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Civil Aviation Act and Airport Authorities Act Review
Ministry of Transport
PO Box 3175
Wellington 6140

RE: CIVIL AVIATION ACT AND AIRPORT AUTHORITIES ACT REVIEW

Introduction and summary

- 1 Christchurch International Airport Limited (*CIAL*) welcomes the opportunity to submit to the Ministry of Transport (*MOT*) on the Civil Aviation Act 1990 (*CAA*) and Airport Authorities Act 1966 (*AAA*) Consultation Document 2014 (*Consultation Document*).
- 2 The Consultation Document covers a lot of ground and it is clear that the MOT has put a significant amount of effort into this review, which we appreciate. We have reviewed and support the NZ Airports Association's (*NZAA*) submission on the Consultation Document. In this submission we highlight a small number of matters raised in the Consultation Document that are of particular significance to Christchurch International Airport.
 - 2.1 **Role of section 4A of the AAA (Item E2):** in our view this provision is a vitally important part of the current legislative scheme, clarifying that airports can set prices. This is part of a package that includes a mandatory consultation requirement and information disclosure. Repealing this provision would open the door to arguments that pricing decisions can be litigated, which would increase cost and uncertainty in the sector.
 - 2.2 **International air carriage competition assessment (Item D6-D7):** we agree the current framework is not fit for purpose. The regulatory framework must provide for a transparent process, expert competition assessment, and the ability to authorise subject to conditions that address risks to competition and consumer welfare.
 - 2.3 **Termination of leases without compensation (Item E5):** we disagree the default regulatory rule needs to change. No problems have been identified, arrangements are best negotiated by commercial parties, and the alternative regulatory approach risks hampering the ability of airports to grow economic activity and competition.
 - 2.4 **Bylaw making powers (Item E6):** the MOT must take great care that any changes do not undermine the legitimacy of existing bylaws, which underpin a number of activities at Christchurch International Airport.

- 2.5 **Aviation Security – search powers (Item B13):** we disagree with giving Avsec intrusive search powers over the landside area. Adequate safeguards exist through existing systems to deal effectively with matters landside, and the serious justification that would be needed to extend search powers in this way does not exist.
- 2.6 **Purpose statements (Item A2):** we are reserved about the value purpose statements will add to the CAA (given its main value is in establishing clear rules rather than principles) and the AAA (given the risk of undermining the investment the sector has made a framework of precedent. We make a plea for caution.
- 2.7 **Common departure terminals (Item B16):** we do not oppose the enabling of common departure terminals, but this should not be prescriptive.
- 2.8 **Participants Obligations/Airspace Safety (Item B2):** we would prefer that rather than relying on vague concepts of 'shared' responsibility these are replaced with clear statements of participants' individual obligations.
- 2.9 **Accident & Incident Reporting (Item B11):** we support a clearer framework for incident reporting which also recognises the needs of airports as industry participants.
- 3 We expand on these issues below.

Section 4A of the AAA

- 4 We do not agree with the view that section 4A of the AAA is redundant. We strongly recommend the section remain as it currently stands because it provides important certainty to airport companies regarding their power to set prices.
- 5 The statement in section 4A - that an airport company can set charges "*as it from time to time thinks fit*" – makes it clear that prices are not to be set through the courts by reference to uncertain common law standards. Rather, there is a statutory framework that includes a requirement to consult, information disclosure and the statutory provision that airports can set their prices. This package replaces the less certain common law position.
- 6 *Vector Ltd v Transpower*¹ made it clear the application of common law doctrines on pricing essential services is precluded by legislation regulating monopoly pricing. Section 4A is an important part of that suite of legislation in relation to airports. Repealing it would open up arguments as to airports' price setting powers and so invite time consuming and expensive litigation.
- 7 We endorse the NZAA submissions at paragraph 143. Following extensive litigation and regulatory change in recent years the information disclosure regime must be allowed the opportunity to bed down. We would be deeply concerned at the introduction of uncertainty and exposure to significant costs that may arise on the misapprehension as to the redundancy of clause 4A.
- 8 We understand the MOT's view is that section 16 of the Companies Act should provide airports with adequate comfort that they can operate as commercial

¹ *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 at [3].

undertakings. We disagree. Section 16 is subject to “the general law”, meaning repeal of section 4A of the AAA would still leave the door open to the type of litigation described above.² We don’t think these risks should be run in the interests of tidiness.

International air carriage competition assessment

- 9 We agree with the MOT that the current authorisation regime under Part 9 of the CAA is flawed and in need of updating.
- 10 At a high level, the following improvements are required:
 - 10.1 a transparent consultation process;
 - 10.2 an expert competition assessment; and
 - 10.3 an ability to approve proposed airline alliances with conditions.
- 11 We look forward to working with the MOT on the details of a framework that delivers these outcomes.

