

The Guild of Air Pilots and Air Navigators of London

(New Zealand Region)



Civil Aviation Act Review

**Submission to the New Zealand Ministry of
Transport**

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Administrator New Zealand Region
Guild of Air Pilots and Air Navigators



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Summary

New Zealand's aviation legislation, at a top level, is no better than it was in 1988 and is probably worse. The Civil Aviation Act 1990 is a general repository for economic requirements relating to the air transport system as well as safety and security requirements relating to the civil aviation system. This legal framework promotes the blurring of sectoral boundaries and responsibilities between these two quite different requirements. New Zealand therefore needs to simplify the aviation legal framework to enable operators to more easily do their job and for New Zealand to maintain and attract investment in the air transport system.

Civil aviation legislation must reflect society's ambitions and at the same time take account of the balance of power within the civil aviation system where individuals and organisations look to maintain and promote their own ambitions, *etc.* In addition, the civil aviation legal framework needs to promote rather than hinder the development and operation of the civil aviation system. This 'balancing act' is best and most simply achieved by separately considering the safety and transport (economic) requirements of the system.

The overall safety goal or objective for the New Zealand civil aviation system should be:

To promote safety in civil aviation at reasonable cost for the benefit of the people of New Zealand.

Reasonable cost is defined as that cost where the benefits to New Zealand exceed the costs to New Zealand. Although the test for safety at reasonable cost may be difficult to explain to a public audience and sometimes difficult to apply, it remains the best documented and accepted test for public policy development and resource allocation. The Guild therefore supports a return to the explicit guiding principle of safety at reasonable cost. Such an objective or goal needs to be expressed in civil aviation legislation.

In turn, the overall air transportation or economic objective for New Zealand should be:

To foster an accessible, affordable and reliable air transport system, and to promote the development of the civil aviation system to enhance the economic and social well being of the people of New Zealand.

The economic objective or goal also needs to be expressed in legislation. This is consistent with current policy.

One of the concerns the International Civil Aviation Organization has expressed is the blurring of sectoral boundaries between safety and economic requirements. That is there should be a clear-cut differentiation between the safety responsibilities and requirements of a State and their transport or economic responsibilities and requirements. The two roles or responsibilities are best to be institutionally and legally separated, controlled and administered.

The sectoral boundaries in New Zealand between safety and economic requirements are becoming blurred. New Zealand's legal framework contributes to this. A legal framework that makes a clear cut distinction between safety requirements and economic requirements will overcome these problems.

In this regard, the safety requirements in terms of rules, regulations and standards are essentially technical and operational in their content– non-discretionary by nature – and require frequent updating. The Responsible Minister is unable to make any useful input due to their technical content. Safety regulation, therefore, is a case where there is no need for the Responsible Minister to be involved in the day-to-day or even week-to-week activities of the 'Regulator'. Indeed a measure of independence is desirable.

Air transportation is essentially an economic activity involving the demand for and supply of air transport and related services where the regulation of this activity is

based on government policy. Such policies are aimed at the economic, social and political development of the country – therefore there is an unavoidable element of political interest and control.

Accordingly, the Responsible Minister will usually be involved in the decision-making and require frequent interaction with his or her officers.

Thus, while transport or economic requirements are more properly matters of trade, commerce and foreign policy, safety requirements are very much technical and operational by nature. Therefore, they are each best controlled and administered separately. Furthermore, in order to avoid conflicts of interest between the accountabilities and responsibilities for

transport or economic requirements and those of flight safety, the two requirements and responsibilities are best provided for in separate Acts.

Accordingly, the New Zealand civil aviation legal framework needs to be consolidated into two new Acts:

- (i) one to prescribe the safety and security requirements to be called the *Civil Aviation Safety and Security Act*; and
- (ii) another to prescribe the transport and economic requirements to be called the *Air Transportation Act*.

17th February 2014

1 Introduction

1.1 Review of the Civil Aviation Act 1990

1. The Ministry of Transport (MoT) is leading a review of the Civil Aviation Act, which governs the civil aviation system in New Zealand. The stated *objectives* of the review are to:

- make sure the Act promotes a responsive regulatory system to support a dynamic aviation sector;
- refresh and improve the Act's usability; and
- ensure that its provisions are current and effective.

2. The MoT considers that the Act is fundamentally sound, but notes that it has been amended a number of times and is now over 20 years old and during this period there have been a number of changes in the aviation industry.

3. The *scope* of the review will include:

- a general review of the Act's provisions to ensure they provide for effective and efficient decision-making – clarifying intent and removing any ambiguity;
- whether the Act can be presented in a clearer, more concise and accessible form;
- whether there are opportunities to consolidate and simplify expectations placed on participants to deliver a more holistic statement of the requirements they must meet;
- whether today's safety and security issues, and economic opportunities, are fully addressed, where appropriate, in the Act;
- the optimal regime for considering authorisation of airline cooperative arrangements;
- ways to improve data collection and reporting needs for the Civil Aviation Authority (CAA); and
- the relationship between the Act and the Airport Authorities Act 1966.

4. On the question of the competition regime for international air services, the MoT notes that this could be placed under the Commerce Act. The MoT also notes, "the review of the Airport Authorities Act will include looking at the provisions relating to charges and information disclosure. However, it is not the intention to use this review as a vehicle for imposing additional airport pricing regulation."

5. The MoT also notes that:

- the transport agencies themselves will not be reviewed;
- Civil Aviation Rules will be retained;
- Airways Corporation of New Zealand Limited will continue as the sole air traffic service provider of area and approach control services and flight information services; and the
- CAA will retain its statutory responsibility for the Aviation Security Service

6. In the MoT's 'questions and answers' concerning the conduct of the review it is stated that:

The review will not alter the fundamental principles of the Act: to establish a regulatory framework to promote civil aviation safety and security, and implement New Zealand's international obligations.

7. The current Act does not precisely set out 'fundamental principles'. However, when the Act initially came into force in September 1990 the principal functions of the Minister were [s14]: "to promote safety at reasonable cost, and to ensure that New Zealand's obligations under international civil aviation agreements are implemented." This changed in 2004 [Civil Aviation Amendment Act (No 2) 2004] with significant and far reaching changes to the principal functions of the Minister – replaced by 'objectives' and 'functions' thus:

14 Objectives of Minister

The objectives of the Minister under this Act are—

- (a) to undertake the Minister's functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system; and
- (b) to ensure that New Zealand's obligations under international civil aviation agreements are implemented.

14A Functions of Minister

The functions of the Minister under this Act are—

- (a) to promote safety in civil aviation:
- (b) to administer New Zealand's participation in the [Chicago] Convention and any other international aviation convention, agreement, or understanding to which the Government of New Zealand is a party:
- (c) to administer the Crown's interest in the aerodromes referred to in Part 10:
- (d) to make rules under this Act.

8. Amongst other things, the matter of fundamental principles and objectives of the Civil Aviation Act will be considered as a specific issue in this submission.

1.2 Guild of Air Pilots and Air Navigators

9. The Guild was founded in 1929 and is a Livery Company of the City of London, receiving its Letters in 1956. Up to March 2002, Her Majesty The Queen was the Patron and His Royal Highness The Prince Philip, Duke of Edinburgh, the Grand Master. At the end of March, Prince Philip took over from Queen Elizabeth II as the Patron and His Royal Highness The Prince Andrew; Duke of York became the Grand Master.

10. The New Zealand Region of the Guild of Air Pilots & Navigators was formed in 1989. Its formation arose out of concern by a number of air transport pilots, air traffic controllers, medical practitioners, lawyers, economists and others. Their concern was the lack of informed debate surrounding safety regulatory and economic reform within the civil aviation system within New Zealand and the South-west Pacific in general. Factual information and unbiased analysis and comment were seen as lacking in many areas of the reform process. As well these were also absent from some areas that influence the ongoing operation of the civil aviation system. Of particular concern was the maintenance of high safety standards, good airmanship and the availability of information.

11. The main objectives of the Guild are:

- to establish and maintain the highest standards of air safety by promoting good airmanship among airmen; and

- to constitute a body of experienced airmen available for advice and consultation to facilitate the exchange of information.

12. The Guild in London is consulted by the Civil Aviation Authority and Department of Transport on legislative proposals concerning the operation of aircraft and other matters (*eg* licensing, training, standards, airspace usage). The Guild in New Zealand is similarly consulted by the Civil Aviation Authority and Ministry of Transport and exchanges information with the Australian Region Guild and with the Guild in the United Kingdom. After the establishment of the Civil Aviation Authority of New Zealand, the New Zealand Region of the Guild, at the invitation of the inaugural chairman of the CAA, made a submission on institutional arrangements and a civil aviation charges regime, which were largely adopted.

13. The New Zealand Region of the Guild continues to maintain an active interest in aviation safety and in particular the regulatory environment, which is one of the key ingredients of the system. The Swedavia McGregor Report (1988)¹ swept away an antiquated regulation based system with a contemporary and forward looking structure that the Guild totally endorsed. The Guild wishes to see the direction of this reform retained but with enhancements to reflect aviation in the 21st century and the removal of "patchwork" revisions to the Act since 1990 that muddled the underlying policy and guiding principles.

14.

1.3 New Zealand's Aviation Legal Framework

15. At the time of the Swedavia McGregor Report, the legal framework for the conduct of civil aviation and air transport included 12 Acts. Nine related to transport or economic requirements (ER) and three Acts related to the safety and security requirements (SR) of civil aviation. *Table 1* details those Acts.

Table 1: New Zealand Aviation Legislation 1988

SR = safety and security requirements
ER = transport or economic requirements

	SR	ER
International Air Services Licensing Act 1947		✓
Civil Aviation Act 1964	✓	
Airport Authority Act 1966		✓
Carriage by Air Act 1967		✓
New Plymouth Airport Act 1961		✓
Whangarei Airport Act 1963		✓
Ministry of Transport Act 1969	✓	
Aircrew Industrial Tribunal Act 1971		✓
Aviation Crimes Act 1972	✓	
Carriage of Goods Act 1979		✓
Air Services Licensing Act 1983		✓
Auckland Airport Act 1987		✓

16. Today three Acts deal mainly with civil aviation safety and security matters:

- *Aviation Crimes Act 1972*: which gives effect to the Tokyo Convention on offences and other acts relating to safety on board aircraft plus the Hague and Montreal Conventions on the unlawful seizure of aircraft.

¹ Swedavia-McGregor Report: *Review of Civil Aviation Safety Regulations and the Resources, Structure and Functions of the New Zealand Ministry of Transport Civil Aviation Division*, 1988.

- *Meteorological Services Act 1990*: this ensures the provision of meteorological services in New Zealand.
 - *Transport Accident Investigation Commission Act 1990*: this provides for aircraft accident investigation.
17. Six Acts deal exclusively with the transport or economic requirements of the air transport system and its markets:
- *New Plymouth Airport Act 1961*: give the New Plymouth City Council certain leasing and other powers in respect of New Plymouth aerodrome.
 - *Whangarei Airport Act 1963*: to provide for the reconstruction, development, maintenance, control, and management of Whangarei Airport.
 - *Airport Authorities Act 1966*: provides for the establishment of airports and airport authorities by local authorities, joint venture airports companies with the Crown as well as various provisions for airport charges, capital expenditure and information disclosure. There have been seven amendments to this Act.
 - *Carriage of Goods Act 1979*: this relates to the carriage of goods within New Zealand (including air carriage).
 - *Auckland Airport Act 1987*: to provide, amongst other things, for the incorporation of a company to own and operate Auckland International Airport.
 - *Wellington Airport Act 1990*: to provide, amongst other things, for the incorporation of a company to own and operate Wellington International Airport.
 - *Air Facilitation Act 1993*: to amend the Customs Act 1966 and the Immigration Act 1987.
 - *Air Facilitation Act (Domestic Passengers and Cargo) Act 1994*: to also amend the Customs Act 1966 and the Immigration Act 1987.
18. One Act, arguably the most significant for the civil aviation system, now deals with what has been referred to within the aviation community as an unscented pot pourri of safety and economic requirements; it is the:
- Civil Aviation Act 1990*: to establish rules for and divisions of responsibility within the civil aviation system and to promote aviation safety, ensure New Zealand's international agreements are met and, what now seems to be, a general repository for various economic requirements relating to the air transport system (as opposed to the civil aviation system).
19. There are 12 Acts that deal with civil aviation and air transport; the situation today is summarised in *table 2*.

Table 2: New Zealand Aviation Legislation 2013

SR = safety and security requirements
ER = transport or economic requirements

	SR	ER
New Plymouth Airport Act 1961		✓
Whangarei Airport Act 1963		✓
Airport Authorities Act 1966		✓
Aviation Crimes Act 1972	✓	
Carriage of Goods Act 1979		✓
Auckland Airport Act 1987		✓
Civil Aviation Act 1990	✓	✓
Wellington Airport Act 1990		✓
Meteorological Services Act 1990	✓	
Transport Accident Investigation Commissions Act 1990	✓	
Air Facilitation Act 1993		✓
Air Facilitation (Domestic Passengers and Cargo) Act 1994		✓

20. The tables above summarise the *industry specific legislation* that deals with or is limited to a specific industry and in this case, the civil aviation and air transport industry. (Note: the Carriage of Goods Act applies to land, sea and air and so specific to the transport industry.) There is *legislation of general applicability* that also applies to the civil aviation and air transport industry such as: Commerce Act 1986, which in 2008 included provision for 'airport services' to be regulated, Consumer Guarantees Act 1993, Health and Safety in Employment Act 1992, Marine and Coastal Area (Takutai Moana) Act 2011 that affects the reclamation of the foreshore for airport development, Resource Management Act 1991, etc.

21. The transition from 1988 to 2013 depicted in tables 1 and 2 belie any suggestion that there has been a simplification or even consolidation of the law relating to civil aviation in New Zealand. This is perhaps best illustrated by the composition or anatomy of the present Civil Aviation Act 1990 (see *figure 1*).

22. Unfortunately, at the outset, the Civil Aviation Act 1990 was a mixture of safety and economic requirements, although the emphasis was predominantly civil aviation safety.

23. Since its introduction, the Civil Aviation Act 1990 has lost its safety focus and is now an omnibus piece of legislation that is difficult to read, with a format that is awkward and complex (*eg* section 77B (1) a (iv) B and section 87ZG). But more importantly, there is a blurring of sectoral boundaries and responsibilities between safety and economic requirements. The Civil Aviation Act has 'lost its way'.

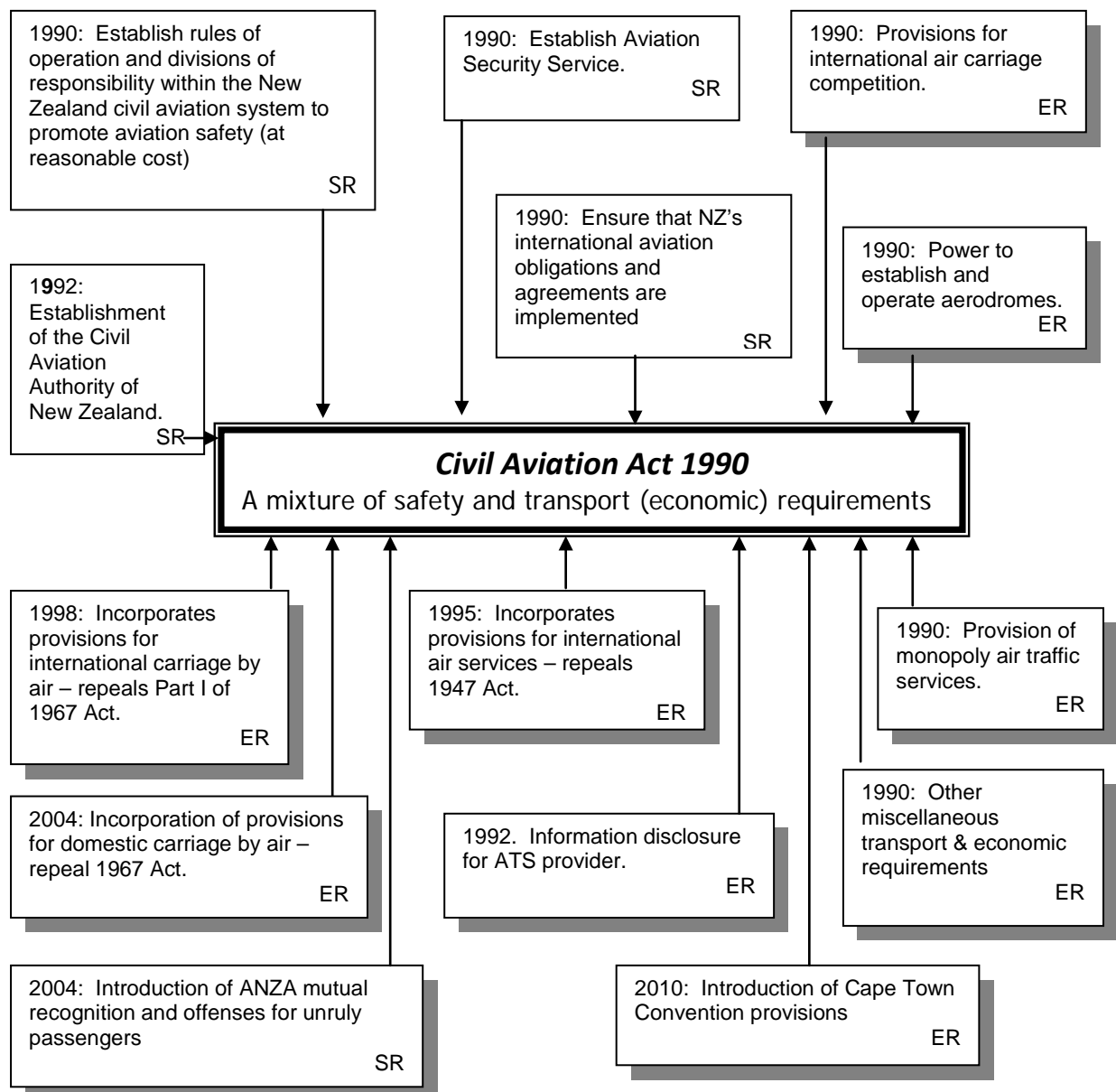
24. In 1988 the Swedavia McGregor Report² noted that the legal framework of the civil aviation system was complex, confusing and difficult to understand and did not make life easy for the aviation industry nor help the civil aviation safety authority do its job.³

² See section 5.4, page 65.

³ When the Civil Aviation Act (Bill) was initially drafted, there was very limited consultation with the aviation community and, surprisingly, the authors of the Swedavia McGregor Report, in which a structure and contents for a new Act were proposed, were excluded from the process. However, their suggested structure and contents (safety requirements) for a new Act were largely adopted; the authors never contemplated that safety and economic requirements would be incorporated into the one Act.

25. The point is, New Zealand's civil aviation and air transport legislation, at a top level, is no better than it was in 1988 and worse as it mixes civil aviation safety requirements with transport and economic requirements.

Figure 1: *Anatomy of Civil Aviation Act*



1.4 Interpretations

26. One of the main problems in understanding the civil aviation system and the air transport system is the incorrect use of the terms "civil aviation" and "air transport".⁴

⁴ See also ICAO Doc 9626, Manual on the Regulation of International Air Transport, 2nd Edition 2004 and 1st Edition, 1996, Foreword.

27. The term “civil aviation” is a generic term referring to air transport, private flying, non military flights by States, aircraft manufacturing, air navigation, aerodrome operations, recreational and sport aviation, specialty air services, and a variety of other goods and services that are supplied to these entities, *etc.*
28. The term “air transport” is more specific, referring to the carriage by air of passengers and cargo, generally in the form of a commercial undertaking.
29. In this submission, the Guild carefully uses these terms to mean what is stated above. Indeed these meanings should be adopted in all legislation relating to civil aviation and air transport.
30. The term “civil aviation system” requires specific amplification and explanation. The term is referred to multiple times in the Civil Aviation Act and is not defined. The civil aviation system is discussed in some detail in chapter 2.
31. There seems to be no agreed definition of the term “economics” or “economic”. Economics maybe loosely defined as the study of the ways people go about getting the things they want. A more elaborate general definition is: the study of how people and society choose to employ scarce resources that have alternative uses to produce various commodities and distribute them for consumption among various people and groups in society. It usually involves analysing the costs and benefits of improving patterns of resource allocation.⁵
32. The process of evaluation requires a measure or standard and that measure is most commonly efficiency. So the efficient use of resources is important – some would argue, paramount. Indeed, the Commerce Commission is required to consider efficiency when determining whether the result of particular conduct will benefit the public.⁶ Economic efficiency is generally considered to comprise three components: allocative efficiency, productive efficiency and innovative efficiency. *Appendix I* elaborates on economic analysis and public policy in the context of this submission.
33. The term “economic requirements” encompasses the general meaning of economics, above, and in particular the concept of economic efficiency. Accordingly, it includes environmental and social considerations in the allocation of resources and commodities along with production of various commodities as well as how things change over time including technological innovation. The point is environmental and social considerations are not ignored.
34. The term “safety” is used in a technical sense and *Appendix II* discusses some aspects of flight safety and risk. The term “safety requirements” is used in a technical sense (and includes some environmental aspects). It refers to both the safety and security aspects of civil aviation and air transport.

1.5 This Submission

35. It is appreciated that a Minister has three sources of advice each representing particular perspectives and formed from particular knowledge and experience:

- *Official advice*, which is advice received from the Minister's own department (*viz* Ministry of Transport) and other government departments;

⁵ Paul Samuelson, *Economics*, 10th Edition, McGraw-Hill Kogakushe Ltd, 1976, (page 3).

⁶ Commerce Act 1986, section 3A, Commission to consider efficiency.

- *Professional advice*, which is advice received from consultants to the government and to ministers and advice received from professional organisations (*eg* Royal Aeronautical Society, Law Society, *etc*); it should be independent; and
- *Industry advice*, which is advice received from individuals and organisations engaged in activities for hire or reward or for recreational purposes and mostly with interests within the civil aviation system (*eg* Airline Pilots Association, Aviation Industry Association, Air New Zealand Limited, aero clubs, *etc*).

36. It is essential that all advice a Minister receives be contestable. Accordingly, professional and industry advice contribute to this requirement. This submission is in the category of professional advice. It focuses on the structure and objectives of aviation legislation and the safety and economic requirements. Importantly, in doing this, New Zealand's framework needs to be compared with that of other developed aviation nations and this is done. Consequently, this submission is more comprehensive than originally envisaged. Notwithstanding this, however, if the legal framework is not 'correct' or ill defined, then the mechanism that drives the civil aviation system will be hindered.

37. Before a legal framework can be considered, it is necessary to appreciate the structure of the civil aviation system and air transport system, their overall objectives and in particular, their economic and safety requirements. These requirements form the foundations of aviation legislation. The elements of a legal structure for civil aviation along with the duties of the State are considered. These matters are considered in chapter 2 and supported by *appendix I*, economic analyses and policy development.

38. In any review of the aviation legal framework, it is important to consider operators' and investors' perspectives, as well as the main international developments and issues. Chapter 3 outlines some current issues and the outlook for international civil aviation, concludes with a number of challenges facing New Zealand and the Australasian region.

39. Chapter 4 elaborates on civil aviation safety regulation and oversight along with air transport (economic) regulation, their quite different requirements together with reasons for separating safety and economic regulatory responsibility at institutional and legal levels. In support of this *appendix II* provides background information on flight safety and public policy and the matter of risk.

40. Also from operators and investors perspectives, the New Zealand legal framework needs to be in step with the leading aviation nations of the world. Chapter 5 summarises the main aviation legislation and institutional arrangements for both the economic and safety regulators along with arrangements for the provision of airport and ANS services and facilities in leading English speaking aviation nations. This chapter provides a snapshot of how New Zealand compares with these nations. It is supported by *appendices III, IV and V* that elaborate on arrangements for the provision of airports, ANS and in particular the situation in the UK.

41. A prerequisite in the formulation of public policy is good quality information and data. Chapter 6 outlines current information sources, what is needed and places information in the context of efficient markets.

42. Chapter 7 draws together the main conclusions relevant to an aviation legal framework and makes some recommendations.

43. Finally, chapter 8 outlines a suggested legal framework for a New Zealand Civil Aviation Safety and Security Act and an Air Transportation Act. This is supported in appendices VI and VII with comments on the contents and a suggested arrangement for the two Acts.

2 The Civil Aviation System

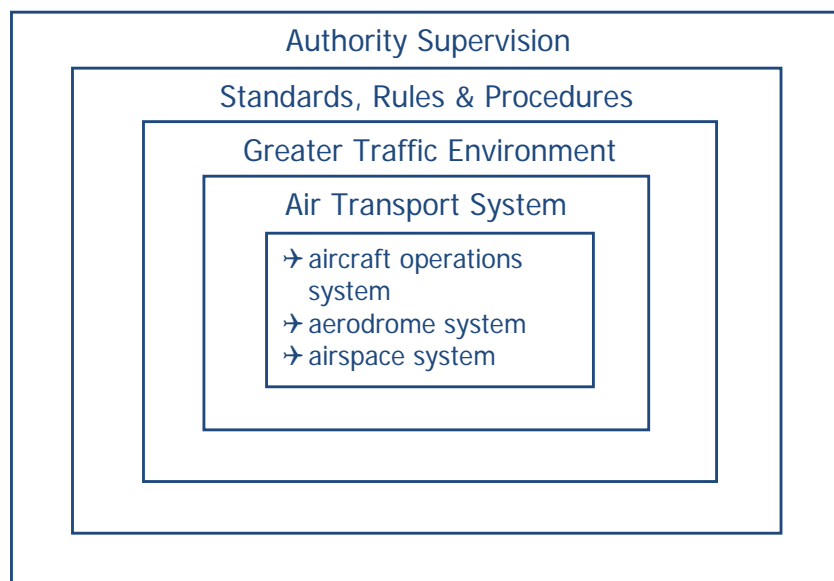
44. There is not a clear understanding as to what is meant by the term “civil aviation system”; this includes the legal profession and the courts themselves may not appreciate what the term refers to.

45. In considering the legal framework for civil aviation a framework for analysis is needed that simply explains the various components of the system and their relationships. Without such an appreciation, sensible and proper conclusions cannot be drawn and an inappropriate legal framework may result, especially relating to the safety and economic requirements of the system. The term was first referred to in the Swedavia McGregor Report (chapter 2). With the assistance of one of the authors of the Swedavia McGregor Report, the elements of the civil aviation system are outlined below.⁷

2.1 The Civil Aviation System⁸

46. The civil aviation system is one of the many systems that exist within the economic, social, environmental and political fabric of a country. Like all systems, it is a complex unit with many different parts, controlled by the same plan or purpose. The civil aviation system is no exception. *Figure 2* illustrates the components of the civil aviation system.

Figure 2: Civil Aviation System



47. The primary objective of the civil aviation system is to transport people and cargo in a safe, efficient and orderly manner from one place to another. The system is therefore focused on the passengers and cargoes, as they are the very reason for

⁷ A similar framework can be readily developed for the maritime and land transport sectors.

⁸ The concept and principles outlined in this chapter were originally set out in the *Swedavia McGregor Report* to the New Zealand Government: Review of Civil Aviation Regulations and the Resources, Structure and Functions of the New Zealand Ministry of Transport Civil Aviation Divisions, April 1988.

the system's existence. The air transport system provides the basic functions that carry out this primary task – that is the transportation work.

48. The air transport system itself consists of three sub systems: the aircraft operations system, the aerodrome system and the airspace system. The air transport system works within a traffic environment, which usually comprises or involves other modes of transport (sea, road, rail), which may overlap with the airspace, aerodrome or even the aircraft operations system. Governing the environment and systems are laws, regulations, standards and procedures; and, surrounding all this⁹ government authorities carry out various levels of supervision and surveillance to see that the rules are respected.

49. The Civil Aviation Act, New Zealand Civil Aviation Rules (NZCARs) along with other aviation legislation noted in table 2 plus legislation of general applicability all contribute towards the standards, rules and procedures that govern the greater traffic environment. The CAA and MoT are two of the (many) authorities supervising this greater traffic environment.

50. We shall return to the air transport system later.

2.1.1 Distribution of Power

51. Operating within the civil aviation system are many and varied organisations and individuals with disparate interests. They can be conveniently classified into three power groups that exercise considerable influence over the civil aviation system:

- *Regulatory power group*: defines the framework for the civil aviation system in both economic and safety dimensions. The regulatory powers want clear and simple rules along with the authority and ability to enforce the rules. In New Zealand the CAA and MoT have exercised most of the regulatory power and since 2008 the Commerce Commission also exercises considerable regulatory power.
- *Commercial power group*⁹: provides the mechanism or means for transporting passengers and cargoes from one place to another. The commercial powers are essentially the organisations rather than the individuals that make up the air operations, aerodrome and airspace sub systems – they produce goods and services (air transport, flying training, aircraft, air navigation services (ANS), *etc*), or buy goods and services (*eg* fuel, parts, aircraft, maintenance, ANS, *etc*) or sell these goods and services. Most organisations accept the need for rules provided they do not unduly affect them or alternatively favour a competitor – rules can sometimes be seen as a way of keeping out potential rivals. The commercial powers expect to be consulted on the rules and want them to be written in a simple format.

A characteristic of commercial powers is that safety has not always been a prime objective; today in many sophisticated organisations, safety is a fundamental ingredient in the producing system. Nevertheless, there are different ambition levels in terms of safety and profit.

