

CIVIL AVIATION BILL

SUBMISSION TO THE TRANSPORT AND INFRASTRUCTURE COMMITTEE

OVERVIEW

Airlines for Australia and New Zealand (A4ANZ) welcomes the opportunity to provide comments on the Civil Aviation Bill (the Bill) to the Transport and Infrastructure Committee.

A4ANZ supports replacing the Civil Aviation Act 1990 and the Airport Authorities Act 1966 with a single new statute to reflect the contemporary aviation environment in New Zealand and was broadly supportive of the exposure draft during the Ministry of Transport's consultation in 2019.

Since consultation on the draft Bill occurred, the New Zealand aviation industry has been devastated by the impact of the COVID-19 pandemic. As the industry looks towards recovery, it is critical for regulatory settings to be appropriate and proportionate to best support the aviation sector's recovery while also providing a safe and secure platform for civil aviation.

A4ANZ congratulates the Government on the development and introduction of this comprehensive Bill. We believe that this legislation reflects a continuously growing and evolving industry, and that it will facilitate a robust, safe, and secure New Zealand aviation sector.

A4ANZ's submission to this consultation addresses the following key areas:

- airport regulation (including airport price setting, consultation requirements for capital expenditure & spatial plans, and enforceable regulatory undertakings),
- aviation security (including the provision which adds airlines to the list of organisations permitted to provide aviation security services), and
- regulatory oversight of the Airways Corporation.

We would welcome the opportunity to further discuss the issues addressed in this submission with the Transport and Infrastructure Committee.

ABOUT A4ANZ

A4ANZ is an industry group representing airlines based in Australia and New Zealand, including international, domestic, regional, full service and low-cost carriers. Established in 2017, A4ANZ's members include Air New Zealand, Qantas, Virgin Australia, Regional Express (Rex), and Jetstar.

A4ANZ works collaboratively with Government and other stakeholders, representing the interests of members, their staff, and customers, in relation to public policy issues. In all policy areas, A4ANZ strives to provide evidence-based, cost-effective solutions to Government to ensure practical and efficient implementation of policy, together with the preservation and strengthening of access to air transport across Australia & New Zealand.

Airport Price Setting

A4ANZ notes that this version of the Bill retains a provision that airports can set charges following consultation but repeals the stipulation that they can do so “as they see fit”, and that this decision was made by Cabinet after considering submissions on the exposure draft.ⁱ

A4ANZ and its member airlines strongly support the repeal of the “price as they see fit” clause which was included in Section 4A of the Airport Authorities Act 1966. Although not the intent of the provision, this section was interpreted as giving airports greater discretion when setting airport charges than they would otherwise have.

It is well accepted that prior to COVID-19, some of New Zealand’s major airports were among the highest-earning businesses in the country.ⁱⁱ Indeed, there is compelling evidence to show that the major airports in New Zealand have historically set prices that are designed to target large profits but are not in the long-term interest of consumers. For example, in the 2018 review of Auckland Airport’s pricing decisions, the Commerce Commission found that the “airport operators were targeting excessive profits” – with the Commission also finding that Auckland’s target return would result in an additional cost to consumers of up to \$53 million.ⁱⁱⁱ

A4ANZ shared the Commission’s concerns regarding the pricing decisions of New Zealand’s major airports in 2018^{iv}, and continues to share them today. Previous analysis by Frontier Economics found that the total value of excess returns to Auckland and Wellington airports (across all airport operations) since privatisation was more than \$3.6 billion and \$400 million, respectively, prior to the COVID-19 pandemic.^v

Similarly, while the entire industry has been impacted and devastated by COVID-19, in the 2019-20 financial year, all three of New Zealand’s major airports still managed to record a net profit, compared to the significant net losses experienced by airlines.^{vi} In the 20-21 financial year, while airlines and airports have both recorded losses, the scale of airlines’ losses is exponentially larger than those of airports.

Airport’s historical behaviour has come at a cost to the New Zealand community, both financially and through lost opportunities for improving the quality and efficiency of airport services.^{vii}

Hence, while repealing the “price as they see fit” clause is a step in the right direction, A4ANZ urges the Government to closely consider the behaviour and pricing decisions of the major airports through the COVID-19 recovery phase; to determine if more effective regulatory pressure is required to prevent excessive pricing by airports and its damaging impact on cash-strapped airlines. This may be necessary in order to return value to consumers and the economy more broadly.