Termination of leases without compensation

- 12 We disagree with the MOT’s proposed amendment to the leasing powers of airports under section 6 of the AAA. We set out our key reasons for this below.
- 13 Our preference is for the status quo regime to remain, whereby airports have the power to terminate leases for “airport purposes” without compensation, unless that compensation has been agreed between the parties. This power recognises airports need to operate commercially and in a way that gives them flexibility and certainty when it comes to planning future land uses. Termination provisions are a legitimate planning tool and often form part of local authority consent applications and approvals.

There is no reason to limit the power to terminate without compensation

- 14 We understand the MOT does not propose to change the power of airports to terminate leases “for airport purposes” under section 6(3),³ but rather proposes to limit the situations in which airports can terminate leases without compensation under section 6(4) - to when this is done for the purposes of the “safe and efficient” operation of the airport.
- 15 There is no apparent reason for limiting an airport’s power to terminate without compensation in this way. Further to this point we note that:
 - 15.1 Airports and leaseholders know this is the default rule and have an ability to negotiate alternative arrangements. That ability is recognised in the existing legislation⁴.

² Section 16 of the Companies Act provides that, subject to other enactments and the general law, a company has “full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction”.

³ If this is not the case, we would appreciate early clarification from the Ministry.

⁴ See section 6(5)

- 15.2 Airports and leaseholders routinely negotiate extended notice periods in relation to termination. These types of mutual arrangements meet the needs of the leaseholder, while at the same time giving airports certainty regarding their ability to use land in the future.
- 15.3 Whether compensation is required and, if so, on what basis and for how much should be a matter for commercial negotiation between the parties rather than prescribed by regulation on a one size fits all basis. Leaseholders at an airport are generally experienced commercial, and often multi-national, players with good quality legal representation.
- 15.4 There is no basis for aligning the test for exercising termination powers without compensation under section 6(4) with the test for exercising lease-granting powers under 6(1). Obviously it is important that leases are not granted in the first instance if they risk interfering with the safe and efficient operation of the airport, as is provided for under section 6(1)⁵. But a similar rationale does not exist to justify limiting termination powers without compensation to 'safe and efficient' purposes. Indeed we are unaware of any rationale for doing so.
- 15.5 The vast majority of leases by airport operators will be entered into on the basis set out under the AAA as currently drafted. It would be highly undesirable to either retrospectively rewrite heavily negotiated leases to insert compensation provisions or to create uncertainty between leases entered into under the existing AAA regime and those under the MOT proposal.
- 15.6 As accepted by the MOT, there has been no indication the current regime is problematic. We are not aware of any evidence an airport has misused its power to terminate, or that a lack of provisioning for compensation has in any way impacted on a leaseholder's decision to operate at an airport. We would expect that as a matter of good regulatory practice a pre-existing problem with the regime should be a threshold requirement before substantive changes are considered.

Limiting the power as proposed would introduce unwarranted risks and uncertainty

- 16 There is a real risk opening up the scenarios in which compensation for termination is payable will disincentivise investment by airports, as it could add additional, unwarranted development costs to legitimate attempts to grow economic activity at the airport.

The MOT's proposal lacks clarity in certain respects

- 17 As an aside we note the MOT does not explain exactly what type of compensation its proposed amendment would entitle leaseholders to or for that matter whether it relates to land leases, land and buildings leases or both. For example, would

⁵ This requirement imposes an important safety and security caveat which would prevent, for example, the granting of a lease to an operation that would emit smoke into the airspace or emit light or other unnecessary interference with aviation activities.

compensation cover improvements, or the injurious effect of the termination on the leaseholder (in a Public Works Act sense)? Further, would compensation extend to cover things such as reestablishment costs or temporary premises? In the absence of any clarity both in terms of the issue and solution, we would strongly recommend the retention of the status quo.

Bylaw making powers

18 We are open to the possibility that improvements could be made to the framework for bylaws. However these will be in the nature of simplification and updating to reflect more current practice, and should only be made where they do not create commercial or operational risks. In particular, we urge the MOT to take care not to make any amendments to the bylaw-making powers contained in section 9 of the AAA if those amendments risk unwinding pre-existing bylaws in force.

19 Christchurch International Airport will often rely on the bylaws contained in the Christchurch International Airport By-laws Approval Order 1989. These were all made pursuant to powers under section 9 of the AAA.