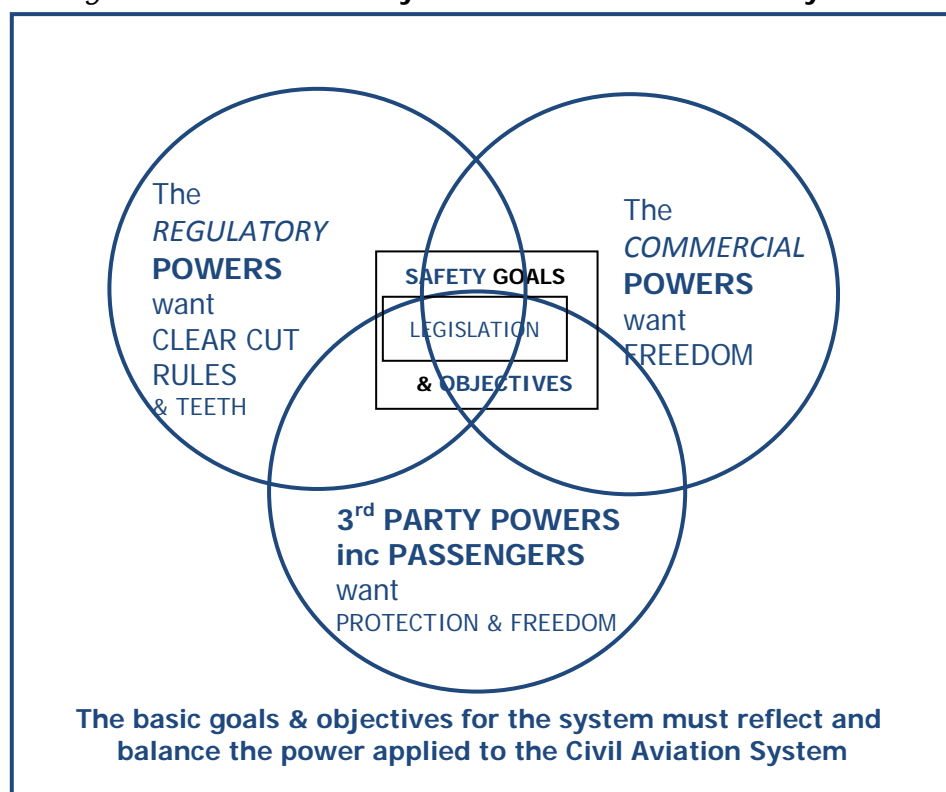
⁹ Non commercial participants, such as private flying for sport or recreation (viz aero clubs), mostly use goods and services that are provided on a commercial basis (*eg* components, parts, fuel, maintenance services, aerodromes, air traffic control) that are provided by organisations within the commercial group. So they may be considered part of that group.

There is generally a high level of knowledge, skill or experience amongst the commercial power group.

The success of the commercial power group is measured by its ability to make a return on the capital employed and the ability to generate assets. Air New Zealand, Airways Corporation and the three main airports presently exercise considerable commercial power on the system and are considered to be major “players” in the system.

- *3rd party power group:* are those organisations and individuals outside the civil aviation system but with a direct interest in what goes on within the system and with what is produced within the system. The most important 3rd party powers are the passenger and the cargo owner. Others include: freight forwarders, travel agents, insurance companies, banks, lawyers, industrial groups and unions, people who live near airports, the news media and society at large. (For example the Aviation Industry Association and the Airline Pilots Association are 3rd party powers.) 3rd party powers have an interest in the activities of commercial powers and in the process of regulation, especially fares and safety issues. A characteristic of 3rd party power is that it can create an impact out of all proportion to the potential impact of the other two powers (*eg* news media).

Figure 3: The Power Play within the Civil Aviation System



52. *Figure 3* illustrates the interplay of the power groups and their relative relationship to the safety goals and other objectives (*viz* profit) of the system. The safety regulator’s prime responsibility is to safeguard the interests of fare-paying passengers and other 3rd parties, such as people on the ground as well as the aircrew.

2.1.2 External Considerations: Forces on the System

53. Historically, free market forces have not been trusted to do a completely satisfactory job in flight safety. There are a number of vested interests that justify regulation.

54. If there were a good balance between the commercial and 3rd party powers then there would theoretically be no need for a regulator. In practice there is a continuous interplay between various organisations (and individuals) in pursuit of their own goals and objectives – both safety and economic.

55. Furthermore, there are a number of external forces that are applied to the civil aviation system. These forces emanate from political, economic, technological, social and environmental changes that surround everyday life. These external forces are not necessarily received and accepted by the three different powers in a uniform manner. Regardless, these forces influence society's ambitions. For example, current public concerns with civil aviation are gas emissions and noise; current passenger concerns are congestion, aviation security and flight safety; whereas industry concerns will continue to be cost related and market competition.

2.1.3 Balance of Power

56. Civil aviation legislation must reflect society's ambitions and at the same time take account of the balance of power within the civil aviation system. Nevertheless, individuals and organisations will naturally look to maintain and promote their own ambitions, *etc.* In addition, the civil aviation legal framework needs to promote rather than hinder the development and operation of the civil aviation system. The key is to do this in a manner that reflects the balance of power:

- *too much regulatory power* (discretionary or otherwise) then the civil aviation system will not be able to do a proper job. (*ie* transport people and cargo safely and efficiently);
- *too little regulatory power* then safety performance will be threatened; and
- *too much pressure* from 3rd parties could collapse the whole system.

57. The Guild considers that this 'balancing act' is best and most simply achieved by separately considering the safety and economic requirements of the system.

2.2 Chicago Convention

58. The Chicago Convention on International Civil Aviation of 1944 (simply referred to as the Chicago Convention) has been the cornerstone of modern aviation development and facilitation. It has enabled aviation to develop into the economic and safe industry that it is today. The Convention has enabled access over and into sovereign States for air transport services and has provided a framework for bilateral, multilateral and plurilateral agreements between contracting states.

59. Safety too has been advanced through minimum standards and recommended practices, by adoption of international guidelines developed in a consultative manner involving contracting states' technical staff led and coordinated by the International Civil Aviation Organisation (ICAO).

60. The Convention applies to international aviation only and States can choose to apply whatever standards they so please to the domestic market. It is most important that at the interface between domestic and international aviation, international standards and recommended practices are applied. (International travellers make the reasonable assumption that the protection they received while

travelling on international flights is also present in domestic operations. Unfortunately, this is not the case in many developing countries including a number of South Pacific island states.) Airlines such as Air New Zealand, operating domestically, adopt one standard, the international standard.

61. The main objective of the Chicago Convention is to ensure the safe and orderly development of international civil aviation. It can be argued that the Chicago Convention has largely achieved its purposes although there are still many difficulties and constraints surrounding traffic rights and tariffs. But at a technical (safety) level, the Convention has been very successful.

62. The “bottom line” for safety requirements for international civil aviation is the Chicago Convention and its standards and recommended practices (SARPs). States may of course adopt higher standards and the leading aviation nations of the world do this.

63. As noted above, for domestic civil aviation, however, there is no “bottom line” provided it does not interfere with international civil aviation. It would be impractical, if not virtually impossible to completely segregate domestic aviation from international aviation.¹⁰ For this reason, States generally adopt the Annexes to the Convention and their SARPs as the “bottom line” for the domestic air transport system. In practice, then, the Annexes and SARPs tend to be the “bottom line” for all air transport services. Safety standards for other air operations such as aerial work, private flying, sport and recreation may be and usually are different.

64. In return for the obligations placed on States there are significant benefits arising from the ICAO system:

- States can have *mutual reliance* on each other to ensure an acceptable level of safety in operations under their respective jurisdictions;
- States can have *mutual acceptance* of licences, operator certificates, airworthiness certificates, certificates of approval, ratings, *etc*; and
- States can have *mutual confidence* in the operation of other State's operators in the knowledge that each State is responsible for supervising its own operators.

65. These benefits relate to the safety requirements of the air transport system and a key ingredient in this mutuality is the civil aviation legal framework. New Zealand's must therefore 'stack up' against other developed aviation nations.

66. The transport or economic requirements, as noted above are generally subject to a range of bilateral, multilateral and plurilateral agreements in which each State endeavours to enhance the economic and social well being of its own people , particular industries (*viz* tourism) and its civil aviation community.

2.3 Legal Structure

67. *Figure 4* illustrates the legal structure that transfers the commitments a State has as a signatory to the Chicago Convention and other international agreements, treaties or conventions into national legislation. This structure exists in one form or another in the domestic legislation for each of the signatory States and exists in New Zealand.

68. Legislation is generally at two levels:

¹⁰ For example, airspace and aerodromes would not be able to mix international and domestic traffic unless the domestic traffic observed the same standards as international aviation.

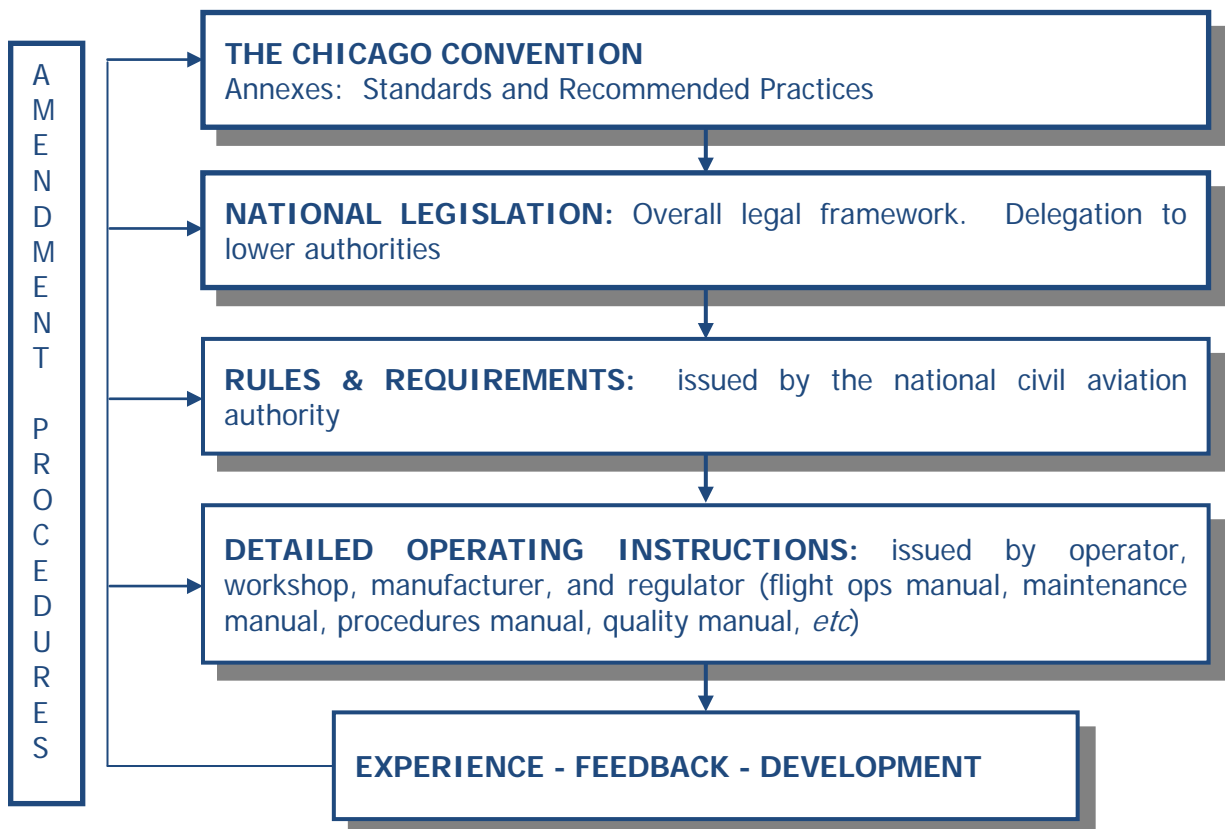
- at the top level *an aviation act* (*viz* Civil Aviation Act) which is decided at parliamentary level; and
- below, regulations (NZCARs) and accompanying government orders and requirements which are decided at government level.

69. Under these statutes the safety regulator (*i.e* civil aviation authority) is usually delegated the authority to issue technical standards, rules and requirements to implement the objectives of the act and regulations.

70. These enable the operator (*i.e* airline, maintenance organisation, airport or ATS provider, *etc*) to, in turn, issue detailed instructions to enable their people to carry out their functions in compliance with legislation, regulatory standards, orders and the operator's own requirements. These instructions are set out in a standard operating procedures manual (exposition). The regulator will (must) also set out its own detailed instructions on how to develop rules, standards, *etc* in its own procedures manual.

71. Provision needs to (must) be made for amendments at all levels of the legal structure to provide flexibility and to cope with the external forces on the civil aviation system, especially technological changes.

Figure 4: The Legal Structure for the Civil Aviation Safety System



72. New Zealand's civil aviation legal framework conforms to the structure illustrated in *figure 4*. At the top level of national legislation there are also are provisions for prescribing economic requirements specific to the New Zealand air transport system. (Table 2 in section 1.3, page 4, summarises the top level aviation legislation.) It is therefore evident why operators and investors have an interest in this framework.

2.4 Air Transport System

73. From an industry perspective, the air transport system directly involves the safe and efficient transportation of passengers and cargo by air from one place to another both within New Zealand and to and from New Zealand.

74. For the purposes of this review, the system includes the use of aircraft for general aviation purposes, including aerial work and for private operations.¹¹ There is a large general aviation sector in New Zealand and based on the number of aircraft or flights per capita New Zealand is one of the leading aviation countries. The general aviation sector includes many small commercial enterprises and it is this part of the air transport sector that is less disciplined in its operations than the airlines or what Australians call 'regular public transport'. Many (most) general aviation enterprises are owner-operators and it is the lifestyle that tends to be at least as important as the air transport services they provide. The point is these enterprises do not always respond to external influences (*viz* regulations) in a predictable manner.

75. It is the air transport system and its three subsystems that we are particularly interested in:

- *Aircraft operations system*: which consists of all the functions, organisations, individuals involved in making an aircraft fly safely and efficiently from one place to another; it includes the airline operator, maintenance organisations and other functions serving aircraft on the ground. This subsystem is inhabited by general aviation. Aircraft operations are mostly carried out by private enterprises. Government ownership of a national carrier is now the exception rather than the rule amongst developed aviation nations – Air New Zealand's 73% government ownership is one of these exceptions. The ownership of an international airline usually has some restrictions attached to it that emanate from the (economic) requirements of international air services agreements or particular State policies. New Zealand has a relatively liberal economic regulatory regime on international aircraft operations. In New Zealand there are no longer any ownership limitations attached to enterprises engaged in domestic aircraft operations.¹²
- *Aerodrome system*: this provides all the services and facilities on the ground for take-off and landing and for loading and unloading passengers and cargo. Aerodromes can be operated by local and State governments as well as by private organisations. Many aerodromes have a geographic monopoly and for this reason they have often been owned and operated by local or State governments. The aerodrome system is the point of entry and exit for

¹¹ Commercial air transport is the carriage of passengers, cargo and mail for hire or reward. General aviation may be defined as aviation activities other than commercial air transport. Aerial work is the use of aircraft for specialised services such as: agriculture, construction, tourist scenic flying, adventure flying, photography, surveying, observation and patrol, search and rescue, fire fighting, aerial advertisement, *etc.*

¹² Some countries, notably Australia, place strict limitations on the ownership of the aircraft operations subsystem and their national carriers often carry considerable influence in determining air transport policy. While Qantas, which is not owned by the Australian government, has largely influenced the economic requirements placed on the Australian air transport system, no such similar influences exist in New Zealand. This is seen as a hindrance to the conduct of the air transport market by some involved in the New Zealand air transport system while others claim that such a policy position fosters the international and domestic air transport markets.

passengers and cargo owners into and out of the air transport system. This is effectively the only part of the air transport system where contact with other transport systems occurs (although the airspace system can have competing claims on airspace). A distinguishing feature of the New Zealand aerodrome system is the dominant ownership of airports by local government.¹³ This system is criticised by airlines and general aviation as possessing too much commercial or (monopoly) market power – yet the Government despite recommendations of the Commerce Commission has so far backed away from using an overtly ‘heavy hand’ in controlling airport charges. Worldwide, over the last 10-15 years airports have flourished and made significant profits while airlines have struggled to survive. This has been the situation in New Zealand too.

- *Airspace system:* this provides the airspace, air traffic services, navigation services and information services for the safe completion of flights. Most functions within the airspace system have until recently been seen to be a State responsibility but over the last 20 years commercial organisations have begun to provide air traffic services. But the sovereignty of the airspace remains with and is a matter for governments. Likewise, its ultimate use remains a matter for governments. Airways Corporation of New Zealand Limited provides the majority of services associated with the airspace subsystem in New Zealand; it is a State-owned enterprise. In 2012 a New Zealand national airspace policy was established that is relatively narrowly focused on ‘design and designation’ of airspace for air transport purposes.¹⁴

76. The characteristics of these three sub systems will be elaborated upon in chapter 5. These sub systems are specifically governed by two quite different and distinct regulatory requirements: transport or economic requirements and safety requirements.

- *Transport (economic) requirements:* these are the policies, regulations and other requirements that are aimed at the air transport market, and, satisfying the supply of and demand for air transport. They deal with traffic rights (both international and domestic), air fares, airport charges, air navigation service charges, service standards for providers of services within the air transport system and any other matter (*eg* airspace sovereignty and its use)

¹³ There are many small aerodromes in New Zealand. Most are privately owned but the metropolitan and provincial airports are mainly owned by local authorities. There are 37 civil aerodromes for which meteorological information is routinely available; there are upwards of 74 aerodromes listed in the New Zealand aeronautical information publication. So in all there are 111 (more or less) civil aerodromes, which are classified as either being certificated (by the CAA) or non-certificated. The difference being that certificated aerodromes can be used by aircraft with 30 or more seats while the use of non-certificated aerodromes is determined by the operational characteristics of the aerodrome as agreed by the CAA. In addition, there are numerous small private airstrips dotted about the country that are used by aerial work aircraft and for private purposes. Auckland and Wellington airports are the only two airports (as opposed to aerodromes) in New Zealand that have a majority of private sector (institutional) owners. Paraparaumu and Ardmore are two aerodromes providing limited airport services and are privately owned.

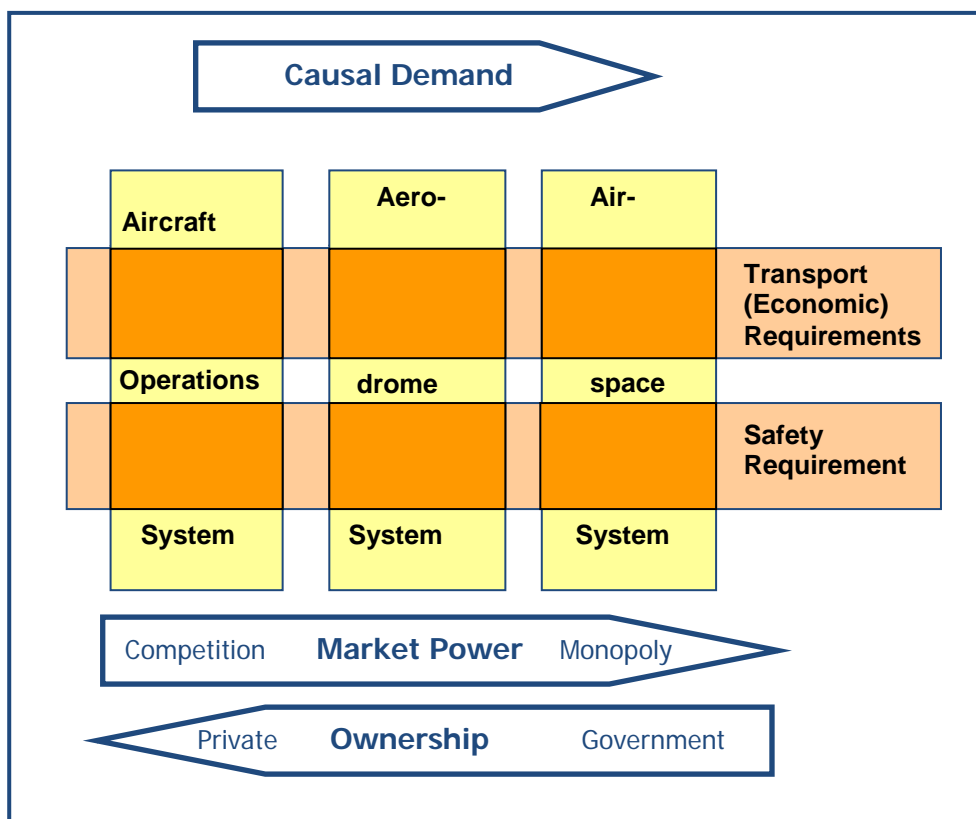
¹⁴ In the words of the National Airspace Policy document: “(the) policy is intended to provide guidance to the aviation sector in New Zealand as to the direction that the development and modernisation of the airspace and air navigation system will take over the next decade (or longer) to ensure the safe and efficient movement of air traffic. This statement is designed to set a framework under which the Civil Aviation Authority can develop a National Airspace and Air Navigation Plan, and designate different areas and classes of airspace consistent with this policy and the National Airspace and Air Navigation Plan.”

that has an impact on the “market” for air transport. For investors, the transport or economic requirements are of prime interest. The Civil Aviation Act 1990 includes a variety of economic requirements.

- *Safety requirements:* these are simply the policies, regulations and other requirements to achieve an appropriate level of flight safety and security within the air transport system. These safety and security requirements are quite independent of the transport or economic requirements. They are of prime interest to operators of various services. The Civil Aviation Act 1990 includes a variety of safety and security requirements.

77. *Figure 5* illustrates the relationship of these requirements within the air transport system. It is important to differentiate between these two requirements and in chapter 4 this differentiation is made.

Figure 5: Air Transport System



2.5 New Zealand Air Transport Market – some observations

78. New Zealand has what may be described as a liberal approach to the economic requirements, both domestic and international. Domestic air transport is completely deregulated in an economic sense; that is, there are no economic licensing requirements. The only ‘licence’ is a safety one in the form of an air operator certificate, airport operator certificate or air traffic service certificate, for example, granted by the director of civil aviation (DCA). For international air transport, licences are required as services are governed by international air services agreements between New Zealand and foreign countries. The Airport Authorities Act 1966 prescribes the economic requirements applicable to airport authorities and airport companies. The Act defines ‘specified airport companies’ as being airports

with an annual revenue in excess of \$10 million and a 'substantial customer' as an entity who makes payments to an airport company for airport services and facilities that are more than 5% of the airport company's total revenue.¹⁵ The Act requires airport companies to disclose certain financial information and consult with 'substantial customers' on airport charges. In addition 'specified airport companies' must consult with 'substantial customers' concerning an airport's capital expenditure plans.¹⁶ This is an example of what is referred to as 'light-handed' regulation, which is the approach to economic and competition regulation presently favoured in New Zealand.

79. New Zealand has what can be described as a world class safety regulatory framework. The New Zealand civil aviation rules (NZCARs) are now looked upon as "model" regulations. Indeed, those responsible for the US Federal Aviation Requirements (US safety rules) have opined that if they could start again they would pick up on the New Zealand experience and adopt many of the innovations incorporated into NZCARs. (NZCARs were originally modelled on the US safety rules whereas previously aviation regulations were an adaptation of the old UK air navigation orders and regulations for colonies.)

80. So the air transport system is governed by a most liberal set of economic requirements creating more or less deregulated air transport markets but at the same time overseen by world-class safety and security requirements.

81. The result is fiercely competitive markets throughout the air transport system but with considerable market power being accumulated by some participants – for example, Airways Corporation (the monopoly air traffic service provider), the major airports of Auckland, Wellington and Christchurch, and Air New Zealand in the domestic market. On balance the major airports probably have more market power than the airlines while the airlines, and especially Air New Zealand, have the balance of power over the provincial airports. Within the aircraft operations subsystem, Air New Zealand has a dominant position in the domestic market but has relatively little or no influence in the international market. It would be fair to say there exists considerable tension between the major airports and the airlines – this tension arises from different levels of commercial ambition as to an appropriate return on investment.¹⁷ A collaborative situation has eventually been worked out between Airways Corporation and the airlines (mainly Air New Zealand).

¹⁵ The three metropolitan airports of Auckland, Wellington and Christchurch are the only 'specified airports', in New Zealand. Air New Zealand (*inc* Air NZ Link), Qantas and Virgin are 'substantial customers' for all airports they operate into. Apart from general aviation companies resident at Taupo few general aviation companies would qualify as 'substantial customers'.

¹⁶ What this means is that the smaller provincial airports such as Hamilton, Tauranga, Rotorua, Napier and Dunedin *etc* can freely proceed with plans to extend runways, terminals, *etc* without necessarily consulting airport users. And, at times, they do not consult. It is argued, on the one hand, that the result is overcapacity and over-specification for the air transport requirements; while, on the other hand, it is an investment to foster economic development. The question is who carries the risk? In the past, the risk tended to be passed on to the airlines by local authority owners.

¹⁷ This includes economic development ambitions. Airlines are not particularly interested in regional economic development unless it generates more passengers in the short term. The longer term is "interesting" but a matter that, for airlines, falls into fleet replacement programmes.

82. In practical terms, this means that, if “push comes to shove”, airlines can cease services to provincial airports without suffering a significant financial loss and, in turn, redeploy services elsewhere or simply quit the aeroplanes. In fact, airlines continually review their network and schedule to monitor profitability and to ensure that too much capacity is not being allowed to evolve commensurate with revenue passengers and cargo. Air New Zealand's withdrawal of services to Singapore in 2006 was an example (now to be reversed with a proposed code share arrangement with Singapore Airlines) as is their threatened and actual withdrawal of services from particular provincial airports (*eg* Taupo, Wanganui). But for the major airports of Auckland, Wellington and Christchurch, the airports generally have the balance of power and a “take-it or leave-it” situation can easily arise. For airlines, the competitive forces revolve around so-called passenger traffic density and fixed costs. The New Zealand domestic market has a relatively low density. So any competitive moves by bigger more dominant airlines can easily be fatal for small airlines.

2.6 Duties of the State and the Air Transport System

83. Three basic duties of the State arise out of its obligations to the Chicago Convention that concern the air transport system. These are to:

- Develop aviation safety objective(s), policies and regulations and to set standards for flight safety.
- Develop air transport objective(s) and policies as they may relate to a State's own ambitions primarily in international civil aviation, but also for domestic air transport and aerodrome (airports) to ensure the orderly development of civil aviation to meet the State's own economic and transportation requirements. As noted earlier these relate to air transport supply and demand, traffic rights, tariffs, *etc* and they are essentially economic requirements.
- Investigate accidents and incidents to determine causes and contributory factors, and in turn to make recommendations to eliminate any deficiencies in the system.

84. These duties are carried out at different levels of the State bureaucracy and are usually distributed among more than one government department or State authority.

2.7 Objectives of the Civil Aviation System

85. In paragraph 47 it was noted that:

The primary objective of the civil aviation system is to transport people and cargo in a safe, efficient and orderly manner from one place to another. The system is therefore focused on the passengers and cargoes, as they are the very reason for the system's existence. The air transport system provides the basic functions that carry out this primary task – that is the transportation work.

86. It was also noted in paragraph 76 that the air transport system is governed by two quite different and distinct regulatory requirements: transport or economic requirements and safety requirements. It follows, therefore, that there are two primary objectives defining the direction (aims) and activities civil aviation system: a safety objective and an economic objective. These objectives are more or less expressed in the Civil Aviation Act at section 14 thus:

The objectives of the Minister under this Act are—

- (a) to undertake the Minister's functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system; and
- (b) to ensure that New Zealand's obligations under international civil aviation agreements are implemented.

87. And elaborated on in section 14A thus:

The functions of the Minister under this Act are—

- (a) to promote safety in civil aviation:
- (b) to administer New Zealand's participation in the Convention and any other international aviation convention, agreement, or understanding to which the Government of New Zealand is a party:
- (c) to administer the Crown's interest in the aerodromes referred to in Part 10:
- (d) to make rules under this Act.

88. These objectives and functions arose from the Civil Aviation Amendment Act (No 2) 2004, which in turn codified the 'overall vision for transport' expressed in the *New Zealand Transport Strategy* published in December 2002, "By 2010 New Zealand will have an affordable, integrated, safe, responsive, and sustainable transport system." This vision was 'underpinned by the four principles of sustainability, integration, safety, and responsiveness ... this included the civil aviation system.

89. Prior to the 2004 amendments to the Civil Aviation Act¹⁸ the functions of the Minister were prescribed as follows:

- (1) The principal functions of the Minister under this Act shall be to promote safety in civil aviation at reasonable cost, and to ensure that New Zealand's obligations under international civil aviation agreements are implemented.
- (2) Without limiting subsection (1) of this section, the Minister shall also have the following functions:
 - (a) To administer New Zealand's participation in the Convention and any other international aviation convention, agreement, or understanding to which the Government of New Zealand is a party:
 - (b) To administer the Crown's interest in the aerodromes referred to in Part X of this Act.
- (3) For the purposes of subsection (1) of this section, a cost is a reasonable cost where the value of the cost to the nation is exceeded by the value of the resulting benefit to the nation.

90. These functions were prescribed in the original version of the Act that came into force in September 1990. The Civil Aviation Act 1990 replaced the Civil Aviation Act 1964 in which the Ministry of Transport was, amongst other things, "to promote and encourage the orderly and economic development of civil aviation" and "to exercise such functions as may be necessary to ensure the safe operation of aircraft". The powers of the Minister were essentially confined to aerodromes.

91. The 2004 amendments to the principal functions (objectives and functions) of the Minister and collateral amendments to the objective and functions of the Civil

¹⁸ The amendments to the objectives and functions of the Minister in the Civil Aviation Act were accompanied by similar amendments to the Land Transport Act 1998 and the Maritime Transport Act 1994.

Aviation Authority created some confusion within the civil aviation community. Furthermore, they arguably became a significant distraction to the CAA in carrying out its role and functions and have hindered the development of civil aviation in New Zealand accordingly.¹⁹ It was never satisfactorily explained just how the objectives of the Minister and the CAA were to be pursued.

92. In 2008, the 2002 transport strategy was updated by the Ministry of Transport. This update essentially continued the core vision of the 2002 strategy, which focused more on land transport than maritime and civil aviation; that is no effective change.²⁰ The government's vision for 2040 being: "People and freight in New Zealand have access to an affordable, integrated, safe, responsive and sustainable transport system."

93. In 2011, the Ministry of Transport published a summary of the broad policy direction for the transport sector for the coming decade, *Connecting New Zealand*. This replaced the 2008 strategy. The overall objective for transport was defined as:

The government is seeking an effective, efficient, safe, secure, accessible and resilient transport system that supports the growth of our economy in order to deliver greater prosperity, security and opportunities for all New Zealanders

94. The three key areas of focus being: economic growth and productivity, 'value for money' and road safety. This objective is a combination of safety and economic requirements; land transport safety is specially singled out.

95. In defining (interpreting) value for money the 2011 policy notes: "improving the performance of the transport system is critical. The government needs to be confident that the transport sector (central and local government in particular) is delivering the right infrastructure and services to the right level, and for the best possible price."

