COMMERCE COMMISSION NEW ZEALAND
Te Komihana Tauhokohoko

# Submission on the Civil Aviation Bill

Submitted to

Ministry of Transport

22 July 2019

# Commerce Commission submission on the Civil Aviation Bill

## Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission on the exposure draft of the Civil Aviation Bill (the Bill) and the accompanying commentary document (together, the Reforms). We look forward to our ongoing engagement with the Ministry of Transport (the Ministry) on this topic.

2. The Commission is responsible for enforcement of the Commerce Act 1986 (the Commerce Act). We provide our comments on the proposed changes to the Civil Aviation Act 1990 (the Civil Aviation Act) so far as they relate to the Commerce Act. In particular, our comments address the proposed changes to s 88 relating to the authorisation of contracts, arrangements and understandings relating to international carriage by air (international air agreements). We also submit on the Bill's implications for airport regulation given its alteration of the Airports Authorities Act 1966.

3. We provided comment to the Ministry on both of these aspects of the Reforms at earlier stages in the Bill's drafting. Where relevant this submission refers to these views.

## Executive summary

4. The Commission has previously submitted that oversight of international air agreements should be brought under the authorisation regime in the Commerce Act. The Commission continues to be of the view that general competition law is sufficiently flexible to deal with international air agreements and that a separate authorisation regime under the Civil Aviation Act is not necessary. In support of this point, the Commission notes the importance of its statutory powers regarding information gathering when considering authorisation requests.

   However, if international air agreements remain subject to a separate regime as currently contemplated, we provide comment on the scope of the proposed amendments in the Bill. We note that the Bill proposes to replace s 88 with cll 184-194. We have two main concerns with the current drafting:

   a. Clause 189(2) requires that when determining whether the grant of an authorisation is in the public interest, the Minister take account of the main and additional purposes of the Bill per cll 3 and 4. Neither of these clauses reference competition. We consider that it is desirable that the purpose provision expressly references competition to remove any ambiguity about whether the Minister ought to consider competition effects when assessing international air agreements.

   b. Clause 189(1) would clarify the activities that can be authorised by the Minister. Under cl 189(1) a list of activities, including frequent flyer schemes, revenue sharing, and joint procurement would be inserted. We suggest that cl 189 should be expressed so that it is clear that the additional listed activities can be authorised only when they relate to international air agreements.

5. We also propose that cll 204 and 205 of the Bill, which impose obligations on airport companies to consult substantial customers concerning charges and capital expenditure plans, should be made subject to regulation imposed on specified airports under Part 4 of the Commerce Act 1986. This amendment to the Bill would recognise the changes to potential forms of economic regulation of airport services introduced by the Commerce Amendment Act 2018.

**Context**

6. The Commission is New Zealand's primary competition and regulatory enforcement agency. We enforce the country's competition and consumer laws and regulate industries that have little or no competition. The Bill amends laws that relate to the authorisation of international air agreements and information disclosure in the aviation sector under the Commerce Act.

7. The Commission's comments particularly focus on the proposed amendments to s 88 of the Civil Aviation Act. Section 88 enables the Minister to authorise international air agreements. Parties can apply for authorisation if they have concerns that an international air agreement would breach ss 27 or 30 of the Commerce Act. The Minister can authorise the agreement to avoid an undesirable effect on international comity. This assessment involves an implied public benefit test. Section 88 creates an exemption so that the restrictive trade practices sections (ss 27-30) of the Commerce Act do not apply to these international air agreements.

8. In the absence of this exemption, if parties are concerned that their arrangement might be at risk of breaching the provisions of the Commerce Act, they can apply under Part 5 of the Commerce Act to the Commission for a clearance of their collaborative activity or authorisation of their contract, arrangement or understanding. In the case of an authorisation, we consider whether there would be a benefit to the public which would outweigh the lessening of competition that would likely result from the agreement. Instead of this process, under the Civil Aviation Act, competition issues may be considered by the Minister at his/her discretion as part of the authorisation process.