20 These bylaws play a useful role in regulating both the commercial and operational environment at Christchurch International Airport. Examples of bylaws relied upon include:

20.1 regulating commercial activity on airport land;

20.2 safe and efficient use of airport roads;

20.3 advertising within the airport;

20.4 area control at the airport;

20.5 operation of vehicles at the airport (for example, our enforcement officers hold warrants of appointment under the Land Transport Act 1998 (LTA) expressly granting those officers powers in relation to offences involving vehicles against the LTA and bylaws made under section 9(1)(e) or (g) of the AAA); and

20.6 stationary aircraft engine testing.

Aviation Security – search powers

21 We do not think it is necessary to extend Avsec's powers to enable Avsec to search unattended items or vehicles in the landside part of the Airport. We are of this view because we have in place an effective safeguards at Christchurch International Airport, and we are not otherwise aware of shortcomings to the current regime which would justify an amendment.

22 Christchurch International Airport has a large landside area that includes a number of car parks and airport roads which are sufficiently far from the airside environment as to not pose significant enough a security risk to merit a change in the status quo. We could not support an amendment that would enable Avsec to search low-risk landside areas – especially where there will be a prevalence of

vehicles owned by, or associated with, tenants and their invitees within the wider airport campus.

- 23 Further, Christchurch International Airport has operational units, systems and protocols that we believe allow us to effectively and safely deal with matters that arise in our landside environment. For example, we have comprehensive security camera coverage and systems which enable us to ascertain the length of time a vehicle has been parked or left unattended. Police officers are stationed permanently at Christchurch International Airport and are equipped with all necessary search powers.
- 24 It would of great concern if additional charges were able to be imposed on airports for the exercise of such powers when it had not been established either that they were necessary for security purposes or provided for the ultimate benefit of passengers.

Purpose statements

- 25 We are reserved about the introduction of purpose statements in civil aviation legislation (however that legislation is ultimately structured).
- 26 The CAA is by its nature a prescriptive piece of legislation. Modernisation efforts should be focused on providing clear and prescriptive rules for the broad range of matters regulated under that Act. A purpose statement that introduced an element of open textured, purposive interpretation would reduce rather than improve regulatory certainty and the efficiency of the regulation. It will also be difficult for a high level purpose statement to accommodate all of the matters covered by the CAA as they cannot readily be pulled into a single thread. In short, while we are open to the suggestion we can see it will be difficult to do in a way that improves the CAA.
- 27 In relation to the AAA, a key consideration is the amount of litigation that has happened under the Act, creating a framework of precedents that now inform the relationship between airports and airlines. A new purpose statement would risk undermining this investment in precedent. An Act must be interpreted in light of its purpose (a principle made clear by section 5(1) of the Interpretation Act, which provides that "*the meaning of an enactment must be ascertained from its text and in light of its purpose*"). If the reform is taken to have imposed a "new" purpose into the AAA, the logical corollary is that the interpretation of the Act's provisions need to be revisited in light of that purpose. Our concern is this would put the sector back through lengthy and expensive litigation.

Common departure terminals

- 28 We do not oppose the enabling of common departure terminals, but emphasise it will be important that any legislative amendments made to accommodate them are not unduly prescriptive. For example, it would be important that airports were afforded sufficient flexibility in determining the configuration of those terminals, and that subsequent alterations to the configuration of the terminals were practicable.

Participants Obligations/Airspace Safety

- 29 Airports have a significant role to play in aviation safety. Aviation is a sector where many different players have a very clear interest in ensuring safety and security,

yet often those roles are ill defined or imprecise. It is critical that all participants have a very clear understanding of the exact extent of their obligations in the risk management framework particularly in relation to responsibilities in respect of airspace safety.

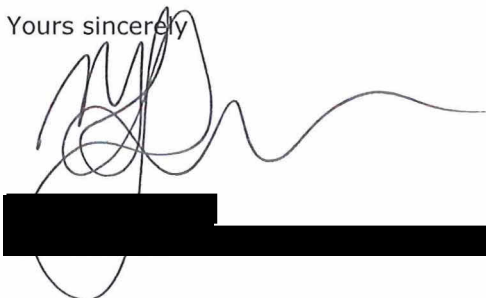
Accident & Incident Reporting

- 30 We are supportive of initiatives to increase reporting on accidents and incidents but are clear those initiatives need to also recognise the responsibilities airports have in respect of both ground and airspace safety. To be able to foster an environment of continuous improvement in aviation safety and comply with the many legal obligations on airports it is important airports are able to access information in relation to incidents and accidents that directly affect them. It is recognised that exchange may need to be subject to certain confidentiality restrictions however that should not act so as to deprive airports of opportunities to improve safety procedures in the sector.

Going forward

- 31 Thank you again for the opportunity to submit on the Consultation Document. Please do not hesitate to contact me in relation to any aspect of this submission.

Yours sincerely

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