96. Curiously, no legislative implications were envisaged arising out of this broad policy direction – even though the Minister's prime function would be altered.

97. Since the introduction of the Civil Aviation Act in 1990, there has been a policy migration from 'safety at reasonable cost' to 'taking all practicable steps' and now to 'value for money'. The perspective of the aviation community is that the current policy, as amended in 2004, is 'safety at any cost'. This seems to be a return to the pre 1990 safety policy regime.

2.7.1 Safety at Reasonable Cost

98. The Swedavia McGregor Report proposed that the guiding principle for aviation safety policy should be that the benefits to society of any activity should outweigh the costs.²¹ So that the aviation safety goal be²²:

the civil aviation system takes all [practicable] measures that would improve safety at reasonable cost, subject to the state meeting its

¹⁹ The objective of the CAA became to "undertake its safety and security, and other functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system."

²⁰ The Strategy supposedly responded to calls from within the transport sector for more guidance on how the vision for the transport system, established in the 2002 Strategy, should be delivered.

²¹ Swedavia-McGregor Report 1988 s9.1

²² Ibid s10.4

minimum requirements under ICAO. Reasonable cost is interpreted as meaning that the cost to the nation is exceeded by the benefit to the nation.

99. The key is the interpretation of 'reasonable cost', without this it would be very difficult to know whether a decision on a safety issue will subsequently be held by a Court or Inquiry to have been reasonable. Different Judges will reach different decisions, depending on the issues involved or at stake.

100. Safety at reasonable cost became part of the principal functions of the Minister in the original 1990 Act (see paragraph 89 above). It reflected the means of assessing the net benefits of a policy and comparing possible (regulatory) alternatives that, in 1987, were being introduced in the context of government intervention in the economy as a whole.²³

101. Is there is a potential difficulty with safety at reasonable cost? It is arguably difficult to explain to the public (non aviation community and third party powers) that what is contemplated is the cost of reducing risk, without the notion that lives are being put at risk because of cost considerations. For politicians this is an especially sensitive issue.

102. Cost-benefit analysis (CBA) is the well known and tested means of determining 'reasonable cost' in public policy development and will be familiar to the MoT (and The Treasury). *Appendix 1* outlines the role of CBA in policy development,

2.7.2 Taking All Practicable Steps

103. Now that 'safety at reasonable cost' seems no longer to be the guiding principle for the safety goal or the main function of the Minister, the requirement of 'practicable' has emerged as the test. However, in rule making the Minister or Director of Civil Aviation shall, amongst other things, have regard to 'the costs of implementing measures for which the rule is being proposed' – this is not necessarily the same as 'reasonable cost'. The Civil Aviation Amendment Act (No 2) 2004 introduced this requirement along with amendments to the functions of the Minister and CAA. Cost-benefit analysis is understood to be the test the CAA applies in having regard to the costs of implementing measures.

104. The word 'practicable' or 'impracticable' occurs in many places in the Civil Aviation Act mainly in the context of timing; in a small number of places it refers to the feasibility or impossibility of an action. These words also occur in NZCARs (*eg* Part 139.51 dealing with runway end safety areas). The key or determining factor is what is *practicable* and what is *impracticable*. The difficulty is that the word 'practicable' is not defined.

105. It can be argued that if a measure is technically and organisationally possible, it is practicable, whatever the cost – this could be interpreted as the ordinary meaning of 'all practicable steps'. But cost is a relevant factor, otherwise, taking all practicable steps would be the equivalent of 'safety at any cost', which would potentially waste resources and hinder the efficient and orderly development of the civil aviation system.²⁴

²³ Economic Development Commission, *Regulatory Reform*, September 1987.

²⁴ The practicable is often practical, and the practical is nearly always practicable; but a practical plan may prove impracticable (due to a change in circumstance) and a practicable policy may be thoroughly unpractical – *Fowler's Modern English Usage*, 2nd Edition 1987, Oxford University Press [page 469].

2.7.3 Value for Money'

106. According to the 2011 broad policy direction, the government needs to be confident that the transport sector (central and local government in particular) is delivering the right infrastructure and services to the right level, and for the best possible price. This obviously includes safety regulation.

107. So, from the government's perspective value for money and CBA are synonymous.

2.7.4 'Safety at Reasonable Cost' or 'Taking All Practicable Steps' or 'Value for Money'?

108. Cost is a relevant factor in considering safety issues.

109. The flexibility of reasonable cost has the merit of enabling any relevant matters to be taken into account. But it also has the drawback of quantifying certain costs (intangibles) and the uncertainty of whether a subsequent review would find the outcome or decision to have been reasonable. Today, the Treasury publishes guidelines for using CBA for a variety of purposes that is designed to overcome these drawbacks.²⁵ Overall, the advantage of flexibility outweighs the disadvantage.

110. Taking all practicable steps without concern for costs amounts to safety at any cost and would be contrary to the one of the three key areas of focus for transport – value for money. And, for all practicable purposes, value for money is synonymous with CBA.

111. Although the test of safety at reasonable cost may be difficult to explain to a public audience and sometimes difficult to apply, it remains, the best documented and accepted test for public policy development and resource allocation. *The Guild therefore supports a return to the explicit guiding principle of safety at reasonable cost.*

2.7.5 Government's Broad Policy Direction

112. Within the air transport system there are both safety and economic requirements. It follows that at a national level two objectives are required: one safety and the other economic. To be able to determine these objectives three things need to be known with some precision:

- (i) *the intended beneficiaries*: the people for whom the civil aviation system exists
- (ii) *the intended benefit*: what the system is to do for them
- (iii) *performance or outcome*: what level of benefit is satisfactory.

This needs to be done for both the safety and economic objective or goal.

113. In the government's broad policy direction for the transport sector, the overall objective for transport states that (see paragraph 93 above):

The government is seeking an effective, efficient, safe, secure, accessible and resilient transport system that supports the growth of our economy in order to deliver greater prosperity, security and opportunities for all New Zealanders

114. The broad policy direction combines safety and economic requirements. This can be readily transposed to the civil aviation system. The intended beneficiaries are

²⁵ New Zealand Treasury, Cost Benefit Analysis Primer, December 2005

and the intended benefits are clear. But it is not obvious what a satisfactory level of benefit would be other than greater prosperity, security and opportunities.

2.7.6 Safety Goal or Objective

115. *Appendix II* discusses flight safety in the context of public policy, in particular: attitudes and perceptions of risk, the ethical problem, levels of risk and risk assessment. These issues are relevant to a safety goal or objective.

116. While the intended beneficiaries from the activities of the civil aviation system can be narrowly identified as the passengers and cargo owners, it is vital to the integrity of the civil aviation system that all participants within the system are also “free from harm” or “safe”. Furthermore, third parties likewise benefit, indirectly perhaps, from a safe civil aviation system. Indeed, the farmer in the fields, who may never fly as a passenger and who may never see an aircraft close up, does not want an aircraft to drop out of the sky on to his fields or his home. Thus, it can be argued that this farmer has a direct interest in a safe civil aviation system.

117. The intended beneficiaries, therefore, from the activities of the civil aviation system are very wide. So it can be concluded that the whole of New Zealand society are, in fact, the intended beneficiaries of a safe civil aviation system. They can be treated as a homogeneous group who have an interest in one benefit, safe skies.

118. So for the safety goal:

- (i) the intended beneficiaries are New Zealand society or more precisely the people of New Zealand,
- (ii) the intended benefit is a safe civil aviation system, and a
- (iii) satisfactory performance would be a level of flight safety that is at least equal to that of the leading aviation nations of the world, for example (in alphabetical order) Australia, Canada, UK, US.

119. The overall New Zealand safety goal or objective may therefore be expressed in a single statement thus:

To promote safety in civil aviation at reasonable cost for the benefit of the people of New Zealand.

120. Reasonable cost being defined as that cost where the benefits to the nation exceed the costs to the nation as a whole, as discussed in section 2.7.4 above. The most appropriate performance indicator is “accidents per 100,000 flight hours” and “accidents per 100,000 flights”.

121. Such an objective or goal needs to be expressed in civil aviation legislation.

2.7.7 Economic Objective

122. As for the safety objective:

- the intended beneficiaries are the people of New Zealand,
- the intended benefit is an increase in their social and economic well being, and
- a satisfactory national performance would be access to an affordable and reliable air transport system that is at least equal to that of the leading aviation nations of the world (*viz* Australia, Canada, UK, US) and a civil aviation system that promotes the economic and social development of New Zealand.

123. The overall economic objective for New Zealand may therefore be expressed in a single statement thus:

To foster an accessible, affordable and reliable air transport system, and to promote the development of the civil aviation system to enhance the economic and social well being of the people of New Zealand.

124. As for the safety goal, such an economic objective or goal needs to be expressed in legislation.

125. Ideally a single indicator of performance is needed showing whether the “intended benefit” is being achieved. What is a satisfactory national performance? Two corporate performance indicators are likely to be required: one to indicate whether an accessible, affordable and reliable air transport system is in operation; and, another to indicate whether the New Zealand civil aviation system is enhancing the well being of New Zealanders.

126. The rate at which passenger numbers increase relative to increases in the gross domestic product (GDP) would be a good indication as to whether the air transport system is accessible, affordable and reliable.

127. Setting and measuring a satisfactory national performance to indicate whether the New Zealand civil aviation system is enhancing the well being of New Zealanders is not so straightforward. This is likely to require specific and specialist consideration. However, the value of aviation goods and services exported less the value of aviation goods and services imported would be a reasonable indication as to how well the civil aviation system is contributing to the well being of New Zealanders. That is a measure of an increase or decrease in exports and import substitution arising from aviation trading activities.

128. The increase in the number of people employed in the civil aviation system (industry) might also be a useful indicator but employment figures do not always tell the full story, especially if an industry is in transformation from a labour intensive to a more capital and intellectual intensive one.

129. The environment inevitably crops up in matters of this kind. In this regard the environment is considered an ingredient in the economic and social well being of the people of New Zealand.

2.7.8 Preferred Objectives for New Zealand

130. The suggested safety and economic objectives for New Zealand are not widely at variance with the government's overall objective for transport defined in its broad policy direction for transport. The advantages that separate safety and economic objectives have are simplicity, clarity and particularity. And of course, they refer to the quite different requirements on the civil aviation and air transport systems.

131. Having examined the role and functions of the civil aviation system and in particular the air transport system along with particular objectives for New Zealand, the next chapter provides an international perspective of civil aviation and air transport. It outlines the issues and outlook to 2030 or so, developments over the past decade as seen by ICAO and their particular concerns. The chapter concludes with a number of challenges facing New Zealand and the Australasian region. From operators and investors perspectives, an appreciation of international developments and issues is obviously important. In turn, the national legal framework and

regulatory oversight needs to be in step with such developments and the leading aviation nations of the world.

3 An International Perspective

132. The MoT's document, *Civil Aviation Act review – questions and answers*, notes that 'the Civil Aviation Act is over 20 years old and during this period there have been a number of changes in the aviation industry; and, that the international aviation industry is changing rapidly ... '. The review therefore provides an opportunity to ensure that the regulatory framework supports the needs of a dynamic sector, what economists refer to as innovative efficiency.

3.1 International Civil Aviation

133. Civil aviation and air transport has made huge progress in the last 60 years. At the time of the introduction of the first jet transport aircraft (1950's) the focus (another way of saying problems) of the industry was on reliability, aircraft range and performance, understanding materials, and, aircraft design loads and stresses. Air transportation was, however, the mode of transport for the privileged few or elite.

134. The 1980's overcame many of these problems and cost was beginning to drive the whole of the air transport system. However, by this time new types of air travel had evolved, especially leisure travel, which created new businesses like dedicated air charter operators, shuttle services and low cost operators began to appear. Also, cargo could now be carried at relatively low cost and this created new business opportunities in air cargo.

135. Today, the issues or problems of air transport and civil aviation may be summarised as:

- The growth market for air transport and how to deal with it – there are various projections on World annual air traffic but the following aircraft manufacturer's figures²⁶ illustrate the situation: in 1980 World traffic was about 1,200 billion revenue passenger km, 5,550 is expected for 2012 and by 2032 the world-wide air transport system is expected to generate up to 14,800 billion revenue passenger km. (Note: historically manufacturers' forecasts have been conservative.) Growth has been met by increased frequencies and the non-stop market. The Asia-Pacific market (exc China) is estimated to grow at 6.2% per annum up to 2032 (China 6.9%). Air Cargo has grown at 5.3% per annum since 1980.
- The globalisation of the civil aviation and air transport industry – airline alliances and joint ventures are now part of the aviation landscape. Presently 92% of long haul traffic is to or from 42 cities including Sydney and Melbourne (on average 0.8 million passengers per day); by 2032 99% of long haul traffic will be to or from 90 cities including Auckland, Brisbane and Perth (up to 2.2 million passengers per day).²⁷
- Public concerns about air and gas emissions, especially CO₂, and aircraft noise around airports and cities – the replacement of old aircraft, changes to air traffic control procedures, new technology and increasing aircraft load factors (the same people carried in less flights) are seen as being the challenges to partly combat gas emissions.
- Passenger concerns about airport congestion, delays in travel and the efficacy of flight safety and aviation security – passengers are unable to differentiate between congestion and delays caused by deficiencies in air traffic management or caused by inadequate management, design and capacity of airports. Similarly, passengers expect the same level of flight safety from low cost budget and "virtual" airlines as they do from the major

²⁶ Boeing Current Market Outlook 2013 to 2032

²⁷ Airbus Global Market Forecast 2013 to 2032.

airline carriers. Accidents in one operator are perceived as being systemic to the whole air transport system.

- The amount, type and quality of safety regulation and control – airlines, aircraft manufacturers, passengers, cargo owners and governments have all expressed at one time or another concern as to the various levels of safety standards and amount and type of government control exercised in civil aviation. Are some countries not doing enough (turning a blind eye) while other countries control the whole system?

136. International airfares continue to decrease in real terms. By 2028, they may be 20% less than they are today.²⁸ Furthermore, the basic economy passenger will increasingly outnumber the premium or business class passenger. These trends will have significant implications on the demand for and supply of air transport.

137. It can be shown that the propensity for air travel is linked to the GDP per capita. On this basis, New Zealand is a very “air travel minded” nation. About 10 years ago, in the USA and Canada the average number of flights per person per annum (fpppa) was 2.0 and 1.8 fpppa for New Zealand. It was 1.0 fpppa for Australia, 0.5 for Japan, 0.2 for Taiwan, 0.02 for Indonesia and 0.6 for Malaysia and Saudi Arabia. The GDP per capita at purchasing power parity is about 70% higher in the USA than in New Zealand and about 20% higher in Canada. On this basis, it may be concluded that New Zealand is a leading country in terms of its use of air travel whether for business or pleasure.²⁹

138. So, what is the civil aviation system likely to present by the year 2030? Apart from more aircraft flying more people and cargo with a continued shortage of engineers and mechanics, we are likely to see:

- some very large airlines emerge (in response to competition);
- more point-to-point routes (to overcome delays and congestion);
- the emergence of large private sector air traffic management regions (to overcome the operational and complexity issues of air traffic control);
- steeper approach angles flown by aircraft into airports (to combat noise);
- new airport systems to handle the numbers of passengers and cargo (to overcome congestion and delays);
- air travel becoming more geographically disbursed;
- the introduction of aircraft that are more quiet (*i.e.* have quiet airframes as well as engines) on landing (to combat noise and appeal more to passengers).

139. Unmanned aerial vehicles (UAVs) or drones have been employed in civil tasks (as well as, of course, military tasks) for some time and their use can be expected to increase. UAVs will undoubtedly increase in size, payload and range while their purpose or role can be expected to broaden. Traditionally New Zealand has been very quick to adopt and refine new aviation technology³⁰. At an international level, just how large scale UAVs will be accommodated into the civil aviation system has not yet been determined.

²⁸ Airfares are today about 55% of the 1970 levels. In 1979, the economy airfare London to New York was the equivalent of 10 days work, in 1999, it was the equivalent of five days work and today less than three days work.

²⁹ This is no doubt due to New Zealand's geographical location and economic development.

³⁰ For example, the Martin Aircraft personal jet pack that has attracted international interest.

140. So in considering changes to the legal framework, likely future developments within civil aviation and air transport need to be kept in mind.

3.2 ICAO's View and Developments

141. According to ICAO, the average increase in scheduled passenger traffic from 2003 to 2013 was 2.8% and 3.0% for scheduled air cargo traffic. Air carrier traffic in the Asia-Pacific region was 18% of world traffic in 1988, 24% in 1999, it was 30% in 2012. It can be expected that Australasian airlines will be part of this regional growth. The systems supporting aviation will need to meet this growth, including safety and economic regulation.

142. ICAO has adopted the role of "world-wide auditor of safety and security standards for international civil aviation", and to this end has already implemented the mandatory audit programme that New Zealand was subjected to in 1999 and again in 2006.

143. ICAO notes the following developments have been occurring on a global scale since the 1990s and are accelerating:

- globalisation and 'transnationalisation' of markets and operations
- continuing partial foreign ownership of airlines
- emergence of regional and sub-regional trading and regulatory blocs
- commercialisation of government service providers
- diversification of fiscal measures to respond to budgetary needs
- liberalisation of economic regulation
- potential evasion of safety regulation as a consequence of the blurring of sectoral boundaries and responsibilities of related authorities
- recognition of and response to environmental concerns, and the
- approaching physical limits of infrastructure capacity.

144. Of particular concern in the rapidly expanding market for air travel, is the blurring of sectoral boundaries and responsibilities relating to safety regulation and economic regulation. The number of commercial jet accidents worldwide in 2010, 2011 and 2012 was 40, 36, 30 respectively, more than one per fortnight. ICAO has predicted an accident rate of one per week – an unacceptable level and has provided the impetus for a number of initiatives aimed at reducing accident rates. Among such initiatives is the thrust to reduce the human factor element in accidents and approach and landing accidents.

145. The question of foreign investment and control in national carriers will test economic policy and rules in a number of countries, including New Zealand and Australia.

3.3 Challenges for New Zealand and Australia

146. In the context of civil aviation and air transport, there are a number of challenges confronting New Zealand and the Australasian region. Briefly these are (in no particular order):

- to maintain mutual recognition, reliance and trust between various State's civil aviation systems;
- to encourage investment in and development of the air transport system(s);
- to promote and achieve the cooperative management of upper airspace in the Pacific;

- to (continue to) harmonize the safety and economic requirements for civil aviation and air transport between New Zealand and Australia;
- to maintain best international practice in safety regulation;
- to ensure that the legal framework supports rather than hinders economic development and safety performance.

147. In the context of a single aviation market between Australia and New Zealand there could be less and less reason to maintain aircraft on the New Zealand register or require New Zealand issued pilot or aircraft maintenance engineer licences. Furthermore, if New Zealand's regulatory framework became out of kilter with that of leading aviation nations then an airline could well seek a more 'appropriate' or 'familiar' regulatory regime ... that could be seen to be the Australian regime.

148. The next chapter elaborates on civil aviation safety regulation and oversight along with air transport (economic) regulation, their quite different requirements together with reasons for separating safety and economic regulatory responsibility at institutional and legal levels.

4 Safety & Economic Regulation

4.1 Matters of Safety Regulation

149. Emanating from the Chicago Convention the State and the operator (*ie* airlines, ANS provider, airport, *etc*) both have responsibilities for the safe and orderly conduct of flight operations. The methods and procedures for discharging this responsibility vary from country to country. But a public responsibility to create the necessary framework for flight safety remains.

150. The State has the responsibility for setting the standards for the safety of what the Chicago Convention refers to as 'air navigation'. The responsibility of the State is implicit in its acceptance of SARPs. As outlined in section 2.3 to discharge this responsibility the State should enact legislation to provide for, amongst other things, the development and promulgation of rules and regulations plus the means to provide safety oversight consistent with its acceptance of the Annexes to the Convention (*eg* certifications, licensing, approvals, *etc*).

151. The operator has the responsibility for the safe and orderly conduct of their operations (*ie* airline, airport, air navigation service provider). The operator also has the responsibility to comply with any regulations the State may promulgate.

152. Thus, there is a division of responsibility between the State and the operator over matters of civil aviation safety, operations and the public interest. The point is, the principles for this division should be clearly defined as a basis for rule-making, licensing and authority surveillance.

153. In MoT's document, *Civil Aviation Act review – questions and answers*, it states, "The Act introduced the concept of shared accountability for safety, between participants in the civil aviation system and the Civil Aviation Authority." The meaning and the words in this statement may differ. To be sure, there are two separate and quite distinct responsibilities between the State and the operator. The State sets the standards and the operator has the responsibility to comply with those standards – the two roles are not interchangeable or strictly shared. So the Act introduces the concept of division(s) of responsibility within the civil aviation system rather than a shared responsibility.

4.1.1 Role of the Minister

154. The Chicago Convention and its Annexes is the cornerstone of civil aviation safety regulation and this mostly involves regulation by standard setting. As a signatory to the Convention, New Zealand has an international obligation, which effectively means that there is little discretion available in the safety regulation of international air transport operations.³¹

155. The point is that, apart from the non-discretionary nature of many of the regulations, the safety requirements in terms of rules, regulations and standards are very much technical and operational in their content and require frequent updating. The Minister cannot make any useful input due to their technical content. Safety

³¹ Strictly, the Annexes to the Convention set minimum standards but States have discretion to demand higher standards than those set by ICAO in the Annexes. Indeed, leading aviation nations do just that.

regulation, therefore, is a case where there is no need for the Responsible Minister to be involved in the day-to-day or even week-to-week activities of the 'Regulator'. In fact, a measure of independence is desirable.

4.2 Safety Oversight Role

156. In developing and implementing a framework for civil aviation regulations and related activities for surveillance and enforcement, the State can adopt one of two extremes: an *active* or *passive* role. In an active role, the State is engaged in detailed instructions for checking operational activities. In a passive role, the State merely sets up the regulatory framework and only becomes involved when there is a regulatory violation. In practice, neither of these extremes is practical or compatible with an appropriate division of responsibility between the State and the operator.

157. An active role tends to be counter-productive. Too detailed rulemaking may stifle development of civil aviation (because rulemaking tends to lag technical and operational development). Too much checking by inspectors may tend to dilute the operator's responsibility for safety and would not necessarily lead to a high level of safety. Furthermore, an active role requires significant State resources, proportional to the volume of activity, to support this type of role.

158. A completely passive role may make the State unable to assess whether or not it is satisfying its international and domestic legal obligations and commitments. A passive role may lead to abuses in the conduct of civil aviation and detection would be limited or unlikely before an accident occurred. Also, a completely passive authority would have difficulty keeping up with technical and operational developments in aviation and be unable to win the confidence of the industry or other Contracting States.

159. In practice, for many developed aviation nations, the most appropriate safety regulatory system falls between these active and passive extremes and:

- represents a well-balanced allocation of responsibility between the State and the operator for safety;³²
- is capable of economic justification within the resources of the State;
- depends on the capabilities of the State and those of the operators;
- depends on the degree to which the State wishes to promote, control or restrict civil aviation operations;
- depends on the State's philosophical approach to public policy and management; and
- depends on the degree of sophistication and maturity of the State's civil aviation industry.

160. In developed aviation countries, the trend is to find a balance by establishing an active but system-orientated role for State authorities on the understanding that the operator has the express responsibility for the safety of its operation.³³ This has

³² This is usually a matter of perceptions. The perceptions of operators will be different from those of the regulator and other users of the civil aviation system.

³³ In a system-oriented role, the authority looks more at the overall system safety of an operation than at the detailed nuts and bolts. This puts more emphasis on the operators' management capabilities to provide for quality and safety assurance in his operation rather than rely on authority inspectors to discover faults. It does not take more work for the authority to audit a quality assurance organisation for an operation of 20 aircraft than one with 5 aircraft. In this concept, the State has still the responsibility to define minimum standards for safety and a regulatory framework as the basis for operators to define their own detailed standards and procedures. Such a system-orientated approach is

been the role adopted in New Zealand. Regardless of the balance in responsibilities, all developed countries, to date, make provision for civil aviation regulations within their national laws and have a State organisation or entity responsible for ensuring regulations are complied with. Many differences exist, however, in the number and scope of regulations and in the type of organisation, management and financing of the State regulatory entity. (The next chapter outlines some of these differences.)

161. With the introduction of Annex 19 (footnote 33 refers), there is now a requirement for each State to establish a safety policy and objectives as part of a State Safety Programme. At a macro level, an appropriate place to articulate these is in top level aviation legislation – for New Zealand, the Civil Aviation Act.

4.3 Matters of Economic Regulation

162. Despite the changes in international air transport during the last 60 years, the 1944 Chicago Convention established the basic rules for civil aviation and these have remained intact. The principle of national sovereignty over each country's airspace remains firm; and, except in a few common market situations, international aviation continues to be regulated by a system of bilateral government-to-government agreements for the exchange of traffic rights, or market access, based on the principle of reciprocity.³⁴ Notwithstanding this, however, recent years have seen the development of plurilateral agreements.

163. Political, economic and technological changes over the past two and even three decades have further widened the horizon, posing difficult problems for governments and the airline industry. Aircraft performance increased the range (playing field) and payload (game) possibilities. Increased equipment and operating costs make it difficult to make a profit. Airline losses increased the subsidy burden on (some) governments and it became untenable. Airlines were privatised.

164. For many states, the point was reached where there were questions about the efficacy of the bilateral system and government-to-government arrangements for granting, what are now seen as, purely commercial traffic rights. But in reaching this point, it was also recognised that in civil aviation there has always been a very close involvement between governments and the industry – politics has always been close to the crux of the issues. Furthermore, the policies that affect air transport have their origin in the broader and deeper dimensions of economic and social policy objectives. Thus the overall and determining objective of international air transport policies is, as a rule, to maximise economic benefits to the particular state concerned, and not necessarily to the national airline.³⁵

165. Establishing fair operating and competition criteria for airlines and air services has never been easy. Problems arise when aviation playing fields that seem flat to one state, appear to slope preferentially to another state or states; or the field is too small for the game to be played profitably. Furthermore, the establishment of a level

represented by what has become known as a "safety management system" such as that advocated by ICAO in their Safety Management Manual Doc 9859 1st edition 2006 and 2nd edition 2009 and adopted by many airlines in varying degrees of detail, a few airports and some civil aviation safety authorities. Annex 19 Safety Management, introduced in July 2013, brings safety management into the Convention along with the requirement for a State Safety Programme.

³⁴ These were set out in the Bermuda Agreement (Bermuda 1) in 1946 and had been largely the model until denounced in 1976 and superseded by the Bermuda 2 Agreement, itself now the object of succession.

³⁵ As has been the case in Australia and is for Pacific Island countries.

playing field might be a priority for one state, whereas for another, the priority is to enlarge the field in order to benefit from economies of scale. The point is, aviation policies which may be prudent, sensible and in the national interest of one state, and may foster “fair” opportunities for its airlines, may be seen as competitive abuses, protectionist or fostering a dominant position, by other states.

166. At the same time, the leading aviation nations of the United States (US) followed by the United Kingdom (UK) became disillusioned with economic regulation and quickly moved towards a freer market. Single aviation markets began to emerge and the globalisation of the air transport market gathered pace (*ie* development of alliances).³⁶ For example, single aviation markets have been operating within the European Community (EC), between Australia and New Zealand for some time; more recently, the Multilateral Agreement on the Liberalisation of Air Transport (MALIAT) sets up a single market – there are currently nine members including New Zealand.³⁷

167. Today the issue over air services is economic liberalisation (deregulation) versus self interest. This is the issue confronting all countries – as it is for New Zealand.

4.3.1 Transport or Economic Requirements

168. With the above in mind and as noted in section 2.4, economic regulations deal with the policies and requirements that are aimed at the air transport market, and in particular at satisfying the supply and demand for civil air transport services – the transport requirements of the air transport system. These requirements are not only confined to airline operators but include airport operators and the providers of aviation services, such as ANS, that all play a role in the provision of civil air transport services. They all have a direct impact on supply and demand.

169. In practice these requirements deal with international and domestic “air rights”, air tariffs, airport charges, air navigation facility charges, airport facilitation, service standards for airports and other providers of air services (*ie* ATC), competition monitoring, air transport market research, and other activities that have an impact on the “market” for air transport. This “market” is naturally of economic, social and political interest. These interests in turn should be reflected informally or formally in an air transport policy that supports overall national economic, social and political ambitions (of New Zealand). These requirements are, among other things, negotiable; trade-offs and compromises to meet socio economic ends are common.

170. It is therefore evident that matters of air transport are more properly matters of trade, commerce and foreign policy than matters of civil aviation safety. Accordingly, they are each best controlled and administered separately .

4.3.2 Role of the Minister

171. It is plain that air transportation is essentially an economic activity involving the demand for and supply of air transport and related services where the regulation

³⁶ In 2012, about 65% of total air transport demand is contained in five distinct markets: intra North America (18%), intra Europe (13%), trans Atlantic (8%), intra Asia (14%), Pacific (3%). According to Boeing 25% of air travel is to, from or within the Asia-Pacific region. The Asia-Pacific share of demand is forecast to increase to 33% over the next 20 years. Against this market split, global carriers have a significant presence in each of their markets and alliances provide the means of this presence.

³⁷ New Zealand administers the MALIAT agreement.

of this activity is not only based on government policy but also involves the implementation of this policy. Such policies are aimed at the economic, social and political development of the country – therefore there is an unavoidable element of political interest and control. Accordingly, the Responsible Minister will usually be involved in the decision-making and in some cases will be the actual licensing authority usually requiring frequent interaction with his or her officers.

4.4 Safety versus Economic Requirements

172. One of the concerns ICAO expressed in its Strategic Action Plan for 1997 was the blurring of sectoral boundaries:

Developments in economic activity have led to a lessened distinction between the boundaries of responsibilities of regulatory authorities (for example amongst trade, tourism, transport and communications) at national, regional and global levels alike. This can lead to evasion of labour, competition and, most importantly, safety regulation, in the absence of adequate safeguards, particularly when the international dimension is added.

173. This concern remains. That is there should be a clear-cut differentiation between the safety responsibilities and requirements of a State and their transport or economic responsibilities and requirements. Accordingly, in order not to create conflicts of interest between the accountabilities and responsibilities for transport (economic) and those of flight safety, the two roles or responsibilities are best to be institutionally separated, controlled and administered, provided there is no legal or administrative barrier to doing this.

