if the parties were willing to offer a capacity commitment in the market in question (as conditions cannot be imposed as part of a clearance). This suggests that in practice most alliances would require the full-blown authorisation process.

5.2. In contrast to an amended process led by the Ministry, Air NZ is firmly of the view that Option 2 is unlikely to meet the criteria set out in paragraph 96 of the Consultation Document. As set out in paragraph 4.2, the starting point for any review is that the Ministry is the appropriate body to consider international air transport competition. Change should only be made if it can be demonstrated that there is a compelling reason to fundamentally change the Ministry's involvement in the process. However, there is nothing to suggest that the Ministry has made any wrong decisions under the current process, nor that a Commerce Commission process would lend itself to a superior outcome.

The Commerce Act cannot take adequate account of all of the costs and benefits associated with airline alliances

5.3. As the Ministry's own analysis shows, airline alliances can generate a range of different benefits, including enhanced connectivity for passengers, the opening of new international routes or increases in capacity and passenger numbers for existing routes, stimulation of tourism and regional development and increasing trade links. As outlined above, alliances also play a major role in opening up access for Air NZ and New Zealanders to major international markets.

5.4. The Commerce Act authorisation process is unlikely to adequately take account of all of the benefits mentioned above. While the Commerce Act allows the Commission to consider public benefit in a broad sense, the Commission has generally assessed benefits and detriment within a narrow lens focussed on economic efficiency. Benefits that cannot clearly be expressed and quantified within the economic efficiency framework have generally been given lesser weight.

5.5. Parties are also required to quantify any benefits they wish to claim as part of the authorisation process. As set out in the Commission's authorisation guidelines,[17] the Commission is required to quantify benefits and detriments to the extent that it is practicable, rather than solely relying on qualitative judgement. This can be contrasted with the Australian process, which explicitly recognises that in many cases it will not be possible to credibly quantify public benefits and detriments but nonetheless permits such benefits to be given weight.[18] In this key aspect, the application of the Commerce Act to international air service would not bring consistency with the Australian regime, as suggested in paragraph 109 of the Discussion Document.

[17] Commerce Commission, *Authorisation Guidelines*, July 2013 at [49].
[18] Australian Competition and Consumer Commission, *Authorisation Guidelines*, June 2013 at [6.28].

5.6. While the Commission has stated in various guidance documents that it will consider qualitative factors in its analysis,[19] in practice there is little evidence that any weight has been attached to these benefits in previous decisions. Nor has this new guidance prompted any applications for authorisation since it was adopted. Instead the requirement to quantify benefits and detriments continues to be recognised as a key problem with the Commerce Act process, despite the Commission's attempts to downplay its significance.[20]

5.7. The quantification process adds substantial costs to the application process due to the need for specialist external economic advisors. These costs, and the uncertainty of the quantification requirement (it typically being extremely sensitive to key assumptions) are key factors in explaining the small number of authorisation applications under section 61 (discussed further below). It raises a particular concern in the context of airlines alliances due to the often unquantifiable nature of the benefits acknowledged to arise.

5.8. Air NZ believes that the authorisation process under the Commerce Act would fail to recognise, or give adequate weight to, a number of alliance benefits that have been correctly recognised under the Part 9 process and demonstrated in fact. The most obvious benefit that would fail to be adequately recognised is the impetus alliance brings for international comity and securing the liberalisation of travel between New Zealand and major international markets. As the Ministry recognised in the NZ/CX Report, maintaining an Air NZ presence in key international markets (in that case, Hong Kong) created national interest benefits for New Zealand.[21] In the NZ/SQ Report, the Ministry also recognised the value of Air NZ to creating flow-on benefits through the New Zealand aviation industry and the economy in general, recognising the importance of a strong national airline.[22] Despite the best efforts on Air NZ's part in the past, other benefits have been particularly difficult to quantify, even though regulators in both New Zealand and Australia have been recognised that the benefits do arise in the alliance context. These include non-price related benefits such as an increased choice of flights and increased frequency and interline connections, the stimulation of tourism and trade related benefits.

5.9. The Commerce Act process could also fail to take adequate account of some of the public detriment typically analysed by the Ministry during the Part 9 process. For example, in the NZ/SQ Report the Ministry considered the regional impact of the alliance on the Wellington and Christchurch regions. To the extent that any detriment to either of these regions was simply as a result of the divergence of passengers to, or through, Auckland Airport, and/or was offset by

[19] See, for example, the Authorisation Guidelines at [52].
[20] See, for example, Sumpter, *New Zealand Competition Law and Policy*, 2010: "the approach [to quantification] has raised the cost and delayed the authorisation process to the point that few applications are filed…the New Zealand position contrasts with Australia where a significant number of authorisations are granted every year."
[21] NZ/CX Report at [121 – 122].
[22] NZ/SQ Report at [219].

benefits to Auckland passengers, they could never be relevant to the Commerce Act authorisation assessment.