Recognising that changes to the major airports’ regulatory regime is outside the scope of this Bill, A4ANZ suggests that Government consider amending the Bill to legislate for specific pricing principles, similar to the guidance that exists in the Australian market.^{viii} Australia’s *Aeronautical Pricing Principles* aim to guide negotiations between airports and airlines on pricing. However, although the principles themselves are supported by the industry, the ACCC, the Productivity Commission and the Federal Government^{ix}, it is important to note that they have yet to be enshrined in legislation, limiting their utility and – in the case of parties acting outside the principles – making them impossible to enforce.

As such, we would echo airline calls for the Government, in consultation with airlines and airports, to develop a set of principles to guide negotiations and pricing, and to include them in this Bill so that both airlines and airports are obliged to adhere to them. Such principles need not be unduly prescriptive, but rather drafted in a balanced fashion to ensure efficient outcomes – particularly when disputes arise – in the interests of all stakeholders.

Consultation on Capital Expenditure & Spatial Plans

Airport charges are directly affected by infrastructure investment decisions, driven by the infrastructure owners' expectations of a particular return on these significant investments.

While A4ANZ supports investment in aviation infrastructure, we are committed to the principle that investment must be fit-for-purpose; that is, aligned with the needs of customers and passengers using the facilities, and demand for air services.

The best way to determine requirements and ensure this fit, is through industry consultation. Genuine and transparent industry consultation would likely reduce instances of overcapitalisation, prioritise efficient operations, and in doing so, would ensure that consumers are not the ones ultimately paying through higher charges.

A4ANZ therefore supports the retention of the provisions for consultation on capital expenditure and welcomes the inclusion of the requirement for airports to consult on spatial plans.

A4ANZ also notes that Clause 232(4) of the Bill facilitates efficient consultation between airports and their substantial customers in the event that the airport operator company is subject to negotiate-arbitrate regulation or price quality regulation under Part 4 of the Commerce Act 1986.

A4ANZ welcomes the inclusion of this clause, and the acknowledgement by Government that the provisions in this Bill should be compatible with both current and potential future regulatory regimes.

Alternative Regulatory Regimes

A4ANZ acknowledges that the Ministry of Transport has advised that consideration of alternative regulatory regimes is outside the scope of consultation on this Bill.^x However, given provision has been made in this Bill to consider its application under alternative scenarios (as noted above), A4ANZ believes it important to restate our clear preference for moving from the current Information Disclosure regime to a negotiate-arbitrate model – as available under the Commerce Act 1986.

As A4ANZ has shared in previous submissions^{xi}, international evidence supports the position that the most effective regulatory solution – and the one that is most likely to result in genuine commercial negotiations between airlines and airports to effect fair outcomes for airport users – is a negotiate-arbitrate model.^{xii,xiii}

A4ANZ and our member airlines believe that greater oversight by the regulator to encourage and – where required – force constructive, commercial engagement is needed, to minimise the negative impact of the airports' monopoly powers.

Moving New Zealand's three major airports to a negotiate-arbitrate regime, with a system of independent dispute resolution, would in fact take the current light-handed regulatory regime forward – allowing for better negotiations between airlines and airports, and improved decision-making in infrastructure investments. There is a strong case to be made that this regime would deliver outcomes that better meet the needs of consumers, and the New Zealand economy; something which is particularly important in the current economic climate.

Understanding that these matters are not directly for consideration as part of the consultation on this Bill, we would again urge both the Commerce Commission and Government to carefully consider the behaviour and pricing decisions of the major airports through the COVID-19 recovery phase, to determine if more effective regulatory pressure is required.

Enforceable Regulatory Undertakings

A4ANZ notes that this version of the Bill introduces a new Subpart 3 in Part 7, outlining the requirements associated with Enforceable Regulatory Undertakings (ERU).

A4ANZ is broadly supportive of the requirement for government agencies to collaboratively agree their requirements for space and infrastructure, and for airports to present a binding plan to the Secretary for Transport as to how they will meet those requirements.

Airports are critical infrastructure assets, with well-functioning, efficient, and high-quality airports key to New Zealand's economic and social wellbeing. As a representative of the airports' major stakeholders, A4ANZ believes that airlines should also be considered for inclusion in the consultation process, alongside border agencies.

A4ANZ would also suggest – given the likelihood of the ERU process not aligning with price setting events (PSEs) – that border agencies be consulted along with airlines, during airports' PSE consultations, to ensure that the short- to medium-term needs of border agencies are accommodated in capital expenditure planning.

We understand that New Zealand's major airports are already well advanced in their consultations for PSE4, and would therefore urge the Government to ensure that any increased requirements for border agencies that may be subject to an ERU (until 2026) are communicated to airports as soon as possible, to avoid inefficiencies in infrastructure investment and planning which may occur with dual processes.