174. The sectoral boundaries in New Zealand between safety and economics are in danger of becoming blurred – if not already blurred.³⁸ New Zealand's legal framework significantly contributes to this, leading to confusion between safety and transport (economic) requirements. A legal framework that makes a clear cut distinction between safety requirements and economic requirements will overcome these problems.

175. Reasons for putting safety and economic regulation together in the one Act are few if any, perhaps historical or imagined (but not measured) economies of operation or efficiency.

4.5 Reasons for Separation

176. The reasons for separating safety and economic requirements in national legislation takes into account:

- differing government functions
- the role of the Minister
- regulatory requirements and responsibilities, and (to a lesser extent)

³⁸ The Civil Aviation Amendment Act 2002 made provisions for the exclusive use of airspace in connection with the Americas Cup regatta. The Minister was delegated the power to appoint an 'event organiser' whose task it was to develop and administer an accreditation system for access to the designated airspace. That is the 'event organiser' was granted monopoly use of the airspace. The Director of Civil Aviation prescribed the rules (referred to as 'terms and conditions') for operation within the designated airspace. This is an example of granting commercial (economic) privileges to an organisation by the Minister responsible for the Civil Aviation Act and the operational enforcement of those privileges delegated to the Director of Civil Aviation. Arguably, at the time, the distinction between the economic requirements and safety requirements were not immediately obvious. Two separate Acts would have made matters obvious.

- how leading aviation nations provide for safety and economic regulation.
177. It may be concluded that the reasons, therefore, for not mixing economic and safety requirements in one Act are:
- ➔ the commonplace difficulty in distinguishing between what are properly economic matters and what are properly safety matters and the potential for blurring the responsibility for these two quite different disciplines;
 - ➔ matters of air transport are more properly matters of trade, commerce and foreign policy and are most effectively and efficiently handled by government organizations like the Ministry of Transport;
 - ➔ matters of flight safety are mostly technical and operational where minimum standards are to be complied with and do not involve 'trade-offs' between foreign policy, industry and commerce policy objectives; and
 - ➔ the institutional considerations and level of involvement of the Responsible Minister is quite different for economic regulation than it is for safety regulation – the former requires a close and frequent involvement by the Minister, the latter requires some distancing between the Minister and the regulator.
178. Any one of these, alone, is sufficient reason for keeping them separated.
179. Regardless, there is no reason or identifiable advantage to support putting safety requirements and economic requirements together in the one Act. So why do it?
180. In summary, in order not to create conflicts of interest between the accountabilities and responsibilities for transport or economic requirements and those of flight safety, the two requirements and responsibilities are best provided for in separate Acts.

5 Legal Framework & Institutional Arrangements in Leading Aviation Nations

181. This chapter comments on aviation-related legislation and institutional arrangements for both economic and safety regulators along with arrangements for the provision of airport services and ANS in leading aviation nations. It provides a snapshot of how New Zealand compares to leading aviation nations.

5.1 The Regulators

182. Amongst other things, a legal framework should reflect government policy and support the institutional arrangements that are designed to implement and administer those policies. Furthermore, as outlined in chapter 4, a legal framework that makes a clear cut differentiation between safety requirements and economic requirements will substantially overcome problems associated with potential conflicts of interest in regulating these requirements within the air transport system.

183. *Table 3* outlines the legal framework and institutional arrangements within the English speaking leading aviation nations, including the main Commonwealth countries, for accommodating the transport (economic) requirements and the safety requirements of the civil aviation system. South Africa is included as a matter of comparison only, not being a leading aviation nation³⁹.

184. It is evident that as a rule, economic and safety regulation is separated institutionally and in the primary legislation or statutes. In some developed aviation nations, economic regulation is subject to some form of legislation of general applicability (*eg* Competition Act, Trade Practices Act, Sherman Act). This is in addition to licensing air transport services. Thus, for some services there can be a separation between the licensing authority (government department or agency) and the oversight of competition and trade practices. In many cases the economic regulator or 'watchdog', as they are often referred to, is a non-ministerial government department headed by a Director-General and generally called an "Office of ...". In the UK, however, the dual responsibility of the Civil Aviation Authority is the exception in the regulation of civil aviation and air transport – moreover, it is the exception in the UK itself.

5.2 The Service Providers

185. Here the concern is airports and ANS including air traffic control. For many years airports (in regulatory circles usually referred to as aerodromes) and air traffic control were provided by the state, being managed and operated by a government department and in some cases by a joint civil and military organization. After World War Two and with the huge expansion in air transport, airports were developed and operated by either municipal government or by central or state government organizations or in some cases both (as joint ventures). Air traffic control, however, became strictly the province of central (state) government.

³⁹ In 2013 serious concerns were (and are) expressed by some sections of the aviation community about recent senior appointments within the South African CAA including that of the Director. These concerns amounted to suitability as a 'fit and proper person'.

Table 3: The Regulators: International Comparisons
Institutional Arrangements and Legal Framework (indicative not exhaustive)

<i>Country</i>	<i>Economic Regulator</i>	<i>Safety Regulator</i>	<i>Economic Law</i>	<i>Safety Law</i>
Australia	International Air Services Commission and Australian Competition and Consumer Commission	Civil Aviation Safety Authority	Competition & Consumer Act, Air Navigation Act, International Air Services Commission Act and Airports Act	Civil Aviation Act, Airspace Act
Canada	Canadian Transportation Agency, Transport Canada Policy Group	Transport Canada Safety and Security Group	Canada Transportation Act, Aeronautics Act, Competition Act, Civil ANS Commercialisation Act	Aeronautics Act
New Zealand	Ministry of Transport and Commerce Commission	Civil Aviation Authority	Civil Aviation Act, Commerce Act, Fair Trading Act and Airport Authorities Act, <i>etc</i>	Civil Aviation Act
South Africa	Department of Transport, Competition Commission	Civil Aviation Authority	Air Services Licensing Act, International Air Services Act, Airports Company Act, Air Traffic and Navigation Services Company Act, Competition Act	Aviation Act
United Kingdom	Department for Transport, Civil Aviation Authority and the Competition Commission to be replaced by the Competition & Markets Authority	Civil Aviation Authority	Fair Trading Act, Competition Act, Enterprise Act, Transport act and Airports Act	Civil Aviation Act
United States ⁴⁰	Department of Transportation, Department of Justice	Federal Aviation Authority	Former Federal Aviation Act 1958 as amended and recodified in Title 49 US Code (<i>eg</i> by International Air Transportation Fair Competitive Practices Act 1979, <i>etc</i>) Sherman Antitrust Act,	Former Federal Aviation Act 1958 as amended and recodified in Title 49 US Code

186. Huge capital investment requirements for both airports and ANS over the last two decades has seen the institutional arrangements for ownership, management and control of both airports and air traffic control undergo significant changes. *Table 4* outlines the relevant legal framework and institutional arrangements supporting the provision and operation of airports and ANS in various developed aviation countries.

⁴⁰ The legal framework in the US is somewhat complicated. [A view shared by prominent aviation lawyers in the US.] The former Federal Aviation Act 1958 covered both safety and economic law and was recodified in 1994 by 'Title 49 "Transportation" of the US Code that is not limited to aviation. In 2000, Congress introduced the Wendall Ford Aviation Investment and Reform Act for the 21st Century that reauthorised FAA programs and made other amendments to title 49, US Code. The US legal framework is quite different to the British or Commonwealth approach.

Table 4: The Service Providers: International Comparisons
Institutional Arrangements and Legal Framework (indicative not exhaustive)

<i>Country</i>	<i>Airports</i>	<i>ANS Provider</i>	<i>Airport Law</i>	<i>ANS Law</i>
Australia	Private and local government-owned companies and public entities (authorities)	Airservices Australia Ltd: government-owned corporation	Airports Act, Companies Act, Competition & Consumer Act	Air Services Act, Airspace Act, Commonwealth Authorities and Companies Act, Competition & Consumer Act
Canada	Government (federal, provincial, municipal) not-for-profit corporations, authorities, societies, companies, and private entities	Nav Canada: private non-share capital corporation	Aeronautics Act, Airport Transfer (Miscellaneous Matters) Act	Aeronautics Act, Civil Air Navigation Services Commercialization Act, Competition Act
New Zealand	Local and central government joint ventures, local government-owned companies and public entities, private companies and private entities.	Airways Corporation of New Zealand Limited: state-owned enterprise	Civil Aviation Act, Airport Authorities Act, Commerce Act, Companies Act	Civil Aviation Act, State-owned Enterprises Act, Commerce Act
South Africa	Public sector participation in government companies	Air Traffic and Navigation Services Company of South Africa: corporatised public entity	Airports Company Act, Competition Act	Air Traffic and Navigation Services Company Act, Competition Act
United Kingdom	Private companies, municipal and government companies, public entities	National Air Traffic Services Limited: public-private-partnership company	Airports Act, Companies Act, Civil Aviation Act, Fair Trading Act, Competition Act	Transportation Act, Companies Act, Fair Trading Act, Competition Act
United States	State or municipality-owned with a pilot privatisation program introduced in 1997; also many private airports	Federal Aviation Administration (FAA): government department	Former Federal Aviation Act 1958 as amended and recodified in Title 49 US Code, and, Sherman Antitrust Act,	Former Federal Aviation Act 1958 as amended and recodified in Title 49 US Code, and, Sherman Antitrust Act,

5.2.1 Airports

187. For airports, there is a real pot pourri of institutional arrangements and so legal frameworks. Some countries prefer government ownership and control while others prefer a more widely dispersed ownership and market-based structure. While the commercial model for airport management and operation is preferred, the not-for-profit organization is not uncommon for airports. This is perhaps not surprising where an airport exhibits monopolistic characteristics or where an airport is considered an important ingredient for economic development. Whether airports are traditional profit organizations or not-for-profit organizations is a matter of public policy and how monopolies are catered for in the particular country (*ie* whether regulated or protected by statute). This is elaborated on in section 5.3. Regardless, there is, one almost common thread and that is the institutional separation of the economic and safety regulator from the provision of airports – the exception being the US where the FAA has a foot in both camps (*eg* the imposition of caps for the

number of flights into congested airports to combat the airline practice of over scheduling).

188. Apart from their geographic monopoly, the issue with airports is their functional position within the air transport system. They appear in international air service agreements as designated points of entry and exit and provide the links within a domestic air transport system. They are therefore seen by many states as being important to economic development, the development of international trade and tourism. At a regional or provincial level, similar importance is attached to airports where a social dimension may also be attached (*eg* access to a region, employment). Within the air transport system the demand for airport services is a derived demand and not (as commonly assumed) a causal demand – it is derived from the demand for air transport services (*i.e* air services). This is recognised in some states. Accordingly, where this is recognised, airports tend to be state-owned, owned by the regional, provincial or municipal government and not-for-profit organizations. Where this is not recognised there tends to be an over-capacity in airport services, even where there is private sector participation.

189. In Europe, airports have been early targets of corporatization and privatisation. Today a number of major international airports in Europe, Australia and the major New Zealand international airport are privatised. As well, what has become known as ‘global airport groupings’, now own, control or operate airports and airport investments beyond their national boundaries.⁴¹

190. In 2006 revenue for the top 100 airports generated an aggregate profit of USD6 billion, which represented a net profit margin of 11.4%. By comparison, the top 150 airlines had a profit margin of 0.4%. (This was before the global financial crisis.) According to the International Air Transport Association (IATA) little has changed since 2006. The profitability gap between airports and airlines has been a feature of the air transport industry over the past decade or more and has averaged between 12-13% over the past decade. This gap causes much of the tension between airlines and airports. To minimise this tension national airport objectives and the institutional arrangements for airports need to promote effectiveness and efficiency. In some countries, this is not at all evident.

191. *Appendix III* further elaborates on airport developments within leading English speaking aviation nations and helps to put New Zealand airports into perspective.

5.2.2 ANS Providers

192. In most cases, except the US, ANS is provided by a commercial entity institutionally separate from the safety and economic regulator. That is, the company model is preferred, often where various self-regulating economic measures to recognise the natural monopoly of an ANS provider, as in New Zealand (*viz* economic value added accounting).

⁴¹ The main global airport groupings are: Ferrovial (of Spain) with revenues of about USD4.3 billion from airport operations, Aena (Spain) USD4.9 billion, Fraport (Germany) USD3.5 billion, Schipol Group (Netherlands) USD1.9 billion, Aero de Paris (France) USD3.7 billion and partly privatised. Some of these groupings have grown out of airport privatisations; others have evolved from government corporations.

5.3 Airports: Corporatization or Privatisation?

193. This section is included to put New Zealand's airport infrastructure and developments in an international perspective and serve to illustrate that the tensions between the airlines and airports are not confined to New Zealand.

194. There is a marked difference in the institutional arrangements for airports in Europe and that in North America. Essentially airports in North America are seen as public utilities that have a role to play in the economic and social development of the region they serve. Whereas in Europe they tend to be seen as just another economic activity, not unlike an airline, that should be freed from the shackles of government management and control, regardless of its natural monopoly.⁴²

195. In Europe, the unshackling process evolved in two stages. First corporatization followed by a possible privatisation. The declared motivation for corporatization was to improve the efficiency and effectiveness of an airport by lowering costs and improving service. This was naturally welcomed by the airlines and passengers. The declared motivation for privatisation has not always been so obvious or transparent. Reasons for privatising airports included: less bureaucracy and more cost consciousness, raising cash for their government owners, gaining efficiency by exposure to 'the market', gaining access to capital markets, *etc.* It was claimed that privatised airports would be managed on a fully commercial basis but it was not stated just what that would mean. The consequences were not foreseen. Government-owned monopolies were simply turned into privately-owned monopolies.

196. Today the benefits to airlines and passengers are hotly debated. On the one hand, there is sufficient evidence to support the view held by the majority of the airlines that costs have not been reduced and that airports have not become more cost conscious. Furthermore, they contend that there appears to be less inclination on the part of governments to regulate impartially these natural monopolies. Airlines operate in a very competitive market against a number of other airlines, have little control over their largest costs (fuel), and sometimes do not always have the power to set prices. Airports do not face the same market conditions and often have the sole 'franchise' for the main point of entry to a country, region or city.⁴³

197. In short airlines are not enamoured with privatised airports or airports owned and operated under some sort of private-public-partnership. They contend that privatisation of airports has resulted in two tranches of price increases. The first increase occurs when the airport is corporatized and being prepared for privatisation.⁴⁴ This is in order to enhance the attractiveness of the airport as an investment. The easiest way of increasing revenue is to increase airport charges. The privatisation process usually awards the airport to the highest bidder in one form or another. The successful bidder sometimes (the airlines would argue 'always') over

⁴² Whereas the general perception in the US is that airports are not-for-profit public utilities, there has been one privatization development that has been successful and welcomed by the airlines in particular. That is the contracting out of the management of Terminal 4 at JFK International Airport, which is owned by the Port Authority of New York and New Jersey. (A private consortium, including Schiphol, has a 50 year lease to develop and manage the terminal with the ability to charge airlines fees and generate revenue from passenger-related (shopping) concessions from the 8 million passengers using the terminal annually.) This is the exception in North America.

⁴³ According to IATA, at the height of the European economic crisis in 2010 with passenger numbers in decline, more than a third of European airports, including 21 of 24 major airports, raised their charges, compared with just 17% that reduced them.

⁴⁴ This occurred in New Zealand in 1988 when differential airport charges were introduced and the international and transshipment passenger charges were revoked.

bid. In turn, to recover their investment cost, the new owners increase airport charges, again. Furthermore, where the Government (and regulator) maintains an ownership interest or receives some franchise income and the airport has a natural monopoly, there seems to be little inclination to regulate prices. Evidence for airline concerns rests with the very high earnings before interest, tax, depreciation and amortization (EBITDA) ratio of up to 78% and pre-tax margins of 48%, whereas airlines are lucky to achieve a pre-tax margin of 10% in good years.

198. On the other hand, the counter arguments are by comparison slim. Privatisation is usually accompanied by an extensive investment or capital expenditure programme to increase airport capacity. Airlines argue that, unlike seaports, airports do not consistently consult on future capital investment expenditure where some upgrading has gone too far and capacity increases unjustified. Regardless, extensive investment or capital expenditure makes a comparison of the before and after privatisation arguments difficult. The airports claim that price increases are only part of the increased pre-tax margins – cost control and productivity increases contribute as well. Private owners of airports seek to get a return on their investment that might be typically 7-12% – so, the greater the investment the greater the cash return.

199. Overall, it is fair to say that considerable tension exists between airlines and airports and that this tension is greatest where airports have been privatised in one form or another.

200. The upshot is that an economic regulatory regime for airports is something that needs to be in place before privatisation. In any event, the regulation of airports should be closely watched by the economic regulator authority. In New Zealand this is presently the Commerce Commission.

5.4 UK Situation

201. The UK CAA, the civil aviation safety regulator, has also been responsible for the economic regulation of UK air services (*ie* air transport market) since it was set up in 1972. With the introduction of the new Airports Act in 1986 at the time of the privatisation of British Airports Authority, the task of economic regulation of airports was also given to the UK CAA. Today the situation in the UK is not straightforward and deserves some explanation. *Appendix V* outlines the UK situation.

5.5 Main Observations

5.5.1 Legal Framework

202. It is evident that within the developed English speaking western economies there is a preference for separating economic from safety requirements in legislation. But there is a mixture of institutional and organizational arrangements catering for the economic and safety requirements of civil aviation, airport services and ANS. Naturally, these reflect the history and development of the public sector within each country along with that of the public administrative and judicial systems.

203. Accordingly the economic regulator is not uniformly separated from the safety regulator and in some cases two entities are involved in economic regulatory intervention – a Ministry and an aviation authority or administration; some form of legislation of general applicability for competition and trade practices is also common.

204. On balance, it can be concluded that the legal framework (and institutional arrangements) of leading aviation nations including the 'older' Commonwealth countries separate the civil aviation safety requirements from the air transport economic requirements. This may be considered international best practice.

5.5.2 Airports

205. During the last 20 years, in some developed aviation countries, airports have been corporatized in one way or another.⁴⁵ In some cases this has been taken a step further with the privatisation of some international airports (*eg* in Australia, Germany, New Zealand, Spain, UK, *etc*) with the participation of large institutional investors and in some cases so-called infrastructure companies all in pursuit of their own profit motives.⁴⁶ While the UK lead the way in the privatisation of airports with BAA, its regional airports have remained firmly in the grip of local government. In North America, airports are viewed as strategic assets in terms of their contribution to the economic and social development of the regions they serve. This is not necessarily the case in Australia and less so in New Zealand.

206. All things considered, there is a definite trend towards the corporatization of airports in one form or another. Outside Europe, there is a preference for governments (national and local) to view airports as being important to the economic and social development of the country. Some form of regulatory intervention exists to support these policies that are generally backed up by legislation of general applicability (*viz* competition, consumer protection, trade practices, *etc*). The economic regulation of international airports tends to be more heavy handed than light handed.

5.5.3 ANS

207. The last decade has seen the commercialisation (corporatization) of ANS providers (except in the US) with the state as the sole owner or having the majority shareholding or control. So, while being commercialised, they remain firmly in the hands of national government supported by a statutory monopoly for at least en route control services but with some form of economic regulatory oversight, usually by way of competition legislation of general applicability.

208. The next chapter emphasises the importance of information in the formulation of civil aviation and air transport policy and in turn the need for quality information and data.

⁴⁵ Many airports in South America (exc Brazil) have been privatised with the encouragement of the World Bank. Further privatisations are likely in Europe and possibly also in India.

⁴⁶ The establishment of free trade areas, common markets, *etc* usually involve property rights that are protected in one way or another. So where this may involve foreign (partner) airport ownership property rights could be protected as for local owners.

6 Importance of Information

209. Policy development cannot sensibly be determined without reference to objectives as well as good quality information and data about activity within the air transport system. This chapter outlines current sources of information, the type of information and data required and makes observations about market efficiency and information.

6.1 Current Sources

210. NZCAR Part 12 prescribes rules for the:

- notification, investigation, and reporting of accidents and incidents;
- preservation of aircraft, aircraft contents, and aircraft records following an accident or serious accident; and
- reporting of aircraft operating and statistical data.

The focus of this rule is aircraft accident investigation.

211. Subpart D of this rule requires hours flown and the number of flights carrying passengers or only cargo to be reported to the CAA quarterly for aircraft on commercial flights and annually otherwise. The details of statistical reports are confidential to the CAA, however, aggregate or de-identified data is supposedly available. The CAA appears to have limited information about the level of activity within the air transport system in terms of the workload. So to be able to determine the workload or work being performed by the air transport system two fundamental statistics are required

- number of flights, and
- flight hours.

Both are vital statistics in assessing flight safety performance (see appendix II).

212. The MoT grants a variety of international air services licences in which the Ministry prescribes and is able to vary their terms and conditions. Part of these terms will (should) be the provision of statistical information to enable the Ministry to verify that airlines are conforming to their licence. However, the scope or degree of detail of statistical information collected or reported by the airlines is not known.

213. The New Zealand Customs Service and Immigration New Zealand collect voluminous statistics from the passenger departure and arrival cards, some of which is aggregated and publically available. Cargo data is also collected by the Customs Service and publically available from Statistics New Zealand.

214. Individual airports in New Zealand also collect information about air traffic (aircraft and passenger movements). The information collected is in most cases very detailed including: aircraft type, origin and destination, airline, date and time, load factors, fees and charges paid, *etc.* This information is not publically available and treated by the airports as commercially confidential. Even their annual reports show only highly aggregated (and so useless) air traffic information.

215. Airways Corporation also collects very detailed information about air traffic as part of their normal operations. Much of this is provided by the airlines as part of their flight planning procedures. Basic air traffic data used to be reported in Airways' annual report, now the level of data publically available is very skimpy. However, air

traffic data can be purchased from Airways. The scope and degree of detail requested will determine the cost and so could be in the hundreds or thousands of dollars. The point is Airways realises the value in the air traffic data it collects as part of its normal operation, treats it as private property, and uses it for commercial gain – the public interest dimension ignored.

216. Compared to leading aviation nations New Zealand's (public) access to readily available detailed information about the air transport system is very poor. Without considerable effort and expense, operators and investors cannot access useful air traffic information and data about New Zealand's air transport system. This is considered a significant hindrance to the development of civil aviation and air transport in New Zealand. What is required, as a minimum, is the level of information currently provided by the Australian Bureau of Infrastructure, Transport and Regional Economics (BITRE)⁴⁷ and the UK CAA Aviation Data Unit. If information about fares and yields is also available, as collected by the US Department of Transport, the utility of publicly available air traffic data would be greatly enhanced. (Curiously New Zealand used to collect and publish a reasonably comprehensive set of civil aviation and air transport statistics covering: international air transport (26 tables), domestic air transport (4 tables), aerial work (4 tables), training organisations (3 tables), aerodrome traffic (1 table), hours flown (1 table) and a classification of aircraft on the New Zealand register (1 table). The last report was published for 1986. It would be an improvement to have this type of statistical summary updated for the last five years.)

6.2 What is Required

217. All information describing the air transport work performed within the New Zealand air transport system is being collected in one form or another by Immigration New Zealand, Customs Service, Airways and the airports as well as, of course, individual airlines. Little information is being collected about general aviation activities (*viz* aerial work, flight training, sport and recreation, *etc*) and what is may be of dubious quality. Fuel usage is presently being reported by New Zealand Statistics and until five years or so ago, this was split between international and inland or domestic usage.⁴⁸

218. The basic information that needs to be publicly and readily available includes (but may not be limited to):

→ air transport production data: number of flights and flight hours by:

- origin & destination
- carrier
- aircraft type
- passengers carried
- cargo carried, and
- date

Airlines and IATA collect air transport statistics by passenger kilometres plus available seat kilometres as these measures are seen as a better indication of work done by the airlines. For many purposes, this is so.

⁴⁷ Presently to analyse the trans Tasman market from a New Zealand perspective or interest the best source of data is BITRE. BITRE data is also useful but not complete for analysing the South Pacific market.

⁴⁸ Supposedly discontinued because the oil companies considered the split between international and domestic usage is commercially confidential – this view is disputed.

Accordingly, as airlines already collect such data it would greatly add to the utility of information if these measures were also collected.

→ general aviation data: number of flights and flight hours by:

- type of activity
 - ~ charter
 - ~ business
 - ~ training
 - ~ ferry
 - ~ agricultural
 - ~ aerial work (specify: test, surveying, photography, *etc*)
 - ~ sport
- commercial or private
- operator
- aircraft type
- passengers carried
- cargo carried
- tonnes dropped by product
 - ~ fertiliser
 - ~ lime
 - ~ seed
 - ~ baits
 - ~ other
- litres sprayed by product
 - ~ fertiliser
 - ~ insecticide
 - ~ fungicide
 - ~ weed killers
 - ~ water
 - ~ other, and
- date

→ domestic air transport air fares:

- highest economy
 - ~ main trunk
 - ~ provincial
 - ~ tourist routes
- mean economy
 - ~ main trunk
 - ~ provincial
 - ~ tourist routes
- best (lowest) discount
 - ~ main trunk
 - ~ provincial
 - ~ tourist routes

→ aviation fuel usage (sales) tonnes

- jet fuel (avtur)
 - ~ international aviation
 - ~ domestic (inland) aviation
- aviation gasoline (avgas)
 - ~ international aviation
 - ~ domestic (inland) aviation

219. Thus, the development of civil aviation and air transport and related activities in New Zealand would be considerably helped by free and easy access to the above information. Furthermore, it would greatly support a light handed economic regulatory regime.

6.3 A Note on Markets

220. A market for a particular commodity or service is the set of circumstances under which it is exchanged among buyers and sellers for money prices. The particular circumstances in one market differ from those of another. The efficiency of a market can be assessed by the differing market structures and circumstances.

221. A useful way of describing market structures and circumstances is by:

- the nature of the commodity or services (*eg* air transport, airport, ANS, aerial work, flight training, fuel, aircraft, *etc*) ... whether homogeneous or there is some form of differentiation by brand, trade mark, inclusion of 'free gifts', *etc*;
- the number of buyers and sellers in the market: many sellers generate competition but with only one seller there is an entirely different situation;
- the degree of knowledge buyers and sellers have about what is going on in the market; naturally an uneven distribution of knowledge favours the party with more market knowledge;
- the incidence of 'off market' trading practices such as 'gentlemen's agreements', restricting supply, and other non price arrangements that distort the market enabling individual sellers to get a better grip on the market (generally referred to as restrictive trade practices); and importantly
- how market prices are determined: whether set by suppliers individually or collectively, whether individual buyers influence the price, and whether prices can be determined by agreement between the buyer(s) and seller(s)?

222. The value of market information is clearly critical to the efficiency with which a market works. The market for civil aviation and air transport services and facilities is no different. Presently the sellers in the New Zealand market for civil aviation and air transport generally have better and more information than buyers.

223. In a 'perceived' market such as that for air transport services, airport services or ANS there are four related sub markets:

- *the ownership market*: this is the sub market where ownership and control of a company occurs; this may be via the share market or simply private arrangements and may be orderly and planned or in the form of a take-over bid (as occurred with Auckland airport in 2007-08). Governments have traditionally placed limitations on the ownership of airlines operating into, out of and within its borders (*eg* Australia), however, a more liberal airline ownership regime is presently finding favour in the more developed aviation nations. Ownership limitations apply to airports in most countries, the exception seems to be the UK. After the furore surrounding the partial take-over bids for Auckland airport the situation in New Zealand is not clear.
- *the supplier market*: this sub market supplies a demand for goods and services to a 'perceived market'. For example: aircraft, aircraft parts, fuel, airport services, ANS, banks, insurance, *etc* to an airline; or communications, navigation, satellite systems, telecommunications equipment, banks,

insurance, *etc* to an ANS provider; or telecommunications equipment, civil engineering services, banks, insurance, to an airport. This sub market is subject to stringent safety requirements for much of the goods and services supplied. Restrictive trade practices can develop within the supplier sub market, especially those pertaining to airports and ANS.

- *the customer (consumer) market:* for airlines this is essentially focused on the passengers and cargo owners; for airports it is the airlines, passengers and cargo owners (and where airports have retail facilities the customer market will include people who are 'passers-by'); for ANS providers the principal customers are the airlines and other aircraft operators and in some cases airports. Depending on the characteristics (market structure and circumstances) of this sub market, it may be vulnerable to restrictive trade practices (*viz* airports, ANS).
- *the labour market:* this sub market consists of the supply of and demand for people with various knowledge, skill and experience. In civil aviation and air transport there are particular competency requirements for some jobs that rely on licensing by a competent authority (*eg* pilots, aeronautical engineers, maintenance engineers (mechanics), air traffic controllers). Some of the skills in this sub market are transportable from one country to another, especially those that involve licensing. Unions can influence the behaviour of the labour market.

224. In New Zealand, in the context of air transportation and civil aviation, the main legislation governing the behaviour of these four sub markets are:

- *the ownership market:*
 - Overseas Investment Act 2014
 - Companies Act 1993
 - Commerce Act 1986
 - State-owned Enterprises Act 1986
 - Airport Authorities Act 1966
- *the supplier market:*
 - Resource Management Act 1991
 - Civil Aviation Act 1990
 - Commerce Act 1986
 - Fair Trading Act 1986
 - Airport Authorities Act 1966
 - Sales of Goods Act 1908
- *the customer (consumer) market:*
 - Consumer Guarantees Act 1993
 - Civil Aviation Act 1990
 - Commerce Act 1986
 - Fair Trading Act 1986
 - Airport Authorities Act 1966
- *the labour market:*
 - Civil Aviation Act 1990
 - State Sector Act 1988
 - Health and Safety in Employment Act 1986

225. Most of these concern economic requirements; the exceptions being the Civil Aviation Act (but which also contains significant economic requirements) and the

Health and Safety in Employment Act. So, from an investor's perspective the economic requirements for investing in New Zealand are many and those relating to the supplier, customer and labour sub markets of the air transportation and civil aviation sector are partly to be found in the Civil Aviation Act.

226. A review of the Civil Aviation Act 1990 provides an opportunity to improve on legislative arrangements for regulating the air transportation and civil aviation markets.