**General competition law is sufficiently flexible, and the Commission's statutory powers are important when assessing authorisations**

9. As a starting point, we submit that, if granted the appropriate resources to expand our oversight to the aviation sector, the Commission would be well-placed to consider whether to authorise international air agreements given our framework for granting authorisations under the Commerce Act. We also note that the Commission has an established approach to information gathering based on the use of statutory powers to request information from third parties. These powers would enable us to carry out a thorough public interest analysis when considering whether an authorisation should be granted.

10. The Minister's assessment of an application for authorisation is similar to that which the Commission undertakes when considering whether to grant authorisation under Part 5 of the Commerce Act. We will grant authorisation if we are satisfied that the agreement

will be likely to result in a benefit to the public that would outweigh the lessening in competition. We call this the 'public benefit test'.[1]

11. The general procedures we consider when determining authorisations and considering clearances for collaborative activities are described in our Authorisation Guidelines[2] and Competitor Collaboration Guidelines[3].

12. We also submit that general competition law under the Commerce Act is sufficiently flexible to take account of any particular circumstances that may be applicable to international air agreements. In particular, we note that recent case law (e.g. Wool Scourers[4] and NZME/Stuff)[5] has confirmed that the Commerce Act allows for consideration of non-economic factors within the context of granting authorisation. Consequently, the Commission would be able to consider particular factors that are relevant to the aviation sector when determining whether to grant authorisation to proposed international air agreements.

13. The Commission also notes that many of the activities contemplated under s 189(1) may not necessarily need to be subjected to an authorisation assessment, if they were brought under general competition law. For instance, collaborative activities could be permitted under s 31 of the Commerce Act (the exception for collaborative activities), while some joint procurement matters could be assessed under s 33.

14. Additionally, we recommend that incorporating international air agreements within the Commission's existing remit would align New Zealand and Australia's regimes; the Australian Competition and Consumer Commission is responsible for authorising international air agreements in Australia. This is significant because many international air agreements will require dual-authorisation given the importance of trans-Tasman routes to New Zealand and Australian aviation. Notably, the 2009 Single Economic Market Outcomes Framework between New Zealand and Australia includes a provision within its Competition Chapter that notes firms operating on both sides of the Tasman should face the same consequences for the same anticompetitive conduct.[6] Therefore, harmonisation of our authorisation regimes would be beneficial from a regulatory and industry perspective.

**The authorisation process contained in the Bill should expressly refer to competition**

15. The current proposal is to improve the international air agreements authorisation process, by replacing s 88 with cll 184-194. Clause 189(2) outlines the test that the

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1 Commerce Commission, "Competitor Collaboration Guidelines, https://comcom.govt.nz/__data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf, at 51.

2 https://comcom.govt.nz/__data/assets/pdf_file/0012/91011/Authorisation-guidelines-July-2013.pdf

3 https://comcom.govt.nz/__data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf

4 *Godfrey Hirst NZ Ltd v Commerce Commission* [2017] 2 NZLR 729 (CA).

5 *NZME Ltd v Commerce Commission* [2018] 3 NZLR 715 (CA).

6 Single Economic Market Outcomes Framework as identified in Prime Ministers Rudd and Keys Joint Statement of Intent, 20 August 2009, http://archive.treasury.gov.au/documents/1605/PDF/outcomes_20090824.pdf at 2.

Minister would apply when considering whether an authorisation of the international air agreement in question would be in the public interest. The complete clause reads as follows:

> **189 Minister may authorise international carriage by air**
>
> (1) The Minister may, in relation to an application for an authorisation under this subpart, authorise 1 or more of the following:
>
> (a) the scheduling, capacity, or frequency of aircraft:
>
> (b) the fixing of tariffs:
>
> (c) the conditions and benefits associated with tariffs:
>
> (d) frequent flyer schemes:
>
> (e) lounge access and other preferential services:
>
> (f) revenue sharing:
>
> (g) joint procurement:
>
> (h) any other operational matters related to co-operation on—
>
> (i) tariffs; or
>
> (ii) capacity; or
>
> (iii) tariffs and capacity.
>
> (2) In determining whether the grant of an authorisation would be in the public interest, the Minister must take into account the main and additional purposes of this Act.
>
> Compare: 1990 No 98 s 88(2), (4)