As noted earlier, A4ANZ is supportive of measures that improve consultation, transparency, and efficient investment in, and access to, infrastructure. As such, we support the Government's intention to use ERUs to provide a greater balance of incentives between airports' commercial objectives and the wider need to provide high-quality, critical transport infrastructure – however, A4ANZ would urge the Government to consider our suggestions on the timing and communication elements of the ERU process.

AVIATION SECURITY

Retention of 'airlines' to the list of organisations permitted to provide aviation security services

A4ANZ and its member airlines have previously welcomed the addition of airlines to the list of organisations permitted to provide aviation security services at New Zealand airports and are pleased to see that this provision, as outlined in Clause 135, remains in the Bill being considered by the Committee.

Whilst A4ANZ recognises that AvSec will continue to be the sole provider of security screening at New Zealand airports presently, we believe that this proposed change is a positive step in facilitating improved consumer outcomes by challenging the monopoly charges on security.

Experience from Australia shows that there is generally a significant difference between security screening services managed by airlines, and the cost of equivalent services charged at common user terminals which are managed by the airport authority.^{xiv} In some cases, the difference in price is so stark that airlines opt to pay a competitor airline with screening authority to undertake security screening services on their behalf, rather than pay the exorbitant prices charged by the airport; which may be almost double that of the airline's price.

Anecdotal evidence indicates that the situation is not dissimilar in New Zealand, given AvSec's monopoly position, and a continual rise in security charges. It is widely accepted that monopolies have minimal incentive to reduce operating expenditure, as these costs can simply be passed on to airport users. The impact of this is ultimately felt by the individual consumer, who may face reduced flight and/or pricing options, and a more expensive travel journey.

A4ANZ therefore wishes to place on record a concern that Clause 138 of the Bill may potentially undermine the provisions outlined in Clause 135 which allow others, including airlines, to provide aviation security services. To address this, the Government may wish to consider an addition to Clause 138 such that, in the event that the Minister specifies that only AvSec is to provide security services, there is a provision for regulatory oversight to place a constraint – in the absence of competition – on monopoly pricing.

The move to allow airlines this option, as a reasonable and viable alternative to AvSec, creates an environment which can drive increased efficiency in security screening operations – something which will be critical through the industry's recovery from the devastating impact of COVID-19.

AIRWAYS NEW ZEALAND

A4ANZ has previously noted the need to ensure that Airways New Zealand, as a monopoly provider of air control services, is appropriately regulated.

As noted above, monopoly operators have the ability to raise prices above a level that would prevail in competitive markets and have little incentive to improve services above a minimum standard of service quality – to the detriment of both economic efficiency and the living standards of consumers.^{xv}

Airways New Zealand's monopoly position has been evident in its previous pricing proposals, and current pricing plan – raising charges by 21.4% over 3 years.

Even though the Bill has a provision for the Minister to specify that only Airways may provide certain aviation services, we note that effectively, this clause provides for potential competition for air control and navigation services, which is welcome.

However, given the relative size of New Zealand's aviation market, it is unlikely that Airways would face viable competition from another provider of air control services. As such, it is imperative that the Government ensure effective governance and regulation of this monopoly service – similar to what we have stated above in relation to *AvSec*.

Ensuring that the regulatory settings across the aviation sector are fit-for-purpose is critical for ensuring that the competitive market is not stifled by egregious monopoly behaviours and charges.

This is important in any sector, but given the importance of ensuring that airline operating costs are kept as low as possible during the sector's recovery from COVID-19, there is now an urgency to introducing sensible regulatory reform.

As such, A4ANZ would again urge the New Zealand Government to consider introducing more rigorous regulatory oversight of Airways New Zealand.

CONCLUDING COMMENTS

A4ANZ broadly supports the Civil Aviation Bill as drafted and thanks the Transport and Infrastructure Committee for the opportunity to make a submission on this important piece of legislation.

Throughout the pandemic, A4ANZ members have shown that they are committed to building, maintaining, and improving positive, constructive relationships with airports and Government; with a view to safeguarding the viability and sustainability of the New Zealand aviation industry.

As the sector starts to recover from the devastating impact of the COVID-19 pandemic, A4ANZ would urge the Government to closely consider the behaviour and practices of monopoly service providers – including the major airports and Airways New Zealand – and the resulting negative impacts on airlines, consumers, and the wider economy.

The Civil Aviation Bill is a positive step towards ensuring a thriving, safe, secure, and sustainable New Zealand aviation sector. Building on this with an appropriate and effective regulatory regime is not only in the interests of airlines, but in the interests of passengers and the New Zealand economy.

A4ANZ would welcome the opportunity to further discuss the issues addressed in this submission with the Transport and Infrastructure Committee.

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