7 Conclusions and Recommendations

7.1 Conclusions

7.1.1 International Perspective

227. Up to 1990 and the development of NZCARs New Zealand had a rudimentary legal framework that was outdated and did not allow the industry to get on with its job and it failed to provide the necessary information and data to enable the industry to do this. The system was based on the UK model and in particular their old Air Navigation (Colonial) Orders.

228. Since the Civil Aviation Act 1990 came into force, enormous developments in civil aviation and air transportation have occurred worldwide, especially in Europe and the US. These developments have involved the liberalization of air transport markets and advances in the technology employed in civil aviation, especially in the areas of aircraft design and performance, communications, navigation and surveillance systems. It would be fair to say the aviation legal framework in some leading aviation nations has been better placed to support these developments while in other nations less so or has even hindered the development of their civil aviation systems. Arguably, those nations that have been generally better placed to accommodate and support these changes have a legal framework that differentiates between the safety and economic requirements. In this regard, the present UK aviation legal framework is neither the best nor finest and has been undergoing changes (improvements) to better support market liberalization and technological changes – the UK situation is complicated by its EU membership and obligations.

7.1.2 Aviation Legal Framework

229. The Civil Aviation Act 1990 is a pot pourri of safety and economic requirements and has become a general repository for economic requirements relating to the air transport system as well as safety and security requirements. This legal framework promotes the blurring of sectoral boundaries and responsibilities between these two quite different requirements. New Zealand needs to simplify its legal framework in order for operators to do their job more easily and for New Zealand to maintain and attract investment in the air transport system.

230. This can be easily achieved by creating two Acts: one dealing with safety and security requirements and the other air transport or economic requirements.

7.1.3 Safety Requirements and Regulations

231. New Zealand's NZCARs have been well received by the aviation community. Internationally they are well recognised having earned the confidence and trust of the leading aviation nations New Zealand routinely deals with.

232. An Act devoted solely to civil aviation safety and security would better support and enhance NZCARs at both domestic and international levels. This can be easily achieved by stripping the Civil Aviation Act of all economic requirements and adding the provisions of the Aviations Crimes Act to this new Act. As noted in section 4.1.1 above, the safety requirements are largely non-discretionary in nature, a great deal technical and operational in their scope and content. This makes for

reasonably simple industry specific legislation providing for civil aviation safety and security.

7.1.4 Economic Requirements

233. The economic requirements on the air transport system are distributed between industry specific legislation (Civil Aviation Act, Airport Authorities Act, Air Facilitation Act, *etc*) and legislation of general applicability (Companies Act, Commerce Act, Fair Trading Act, Consumer Guarantees Act, Resource Management Act, Overseas Investment Act, *etc*). Given the approach to economic regulation in New Zealand this is to be expected. However, what stands out is that New Zealand does not (now) have particular industry specific legislation devoted to the economic requirements of the air transport system, as other leading aviation nations have to varying degrees.

234. To some extent the air transport system and its stakeholders (*viz* owners, suppliers, customers or consumers and labour) will always be subject to legislation of general applicability as part of the 'price' for, or in return for the benefit of, carrying on business within the greater New Zealand economy. The question is – to what extent should or can the economic requirements of the air transport system be kept or confined to industry specific legislation? In this regard, investors prefer all their eggs in one basket' (depending, naturally, on the substance of the legislation).

235. It would be a simple matter to remove all the economic requirements from the current Civil Aviation Act and place in a new Act. As well, existing aviation industry specific legislation of an economic kind can be added to such a new Act.

236. The following sections further consider the economic requirements within the three subsystems of the air transport system.

7.1.5 Air Transport Operators

237. That part of New Zealand's air transport system providing air services (*viz* airlines and other air transport operators) is largely liberalized. In 2012, New Zealand issued a revised international air transport policy. This policy favours reciprocal open skies agreements otherwise the most open package of air services arrangements that are in New Zealand's overall best interests and where New Zealand-based airlines have a fair and equal opportunity to compete.

238. Domestic air services are effectively deregulated in an economic sense, all that is required is an air operator certificate issued by the Director of Civil Aviation. Outside of this the current Civil Aviation Act makes consumer protection provisions for the domestic carriage by air. The Commerce Act, Fair Trading Act and Consumer Guarantees Act also provide general consumer protection against collusion between operators, unfair practices, the supply of consumer information and guarantees given to consumers (air fares, *etc*). The Commerce Act also rules on airline business acquisitions (*viz* mergers and takeovers).

239. The economic requirements for scheduled international air services are detailed in the present Civil Aviation Act and these require the granting (as opposed to issuing) of a licence depending on whether it pertains to a New Zealand international airline, a foreign international airline or what the Act defines as an open aviation market. As for domestic air services the Commerce Act, Fair Trading Act and Consumer Guarantees Act provide general consumer protection. The Commerce Act has also a particular role to play in the approval or otherwise of airline alliances and mergers or takeovers (*eg* Qantas and Air New Zealand in 2003, Air New Zealand purchase of Ansett Holdings 1996).

240. Airline ownership and third-country investment in foreign international airlines is problematic and most developed aviation nations now have clear cut rules. New Zealand follows the ICAO liberalisation model that links airline ownership with its principal place of business, place of incorporation and effective regulatory control. However, there are no foreign airline ownership limitations for New Zealand airlines (*ie* open investment policy). Nevertheless, the government has yet to decide on the ownership of Air New Zealand.

241. Thus, some economic requirements on airlines and air transport operators are contained in legislation of general applicability and others in the Civil Aviation Act. Removing international air services licensing provisions and the carriage by air provisions from the Civil Aviation Act and placing them in a new Act would be a step in the right direction. While New Zealand's quite liberal regime is in force this is the only action needed for streamlining the legal framework relating to the economic requirements for airlines and air transport operators.

7.1.6 Airports

242. The airport situation is different. Where airports are privatized, ownership has generally resulted in a closely held arrangement involving a small number of investment companies, where the objective is to maximise the return to shareholders. Where airports are government owned they are usually operated as a not-for-profit organisation. In either case, the concern is that of the exercise of monopoly market power.

243. Part 10 of the Civil Aviation Act deals with aerodromes, facilities and joint venture airports. Part 11, section 96, of the Civil Aviation Act, dealing with miscellaneous matters, includes provisions for the sale of alcohol at international airports.⁴⁹ These provisions are all economic requirements and can be easily removed from the Civil Aviation Act and placed in a new Act entirely devoted to the economic requirements of the air transport system, which in turn would include specific parts for aerodromes and airports.

244. The Airport Authorities Act deals with the establishment of airports and airport authorities by local authorities, joint venture airport companies between the Crown and local authorities, as well as various provisions for airport charges, capital expenditure and information disclosure. This Act essentially prescribes a light-handed economic regulatory regime based on information disclosure and consultation between airport companies and what is defined as substantial customers. Accordingly, the Airport Authorities Act can be streamlined and placed in a new Act entirely devoted to the economic requirements of the air transport system. And Part 10 *etc* of the Civil Aviation Act can be removed from the Civil Aviation Act and likewise placed in this new Act.

245. The Auckland Airport Act, Wellington Airport Act, New Plymouth Airport Act, Whangarei Airport Act, Air Facilitation Act and Air Facilitation (Domestic Passengers and Cargo) Act can all be placed in this new Act. They concern economic requirements relating to airports.

246. Part 4 of the Commerce Act deals with regulated goods or services. Airport services are regulated and Subpart 11 of Part 4 prescribes information disclosure and reporting requirements for particular airports. In this way specified airport services at Auckland, Wellington and Christchurch airports are regulated under Part 4 (sections

⁴⁹ Just why the sale of alcohol at international airports needs to be included in aviation legislation is not obvious; this may be more appropriately dealt with in the Customs Act or similar.

56 et al). What this means is that the Commission reviews information disclosed by the airports and consults with interested parties (airlines and other airport users, *etc*). It then reports to the Ministers of Commerce(?) and Transport as to 'how effectively information disclosure regulation promotes the long-term benefit of consumers and the outcomes for specified airport services are consistent with outcomes produced in competitive markets'.

247. Airport services are one of three services regulated under Part 4 by the Commerce Commission; the other two are electricity lines services and gas pipeline services. As noted above the Commerce Commission also rules on business acquisitions (*viz* mergers and takeovers) and so has an interest in airport ownership. To carry out its regulatory role and functions the Commission consists of two 'regulatory' branches, denoted competition and regulation; these are supported by what is referred to as the organisation performance branch (*ie* corporate services). The Commerce Commission also has an interest in the Fair Trading Act and Consumer Guarantees Act.

248. It is evident the Commerce Commission is established and resourced to carry out its role and functions under the Commerce Act and its interest in the Fair Trading Act. The question is whether the Commerce Act's functions and responsibilities in respect of airport services would be best placed in a new Act dedicated to the economic requirements of the air transport system. It also begs a second question of whether these functions and responsibilities for airport services could be best carried out by the MoT alongside its other air transport functions. The answer to the second question may influence the answer to the first question.

249. So in answer to the second question, it depends on whether the MoT has the capability and capacity to competently analyse and review the conduct of the regulated airports and is able to assess how effectively information disclosure regulation promotes the long-term benefit of consumers *et al*. Obviously, the Guild is not in a position to make this sort of judgement; it is something for the MoT and Commerce Commission to decide.

250. Concerning the first question, however, there are at least three standpoints. From an investors standpoint it would be more orderly and simpler to have all related economic requirements in one Act. If the Commerce Commission remains the arbiters of Subpart 11 sections 64 *et al* then there is good reason for these sections to remain in the Commerce Act – yet, the Commerce Act itself merits a complete reformatting (as opposed to rewriting), as there have been numerous amendments to the original Act. Nonetheless, the Commerce Act could still effectively do its job if sections 64 *et al* were removed to a new Act (unless there was some specific administrative impediment). From the standpoint of the MoT, if they became the arbiter then the provisions of sections 64 *et al* are best placed in a new Act.

251. Regardless, the economic requirements for airports are best consolidated into a new Act dedicated to the economic requirements of the air transport system. Whether Subpart 11 of the Commerce Act follows is best left to the MoT and Commerce Commission to determine.

7.1.7 ANS Providers.

252. Part 11, Miscellaneous, section 99 in the Civil Aviation Act deals with the granting of statutory monopoly rights to Airways Corporation for the sole provision of area control services, approach control services and flight information services. Aerodrome control and flight information services to be contestable. Sections 99A, 99B, 99C make provisions for information disclosure and statements of information

to be provided to the Secretary for Transport or to be publically available or both. These provisions essentially define a lighted-handed economic regulatory regime based on information disclosure.

253. These provisions all concern economic requirements and can be easily removed from the Civil Aviation Act and placed in a new Act entirely devoted to the economic requirements of the air transport system that would include a specific part for the provision of ANS.

254. The importance of information is discussed in chapter 6 and at paragraph 215 the treatment as private property by Airways Corporation of the air traffic and operational information it collects is discussed. This is considered an impediment to the public availability of air traffic and related information and data. It needs to be appropriately attended to in a new Act to enable airport specific air traffic data to be publically available as it is in Australia, the UK and the US. This type of information was last publically available in 1986-87.

7.1.8 Penalties for Offences

255. It is not the purpose of this submission to comment on the detail of the Civil Aviation Act. Notwithstanding this, however, it is considered that the present level of penalties for individuals and especially a body corporate for safety, security and general offences are too low. It is appreciated that there needs to be some relativity between penalties for 'civil aviation offences' and other civil and criminal penalties. There also needs to be some relativity between New Zealand and leading aviation nations if New Zealand is to preserve its reputation as an advanced aviation nation. The potential or actual catastrophic consequences of 'civil aviation offences' needs to be fully recognised.

256. In the US, the FAA imposes civil penalties of up to USD50,000 for individuals and small businesses and up to USD400,000 otherwise. There is no dollar limitation on assessments for violations of the Hazardous Materials Transportation Safety Act.⁵⁰

257. It is noted that penalties under the Commerce Act for restrictive trade practices can be up to \$0.5 million for an individual and \$10 million for a body corporate or three times the commercial gain resulting from a breach, or 10 per cent of the company's turnover, whichever is the greatest.⁵¹ For improper business

⁵⁰ Recently, for shipping a quart of high-gloss enamel paint on a FedEx flight from Lexington, Kentucky, to Corpus Christi, Texas that leaked through the package the FAA fined Amazon \$78,000 for the improper labelling of a hazardous material. (Paint is considered a Class 3 flammable material, but was not documented correctly.) The FAA also recently fined Sierra Academy of Aeronautics in California, \$204,000 for operating nine Cessna 152 aircraft that did not comply with federal regulations - seat locking pins were not inspected, and the FAA considered an unlocked seat could cause the pilot to lose control of the plane. In 2010, the FAA levied a \$24.2 million civil penalty relating to the April 2008 grounding of about 300 American Airlines MD80s. The FAA determined that 286 of American's MD-80s flew a combined 14,278 passenger flights while not in compliance with an airworthiness directive that required operators to inspect and repair wire bundles in wheel wells. FAA considered that abrasion on the wires could have led to fires and fuel-tank explosions.

⁵¹ In June 2013, the New Zealand High Court approved a \$7.5 million penalty against Air New Zealand for price-fixing in the New Zealand air cargo market. The Air NZ settlement followed settlements with British Airways, Cargolux, Cathay Pacific, Emirates, Korean Air, MASKargo, Qantas, Japan Airlines, Singapore Airlines Cargo and Thai Airways. In agreeing to the penalty, Air NZ admitted liability for reaching understandings with competitors over fuel and security surcharges between 2001 and 2006 should have obtained regulatory approval from the Ministry of Transport in New Zealand [for the understandings]. The ruling ends a long-running case brought by the Commerce Commission against several airlines and brought the total penalties to \$42.5 million.

acquisitions the penalties are up to \$0.5 million for an individual and \$5 million for a body corporate. Neither of these contraventions of the Commerce Act are likely to involve or result in potential or actual catastrophic consequences (*viz* fatalities, serious injuries or physical damage to property).

7.2 Recommendations

258. It is recommended that:

- (I) New Zealand refrains from mixing in law the safety requirements of the civil aviation system with those relating to the economic requirements of the air transport system.
- (II) New Zealand review and consolidate its laws relating to civil aviation and air transport into two Acts: one dedicated to safety and security requirements and the other to economic requirements.
- (III) The objectives of the responsible Minister under the new Acts be revised to include a specific safety and security goal or objective thus⁵²:

To promote safety in civil aviation at reasonable cost for the benefit of the people of New Zealand.

Reasonable cost being defined as that cost where the benefits to the nation exceed the costs to the nation as a whole.

And, an air transportation goal or objective that is consistent with the government's broad policy direction for transport and New Zealand's international air transport policy thus:

To foster an accessible, affordable and reliable air transport system, and to promote the development of the civil aviation system to enhance the economic and social well being of the people of New Zealand.

- (IV) In the review and consolidation process, safety and economic requirements be simplified.
- (V) New Zealand reviews the level of fines for safety, security and general offences relating to flight safety to bring them more into line with the leading aviation nations.

259. The following chapter elaborates on two industry specific Acts to provide for safety and economic requirements.

⁵² This recommendation returns the safety goal to that applicable before the 2004 amendments to the Civil Aviation Act.

8 A Legal Framework for New Zealand Civil Aviation and Air Transport

8.1 Proposed Legal Framework

260. The New Zealand civil aviation legal framework needs to be consolidated into two new Acts:

- (iii) one to prescribe the safety and security requirements to be called the *Civil Aviation Safety Act*; and
- (iv) another to prescribe the transport and economic requirements to be called the *Air Transportation Act*.

261. The new *Civil Aviation Safety Act* would, as its name suggests, provide for New Zealand's safety and security requirements and its obligations as a signatory to the Chicago Convention and the Tokyo (1963), Hague (1970) and Montreal (1971) Conventions. It would be this Act that provides for the establishment of the Civil Aviation Authority of New Zealand (CAA) and the Aviation Security Service (AvSec) and provide for the safety and security regulation of the New Zealand civil aviation system.

262. The new *Air Transportation Act* would, as its name suggests, provide for New Zealand's transport (economic) requirements and also its obligations as a signatory to the Chicago Convention and the Warsaw Convention amended by the Montreal Protocols (No 1, 2 and 4), and the Cape Town Convention. It would be this Act that, amongst other things, provides for the economic regulation of air transport markets relevant to New Zealand including those markets relating to airports and airspace (*ie* the provision of airport and air navigation services). The Act would generally compliment the economic regulatory provisions found in legislation of general applicability (*eg* Commerce Act, Fair Trading Act, *etc*).

263. To be sure the reasons for the two separate Acts are:

- to simplify the regulation and monitoring of New Zealand's international air transportation obligations relating to transport (economic) requirements and aviation safety requirements and to make clear which entity administers which requirements;
- to avoid the blurring of responsibility between transport (economic) requirements and aviation safety requirements and to help distinguish between these two quite different requirements; which can be achieved by
- collecting all economic development, trade and foreign policy matters relating to the air transport system together in an Air Transportation Act, which reflect government policy and therefore subject to close Ministerial involvement; and by
- collecting all technical and operational matters relating to flight safety together in a Civil Aviation Safety Act; matters that are largely independent of government policy other than the pursuit of a high level of safety.

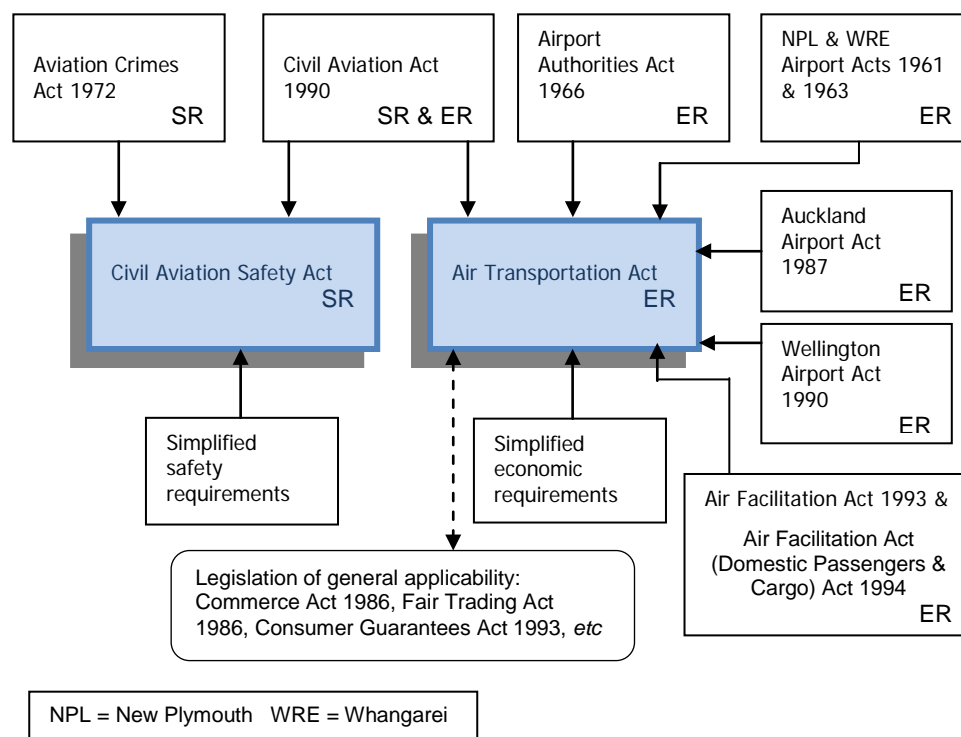
264. Importantly the two Acts are aimed at different users or audiences. As emphasised, the Air Transport Act is mainly of interest to owners and investors, and their representatives (*eg* governing bodies, chief executives, *etc*). Whereas the Civil

Aviation Safety Act is of prime interest to pilots, engineers, air traffic controllers and people directly involved in operating services or facilities within the civil aviation system. It is evident that these two different interest groups or users are mainly interested in different requirements.

265. Thus, two separate Acts would help those mainly concerned with the day-to-day operation and control of the civil aviation system (including the regulators), along with those responsible for flight safety, to have a clear prescription of the safety requirements. Similarly, those interested in investment in the air transport system and in its economic performance would have a clear picture of the transport and economic requirements. This would benefit the overall performance of the New Zealand civil aviation system and help make for clear sectoral boundaries and responsibilities between the two requirements.

266. *Figure 6* outlines the suggested rearrangement and consolidation. It puts all existing safety provisions (except the Meteorological Services Act) into the Civil Aviation Safety and Security Act and the transport (economic) provisions into the Air Transportation Act (except the Carriage of Goods Act).

Figure 6: Proposed Legal Framework



267. The two draft Bills could be clipped together to produce one Act. However, joining the two draft Bills together to produce one omnibus Act defeats their purposes. It would make the Act unwieldy and negate all the reasons for consolidating and rationalising the seven or so existing Acts into two. There is no advantage to joining the two Acts together.

8.2 Basic Requirements

268. The two Acts must define their respective objectives for civil aviation safety and air transportation. This is discussed in section 2.7 above. While it may be useful to incorporate specific government policy, it would probably be best detailed in

separate policy statements rather than in the Act, which is best kept to reflect broad policy that is unlikely to change in the medium term or longer.

269. The two Acts need to ensure suitable provision for the collection of information and data to support the safety and economic regulation of civil aviation and air transport respectively. New Zealand regulators need to have at least as good data as their counterparts in Australia, the UK and the US have access to. In this regard practically all the necessary data is already being collected in one form or another by one or more government agencies. The place to collect and collate this is the MoT. The CAA, of course, needs production and flight exposure data for its own safety oversight purposes. It would be a very simple matter to coordinate the collection and collation of this data between the MoT and CAA. Naturally, relevant information and data needs to be publically available, which it is not at present.

270. The following two sections suggest the main contents for a Civil Aviation Safety Act and Air Transportation Act.

8.3 Civil Aviation Safety Act

271. In general the Act needs to at least:

- define the objective of the civil aviation system;
- declare the responsibilities of the responsible Minister (Minister of Transport)
- declare the responsibilities of all participants within the civil aviation system; and make provisions for the following:
- the power of the Minister to make civil aviation regulations (rules);
- the establishment of a civil aviation authority and the appointment of a director-general of civil aviation responsible for administering the Act and exercising specific powers under the Act and for the discharge of all the functions of the authority;
- the functions and powers of the director-general;
- provide for the collection of information and data about the performance of the civil aviation system;
- include offences and penalties relating to safety, security and general matters; and
- provide for appeal provisions.

8.3.1 Objectives

272. Section 2.7 discusses at length the objectives of the civil aviation system and at section 2.7.6 suggests an overall safety goal for New Zealand. This goal or objective is not out of step with the government's broad policy direction for transport.

273. The overall New Zealand safety goal or objective may be expressed thus:

To promote safety in civil aviation at reasonable cost for the benefit of the people of New Zealand.

274. Reasonable cost being defined as that cost where the benefits to the nation exceed the costs to the nation as a whole, as also discussed in section 2.7.4 above.

8.3.2 Value for Money or Reasonable Cost

275. The suggested goal is more or less a refocusing of the current provisions in the Civil Aviation Act and as noted consistent with the government's broad policy direction. Unless there is a refocusing then safety oversight will be vulnerable to what amounts to safety at any cost, which does not lead to value for money. Again, sections 2.7.1, 2.7.2, 2.7.3, 2.7.4 and 2.7.5 discuss these issues.

8.3.3 The Importance of Data

276. It cannot be over emphasised how important the collection, collation and analysis of the civil aviation system is. As stated, the CAA needs aircraft production and flight exposure data for safety oversight purposes. Without this the safety regulator is unable to determine the performance of the system and so discover which sectors of the industry require attention. The aviation community also need this data.

8.3.4 Outline for a New Safety Act

277. *Appendix VI* outlines the broad contents and arrangements for a new Civil Aviation Safety and Security Act. This is provided by way of example to illustrate what such an Act would consist of. As already stated it essentially involves distilling the safety requirements from the current Civil Aviation Act, simplifying them and inserting them into the new Act. The Aviation Crimes Act is moved into the new Act.

8.4 Air Transportation Act

278. The Act needs to:

- define the objective(s) of the air transport system;
- declare the responsibilities of the responsible Minister (Minister of Transport);
- define relevant and specific markets subject to the Act (i.e. open and closed markets, statutory monopolies, *etc*);
- declare licensing authorities for specific markets;
- provide for the power of the Minister to make air transport regulations;
- provide for the powers and functions of the licensing authority(s);
- provide for consumer protection (domestic and international carriage by air);
- provide for the collection of information and data about the performance of the air transport system;
- include offences and penalties relating to restrictive trade practices, monopoly abuses, and general matters;
- provide for appeal provisions; and
- provide for aircraft accident investigation.

8.4.1 Objectives

279. Section 2.7.7 discusses the objectives of the air transport system and suggests an overall air transport goal for New Zealand. This goal or objective is in step with the government's broad policy direction for transport. The overall transport (economic) objective for New Zealand may be expressed thus:

To foster an accessible, affordable and reliable air transport system, and to promote the development of the civil aviation system to enhance the economic and social well being of the people of New Zealand.

280. It is also noted that according to New Zealand's international air transport policy, "The objective of New Zealand's international air transport policy is to help grow the economy and deliver greater prosperity, security and opportunities for New Zealanders".

8.4.2 The Importance of Data

281. As for safety requirements it cannot be over emphasised how important the collection, collation and analysis of the air transport system is. Without first class and quality information air transport policy is vulnerable to short-sightedness, compromise to the disadvantage of New Zealand and furthermore, investment decisions will either dry up or be flawed. Obviously, this would not work to promote the economic and social well being of New Zealanders.

8.4.3 Outline for a New Transport (Economic) Act

282. *Appendix VI* outlines the broad contents and arrangements for a new Air Transportation Act. This is also by way of example to illustrate what such an Act would consist of.

Appendix I: Economic Analysis and Policy Development

1. In public policy development, economic analysis enables questions of resource allocation to be answered in a way that will lead to the achievement of specific objectives in a least cost manner. In the absence of mandatory objectives, only those objectives where the costs of achieving them are less than the benefits resulting from them should be pursued. And, each objective should be accomplished for the least cost; this generally means for the least amount of resources employed.
2. In the private sector, economic analysis compliments market forces in answering these questions. In the public sector, where often a market place does not exist for its services, economic analysis is the only way of answering these questions. This of course applies regardless of who pays. In the private sector the buyer or payer usually consumes the goods or services. This is not necessarily the case in the public sector, especially where it is paid for from general taxation or through levies such as the Civil Aviation Safety Levy. For example, in the operation of aerodromes the various charges (*eg* landing charge, aerodrome ATS charge, *etc*) and the relationship between the person calling up the cost and what they pay is not always clearly established.
3. Cost-benefit analysis (CBA) is a well documented and accepted method of economic analysis, which is a useful tool to assess the consequences of alternative public policies. In both the public and private sector CBA is also commonly used to determine whether particular outputs (benefits) will be produced as a result of an investment project; and if so, how best they may be produced.
4. CBA is (sometimes) used by the CAA in pursuit of the safety goal (standard setting) and specific safety outcomes. In particular in the matter of NZCARs and where there is some discretion concerning safety requirements (*i.e* standards, practices and procedures) then some form of economic analysis (*viz* CBA) is required. However, where there is no discretion, which might be in complying with Annex standards, the role of any economic analysis is limited to assisting in the task of determining how best the standards should be applied. This is usually more often the task of the participant rather than the regulator.
5. For the sake of completeness, some comments about cost-effective analysis (CEA) are appropriate.
6. Cost-effective analysis (CEA) is similar to cost-benefit analysis and is useful in the evaluation of investment decisions. There are generally two questions to be answered before making investment decisions:
 - “Is it worth it?” CBA is able to answer this question; and
 - “What is the best way of doing it?” CEA is able to answer this question; CBA can also answer it.
7. There is an important distinction here. An aircraft or aerodrome operator (investor) may have no interest or concern with some benefits or costs (*eg* the impact on tourism or air travel within a region outside of the investor’s operation). Similarly, this same investor is only concerned about the costs and benefits that directly affect their operation (usually limited to demand and revenue or secondary

benefits). A regulator, however, is concerned with all costs and benefits to the civil aviation system and to the nation as a whole.

8. The point is the investor's main question is, "how best to produce the operation". This question essentially reduces to the least cost given the output. The output, of course, is an air transport operation that meets the required safety performance. Once determined, the required safety standards and performance should be non-negotiable. (The safety performance is the safety targets that are usually expressed as accident rates.)

9. Investors can confuse a least cost CEA with a CBA. Furthermore some investors may seek to reduce costs of compliance (*ie* of producing the operation) and sometimes the only way they could achieve this was by changing the output. Furthermore, within the air transport system there can be differing requirements or interests.

10. For example, in aerodrome design, operation and use there are two investors or operators with differing interests. The aerodrome operator will naturally seek to preserve operating capability and capacity at minimum cost. In practical terms this means ensuring there are no reductions to the declared distances and being able to recover any costs associated from meeting the safety standard (*eg* providing a RESA) from aerodrome users. The aerodrome user or aircraft operators will not want an increase in their operating cost but at the same time will not want a reduction in safety standards. In this regard they may even be prepared to sacrifice a small reduction in operating capacity (*eg* takeoff weight, take off distance, landing distance, *etc*) to maintain safety performance and ensure that operating costs do not significantly increase.

11. In summary, investors and operators are primarily interested in least cost CEA whereas the CAA and MoT are primarily interested in CBA. The two should not be confused.

Appendix II: Flight Safety & Public Policy⁵³

Attitudes & perceptions of risk⁵⁴

1. Perceptions of risk are affected by the news media and in particular its treatment of fatal accidents or “bad consequences”. Sensationalism, or media excitement rather than the bald facts, sell newspapers, TV and radio time. The impact of this type of journalism has a significant (adverse) affect on the perceptions of the hazards of flying and in particular flying in small aeroplanes and helicopters.
2. Public perceptions of risk can hinder public policy formation and implementation. Politicians are sometimes (usually) vulnerable to public perceptions and it can be argued that for politicians, public perceptions of risk are of much greater concern than any statistic or scientific assessment. Politicians in New Zealand will be no different from their colleagues in other socially and economically developed countries. It is important therefore that public perceptions, however formed, can be compared with reality (the facts) and appropriate adjustments made.
3. There is no individual market for safety services. So in deciding the optimal level of public investment in safety for the public or society as a whole, there is a need for an informed assessment of the risks, activity levels as well as social decision rules (like the statistical value of life). Any safety policy which relied on public perceptions (as opposed to scientific and economic assessments) is bound to be faulty and at least inefficient; which is a public hindrance in itself. Thus in assessing risks and defining attitudes it is important to maintain a sense of perspective and balance.