5.10. The difficulties with the current Commerce Commission practice is consistent with the Ministry's own decision on the Air NZ/Virgin alliance ("**NZ/Virgin**").[23] In NZ/Virgin, the Ministry did not attempt to quantify the benefits likely to be achieved by that alliance. Amongst other things, the Ministry noted that data limitations and the nature of assumptions generally" made quantification difficult. One example given was wing-tip flying, which the Ministry concluded would require making assumptions about a number of parameters such that a quantitative analysis "would not add to a more general analysis".[24]

5.11. The Ministry also commented on the approach taken in relation to the 2003 alliance proposal between Air New Zealand and Qantas. The Ministry conclusion succinctly captures the problems that would be inherent in analysing international aviation under a Commerce Act process:[25]

> The nature of modelling the outcomes of future behaviour in a dynamic market such as international aviation is such that different models using different but equally plausible parameters can lead to very different results. Given the difficulties in quantifying some of the benefits a balance appraisal of quantified benefits and quantified detriments would not have been possible.

5.12. After noting that neither the Australian ACCC process, nor the US DOT process, required quantification, the Ministry concluded that a general assessment of the public interest was appropriate, and that the outcome of a national economic benefit test (such as that considered under the Commerce Act authorisation process) could lead to "perverse" outcomes.[26] Air NZ agrees with these observations made by the Ministry.

5.13. Air NZ agrees with the Ministry not to recommend an option whereby the Commission will consult the Minister, or to take into account international arrangements, agreements and obligations. As the Ministry observes, taking such an approach would undermine any perceived advantages from consolidating international air transport into the Commerce Act regime, and confuse the split in responsibilities between the Commission and the Minister. Even if the Ministry was able to make submissions to the Commission on certain matters, the Commission's jurisdiction to consider these matters would still be subject to the narrow scope of the Commerce Act process. Finally, the Commission's practice in relation to section 26 also suggests that unless such a requirement, and the weight it should be given in the analysis, is clearly defined, it is unlikely to have any practical effect on the Commission's analysis.

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[23] Ministry of Transport, *Analysis of Air New Zealand/Virgin Blue application for authorisation of a trans-Tasman alliance*, 2010.
[24] Ibid at [94].
[25] Ibid at [97].
[26] Ibid at [99].

Minimising the direct cost to government and affected parties

5.14. Option 2 will not meet the Ministry's criterion of minimising direct cost to government and affected parties. The authorisation process is expensive and time consuming for parties and regulators. In addition to the authorisation fee of $11,500,[27] the Commission has recently released figures which show that the cost to the Commission of a restrictive trade practices authorisation is typically greater than $100,000, with some investigations costing considerably more than this.[28] Parties to an authorisation application will typically spend many times this amount again on legal and economic analysis in preparing an application (they will need to retain external advisers for this work), together with substantial management time devoted to the application and ensuing Commission questions. While the Ministry will, quite rightly, also have a range of questions and information requests of applicants in a Part 9 context, the cost to the applicant (in both dollar terms and management time) tends to be much lower because: (a) the Ministry has an up-to-date knowledge of the carriers on various routes, capacity, bilaterals/rights, etc.; and (b) the absence of a need to quantify where possible avoids the very large costs of retaining specialist economists to quantify the benefits/detriments Finally, as set out in paragraph 4.19, there is no explicit time frame within which authorisations must be completed, creating significant uncertainty for the parties involved in the process.

5.15. The time, cost and uncertainty in the authorisation process is reflected in the very small number of authorisation applications under section 61 of the Commerce Act. The most recent authorisation application was in 2011, and there has only been one other authorisation application since 2006.[29] This is despite the Commission attempting to increase the number of authorisation applications through the publication of a streamlined authorisation process in 2009, and the publication of new authorisation guidelines in July 2013. This can be compared to the ACCC process, which saw the ACCC make 28 authorisation decisions in relation to restrictive trade practices in the 2012/13 financial year, and 20 in the 2011/12 financial year.

5.16. Based on the current time limited authorised alliances Air NZ has with the Ministry, Air NZ would be required to file three authorisations with the Commission within the next four years (with Qantas/Emirates also required to file for reauthorisation before 2018). This does not include any new alliances for which authorisation might be required. Rather than the Commission absorbing alliance authorisations into any existing authorisations caseload, airline authorisations would have to become almost the sole source of authorisation work for the Commission.

Chilling legitimate commercial activity

[27] This fee is currently under review by the Ministry of Business, Innovation and Employment (http://www.med.govt.nz/business/competition-policy/commerce-act-fees-review/consultation). Options for change include increases to between $30,000 and $71,000.
[28] Ibid at Table 4.
[29] There was an authorisation decision in 2010 but that was as a result of the Commission re-opening a prior authorisation due to changed circumstances. There have also been two authorisation applications since 2002 under the Commission's merger authorisation process.

5.17. For the reasons set out above, Air NZ's view is that the adoption of Option 2 would require Air NZ to factor the increase time, cost and complexity of the Commerce Act authorisation process into its business case when considering alliances. As such, there is a risk that it would deter Air NZ from entering into certain alliance agreements, thereby limiting the growth of Air NZ's international services. While it may be argued that the authorisation process applies equally to other industries, the fact that the authorisation chills legitimate commercial activity in these industries is not a good reason to require airlines to submit to these process. Nor does it recognise the unique features and benefits of airline alliances that would potentially fall outside of the scope of the Commerce Act authorisation process (see paragraph [X] above)