16. Clauses 3 and 4 state the Bill's main and additional purposes:

> **3 Main purpose**
>
> The main purpose of this Act is to facilitate the operation of a safe and secure civil aviation system.
>
> **Please see Ministry of Transport commentary document: *Purpose statement***
>
> **4 Additional purposes**
>
> This Act has the following additional purposes:
>
> (a) to contribute to achieving an accessible, safe, sustainable, resilient, and productive transport system:
>
> (b) to facilitate the development of civil aviation:
>
> (c) to ensure that New Zealand's obligations under international civil aviation conventions, agreements, and understandings are implemented:
>
> (d) to preserve New Zealand's national security and national interests:
>
> (e) to protect the interests of people and the environment that are affected by civil aviation.
>
> **Please see Ministry of Transport commentary document: *Purpose statement***

17. We agree that s 88 does not reflect changes in sector and regulatory practice. However, we submit that omitting to include a reference to competition within the main and additional purposes of the Bill creates some potential ambiguity about whether, and to what extent, the Minister ought to consider the competition effects of international air

agreements during the authorisation process as contemplated under cl 189. In contrast, factors relevant to the proper applications of the public interest test applying to authorisations under the Commerce Act are well established.

18. Therefore, we recommend that, if the Bill progresses with ministerial oversight of the authorisation process, a requirement is inserted into the additional purposes clause that expressly requires the Minister to consider the proposed agreements' effects on competition as part of his or her consideration of the public interest to ensure that New Zealand's civil aviation system operates competitively. We consider that these issues are as relevant to aviation markets as they are in other industry sectors in New Zealand.

19. We recommend this because competition plays an important role in ensuring markets operate for the long-term benefit of consumers in New Zealand. Competition generally lowers prices, increases firms' incentives to innovate, and results in better allocation of resources. Ensuring our markets are competitive also enables sustainable economic growth that creates jobs, increases income and allows New Zealand firms to compete internationally.

**Consequences of drafting/increased scope of international air agreements**

20. We note that s 88 of the Civil Aviation Act is primarily concerned with the authorisation of contracts, arrangements or understandings that fix tariffs or capacity but is generally accepted to extend to other ancillary activities that relate to cooperation among airline operators. Section 88(2) reads as follows:

> **88 Authorisation of contracts, arrangements, and understandings relating to international carriage by air**
>
> (2) The Minister may from time to time specifically authorise all or any provisions of a contract, arrangement, or understanding made between 2 or more persons in respect of international carriage by air and related to such carriage so far as the provisions relate, whether directly or indirectly, to the fixing of tariffs, the application of tariffs, or the fixing of capacity, or any combination thereof.

21. Clause 189(1) of the Bill clarifies the activities that could be considered as part of an international air agreement and authorised.

22. We recommend that cl 189 should be expressed so that it is clear that the additional listed activities can be authorised only when they relate to international air agreements . We suggest that this could be achieved by inserting language into cl 189 such as "The Minister may, in relation to an application for an authorisation under this subpart, authorise one or more of the following operational activities so far as it relates to international air agreements: …"

23. In the absence of such a limitation, airlines could apply for authorisation of collective agreements relating to, for example, joint purchasing or lounge access, that had no relationship with specific international air travel agreements.

**Interaction with Part 4 of the Commerce Act**

24. Clauses 204 and 205 of the Bill would, in effect, carry over sections 4B and 4C of the Airport Authorities Act 1966 (AA Act). Those provisions impose obligations on airport companies to consult with substantial customers concerning charges and capital expenditure plans. We propose that these provisions should be made subject to regulation imposed on specified airports under Part 4 of the Commerce Act, which deals with the economic regulation of specified airport services.