Some problems

4. There are a number of ethical issues surrounding the concepts of safety and risk. Some of these have to do with value and choice. In some cases, individuals can choose to expose themselves to risk or harm. For example drinking and driving or smoking. But for a pedestrian or 3rd party motorist, for example, there are very limited means of making a sensible choice. In other cases, for example many forms of industrial risk, the individual usually does not have the means of being able to make a choice – this also applies to airline passengers. However, the provision of information like “the surgeon-general’s warning” and “drink-driving can kill” helps to overcome the ethical questions of choice.
5. Related to the question of choice is the voluntary acceptance of risk as opposed to the involuntary acceptance of risk. In terms of social decision rules, is the same value placed on both?
6. Where there is no individual acceptance of risk for public or social purposes, the level of risk is effectively allocated by the Government, (by the way in which it allocates resources to various safety regulatory organisations along with the focus

⁵³ This appendix has been adapted from the McGregor & Company Report, Regulation of Adventure Flying, 1996, an investigation for the New Zealand CAA.

⁵⁴ By attitudes, we mean a settled frame of mind or mode of thinking as indicating an opinion on risks. By perceptions we mean the intuitive recognition of, in this case, risk. Attitudes are generally the result of some form of reason whereas perceptions often lack reason and are more the result of immediate apprehension (of feelings) or uneasiness.

and objectives decided). This is an ethical problem concerning the proper use of power and resources.

7. In such cases some people may be exposed to greater risk (harmed more) than others.

8. This applies to flight safety. The individual or passenger does not have a choice – there is no individual market for flight safety. (It could be argued, for example, that the individual could decide not to do up the seat belt in an aeroplane but the crew would possibly notice and instruct the person to do up the seat belt.)

9. For more than a decade, the notion of zero accidents has been discussed in both the public and private arenas. A zero accident rate equates to zero risk.

10. Having zero risk (*ie* zero accident rate) as a safety goal is intuitively meritorious. Public perception and political rhetoric would support such a goal. In practice, it is probably unachievable. Regardless, such a safety goal would have a significant impact on the provision and allocation of resources. It would mean that in any economic analysis and cost-benefit trade-off, safety would be given greater (probably unlimited) weighting than any other factor (*viz* efficiency, effectiveness, comfort, *etc*). Under zero risk influence, safety standards are likely to be set too high (*ie* over-regulation). As well, it has been argued that the courts, in dealing with compensation, tend to be more impressed by the event than the cost- (or risk-) benefit equation.

11. To begin with, in assessing the risk (*ie* the severity of the problem or the exposure to injury or loss) there is an ethical problem behind the public wish for zero risk (or zero accidents). The reality is that if any finite risk (of death) is accepted from an activity (like flying), someone will come to harm (die) if the activity is repeated often enough. This is the ethical problem – we let people die.

12. So while it is quite probable that in New Zealand, zero accidents might be achieved over one, two or even five or 10 years, there will continue to be a risk. Accordingly, it is unreasonable to base public policy on a zero risk or zero accident rate target.

Flight Safety and the Level of Risk

13. So an activity is either safe or unsafe; that is, has zero risk or has an element of risk. In the strict sense of the word 'safety' there are no degrees or levels of safety (*ie* it cannot be measured). Nevertheless, the public notion (and that of a wide sector of the civil aviation system) of safety is something that is measured: "how safe is that operation?", "a high or low level of flight safety." What can be measured is the level of risk and this is loosely referred to as the "level of safety." For flight safety, one way of assessing the level of risk is to measure the probability of an aircraft accident.

14. Attitudes to flight safety and risk suggest that if the consequences of an aircraft accident are always minor then we (society) tend to accept a higher probability of an accident. But if the consequences of an aircraft accident are catastrophic then we (society) require that the probability for the accident be very low. This is reasonable.

15. We can "improve" flight safety by reducing the probability of an aircraft accident; that is we reduce the level of risk. We can also "improve" flight safety by lessening the consequences, harm or hazard of an accident (*eg* wearing seat belts).

Risk Assessment

16. The purpose of risk assessment is to enable risk management, which involves the allocation and organisation of resources to identify and reduce risk. Not all risks can be measured quantitatively or with certainty. But in the absence of a sensible assessment of risk (and in the absence of safety regulation) it will not be possible to make choices that lead to the orderly development of the civil aviation system or, for that matter, any economic activity. Rather, it has been argued, various forms of superstition will determine the rate of progress or failure.

17. In civil aviation two methods of “safety measurement” or rather risk assessment are used: the number of accidents and the probability of an accident (*ie* accident rates). To be useful accident rates need to be related to risk exposure (*ie* the level of activity) or to production (*ie* the number of occurrences). The appropriate measurements in civil aviation are:

- risk exposure: *accidents per 100,000 flight hours*;
- production: *accidents per million flights*.

18. Other measures such as accidents per passenger-kilometres or seat-kilometres or aircraft kilometres flown or revenue passengers carried are also used but these have very limited application in safety regulation. With the introduction of long range, high capacity aircraft these measures have become effectively redundant. Worldwide, most accidents occur during take-off and landing, regardless of the capacity or range of aircraft concerned. But moreover, the occurrence of an accident reflects on the safety performance of the civil aviation system as a whole (regardless of its range, capacity or flight time). For manufacturers, insurers and operators, the number of flight hours per hull loss is an important measure. While for passengers, the relevant measure of risk is the number of flights per passenger fatality or fatal accident.

19. What is important in assessing risk or the probability of an accident is to match the purpose of the assessment with the risk management application: commercial jet air transport, other commercial air transport (fixed or rotary wing), general aviation fixed wing, general aviation rotary wing, sport and recreation, *etc*.

20. The risk of an aircraft accident depends on:

- the type of activity and operation
- the operator of the aircraft
- the area of operation (*eg* terrain, facilities)
- the aircraft type
- the phase of flight
- the knowledge, skill and experience of the pilot and crew; and
- the conditions of flight (*eg* weather).

21. The first factor is of vital importance to safety regulation. Differences in the risk of an aircraft accident partly reflect the standards set and requirements of the regulatory authority. The other factors are perhaps more important to matters of accident prevention (but they are important to the regulator as well).

22. Regardless, to be able to successfully regulate for and promote the safety of civil aviation it is necessary to be able to measure the level of risk or “levels of safety”. And to do this data and information about the ‘workload’ or aviation activity within the air transport system is needed. In particular, exposure (hours flown) and production (number of flights) as well as the information listed in paragraph 20 above. All this is generally collected except for ‘number of flights’. The number of

flights and passengers carried are collected by the international airports and regional airports but this information is not readily available in detail form other than what is revealed in annual reports, which is of little use in risk assessment.

Appendix III: Airports: an international perspective

1. Historically, most of **Australia's** major airports were owned and operated by the Australian Government. In 1997, the Government began the process of privatising its airport holdings through the sale of long term leases (50 years with an option to renew for a further 49 years). This process was completed with the sale of the leases for the remaining Sydney-basin airports in 2003.⁵⁵

2. In privatising these airports, the Federal Government recognised that some had significant market power, which they could potentially use to raise prices for their services above those that would prevail in a more contestable market. Accordingly, it introduced price regulation at all state capital city and some regional airports. Initially, this price regulation involved a mix of price notification, price monitoring and price cap (CPI-X) arrangements.

3. However, in the light of a downturn in global air traffic and the ensuing falls in airport revenue following 9/11 plus the demise of Ansett Airlines in 2001, the coverage and stringency of this regulation was subsequently eased. So that since 2002 price regulation is essentially limited to the Australian Competition and Consumer Commission (ACCC) monitoring of charges (and service quality) for aeronautical and related services at seven airports – Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth and Sydney. This 'new' regulatory regime was introduced for five years, with a review to be conducted by the end of this period. Accordingly, in 2006 the Australian Productivity Commission undertook a review for the Federal Government to examine how well the price monitoring regime has worked and whether it, or some other form of prices oversight, should continue after 2007.

4. Accordingly, from 2007 price monitoring by the ACCC continued for Adelaide, Brisbane, Melbourne, Perth, Sydney, and car parking came under the ACCC's scrutiny in 2008. In 2009, an information disclosure regime was introduced for Canberra, Darwin, Gold Coast, and Hobart that includes pricing and complaints. In 2012, following the 2011 Productivity Commission's report on airport economic regulation,

⁵⁵ The Federal Airports Corporation (FAC) was established in 1986 and took responsibility for the ownership and control of all Federal airports. In 1997 FAC privatised (sold long term leases for airport management and operation) Brisbane, Melbourne and Perth (receiving AUD3.3 billion). A further 15 airports were privatised in 1998 (and some were offered on a freehold basis) involving 10 regular public transport airports and five general aviation airports. In 1998, the Sydney Airport Corporation Limited (SACL) was formed (corporatized out of the FAC) and the FAC was dissolved as other airports were also similarly divested. In 2002, a long term lease for the management and operation of SACL was sold by the Australian government for almost AUD5.6 billion to a consortium of Australian and international investment companies with 82% Australian interests – Sydney Airport Corporation Limited, being the operating company and in turn owned by Southern Cross Airports Corporation Holdings Limited. Today the beneficial owners of Sydney Airport are Southern Cross Australasian Airports Trust (62.3%), 25.6% listed on the Australian stock exchange and 12.1% other. Southern Cross Trust is understood to be affiliated with the Macquarie Group an Australian investment company. Melbourne and Launceston airports (*viz* the airport operating companies) are owned by Australia Pacific Airports Corporation: a private company of five institutional investors, predominantly superannuation/pension funds. Brisbane airport is owned by the Queensland government, Schipol Airport (Amsterdam) and a small number of mainly Australian institutional investors. In 2007, the Macquarie Group made an unsuccessful takeover bid for Qantas.

Adelaide moved from the price monitoring regime to the information disclosure regime.

5. At a policy level the Federal Government (Department of Infrastructure and Regional Development – DIRD) also regulates the management and ownership of leased federal airports to ensure: majority Australian ownership of airports, to place limits on the ownership of airports by airlines, ensure diversity of ownership and control of certain major airports, and to “promote efficient and economic development and operation of airports”. There are three major restrictions on ownership of airport-operator companies at leased airports: foreign ownership, airline ownership and cross-ownership. In simple terms aggregate foreign ownership is limited to 49%; airline ownership is limited to 5%; and, there is a 15% limit on cross-ownership between paired airport-operator companies of Sydney and the three other main airports. These terms apply only to leased federal airports. Leased federal airports are also required to submit an annual ‘return’ to the DIRD as well as submit draft airport master plans for Ministerial approval.

6. There are over 700 airports in Canada and many more airstrips. The **Canadian** situation is different to other developed Western economies. Until about 20 years ago, the Canadian federal government operated Canada’s airports. Now they are managed by local bodies with primary responsibility to the communities they serve. All airports in national, provincial and territorial capitals, plus those that serviced more than 200,000 passengers a year in 1994, became federally designated National Airports System (NAS) airports. These NAS airports are operated under long-term lease arrangements with the federal government and managed by airport authorities governed by boards of non-elected representatives nominated by local, provincial or territorial and federal governments, as well as by local business groups and other stakeholders.

7. NAS airport authorities are not-for-profit, non-share capital, corporations. They operate in accordance with principles of governance and public accountability enshrined in each airport’s lease that detail their board composition, community consultation requirements, and transparent requirements for financial and operating reporting. Ownership and management of non-NAS airports previously operated by the federal government has been transferred to local entities – airport authorities or commissions, or local municipalities. There is also a group of airports owned and operated by provincial and territorial governments, which primarily serve remote or Arctic locations.

8. Regardless of the institutional arrangements and governance, Canada’s airports share the common goal of meeting the interests of the communities they serve. The economic and safety regulatory oversight of airports is provided by Transport Canada. On the economic regulatory side, this includes property and lease management functions for airports as well as obligations in regard to international air services agreements and domestic air transport.

9. The historical and present policies and institutional arrangements have resulted in significant overcapacity and substantial (taxpayer) subsidies to Canada’s airports.⁵⁶ The policy emphasis now is safety, reliability and efficiency. With this in

⁵⁶ There are 726 airports in Canada of which 26 cater for 94% of all passengers and cargo. However, direct and indirect subsidies for the air transport system are small compared to other modes

mind, the federal government is exploring the commercialization of its transport sector activities. This includes consideration of 'commercializing' government agencies to not-for-profit organizations, to public-private-partnerships, to employee-run companies, to Crown corporations and to privatization. Some progress has been made with the not-for-profit option for airports.

10. In the **United States** there is again a different picture. The FAA's National Plan of Integrated Airport Systems (NPIAS) identifies more than 3,300 airports that are significant to national air transportation and thus eligible to receive federal grants under the Airport Improvement Program (AIP). The NPIAS comprises all primary airports, commercial service airports, all so-called reliever airports, and selected general aviation airports.⁵⁷ The Airport and Airway Trust Fund (AATF) provides funding for the federal commitment to the nation's aviation system through a variety of passenger, cargo and fuel charges (called collections). This aviation trust fund is presently under pressure as demands on its funds outstrip income. The FAA's Airport Compliance Program ensures airport sponsors comply with the federal obligations they assume when they accept federal grant funds or the transfer of federal property for airport purposes (*viz* to preserve and operate their facilities in a safe and efficient manner and comply with certain conditions and assurances). The program serves to protect the public interest in civil aviation and ensure compliance with applicable federal laws, FAA rules, and policies.

11. Airports in the **United Kingdom** are a mixture of private and local government owned. Those airports with annual revenues greater than £1 million are subject to economic regulation. This is elaborated on in *Appendix 5*.

12. In **New Zealand** airports were historically owned as joint ventures between the government and local municipalities. In 1986 the government initiated a corporatization process where airport authorities could be established as airport companies to be operated and managed as a "commercial undertaking". In 1997 the government declared airports to be 'non strategic' assets and decided to divest itself of its ownership in airports. The government's privatisation decision created considerable discussion that was by no means generally supported, resulting in political turmoil at local government level. Nevertheless, Auckland airport was privatised and floated on the stock exchange in 1998 and is presently almost 44% owned by Auckland city's local (municipal) government. In the same year the government sold its 66% ownership of Wellington airport to a local stock exchange listed investment company – the local city council retaining its 34% ownership. The other main international airport company, Christchurch, remains a joint venture – 75% with the local city council and 25% with the government. Almost all provincial airports, however, are owned by local government or have remained joint ventures between the government and local municipalities.

of transport (*eg* rail, sea transport, ports and harbours, Coast Guard, *etc*) but is nevertheless not insignificant (*viz* \$8 billion in rent relief for all NAS airports up to 2020).

⁵⁷ Primary airports (about 380) account for 99% of passenger arrivals and departures; about 70% of aircraft are based at non-primary airports, made up of commercial service airports (about 130 in number), reliever (280) and general aviation (2500 airports or aerodromes). There are almost 20,000 airports in the US of which about 5,300 are public and the remainder private (not open to the public).

13. In 2007 Auckland airport was the target of an unsuccessful partial take-over by a consortium of Dubai companies seeking 59%. When this failed the Canadian Pension Plan Investment Board (CPPIB) approached Auckland airport with a partial take-over offer of 49%, subsequently reduced to 40%. In turn, the Auckland and Manukau City Councils, which at the time both owned shares in the Airport, plus the Wellington based investment firm Infratil, made separate bids. The CPPIB offer resulted in an upheaval or commotion between shareholders and the airport board as well as generating considerable political interest at a central government level.

14. In March 2008, the Government made changes to the Regulations to the Overseas Investment Act to allow the appropriate Ministers to block the sale of any overseas land or assets if the investment runs counter to the need to maintain New Zealand control of strategically important infrastructure or sensitive land. This gave the Government power to intervene in the sale process as the final arbiter. While the Overseas Investment Office (OIO) had recommended the sale as being beneficial, the government rejected the deal for the reason that it did not offer substantial benefits to New Zealand and that "AIA is a strategic asset and a monopoly provider, so there had to be good reasons why the proposal should be approved".

15. Auckland airport will undoubtedly remain a potential takeover target for overseas institutional investors, especially Auckland as it is forecast to be one of the 90 airports that by 2032 will be amongst the 90 airports that will handle 99% of worldwide long haul traffic.

16. Airport companies in New Zealand have the ability to set charges subject only to the requirement to consult with users while larger airports also have a requirement to consult on capital expenditure plans. For the three main international airports, however, a light-handed regulatory regime exists in the form of an information disclosure requirement under section 56 of the Commerce Act. The purpose is to ensure that sufficient information is readily available to interested persons, particularly airlines. Over the last year or so Auckland, Wellington and Christchurch have submitted documents (s56G reports) using Commerce Commission templates. These provided information on forecast traffic, revenue and capital expenditure for the 10 years out to 2022. In turn, the Commission is required to report to the Ministers of Commerce(?) and Transport as to how effectively information disclosure regulation is promoting, amongst other things, 'the long term benefit of consumers' in respect of airport services. It is understood the Commission has yet to fully report.

17. In New Zealand the airlines are unanimous in their view that the three main airports abuse their monopoly position in setting charges, operating terms and conditions.

18. Unlike Australia, there are no foreign ownership restrictions to airport ownership unless the airport is sited on coastal land or lake foreshore⁵⁸. Presently New Zealand seems to be without an explicit airports policy.

⁵⁸ If an airport is bounded by the sea or lake and is of an area greater than 0.2 or 0.4 hectares respectively then it is subject to the Overseas Investment Act 2014 where foreign ownership or control of 25% or more is contemplated.

Appendix IV: ANS: an international perspective

1. In **Australia**, a Statement of Expectation is issued to Airservices Australia Limited by the Responsible Minister along with guidelines for engaging in significant non-regulated activities. The regulatory regime could be described as direct government intervention but of a light handed nature.
2. In **Canada**, Nav Canada is a private non-share capital corporation that has no shareholders; all revenues stay within the ANS, which is a not-for-profit organization. That is, no individual, company or other entity benefits or receives any financial return from the operation of the ANS. The company is financed through the debt markets, with (Canadian) \$2.175 billion in long-term bonds available for trade every day. This commercial model is designed to ensure the safe, effective and efficient provision of ANS. Furthermore, as there are no shareholders as such, the company is governed by directors representing the air carriers, the Federal Government, employees plus business and general aviation, in order of influence. It could be argued that the institutional arrangement for Nav Canada obviates the need for specific economic regulation, which is provided for in Nav Canada's enabling legislation.
3. In the **United States**, the Federal Aviation Administration is part of the Department of Transportation. Both these entities are huge organizations. The FAA's national traffic organization (NTO) employs about 35,000 controllers, technicians, engineers and support personnel, handling about 7,000 movements per hour and 50,000 aircraft per day. For all intents and purposes considerable functional separation exists between regulator and ANS provider (*ie* FAA). But the fact remains they are one in terms of governance and funding. There is no specific economic regulatory regime for the regulation of ANS.
4. As noted, the situation in the **United Kingdom**, deserves some elaboration because its model has been the basis of civil aviation regulation and provision of ANS in former colonies such as Australia, Malaysia, New Zealand, Singapore, *etc.* The 'old' model was designed some 60 years ago and has been significantly overtaken by civil aviation and air transport developments and requirements over the last two decades or so, notwithstanding the changes in Europe under Eurocontrol.
5. In **New Zealand**, Airways Corporation of New Zealand Limited is given a statutory monopoly for en route (area control), approach control and flight information services. Aerodrome control is contestable and the responsibility of the airport. Airways Corporation provides almost all aerodrome control services in New Zealand under contract to individual airports. As well as the conventional accounting approach, the economic value added (EVA) method is used for operational and financial management where 'customers' receive a rebate after a reasonable charge for the cost of capital. A very light-handed economic regulatory environment exists where the main regulatory instrument is the threat of information disclosure into the public domain.

Appendix V: The Situation in the UK

The Regulators

1. The UK Civil Aviation Authority (UK CAA) was set up in 1972 to regulate civil aviation safety and to be responsible for the economic regulation of UK air services (*ie* air transport market). With the introduction of the then new Airports Act in 1986 as a consequence of the privatisation of the British Airports Authority, the task of the economic regulation of airports was assigned to the UK CAA. There is a reason for this that can be traced to the then approach to economic regulation of utilities being conceived as rules-based and non-discretionary. However, while the approach to economic regulation of utilities, including airports, was conceived as rules-based and non-discretionary, there is little consistency amongst these specialist regulators, including the UK CAA. The following paragraphs illustrate this.

2. The Office of Fair Trading (OFT) has been responsible for monitoring competition in the UK focusing on restrictive trade practices, cartels, *etc*⁵⁹. Prior to the privatisation of telecommunications (1984), airports (1986), gas (1986) water (1989), and electricity (1990), the protection of consumer interests and the promotion of competition was seen as requiring little more than an expansion of the role and function of the OFT⁶⁰. The OFT demurred and as a result a number of specialist or industry regulators were set up to ensure prices were not excessive, dominant monopoly positions were not abused and competition was encouraged. These specialist regulators were to be assisted by the Monopolies and Mergers Commission (MMC). The Competition Commission (CC) replaced the MMC in April 1999.⁶¹ The CC is an independent public body responsible for investigating mergers and markets and regulating major infrastructure companies. Its powers emanate from the Enterprise Act 2002. In April 2014 the Competition and Markets Authority (CMA) will replace the OFT and CC. Like the OFT the CMA is (will be) a non ministerial government department.

3. At the same time as specialist or industry economic regulators, a number of 'quality' regulators (not unlike safety regulators) were established to deal with quality regulation and the licensing of new entrants. Her Majesty's Inspectorate of Pollution (1987) and the National Rivers Authority (1989) were set up to develop and enforce environmental standards. In 1996, the Environment Agency took over the functions of the National Rivers Authority, Her Majesty's Inspectorate of Pollution and local waste regulation authorities in England and Wales.⁶² The Broadcasting Standards

⁵⁹ The OFT was originally set up in 1951 and administers parts of the Fair Trading Act 1973; it is a non ministerial government department.

⁶⁰ Dr Cento Veljanovski (Editor), *Regulators and the Market: An Assessment of the Growth of Regulation in the UK*, The Institute of Economic Affairs, London, 1991.

⁶¹ The MMC was established in 1948 and administered parts of the Fair Trading Act 1973 and the Competition Act 1980.

⁶² The Environment Agency is a non-departmental public body of the Department for Environment, Food and Rural Affairs (Defra) and an Assembly Sponsored Public Body of the National Assembly for Wales.

Council was formed in 1990. The Independent Television Commission (ITC) (1991) and Radio Authority (RAu) (1991) were established to licence (by auction) broadcasters and cable operators. In 2003, the Office of Communications (Ofcom) inherited the functions of five regulators that it replaced; the Broadcasting Standards Commission/Council (BSC), the ITC, the Office of Telecommunications (OfTel), the Radiocommunications Agency (RA) and the RAu. The Office of Communications is responsible for both economic regulation and consumer protection.

4. Originally, the Office of Gas Supply (Ofgas) was responsible for economic regulation whereas the Gas Consumers' Councils dealt with consumer complaints and service standards. In 2000, the Office of Gas and Electricity Markets (Ofgem) and Energywatch were formed and took over the functions of the Ofgas and the Gas Consumers Council respectively. Ofgem is an independent economic regulator with a primary duty to protect the interests of consumers by promoting competition whereas Energywatch is an independent gas and electricity consumer watchdog. Energywatch and Ofgem are required to arrange to secure co-operation, exchange of information and ensure consistent treatment of matters affecting both organizations.

5. The Office of Water Services (Ofwat) was established in 1989 as the economic regulator and works with the environmental regulator, the Environmental Agency, and the Consumer Council for Water.

6. Sitting out on its own is the independent Office of Rail Regulation (ORR), which is the combined safety and economic regulator in the UK. Its predecessor, the Rail Regulator, was set up just before (1993) British Rail was split into rail service providers and a railway infrastructure company (1994).

7. While the approach to economic regulation of water, gas, electricity and telecommunications utilities, including airports, was conceived as rules-based and non-discretionary, there is little consistency amongst these specialist regulators including the UK CAA. Ofcom is responsible for both economic regulation and consumer protection. Ofgas is responsible for economic regulation whereas the Gas Consumers' Councils deals with consumer complaints and service standards. Ofwat is the economic regulator and the Environmental Agency Authority is the environmental regulator. The UK CAA is the safety regulator and the economic regulator but the Department for Transport (DfT) is also involved in the economic regulation of international air transportation. The CMA (ex OFT and CC) is also, amongst other things, involved in economic regulation of aviation (*viz* airports and ANS) and air transport.

8. It is evident that in most cases except the UK CAA, the economic regulators are non-ministerial departments headed by a Director General and generally called an "Office of ...". The UK CAA was, however, created in an earlier era as a statutory authority headed by a board and is considered to be outside the civil service. (It should be noted that at the time of its formation, the UK CAA was technically a nationalised industry as an ANS provider as well as a regulator; this has now changed with the splitting off of NATS into a public-private-partnership company.)

9. Again, in all cases in the UK other than the UK CAA, the review of licence terms and the price cap along with general competition matters is (was) the responsibility of the Competition Commission (CC), soon to be the Competition and

Markets Authority (CMA). The CC acts (acted) as an 'appeal court' for licence revision and re-setting of price caps if the regulator (UK CAA) fails to reach agreement with the industry. In the economic regulation of airports the CC only makes recommendations to the UK CAA on price caps, the UK CAA makes the final.

10. It is thus evident that within the UK there is considerable diversity in the approach to economic regulation and that for mainly historical reasons the UK CAA is the exception to all other regulators. Generally, safety and environmental regulation is separated from economic regulation (and their associated legislation). Perhaps the only common feature is that the UK relies on 'expert industry' economic regulators for utility industries.

11. However, the economic regulatory system in the UK has itself been under scrutiny over the last decade or more – all regulators will always be subject to a certain amount of scrutiny and this is not a bad thing. On this score, perhaps it is best to reflect on the comments made by an industry 'expert' regulator Dr Cento Veljanovski on the UK system of economic regulation⁶³:

Regulation UK style is evolving into a discretionary system where negotiations and personality are becoming its most important features. It is turning into a 'game' between industry chiefs and regulators because regulation does not provide a clear and certain set of rules within which the industry can make economic decisions. Rather investing in influencing regulators and changing the rules of the game are becoming an industry in themselves, consuming resources and increasing the burden of regulation.

12. Separating the safety and economic requirements in law will help to avoid these and similar problems.

13. In November 1999, the UK Government formally responded to Parliament's Environment, Transport and Regional Affairs Committee's Report 'Aviation Safety'⁶⁴. The response is a consolidated reply on behalf of the Government and the UK CAA. It states that:

We recommend that the Safety Regulation Group should in due course be transferred to a new independent Transport Safety Authority. The remaining functions of the CAA should either continue to be the responsibility of the Authority or absorbed within another, existing, body or Government department.

14. In its conclusions regarding this report the UK Government states that:

All involved in aviation should remember that openness and criticism aid safety, and the maintenance of safety standards is the most important factor in building a successful aviation industry. We recommend that the Department of the Environment, Transport and the Regions maintain a careful relationship between the Safety Regulation Group and the industry it regulates, and act firmly to ensure that the Regulation Group remains independent and critical of the industry. As we have

⁶³ Dr Cento Veljanovski (Editor), *Regulation and the Market*, Institute of Economic Affairs, London, 1991: Dr Veljanovski is a lawyer and economist and the author of a number of books and journals covering economic regulatory enforcement, privatisation and competition and the political economy of regulation. He was some time senior research fellow in law and economics at the Institute of Economic Affairs, London.

⁶⁴ The Government's response to the Environment, Transport and Regional Affairs Committee's Report, Aviation Safety, Presented to Parliament by the Deputy Prime Minister and Secretary of State for the Environment, Transport and the Regions by Command of Her Majesty, November 1999.

said, splitting the Safety Regulation Group from the Economic Regulation Group, through the creation of an independent Transport Safety Authority, would help to ensure that the safety regulator maintained an appropriate distance from the industry.

15. It is therefore evident that the UK Government and the CAA each recognise that safety regulation and economic regulation of civil aviation are best separated and independent of each other. When (if ever) this is achieved, the UK will then be in line with other major aviation nations of the world.

16. Complicating all this is the UK's membership of the European Union (EU) and European Aviation Safety Authority (EASA).⁶⁵

17. In July 2002 the European Parliament and the European Council, having regard to the Treaty Establishing the European Community (Article 80(2)) prescribed a Regulation to provide for common rules in the field of civil aviation and establishing a European Aviation Safety Agency. (Regulation (EC) No 1592/2002)⁶⁶. The principal objective of this Regulation is to ensure a high and uniform level of protection of the European citizen in civil aviation by the adoption of and compliance with common safety rules, including those for protecting the environment.

18. A consequence of being a signatory to these treaties is that the Member States are required to bring into their domestic law European Community Directives incorporating all appropriate provisions to give effect to such Directives. In addition, European Community Regulations that prescribe new law are to be given effect in domestic law along with any administrative legislation to enable this.

19. For civil aviation in the UK, the upshot is that EASA has assumed a number of responsibilities and tasks previously those of Member States. Moreover, the UK CAA has been designated by EASA as the competent authority - the National Aviation Authority (NAA) in respect of EASA's safety requirements.

Airports & ANS Providers

20. The great majority of airports in the UK are operated on a commercial basis whether privately or publicly owned. At these airports, the operators determine the exact form and funding of future development and new capacity to meet air transport requirements. There are also small local airports owned by local authorities that require deficit funding to cover operating costs and investment in new capacity, but in return offer important accessibility, economic and social benefits to the areas they serve. As well, airports designated for regional aid under European

⁶⁵ The Treaty Establishing the European Community (EC Treaty) provides (see Article 80) for the [European] Council to decide whether, to what extent and by what procedure appropriate provisions may be laid down for air transport. Furthermore the objectives of this Treaty shall be pursued within a framework of a common transport policy (Article 71) and the Council shall lay down:

- (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;
- (b) the conditions under which non-resident carriers may operate transport services within a Member State;
- (c) measures to improve transport safety;
- (d) any other appropriate provisions.

⁶⁶ Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency.

Community law can apply for public funding to help finance investment in new capacity provided there is clear evidence that the project is not fundable commercially, has good relative value for money and would not be anti-competitive. Regardless, for regional airports, some limited public funding may be available if it contributes to wider employment creation, regeneration, social development and regional and local economic development.

21. Heathrow, Gatwick, Stansted and Manchester are the four main and biggest airports in the UK. Heathrow is owned by a FGP Topco Limited a Spanish lead consortium – see later. Gatwick Airport is owned by group of international investment funds, of which Global Infrastructure Partners⁶⁷ is the majority shareholder. Stansted is owned by the Manchester Airport Group (MAG). MAG is the largest UK-owned airport operator with Stansted, Bournemouth, East Midlands and Manchester. MAG in turn is owned by IFM Investors⁶⁸ (35.5%), Manchester City Council (35.5%) and nine Greater Manchester Councils (29%). BAA Limited owns and operates Heathrow as well as Glasgow, Aberdeen, Southampton (in the UK) and owns 70% of Naples (in Italy).

22. Some observations about BAA Limited are appropriate. The company has its origin with the establishment of the British Airports Authority in 1965. In 1986, the airport was corporatized by the formation of a government-owned company BAA plc and at the same time, a comprehensive economic regulatory regime was prescribed in the Airports Act 1986. The following year BAA plc was floated on the London stock exchange and was generally considered to have been a successful privatisation.⁶⁹ BAA plc subsequently acquires interests in four Australian state and regional airports plus taking an investment in the UK NATS Group. In 2006 a consortium, FGP Topco Limited, led by the Spanish infrastructure company Grupo Ferrovial, is established in the UK and acquires BAA plc (renamed to BAA Limited) after a controversial take-over, renaming it Heathrow Airport Holdings Limited (HAHL).⁷⁰ Prior to 2002 Ferrovial had no airport interests, BAA accounts for over half of Ferrovial's overall business. The company now owns and operates one of the largest airports in the World – Heathrow – which also has one of the worst reputations from a passenger

⁶⁷ Global Infrastructure Partners is a New York based private equity firm that also owns London City airport and Edinburgh airport.

⁶⁸ IFM Investors is a uniquely-structured global fund manager with A\$50 billion in assets under management (as at 31 December 2013) across infrastructure, debt, equities and private capital. Established over twenty years ago and owned by 30 Australian major pension funds, IFM states that their 'interests are deeply aligned with that of (their) institutional investors and (an) unwavering focus is on maximising investor returns'.

⁶⁹ 500 million shares were put up for sale: 260 million at a fixed price to the public, 115 million at a fixed price to financial institutions and 125 million offered for tender. The sale was oversubscribed by about eight times and the government raised £1.3 billion.

⁷⁰ Ferrovial is listed on the Spanish stock exchange. It started as a railway company in 1952 and since then has developed into a major construction, airport, road toll and car parking company with airport interests in Chile and the UK (selling 20.9% of Sydney airport in February 2007 conditional upon buying a controlling stake in BAA) plus an international airport ground handling company. FGP Topco Limited, a former subsidiary of Ferrovial Infraestructuras SA, is now owned by: Ferrovial S.A. (25.00%), Qatar Holding LLC (20.00%), Caisse de dépôt et placement du Québec (13.29%), the Government of Singapore Investment Corporation (11.88%), Alinda Capital Partners (11.18%), China Investment Corporation (10.00%) and Universities Superannuation Scheme (USS) (8.65%). FGP TopCo Limited provides management of airport facilities in the United Kingdom and overseas. The company was incorporated in 2006 and is based in Hounslow, United Kingdom. FGP TopCo Limited is a former subsidiary of Ferrovial Infraestructuras S.A.

perspective. The Ferrovial takeover well illustrates the multilateral ownership trend of international airports and the potential for institutional ownership (funds managers, pension funds, *etc*) as exists in many other large businesses with its attendant risks and rewards. (Following the global financial crisis, it is understood Grupo Ferrovial were forced to review its holdings in what was BAA plc and in turn widening institutional ownership). In 2012 BAA Limited was renamed Heathrow Airport Holdings Limited and BAA Airports Limited was renamed to LHR Airports Limited.

23. It is clear that the UK's airport ownership situation is an assortment of models or rather types but where an airport can be a commercial proposition private investors have been able to own and control them.

24. After the World War 2, air traffic control in the UK was the responsibility of the Ministry of Civil Aviation. In 1962, National Air Traffic Control Services (NATCS) was established as a 'unified national organization' covering civil air traffic control but liaising with the Ministry of Defence (air force) in areas where military aircraft crossed civil routes. When the CAA was established in 1972 NATCS became National Air Traffic Services (NATS). In 1996 in recognition that NATS, as a service provider, should be operated at some distance from its regulator (the UK CAA) and the need to improve its effectiveness and efficiency, NATS was corporatized and became a wholly-owned subsidiary of the UK CAA. While privatisation of NATS was first mooted in 1992 and a public-private partnership (PPP) proposed in 1998, it was not until a PPP was prescribed in the Transport Act 2000 that action was taken. In 2001, the company was partly privatised (PPP) as NATS Limited: the Airline Group acquired 46%, the staff 5%, with the Government retaining the 49% balance plus a 'golden share'. In 2001 in the wake of the air transport downturn BAA plc took a four percent shareholding, reducing the Airline Group's holding to 42%. The Airline Group is a consortium of seven UK airlines: British Airways, bmi British Midland, Virgin Atlantic, Thomas Cook, Monarch Airlines, easyJet and Tui Travel.

25. NATS Holdings Limited is the parent company of the NATS Group. NATS Limited holds the investments in the two principal operating companies: NATS En Route plc (provider of en route control services for aircraft flying through UK airspace), NATS (Services) Ltd (provider of aerodrome control at 15 of the UK's biggest airports including all BAA airports, and, provider of communications, navigation and surveillance (CNS) and consulting services). NATS (Services) Ltd is the employer of all staff in the NATS Group. NATSNAV Ltd is a subsidiary of NATS (Services) Ltd and a member of the European Economic Interest Grouping which aims to act as a European Satellite Services Provider.

26. NATS has a statutory monopoly for en route control but aerodrome control is contestable. Air traffic control at aerodromes where NATS does not provide services is provided by the local airport authority or company.

Regulation of & ANS Providers

27. In its own words the Economic Regulation Group (ERG) of the UK CAA:

regulates airports, air traffic services and airlines and provides advice on aviation policy from an economic standpoint. Its aim is to secure the best sustainable outcome for users of air transport services. ERG's main tasks are to promote liberalisation through the removal of Government-imposed restrictions to entry to the airline market and to facilitate the optimal supply and regulation of aviation infrastructure. ERG acts

as expert adviser to the Government and collects, analyses and publishes statistical information on airlines and airports.

ERG's 'four core functions' are (in its own words):

- *economic regulation of the three designated airports (Heathrow, Gatwick and Stansted) and NATS;*
- *enforcement of consumer legislation – for example, to protect consumers in instances of flight cancellation and denied boarding, and protect people of reduced mobility when they fly;*
- *providing expert policy and economic advice and analysis across [UK] CAA, to government and others on airports, airlines and air traffic services; and*
- *collecting and analysing aviation statistics and survey responses.*

28. Not all airports are regulated in the UK. Presently the economic regulation of airports is in a transitional period under both the Airports Act 1986 and the Civil Aviation Act 2012. Accordingly, things are presently not straightforward.

29. Under the Airports Act 1986, economic regulation applies in general to airports where annual turnover exceeds £1 million in two of the last three financial years – there are some exceptions that include airports owned or managed by the UK CAA or a UK CAA subsidiary and those managed by the Government. Airports that qualify can then apply to the UK CAA for permission to levy airport charges, which is effectively automatically granted and remains in force unless it is revoked. It may be revoked only where the airport ceases to be regulated or where the airport persistently fails to comply with any condition the UK CAA has imposed on it (other than an accounts or information disclosure condition).⁷¹

30. Under the Airports Act 1986 regime the government (Secretary of State) designates certain airports where the ERG regulates the charges paid by airlines at airports, imposes information disclosure conditions and deals with complaints about the conduct of airports. The charges condition is reviewed every five years by the Competition Commission and the UK CAA.⁷² Currently the 'designated airports' are: Heathrow, Gatwick and Stansted – Manchester was (and may still be) 'designated'.

31. Under the Civil Aviation Act 2012 an airport operator that passes the following test will require an economic licence issued by the CAA:

- The relevant operator has, or is likely to acquire, substantial market power in a market, either alone or taken with such other persons as the UK CAA considers appropriate.

⁷¹ Airports holding such permission routinely provide the UK CAA with annual statutory accounts, their schedules of airport charges. Airports do not need (have not needed) to seek the CAA's approval before they revise their airport charges but they must notify the UK CAA of the new charges before they take effect.

⁷² The CAA-ERG asks the Competition Commission (CC) to report on the maximum limit for airport charges for the following five years (*à la* a price cap); and, whether the airport has since the date of the previous reference pursued a course of conduct contrary to the public interest. On receipt of the CC's report, the UK CAA publishes its own proposals for airport charges and on any public interest findings the CC has made. The UK CAA is not bound to follow the CC's recommendation on airport charges but where the proposals differ the UK CAA will give reasons why it has come to a different provisional view. However, in the case of any public interest finding by the CC, the UK CAA cannot disagree about the finding itself and must impose conditions that, may differ in detail from the CC's recommended remedy, but must have the identical effect. In April 2014 the Competition and Markets Authority takes over from the CC.

- Competition law does not provide sufficient protection against the risk that the relevant operator may engage in conduct that amounts to an abuse of that substantial market power.
- For users of air transport services, the benefits of regulating the relevant operator by means of a licence are likely to outweigh the adverse effects.

Operators of Heathrow, Gatwick and Stansted airports are presently being 'tested' by the CAA to determine whether they will require a licence from 1 April 2014.

32. In addition, CAA-ERG has functions under the European Council directive on ground handling at airports as well as under the UK Airports Act. In this regard, the UK CAA can impose discretionary conditions in relation to restrictive trade practices relating to the provision of so-called relevant activities (*ie* landing, parking or taking off of aircraft, the servicing of aircraft, handling of passengers, baggage and cargo) and operational activities.

33. The UK CAA has concurrent powers with the OFT to enforce the prohibitions (restrictive trade practices, *etc*) in the Competition Act as they relate to airport operation services. The UK CAA also has powers to enforce the equivalent provisions relating to competition in the Treaty on the Functioning of the European Union (Articles 101 (airports) and 102 (ANS)) where the relevant behaviour may affect trade between Member States.

34. The Government (Minister of Transport) issues a licence to NATS (En Route) plc (NERL) to provide en route air traffic services in the UK and the UK CAA has the role of the economic regulator of NERL. The UK CAA exercises its role as economic regulator (as distinct from safety regulator) mainly by monitoring and enforcing the conditions in the licence and through modifications to the licence, which include price control. The UK CAA sets caps on the prices for NERL's en route services (both Eurocontrol and Oceanic)⁷³. In regulating NERL and the supply of air traffic services the UK CAA adopted the guidelines published by the OFT on the application and enforcement of the prohibitions in the Competition Act 1998 until such time as the UK CAA considered it is appropriate to publish more detailed guidelines (in April 2007).

⁷³ The current caps were reviewed in 2011 and run to 2014.

Appendix VI: Civil Aviation Safety and Security Act 2014

1. As well as providing for New Zealand's international civil aviation obligations, the new Civil Aviation Safety and Security Act 2014 (the Safety Act) will reflect public policy decisions specific to civil aviation safety and security relevant to New Zealand. In this regard the Safety Act needs to provide for:

- the national safety and security goal for the civil aviation system;
- the division of responsibility to ensure the operator is responsible for the safe conduct of his or her operation and to comply with any regulations the Minister may promulgate;
- the adoption of the 'life cycle' approach to regulating civil aviation; and
- a civil aviation authority to set regulations for the safety and security of civil aviation and to seek compliance with those regulations.

2. The following paragraphs outline in a general way the safety and security requirements that should be provided for in the Safety Act. They serve to illustrate the likely contents of a Safety Act and so are indicative and by no means definitive. The contents mostly mirror existing safety related contents of the present Civil Aviation Act.

Purpose

3. This is similar to the purpose of the current Civil Aviation Act.
- (a) To establish rules of operation and the divisions of responsibility within the New Zealand's civil aviation system in order to promote safety and security.
 - (b) To ensure New Zealand's obligations and responsibilities under international aviation agreements in respect of civil aviation safety and security are met and to administer New Zealand's obligations and responsibilities.
 - (c) To consolidate and amend the law relating to civil aviation safety and security.

Minimum Legislative Requirements

4. The Act should reflect New Zealand's policies for civil aviation safety and security and provide for the development of regulations and standards for flight safety and security. Flight safety in this context means civil aviation safety and security, the point being that it is about the interests of safety and security relating to aircraft operations (flying) and those systems that support aircraft operations (flying) such as aerodromes and the airspace sub systems.

5. The minimum legislative requirements in terms of the Chicago Convention relate to international air transport. It is therefore up to New Zealand to decide what it will do with domestic aviation. For air transport operations New Zealand does not differentiate between international and domestic standards for flight safety. For other domestic aircraft operations, such as aerial work and private flying, New Zealand can and does differentiate. Regardless, the Safety Act should provide for the promulgation of regulations that recognise differing levels of risk and safety standards depending on the activity or service being regulated.

International Obligations

6. The Act needs to recognise New Zealand's obligations and to provide for the administration of New Zealand's international agreements (obligations) that are to do with civil aviation safety and security. Under present institutional arrangements the civil aviation authority should be delegated the responsibility to administer New Zealand's international aviation safety and security obligations and agreements. The Safety Act needs to provide for this.

Distribution & Balance of Responsibility

7. The Safety Act should make it clear that State (*ie* New Zealand) is responsible for setting civil aviation safety and security standards and for requiring and seeking compliance with those standards. Whereas the operator (*ie* airline, aerodrome, ATS provider, *etc*) is responsible for the safe conduct of his or her operation and to comply with the standards and any regulations the State may promulgate.

8. Related to the balance of responsibility are the provisions for vesting privileges in individuals (by licences) and organisations (by certificates). The conditions for the vesting of privileges need to be established in the Act to reflect the distribution of responsibility. Note, the licenses referred to are personnel licenses and not economic licences; personnel licenses are the only licences granted by the safety regulator. Certificates are granted to organisations once they have satisfied the director-general that the organisation meets and can continue to meet specific safety standards. All organisations providing goods or services for use within the civil aviation system, by and large, will be required by the Safety Act to have a certificate to enable it to operate; this includes all aerodromes, air transport operations (*ie* airlines, *etc*), ATS providers, flying training organisations, aerial work operators, aviation security service providers, *etc*). This reflects current provisions of the Civil Aviation Act.

9. All personnel licences, certificates and permits for organisations relating to a person, aircraft, procedure, aerodrome, product or service provided within the civil aviation system is now generally referred to as an 'aviation document'. Although a contentious issue, a medical certificate in connection with a personnel licence should be classified as an 'aviation document'.

Responsibilities & Functions of the Minister

10. The fundamental responsibility (function) of the Minister is to ensure that the basic goal for safety and security in civil aviation in New Zealand is met along with the provisions of the Act. This effectively amounts to two responsibilities: the promotion of flight safety and security for the benefit of New Zealand; and, the implementation and administration of New Zealand's international obligations. There is also a collateral responsibility for the Minister to ensure that the organisation (i.e. civil aviation authority) has the resources to carry out the provisions of the Act.

Establish the Safety Goal

11. The following safety and security goal is proposed:

To promote safety in civil aviation at reasonable cost for the benefit of the people of New Zealand.

12. In pursuing the safety goal there should be:
- recognition that different sectors of the civil aviation system will have different safety levels and requirements (*ie* international air transport, domestic air transport, aerial work, private operations);
 - a balance between the safety goals and air transport requirements demanded by New Zealand society (*ie* the people of New Zealand – this should be indicated by Parliament and perhaps conveyed, as required, to the civil aviation authority in a written instruction from the Minister);⁷⁴ and
 - recognition of the resources available for safety oversight, promotion and improvements.
13. These requirements can be recognised by ensuring in the Act particular matters to be taken into account when making regulations.

Establish a Civil Aviation Authority, its Role and Functions

14. The Act should establish a civil aviation authority (authority), its objective and set out its functions. The objective of the authority is naturally to pursue the safety goal prescribed in the Act. Its functions are all those activities that will enable the authority to satisfy the objective.

15. Thus, the objective of the authority is to promote safety and security within the civil aviation system to the benefit of New Zealand.

16. The *principal function* of the authority shall be to undertake activities that promote safety and security in civil aviation for the benefit of New Zealand.

17. In pursuing its objective and further to its principal function the authority shall carry out the following functions:

- To provide the Minister with advice.
- To administer New Zealand's international aviation safety and security obligations and agreements.
- To establish safety and security standards relating to entry into, and continued operation within, the civil aviation system.
- To exercise entry control to, and exit control from, the civil aviation system.
- To monitor and enforce adherence to safety and security standards within the civil aviation system.
- To ensure the availability of facilities and services within the civil aviation system for safe and orderly air navigation.

⁷⁴ Currently some airstrips and aerodromes in the New Zealand may not strictly meet the minimum standards required by the Chicago convention for air transport operations. But if the standards were strictly enforced by the CAA air services to these airstrips and aerodromes would probably cease. To some extent a cost benefit analysis will assist in striking this balance and so recognition in the Act of this sort of balance may be helpful.

- To promote safety and security in the civil aviation system by providing safety and security information and advice, industry safety and security performance advice and fostering safety and security information education programmes.
- To ensure regular reviews of the civil aviation system to promote the improvement and development of its safety and security performance.
- To maintain and preserve records and documents relating to activities within the civil aviation system, and in particular to maintain the Civil Aviation Registry.
- To ensure the collection, collation and publication of information about the activity within and performance of the civil aviation system.
- To ensure the collection, publication and provision of charts and aeronautical information.
- To investigate and review accidents and incidents in its capacity as the responsible safety regulator (subject to the limitations required permitting an independent agency to adequately investigate accidents when appropriate).
- To support the development and growth of the aviation industry in New Zealand.

18. The Act should also state that in the exercise of its principal function the authority shall have regard to government policy and (written) directions from the Minister. But the Minister is not to intervene or direct the authority or the director-general in its activities. It would, however, be reasonable for the Minister (or the authority) to direct the director-general in relation to classes of people or operations.

19. It is suggested that the Act establishes the authority under the Director-General of Civil Aviation. However, this may have institutional considerations outside the scope of this review. Nevertheless, the title 'Director-General' is preferred to 'Director' because it carries considerably more gravitas internationally, especially in Asia and Europe.

Define Regulatory Powers

20. As currently provided for in the Civil Aviation Act the regulatory powers needed to meet the safety goal and any other objective in relation to civil aviation safety and security need to be provided, including the power to:

- make regulations
- suspend, revoke, vary licences, certificates
- detain, seize, impose conditions or prohibitions on aircraft, products, parts, *etc*
- impose conditions or prohibitions on aeronautical procedures, systems, *etc*

Responsibilities and Functions of the Director-General of Civil Aviation

21. The director-general is the chief executive of the authority and the actual safety regulator of the civil aviation system – that is the licensing authority for the granting of all licences, certificates, permits, dispensations, *etc*.

22. As the chief executive, the director-general is effectively responsible for the efficient and effective management of the authority. The functions that go with this are straightforward and require no special provisions within the Act.

23. As the safety regulator, the director-general is responsible to the Minister for promoting safety within the civil aviation system for the benefit of New Zealand. (Note the director-general is not responsible to the Board for these functions.) To carry out this responsibility the functions of the director-general will need to include:

- the exercise of entry control into the civil aviation system by the granting of licences, certificates, permits, *etc* (*ie* aviation documents) or validating other civil aviation authority actions;
- the exercise of functional supervision over participants within the civil aviation system by inspecting, auditing, checking, analysing, meeting with participants, *etc*;
- the enforcement of the regulations, rules and standards;
- the variation, suspension, revocation and disqualification of licenses, certificates, *etc*
- the taking of such action as may be appropriate in the public interest; and
- any other functions conferred or imposed by the Act or regulations or delegated by the Minister.

24. In the performance and exercise of these functions, the director-general should have complete autonomy to act independently.

Delegations of Power

25. This provides for the delegations of power to:

- the director-general
- people employed by the authority by the director-general
- people outside the authority by the director-general.
- delegate director-general's authority to people employed by the authority
- delegate director-general's authority to people outside the authority.

Duties of Participants

26. The duties of participants are related to the distribution & balance of responsibility for safety and security. Essentially the Act will prescribe that it is the responsibility of every participant (*eg* pilot, engineer, ATCO, *etc*) to ensure that they:

- have the appropriate licences and certificates;
- comply with the Act, regulations and the conditions of their licence, certificate; and
- will carry out their operation safely and in accordance with prescribed safety standards and practices.

27. Where the provision of a service within the civil aviation system is involved, the participant (*eg* an airline, maintenance organisation, aerodrome, ATS provider, design organisation, manufacturer) is to ensure that they:

- provide appropriate training and supervision to all employees; and
- provide sufficient funds to ensure compliance with safety standards.

28. There is a general duty on all participants, including the authority, to notify all aircraft accidents and incidents – for the authority, itself, notification is to the independent accident investigation organisation and for others to the authority.

Making Regulations

29. The Act needs to establish provisions for the adoption of regulations based on the provisions of the Annexes to the Chicago Convention, when applicable, and adapted to meet the goals and objectives of the New Zealand civil aviation system.

30. It is very important for the Safety Act to state what matters must be considered when making rules such as: recognition that there will be various levels of safety, the actual safety performance of the civil aviation system, the nature of the activity and the attendant level of risk. An important factor is also the impact on the participants (and industry) and the compliance costs.

31. The Act must establish the conditions for the director-general to make emergency regulations.

Requirements on Participants

32. Related to the making of regulations, rules and standards is the requirement for all operations and activities conducted within the civil aviation system to be conducted in accordance with the Act, regulations and standards. All operations and activities conducted within the civil aviation system are also to be conducted in accordance with any other condition the State (director-general, Minister) may consider to be in the interests of safety and security or in accordance with agreements or treaties between New Zealand and other State(s).

33. These requirements can be made in a general or particular way. The duties of participants noted above are in effect particular requirements on the participants.

Aeronautical Information & Records

34. The Act needs to provide for the collection, maintenance and preservation of records and documents relating to activities within the civil aviation system. In particular, the Civil Aviation Registry and the New Zealand Register of Aircraft⁷⁵. The Civil Aviation Registry is a very important set of documents and probably the most important official information pertaining to civil aviation in New Zealand. The

⁷⁵ The New Zealand Register of Aircraft records the owner of each aircraft and the registration mark allocated by the director general. This register essentially defines all aircraft that participate in the New Zealand civil aviation system and so are subject to New Zealand law. The Register of Aircraft actually forms part of the Civil Aviation Register.

performance and activities of the civil aviation system are measured by this information recorded in the Register.

35. The Civil Aviation Register is a public document and so should be available to the public. The authority should also be required in the Act to provide and disseminate information about safety and the civil aviation system.

Aviation Security

36. The Safety Act needs to set out:

- the Minister's responsibility to ensure that aviation security services are provided at all international airports and 'security designated aerodromes or installations'
- the functions and duties of an aviation security organisation
- define security areas and provide for the right of access
- provide for the powers of arrest for aviation security officers
- provide for the powers of aviation security officers in relation to dangerous goods, and
- set out the obligations of the Police in these matters.

Enforcement

37. The Act needs to establish provisions for enforcement of the law relating to the civil aviation system; there should be no provisions for enforcement in the regulations.

38. As well the Act needs to provide for:

- the suspension and cancellation of vested privileges (licences, certificates); and
- disqualification from holding vested privileges.

Offences & Penalties

39. The Act needs to provide for civil penalties and criminal penalties. The penalties need to be sufficient to be an effective deterrent to both individuals and corporate entities and to signal to the Courts the seriousness with which New Zealand society views the offence. This is especially important for major offences or serious breaches of any of the provisions of the Act.

40. If New Zealand wishes to be seen as a leading regional aviation nation and is to be taken seriously by the international aviation community, then the provision for offences and penalties need to be in step with those of other leading aviation nations. The US can perhaps be taken as the benchmark here. The FAA routinely seeks (and imposes) fines for safety, security and general offences involving major breaches in the order of hundreds of thousands of dollars and sometimes in the order of USD millions.⁷⁶

⁷⁶ Reasonably heavy fines are regularly proposed and imposed by the FAA. For example to illustrate this and the variety of offences involved, the year 2000 (14 years ago) does this well; it was not an extraordinary year for fines. The FAA proposed fines totalling US\$988,500 against Alaska Airlines

41. The following fines are suggested and are maximum levels, and at levels that would not be inconsistent with practice in the US, for example:

- Safety offences:
 - Individual: imprisonment for a term not exceeding 12 months or a fine not exceeding NZD 50,000
 - Body corporate: a fine not exceeding NZD 400,000
- Security offences:
 - Individual: imprisonment for a term not exceeding 12 months or a fine not exceeding NZD 50,000
 - Body corporate: a fine not exceeding NZD 400,000
- General offences:
 - Individual: imprisonment for a term not exceeding 4 months or a fine not exceeding NZD 20,000
 - Body corporate: a fine not exceeding NZD 200,000

42. Unruly passenger offences could match security offences.

43. It is up to the New Zealand Parliament to reflect on whether the suggested levels are consistent with how seriously New Zealand society views major offences or breaches of any of the provisions of the Act.⁷⁷

44. In this regard, the Act needs to differentiate between safety offences (*eg* dangerous flying, non-compliance, etc) general offences (*eg* supplying false information, failure to supply information, obstructing the regulator (authority officers), etc) and security offences.

45. The Act needs to:

- provide for crimes relating to aircraft, which include:

for maintenance violations and operating B737 and MD80 aircraft not in compliance with Federal Aviation Regulations; for not conducting employee drug and alcohol tests the FAA proposed a fine of US\$172,500 against Chautaugua Airlines; in October 2000 the FAA proposed US\$2.5 million penalty against the Ohio firm Parker-Hannifin Corp for failing to notify the FAA of minor design changes to aircraft hydraulic assemblies over a 12 year period; the FAA proposed in September 2000 to fine Trans World Airlines US\$126,750 for failing to perform record checks on 44 screening personnel; in August a US\$741,000 penalty was proposed against Boeing; in July 2000 a US\$240,000 fine was proposed against Mexicana Airlines for carrying hazardous materials; in June 2000 the FAA proposed a US\$698,000 civil penalty against American Airlines for flying two Fokker F100 aircraft 113 times in March and April 1999 with improper circuit breakers (20 ampere instead of 25 ampere); in March 2000 Toyota Motor Sales USA, as a result of failing to properly label nine shipments of hazardous materials (shock absorbers or paint) and offering the packages to Federal Express and leaving no 24-hour emergency response telephone number, the FAA have proposed a fine of US\$860,000; and, in February 2000 the Port Authority of New York and New Jersey, operators of John F Kennedy airport, for failing to correct in a timely manner discrepancies relating to runway and taxiway markings and signs, inspections of fuel facilities and vehicles used to fuel aircraft and in the airport operator's own inspection program, the FAA proposed a fine of US\$93,000. All these penalties and fines proposed by the FAA were done after careful consideration of the potential safety consequences of each action. Each operator has 30 days from receipt of the FAA civil penalty letter to respond. The final penalties are then decided, which can be through the court system.

⁷⁷ In any event, it is plain that offences or breaches involving gross negligence or deliberate acts resulting in a catastrophic event or even a potentially catastrophic outcome will be viewed by New Zealand's society and other countries as deserving of the most severe penalties.

- hijacking
- other crimes which are likely to endanger the safety of the aircraft, destroys or damages aircraft
- interference with, destruction of or damage to air navigation facilities used in air navigation
- communication of false information which endangers the safety of an aircraft
- provisions for extradition (*ie* The Hague, Montreal Conventions *et al*)
- situations where New Zealand citizens are the alleged offender or the alleged offender is in New Zealand or the offence occurred in New Zealand but otherwise not involve New Zealand aircraft
- provide for crimes relating to the carriage (taking) of firearms, explosives, *etc* on to aircraft
- provide for the searching of persons (passengers)
- provide for the powers of the 'aircraft commander' to restrain any person in the interests of protecting the safety of an aircraft and to maintain good order and discipline, to search persons, *etc*.
- provide for unruly passengers (especially intoxicated passengers), interference with the aircraft, the carriage of dangerous goods, including firearms, *etc*

Disqualification

46. There needs to be provision for the disqualification of individuals and organisations holding licences and certificates (aviation documents) for breaches of the terms and conditions of their aviation document or for breaches of the Act and the failure to pay fees or charges. This should include the effect of the disqualification, when it commences, the custody of the actual aviation document and recording of the disqualification (in the Register).

Rights of Appeal

47. The right to appeal to a court against decisions made by the Director-General where the Act gives such a right is a very important provision.

Fees & Charges

48. There needs to be provision in the Act to set fees and charges and provide sanctions for the authority when payment is not made. There may also be a need to provide for Parliament to impose levies (taxes) to fund the authority. If so then the Act must specify the basis on how levies may be established and imposed. Since the introduction of civil aviation charges unnecessary time, resources and effort have been expended by both the industry and the CAA on the question of charges. There is no doubt that during these periods of tension between the regulator and the regulated the regulator's 'eye was taken off the ball'. If cost recovery is government policy then provisions that are more satisfactory need to be established rather than the present adversarial arrangements.

Transitional Requirements

49. It is unlikely transitions would be needed, as the Safety Act will not materially alter the requirements and provisions of the current Civil Aviation Act.

An Arrangement

50. A possible arrangement for the Civil Aviation Safety and Security Act 2014 is illustrated below. This is an attempt to arrange the Act in a manner that participants in the civil aviation system will better follow.