25. At present, certain services supplied by the operators of Auckland International Airport, Wellington International Airport and Christchurch International Airport are subject to information disclosure regulation, under which the operators are obliged to publicly disclose certain information concerning their actual and proposed activities (including pricing). However, the Commerce Amendment Act 2018 amended subpart 11 of Part 4 of the Commerce Act. One of the amendments was to create a process whereby the Minister could, following a Commission inquiry, recommend an Order in Council to impose different types of regulation on specified airport services (see sections 56F-56K of the Commerce Act). These different types of regulation are negotiate/arbitrate regulation, default/customised price-quality regulation and individual price-quality regulation, and the parameters of those types of regulation are set out in other provisions in Part 4.

26. The precise way in which a different type of regulation would apply to specified airport services would be determined by the Commission following the Order in Council. However, we anticipate that it is possible that some aspects of new regulation might conflict with the obligations on the airport companies under cll 204 and 205 of the Bill. For example:

    a. if the Order in Council imposed a form of price-quality regulation on specified airport services, then the charges that airport companies levied for those services would be set as part of the Commission's regulation. In setting that regulation, the Commission would consult on its proposals, and would invite submissions from interested parties, including substantial customers of the airport. In that circumstance, it would be inappropriate for the airport companies also to have an obligation in cl 204 of the Bill to consult on matters that had been determined by the Commission. It is also possible that the Commission, as part of its price-quality regulation, would impose its own consultation requirements on airport companies in relation to capital expenditure proposals, which might conflict with the obligations in cl 205 of the Bill.

    b. if the Order in Council imposed negotiate/arbitrate regulation on specified airport services, then the charges and capital expenditure of airport companies would likely be the subject of negotiation between the companies and their customers. However, the regulation would also provide for those matters to be set by arbitration if agreement could not be reached. Again, it would be inappropriate for the airport companies also to have an obligation under cll 204 and 205 of the Bill to consult on matters that had been determined by an arbitrator.

27. We note that s 4A(4) of the AA Act ensures that the operation of the existing s 4A does not limit the application of Part 4, and thereby enables both requirements to co-exist. However, in our view, the Bill will require a somewhat different provision, which would ensure that specific regulation of specified airport services under Part 4 would take precedence over the general consultation obligations in cll 204 and 205 of the Bill if the requirements were to be in conflict.

28. We would be happy to discuss with the Ministry the manner in which this potential conflict between cll 204 and 205, and potential future regulation under Part 4, could be resolved in the text of the Bill.

**Conclusion**

29. It is our view that the Civil Aviation Act should be reformed to improve the authorisation decision-making process. We have previously submitted that the Commission is well equipped to provide oversight of the authorisation process, and that competition law is sufficiently flexible to deal with international air agreements.

30. In the event that the Minister retains responsibility for authorisation per cll 184-194, we submit that the effects of international air agreements on competition should be expressly stated to be relevant to the Minister's discretion. Furthermore, we recommend that the Ministry clarify the scope of authorisation of airline cooperation arrangements to restrict these to activities to those that concern cooperation for the purposes of an international airline agreement. We suggest that the Ministry give more consideration to these points to mitigate the risk of inadvertent authorisation of agreements with anticompetitive effects within the aviation sector.

31. We also recommend amendments that would ensure that specific regulation of specified airport services under Part 4 of the Commerce Act would take precedence over airport's general consultation obligations in cll 204 and 205, where these requirements are in conflict. Such amendments would recognise the new forms of potential economic regulation of airports introduced by the Commerce Amendment Act 2018; namely, price-quality regulation and negotiate-arbitrate regulation. In our view, if airports' charges or capital expenditure were to be determined by the Commission or an arbitrator after an extensive decision-making process (including consultation with stakeholders), then it would be inappropriate (and redundant) for the airports to also be obliged to consult on those matters with their customers. We would be happy to discuss with the Ministry the ways in which this potential conflict could be resolved in the text of the Bill.

32. We thank the Ministry for this submission opportunity and would be pleased to provide any further assistance that you may require. If you have any specific questions on this submission please contact John Stewart, Advocacy Advisor on 04 924 3706 or john.stewart@comcom.govt.nz in the first instance.