Arrangement of Clauses

Part I Preliminary

1. *Short title and commencement*
2. Interpretation
3. Application of Act

Part II Powers of Minister

4. Minister's Responsibility for Safety and Security
5. Power of Minister to make Regulations
6. Delegation of Minister's Powers

Part III Establishment of the Civil Aviation Authority

7. Establishment of the Authority and its objectives
8. Appointment of the Director-General
9. Approval to hold other office
10. Revocation of appointment, resignation and vacation of office
11. Appointment of Employees
12. Public Servants
13. Functions of the Authority

Part IV Functions and Powers of the Director-General

14. Functions and Powers of Director-General
15. Delegation of Director-General's Functions and Powers
16. Preservation of Powers
17. Power of Director-General to make Emergency Regulations
18. Issuance of airworthiness directive
19. Power of Director-General to detain aircraft, seize aeronautical products, and impose prohibitions and conditions
20. Power of the Director-General to investigate a holder of an aviation document
21. Power of the Director-General to suspend or revoke an aviation document or impose conditions
22. Director-General to notify accidents and incidents to the Minister

Part V

Responsibility of Participants within the Civil Aviation System

- 23. General Requirements for participants in Civil Aviation System
- 24. Requirement to register an aircraft
- 25. Requirement for aviation document
- 26. Application for aviation document
- 27. Grant or renewal of aviation document
- 28. Duties of Aircraft Commander
- 29. In-flight Emergencies
- 30. Mercy Flights
- 31. Obligation to notify all in-flight emergencies or mercy flights
- 32. Obligation to notify all accidents and incidents
- 33. Obligations to supply information and data

Part VI

Rules & Regulations

- 34. Procedure for making Rules
- 35. Matters to be taken into account in making Rules
- 36. Procedure for making Emergency Rules
- 37. Incorporation by Reference
- 38. Matters to be taken into account in making Emergency Rules
- 39. Power of Dispensation by Director-General

Part VII

Maintenance of Records and the Supply of Aeronautical Information

- 40. New Zealand Civil Aviation Registry
- 41. Aeronautical Information Services

Part VIII

Aviation Security

- 42. Authorised aviation security organisation
- 43. Functions and duties of aviation security organisation
- 44. Security designated aerodromes and navigation installations
- 45. Rights of access
- 46. Security areas
- 47. Powers of arrest
- 48. Arrest of persons delivered to the New Zealand Police
- 49. Powers of the New Zealand Police

Part IX Offences and Penalties

Safety Offences

- 50. Endangerment caused by participant (holder of an aviation document)
- 51. Careless operation of aircraft and aviation related service
- 52. Dangerous activity involving aircraft, aeronautical product, or aviation related service
- 53. Acting without necessary aviation document
- 54. Additional penalty for offences involving commercial gain
- 55. Contravention of Emergency Rules, prohibition, or condition
- 56. Communicating false information affecting safety

Security Offences

- 57. Security area offences
- 58. Impersonation or obstruction of aviation security officer
- 59. Application of criminal law to aircraft
- 60. Provisions as to extradition
- 61. Powers of the Aircraft Commander
- 62. Provisions as to evidence in connection with aircraft
- 63. Hijacking
- 64. Violence against passengers or crew
- 65. Destroying, damaging or endangering safety of aircraft, airports and ANS
- 66. Other acts endangering or likely to endanger the safety of aircraft, airports and ANS
- 67. Abetting the commission of acts outside New Zealand
- 68. Penalties
- 69. Consent for prosecution
- 70. Position relating to extradition where there is no arrangement

Unruly Passenger Offences

- 71. Liability
- 72. Disruptive behaviour
- 73. Offensive behaviour
- 74. Dangerous goods
- 75. Penalties

General Offences

- 76. Applying for Aviation Document while disqualified

- 77. Communicating false information or failing to disclose information relevant to granting or holding of aviation document
- 78. Obstruction of persons duly authorised by Director-General
- 79. Trespass
- 80. Failure to maintain accurate records

Part X

Disqualification of Document Holder

- 81. Disqualification or revocation of aviation document
- 82. Effect of disqualification
- 83. Commencement of a period of disqualification
- 84. Retention and custody of document
- 85. Removal of disqualification
- 86. Particulars of disqualification orders, to be sent to the New Zealand Civil Aviation Registry

Part XI

Rights of Appeal

- 87. Right of Appeal to a Court

Part XII

Civil Aviation Fees and Charges

- 88. Fees and charges
- 89. Payment of Fees and Charges
- 90. Recovery of fees and charges for aviation related services

Part XIII

Transitionals

- 91. Repeal of certain laws and saving provisions
- 92. Transitional Provisions

Appendix VII: Air Transportation Act 2014

1. The new Air Transportation Act 2014 (an economic Act) will provide for New Zealand's international air transportation obligations and reflect a number of public policy decisions specific to New Zealand's air transport markets. The following paragraphs outline the provisions in the new Act. They serve to illustrate the likely contents of an economic Act and so are indicative and not definitive.

Purpose

2. The purpose of the new Act is:
- To make provision for the licensing of international air services operating in New Zealand.
 - To make provision for the licensing of aerodromes operating in New Zealand.
 - To make provision for the control and management of New Zealand's airspace for air navigation.
 - To make provision for the licensing of air navigation services (ANS) operating in New Zealand.
 - To ensure New Zealand's obligations and responsibilities under international aviation agreements in respect of international air transport are implemented.
 - To consolidate and amend the law relating to air services and air transportation.

Policy Assumptions

3. For any form of economic regulation the policy, objectives need to be clear and if there is more than one objective, they need to be consistent. Short-term decisions should be aligned with long-term objectives and the process should be transparent, open, and consistent with accountability. The objective of economic regulation (in this case for air transportation services) may be and has been seen as any one or a number of the following):

- to meet reasonable demands
- to ensure providers of services have adequate financing
- to promote competition
- to protect consumer interests⁷⁸
- to promote efficiency
- to protect the environment, or to
- to promote research and development.

4. At a general level, economic regulation is usually to do with overall welfare or consumer benefits – where overall welfare includes profits for the regulated company as well as lower prices for consumers.

5. Thus it is assumed that the government will wish to pursue transport and economic policies that:

- promote competition in the air transport markets
- promote economic development within the New Zealand
- promote economic efficiency in the provision of air transport and related aviation services and facilities.

⁷⁸ Usually seen in the context of monopolies or oligopolies and their market power.

6. It is also assumed that the objective of economic regulation of the air transport markets is generally to maintain consumer benefits and to foster the development of the New Zealand air transport system for the benefit of New Zealanders. But it may also be concerned with some of the other (generally unannounced) objectives.

7. Aerodromes and airports in New Zealand are owned and operated by a mix of central and provincial governments as well as the private sector and the majority are public aerodromes. Airways Corporation is the sole air traffic service (ATS) provider Airways, therefore, has a monopoly over the provision of terminal and en route ANS.

8. It is assumed that the administration of economic regulation will be the responsibility of the MoT. That is, MoT would be the regulatory body for air transport regulation. The licensing authority would be the Minister of Transport.

Approach to Economic Regulation of Air Transport

9. A market may be described in a number of ways. But from an economic regulator's perspective the market may be most conveniently described by reference to the following characteristics:

- the number of buyers versus the number of sellers
- the distribution of market knowledge between the buyers and sellers
- the way in which prices are determined
- the use of non market practices to influence buyers
- the geographic spread of the market
- the scope of the goods and services that make up the market, and
- the ease with which sellers may enter or leave a market.

10. The last characteristic provides a useful way in which to look at the air transport markets. On this basis, there are essentially two markets for air services (and this is how the present Civil Aviation Act neatly interprets them):

- a *closed aviation* market in which there is no free entry and exit and so there may be, for example, capacity and route restrictions placed on air carriers and providers of aviation services by the licensing authority; and
- an *open aviation* market in which there is effectively free entry and exit and there are little or no capacity restrictions on air carriers and providers of aviation services but the licensing authority may nevertheless impose certain terms and conditions such as performance standards.

11. A closed aviation market describes a regulated market governed by the issuing of licences. The open aviation market describes what is often (and mistakenly) referred to as "open skies". Three New Zealand air transport markets are closed markets and include the:

- parts of the international air transport market
- ANS market for international and domestic air traffic management, and
- the international airport market that has particular monopolistic characteristics.

12. These are the air transportation markets of main concern.

13. Thus, it is assumed that the international air transport markets will be a mix of open and closed markets, the domestic air transport market will be open, that the international airport markets will be closed and domestic airport markets will be open, the ANS market will be closed (a monopoly) and markets for related aviation services will be open.

Minimum Legislative Requirements

14. The Act should reflect New Zealand's policies for the operation of the air transport markets provide for the development of regulations, the issuing of licences, and setting of service standards, where appropriate. By air transport markets it is meant markets for services provided by the aircraft operations subsystem (*ie* air services markets), the aerodrome subsystem (*ie* airport markets, aircraft ground handling market, etc) and the airspace subsystem (*ie* ATS (air traffic services) market, aeronautical information services (AIS) market, etc).⁷⁹

Definitions & Interpretation

15. This is an area where the current Acts are deficient and some consolidation will be necessary with ICAO Document 9626. To begin with there is a need to differentiate between "air services" and "aviation services".

16. An air service is any service performed by aircraft for hire or reward, which is public transportation. An aviation service is any service other than an air service performed in support of air services [and public transportation].

17. Definitions will be required for the following terms:

- air service
- air transport service
- aerial work service
- aviation service
- aerodrome
- airport
- air navigation service

and maybe

- air carrier
- national carrier
- designated carrier.

18. A *licence* is the term used to describe the formal authority to operate air services or aviation services; the term *permit* can be confusing and is sometimes used in safety regulation in connection with aircraft airworthiness.⁸⁰ So any reference to the term licence for organisations relates to economic regulation – under the proposed Civil Aviation and Security Act a licence is something individuals

⁷⁹ Refer to section 2.4 in the submission.

⁸⁰ The use of the term licence and permit differs from country to country and in many countries only the term licence is used. Licence is used to denote air services provided by national carriers and permits by foreign carriers; licence can also refer to scheduled air services and a permit to non scheduled or charter air services (as it tends to be used in New Zealand).

have. Thus, international air services will be required to obtain an economic licence from the licensing authority in order to carry out its business.

International Obligations

19. The Act needs to recognise New Zealand's international obligations and to provide for the administration of New Zealand's international agreements (obligations) that are to do with international air transport.

20. The MoT should be (and is) responsible for the administration of New Zealand's international agreements (obligations) that are to do with international air transport.

Licensing Authority

21. The present Civil Aviation Act and related regulations are not at all clear about matters of licensing authorities for aerodromes and ATS as they are for air services. The licensing authority(s) needs to be clear in the Act.

22. Presently the MoT is the licensing authority for international air services. There is no (economic) licensing authority for aerodromes (viz international airports) and ANS. However, the Minister by making regulations can grant monopoly powers to providers of any services relating to the air transport markets and so in this sense the Minister is a licensing authority.

23. Thus, for the new Act the MoT will (continue to) administer and be the economic regulatory body. The Minister of Transport being the licensing authority for closed markets and the Secretary for Transport the licensing authority for open markets.

Responsibilities & Functions of the Minister

24. The fundamental responsibility (function) of the Minister is to ensure that the basic goal for the air transport system in New Zealand is met along with the provisions of the Act. This amounts to fostering an accessible, affordable and reliable air transport system for the economic and social well-being of the people of New Zealand. The need to foster a safe air transport system is explicitly provided for in the Civil Aviation Safety and Security Act.

25. There is also a collateral responsibility for the Minister to ensure that the administrator (*ie* MoT) has the resources to carry out the provisions of the new Act.

Establish the Transport Goal or Objective

26. It is proposed the following transport (economic) goal be prescribed in the new Act, which closely resembles current policy:

To foster an accessible, affordable and reliable air transport system, and to promote the development of the civil aviation system to enhance the economic and social well being of the people of New Zealand.

27. In pursuing the transport goal there should be:

- recognition that different markets within the air transport system will have different requirements (*ie* international air transport, domestic air transport, aerial work, private operations, airports, ATS, *etc*);
- a balance between the safety goal and the transport goal with respect to the desires (or demands) of New Zealand society (*ie* the people of New Zealand) – this should be indicated by Parliament and perhaps conveyed to the MoT and the civil aviation authority in a written instruction from the Minister); and
- recognition of the resources available for improvements in the air transport system.

28. These matters need to be set out in the Act.

Define the Functions of the Minister

29. There is a need to define in the new economic Act the responsibility New Zealand has assumed as a contracting state to the Chicago Convention in terms of international air transport. There is also the need to meet the transport goal and any other objective in relation the air transport system.

30. With this in mind there are three functions:

- to (develop and) prescribe air transport policies to ensure the orderly development and facilitation of air transport, including airports, airspace and air navigation facilities for civil aviation;
- to license air services and certain aviation services; and
- to investigate accidents and incidents to determine causes and contributory factors, and to make recommendations to eliminate any deficiencies within the civil aviation system.

31. As long as the State provides aerodrome services there will need to be provision in the Act for the establishment, development and operation of aerodromes. This is part of the “orderly development and facilitation of air transport, including airports, airspace and air navigation facilities for civil aviation”.

Define Regulatory Powers Needed

32. The regulatory powers needed to meet the transport goal and any other objective in relation to the air transport markets and aircraft accident investigation include the power to:

- make regulations
- enter premises (for accident investigation)
- issue, suspend, revoke, vary licences
- impose conditions or prohibitions on air services, aviation services, *etc*
- delegate the Minister’s authority.

Delegations of Power

33. The Act should provide for the delegations of power by the Minister to people employed within the MoT and the chairman of the Transport Accident Investigation Commission (and for that matter, any person the Minister thinks fit).

34. Limitations on the delegations of power such as those relating to the making of regulations and the granting of closed licences need to be spelt out. The economic Act should, however, provide for delegations for the following purposes:

- the monitoring of the air transport market and civil aviation system, *etc*;
- the granting of open licences for air services and aviation services;
- the enforcement of the regulations, terms and conditions of licenses including service standards;
- the suspension, revocation or variation of licenses, *etc*
- the carrying out of accident investigations relating to aircraft operation and related aviation services
- the taking of such action as may be appropriate in the public interest; or
- any other functions conferred or imposed by the Act or regulations or delegated by the Minister.

Establishment and Operation of Aerodromes

35. While the Government own and operate aerodromes, as a joint venture partner or otherwise, there needs to be provision in the new Act to establish, maintain and operate aerodromes and airports. This should essentially give the Minister the power to establish and operate an aerodrome or airport, provide for the acquisition of land for aerodrome purposes (unless it is provided for in other legislation), provide for compensation in the acquisition of any land, and, trespassing on any public aerodrome. As well, the new Act needs to provide for the establishment of airport companies, airport authorities as presently provided for in the Airport Authorities Act.

36. There is also the need to provide for the disclosure of information about airport operations. This requirement is to ensure that a monopoly airport operator provides information to its users (*ie* airlines, airport services companies, *etc*) to enable them to make informed decisions about their own operations. Furthermore, there are ICAO guidelines on airport charges and these apply to international air services. Here there is an expectation that airports will consult with its users over the setting of charges. To do this airport users need to have access to information about airport operations, including financial information, which is mostly provided for in the present Airport Authorities Act.

37. It is also important to include provision for the Minister to designate international airports, unless this is provided for in other legislation (eg Customs Act). This is because an international airport calls up considerable national resources and involves particular safety and security requirements, including border protection requirements.

Provision of Airspace and ANS

38. The economic Act needs to make provision for:

- ANS (note the arrangements for the provision of aeronautical information services is one of the functions of the civil aviation authority and so will (should) be included in the Civil Aviation Safety and Security Act);
- the allocation of New Zealand airspace for civil aviation, military aviation and other purposes;
- the sole (monopoly) provision of certain ANS; and

- information disclosure requirements for ANS.

39. The reasons for information closure are similar to those for airports – to enable users to make informed decisions and to satisfy ICAO's guidelines on charges for ANS.

Economic Regulations

40. The Act needs to establish provisions for the adoption of regulations to meet the goals and objectives of the New Zealand air transport system. The act should state what matters must be considered when making regulations such as: fostering accessible, affordable and reliable air transport, the development of the air transport system, the actual transport (economic) and safety performance of the air transport system, the nature of the activity involved and the overall benefits to the economic and social well-being of the people of New Zealand. Two important factors are the impact on the participants as well as the economy and the impact on compliance costs (specific industries should not be identified in the Act).

41. "Good" regulations are generally considered those that promote the long-term interests of the country or industry (*eg* tourism, fishing, forestry, etc) and meet economic efficiency objectives. At the same time, the regulations should encourage monopolies to meet the longer-term needs of the air transport markets through both efficient operations and investment. This will only (more likely) occur if the regulatory process is open (allows challenges and responses), transparent (with minimum scope for discretion and uses available and replicable information), consistent (which means a stable set of decision criteria) and accountable (being based on reasoned and justified decisions). These qualities should be kept in mind when making economic regulations. The Commerce Act is supposed to meet these four conditions.

42. Essentially, the economic regulatory provisions within the Act need to promote competition and provide for essential services (network connections).

43. There are five types of regulations the Minister may make:

- economic regulations involving the granting of licences (open or closed market as the case may be) to;
 - operate an air service
 - operate an aerodrome (and airport)
 - operate an ANS, and
 - operate other aviation services relating to air transportation;
- regulations to charge fees, *etc* relating to the granting of licences *et al*;
- regulations to charge fees, *etc* for the provision of airport and ANS, including meteorology;
- regulations about information disclosure; and
- regulations relating to offences and penalties.

44. There should be no dispensations in economic regulation.

45. Within the air transportation markets there are usually companies that have a dominant position in the market, sometimes by way of a natural or statutory monopoly. This poses specific potential problems for aerodromes (airports) and ANS where access can be easily restricted and prices (charges and fees) can be easily and

unreasonably raised. Accordingly there needs to be provision to prevent these and other companies or organisations from engaging in restrictive trade practices and monopoly abuses such as:

- ✖ restrictive trade practices:
 - ♣ arrangements that lessen competition
 - ♣ price fixing
 - ♣ resale price maintenance
 - ♣ withholding or preventing the supply of services
 - ♣ use of a dominant position
 - ♣ restricting entry to a market
 - ♣ eliminating a person (organisation) from a market
 - ♣ preventing or deterring from engaging in a market:
- ✖ monopoly abuses:
 - ♣ denial of access (*including*: restricting entry to a market and preventing or deterring from engaging in a market)
 - ♣ bundling services (a type of denial)
 - ♣ unreasonable compliance requirements
 - ♣ unreasonable prices.

Application and Granting of Closed Licences⁸¹

46. As provided for in the Civil Aviation Act (for air services only) the new Act needs to establish provisions for the application and granting of closed licences to operate air services, airports, ANS and other aviation services. Specifically the Act should set out:

- matters to be taken into account when considering an application for a closed licence, such as:
 - relevant international agreements or arrangements to which New Zealand is a party,
 - safety and aviation security requirements of the director-general of the CAA as a prerequisite for obtaining an economic licence,
 - financial ability of the applicant to carry out the proposed service satisfactorily,
 - how the proposed services foster an accessible, affordable and reliable air transport,
 - written representations received by the Minister in relation to the application; and
 - such other matters as the Minister thinks fit;
- that the granting of open licences may be subject to terms and conditions (this is where provision is made for imposing service standards, capacity constraints, route requirements, fare levels, annual fees, information requirements and the provision of annual returns, *etc*);
- the duration of the closed licence;
- the procedure for the renewal of closed licences;
- the provisions for the variation of the terms or conditions of the closed licence (this enables the licensing authority (Minister) to amend or revoke any terms

⁸¹ The concept of open and closed markets is a most appropriate concept and description and could be extended to airports, ANS and other aeronautical services.

or conditions to benefit of the economic or social well-being of the people of New Zealand (*ie* in the public interest));

- the provisions for the transfer of closed licences (this provision is usually desirable for air services but may not be for other aviation services); and
- the suspension, revocation of licences (*eg* willful breach or failure to comply with the terms and conditions, termination of the service, international agreement changed or ceased, *etc*).

47. Obviously, a closed licence cannot be granted if it is contrary to any international agreement or arrangement to which New Zealand is a party.

48. The Minister to be the licensing authority for closed markets.

Application and Granting of Open Licences

49. The Act needs to establish provisions for the application and granting of open licences to operate air services, airports, ANS and other aviation services. Specifically the Act should set out:

- matters to be taken into account when considering an application for an open licence, such as:
 - relevant international agreements or arrangements to which New Zealand is a party,
 - safety and aviation security requirements of the director-general of the CAA as a prerequisite for obtaining an economic licence; and
 - such other matters as the Minister thinks fit;
- the terms and conditions for an international air service such as the countries the open licence applies to service standards, information requirements and the provision of annual returns, *etc* ... there should be no requirements for capacity, frequency or fare limitations;
- the duration of the open licence to be unlimited unless relevant international agreements or arrangements provide otherwise;
- the procedure for the renewal of open licences;
- the provisions for the variation of the terms or conditions of the open licence (this enables the licensing authority (Secretary for Transport) to amend or revoke any terms or conditions that may be in the economic or social well-being of the people of New Zealand (*ie* public interest));
- the provisions for the transfer of open licences, which is usually desirable for air services but may not be for other aviation services; and
- the suspension, revocation of open licences (*eg* willful breach, termination of the service, international agreement changed or ceased, *etc*).

50. An open licence cannot be granted if it is contrary to any international agreement or arrangement to which New Zealand is a party.

51. The Secretary for Transport to be the licensing authority for closed markets (as is the present situation for international air services).

Requirements on Licensees

52. Related to the granting of licences is the requirement for all air services and aviation services to be conducted in accordance with the new Act, the Safety Act, and, if applicable, performance standards. All operations and activities conducted within the air transport system are also to be conducted in accordance with any other condition the Minister may consider to be in the interests of the economic or social well-being of the people of New Zealand or in accordance with agreements or treaties between New Zealand and other State(s).

53. As well as these general requirements, the Act should require the applicant or licensee to satisfy the licensing authority (Minister or Secretary) that they are covered by insurance against liability for death, bodily injury, loss or damage to property arising out of or in connection with the provision of the service. This applies to all aviation services as well as air services.

54. It is very important that provision be made in the new economic Act for the submission of statistical and financial returns and statements to the MoT. Licensees are the prime source of information about the performance of the air transport market and aviation industry. This may be best handled in the terms and conditions of an open and closed market licence but where no licence is required then the Act needs to make specific provision for the collection of information.

Airport Charges and Air Navigation Fees

55. Provision needs to be made for the Minister to make regulations for the charging of airport and air navigation service charges as well as an aviation security charge.

Enforcement

56. The Act needs to establish provisions for enforcement of the law relating to the economic regulation of air transport markets.

Offences & Penalties

57. As for the Civil Aviation Safety and Security Act, it is important that the Air Transportation Act signal to the Courts how seriously New Zealand society views major offences or breaches of any of the provisions of the Act. Again, this is also especially important in the context of international civil aviation and air transport if New Zealand wishes to be seen as a leading aviation nation and taken seriously by the international aviation community. Likewise, the provision for offences and penalties need to be in step with those of leading aviation nations. In this regard the US and European courts are particularly harsh on anti competitive behaviour. In the US, antitrust (anti competitive behaviour) penalties involve treble damages and so can easily run into USD millions.⁸²

58. It is suggested that penalties for offences under the new Act be in line with the Commerce Act:

⁸² It is now reasonably common place for cases to come before the courts or competition commissions in the US, Australia, New Zealand and the UK involving the an abuse of a monopoly position and predatory behaviour (the abuse of a dominant position) in the air transport markets. (For example the case in the early 2000s involving American Airlines for allegedly excluding would-be competitors from the Dallas-Fort Worth market.)

- ☠ for persons: a maximum of six months imprisonment or a fine not exceeding NZD500,000;
- ☠ for body corporate: a fine not exceeding NZD10,000,000; and
- ☠ for offences involving commercial gain: in addition to other penalties a payment of up to ten times the value of any commercial gain resulting from the offence.

59. As noted for the proposed Civil Aviation Safety and Security Act it is up to New Zealand's Parliament to reflect on whether the suggested levels are consistent with the seriousness New Zealand society views major offences or breaches of any of the provisions of the Air Transportation Act. In this regard the present Commerce Act guidelines may be seen to be lenient.

60. With this in mind, the new Act needs to provide offences and penalties:

- for operating without a licence
- involving a breach of the terms and conditions of a licence for commercial gain
- involving a breach of the terms and conditions of a licence (particularly in regard to service standards)
- involving restrictive trade practices (particularly relevant to airport companies and ANS), and
- involving the use of a dominant position to adversely affect or limit or restrict the supply or receipt of aviation related services or facilities (particularly relevant to air services).

61. There should also be penalties for interfering in an accident investigation – see next section.

Provision for Accident Investigation

62. Accident investigation is one of the three basic duties of a State. Notwithstanding the existence of the Transport Accident Investigation Commission Act, provision for accident investigation needs to be made in the new Act.

63. The Transport Accident Investigation Commission is independent of the responsible Ministry. It needs to be recognised that New Zealand is a relatively small developed aviation nation and does not have the resources to establish a commission comparable with its counterparts in Australia, North America and Europe.

International Carriage by Air

64. The international air law instruments relating to carriage by air should be incorporated into the new Act – Warsaw Convention (1929), The Hague Protocol (1966), Guadalajara Convention (1961) and Protocols, Montreal Protocol No4 (1976), *etc* – as provided for in Part 9A in the current Civil Aviation Act.

Domestic Carriage by Air

65. Part 9B of the current Civil Aviation Act should be replicated in the new Act.

66. One of the requirements on licensees is insurance against liability for death, bodily injury, loss or damage to property arising out of or in connection with the

provision of the service. This applies to all aviation services as well as air services and this is considered sufficient consumer protection for domestic carriage by air.

Special Power in an Emergency.

67. In the event of a civil emergency or disaster, the Minister needs special powers to mobilize parts of the air transport system for particular purposes. Such special powers would probably need to be authorised by the Governor-General by way of an order in council, to take action. The Minister may then:

- ✂ suspend any licences
- ✂ take temporary possession of any aerodrome
- ✂ operate any air services and aerodrome in such a manner as the Minister thinks fit
- ✂ withdraw any aerodrome partly or totally from any class of persons or from the public at large.

68. Adequate compensation needs to be paid for taking possession of any aerodrome.

Provision for Appeals

69. There needs to be provision for appeals in respect to licensing decisions and probably best catered for in the part dealing with the application and granting of a licence.

Transitional Requirements

70. It is unlikely that the new Act would require complex transitional provisions other than repealing certain laws and saving provisions.

Suggested Arrangement

71. A possible arrangement for the Air Transportation Act 2014 is illustrated below. Likewise, this is an attempt to arrange the new Act so that those with an interest in the air transport system will readily follow.

Arrangement of Clauses

Part I Preliminary

1. Short title and commencement
2. Interpretation
3. Application of Act

Part II Powers of Minister

4. Minister's Powers and Functions
5. Delegation of Minister's Powers
6. Preservation of Powers
7. Power of Minister to make regulations

Part III Air Transport Competition

8. Authorisation of contracts, arrangements, and understandings
9. Minister may issue commission regimes
10. Authorisation of tariffs and charges by Minister
11. Application of Commerce Act 1986

Part IV Establishment and Operation of Aerodromes and Airport

12. Establishment of airports and aerodromes by the Minister
13. Establishment of airport authorities
14. Joint venture airports
15. International airports
16. Minister may authorize a company under licence to establish *etc.* an aerodrome
17. Duty to disclose information for aerodromes and airports
18. Airports must consult concerning charges
19. Auckland airport
20. Wellington airport
21. Whangarei airport
22. New Plymouth airport

Part V
Provision of Airspace and Air Navigation Services

- 23. Allocation of airspace
- 24. Duty of Minister towards air navigation services
- 25. Granting of licenses towards the provision of airspace and air navigation services
- 26. Sole provider of certain air navigation services
- 27. Duty to disclose information for air navigation services
- 28. ANS providers must consult concerning charges

Part VI
Economic Regulations

- 29. Matters to be taken into account in making regulations

Part VII
Licences

- 30. Grant of a Closed Market Licence
- 31. Details of Closed Market Licence
- 32. Grant of a Open Market Licence
- 33. Details of Open Market Licence
- 34. Renewal of Licences
- 35. Variation of Terms and Conditions of Licences
- 36. Suspension or revocation of licence on breach of condition of licence
- 37. Suspension or revocation of licence on breach of this Act or regulations
- 38. Suspension or revocation of licence for failure to pay fees or charges
- 39. General Competition Practices
- 40. Minister may direct licensee in dominant position

Part VIII
Fees and charges

- 41. Airport charges
- 42. Air navigation fees
- 43. Payment of Fees and Charges
- 44. Recovery of fees and charges for aviation related services

Part IX
Accident Investigation

- 45. Transport Accident Investigation Commission

Part X Offences and Penalties

- 46. Acting without necessary Licence
- 47. Contravention of condition of Licence
- 48. Contravention of prohibition on anti-competitive conduct
- 49. Additional penalty for offences involving commercial gain
- 50. Offences in respect of certain powers of investigation

Part XI International Carriage by Air

- 51. Interpretation
- 52. Application of Guadalajara Convention
- 53. Convention to have force of law
- 54. Designation of Parties
- 55. Fatal accidents
- 56. Limitations of liability
- 57. Time for bringing proceedings
- 58. Contributory negligence
- 59. Power to exclude aircraft in use of military
- 60. Actions against High Contracting Parties
- 61. Provision for applying Act to carriage which is not carriage to which the Convention applies and for giving effect to amendments of the Convention
- 62. Regulations

Part XII Domestic Carriage by Air

- 63. Interpretation
- 64. Application of this Part
- 65. Exclusions
- 66. Provisions if carriage performed by actual carrier
- 67. Provisions if carriage performed by successive carriers
- 68. Liability of carrier in respect of delay
- 69. Avoidance of liability
- 70. Contributory negligence
- 71. Limitation of liability
- 72. Contracting out
- 73. Willful or reckless misconduct
- 74. Servants or agents of carrier
- 75. Aggregation of damages
- 76. Aggregate liability

- 77. Just and equitable orders and awards
- 78. Tortfeasors
- 79. Relationship between carriers
- 80. Limitation of actions
- 81. Combined carriage

Part XIII

Air Facilitation

- 82. Immigration Act and Interpretation
- 83. Responsibilities of internationally ticketed passengers travelling by air within New Zealand

Part XIV

Capetown Convention and Aircraft Protocol

- 84. Contracting states
- 85. To have the force of law
- 86. To replace New Zealand law in some circumstances
- 87. Declarations
- 88. Deregistration and removal

Part XV

Special Power In Emergency

- 89. Special power in emergency

Part XVI

Transitional Provisions

- 90. Transitional Provisions

