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**DRAFT COMMERCE ACT (SPECIFIED AIRPORT SERVICES INFORMATION DISCLOSURE)
AMENDMENT 2010 – CONSULTATION PAPER**

Draft amendment to Decision 715 made under s52Q of the Commerce Act 1986

Date: 19 December 2011

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Purpose

1. This consultation paper seeks submissions on our proposed amendments to the *Commerce Act (Specified Airport Services Information Disclosure) Determination 2010*, Decision No. 715, dated 22 December 2010 (the Airports ID Determination). The proposed amendments are set out in the draft amended Airports ID Determination being released alongside this paper.
2. We seek submissions by 5pm on **Thursday, 12 January 2012**.

Background

3. The Airports ID Determination is one of several determinations made under Part 4 of the Commerce Act 1986 (the Act).
4. The Commission posted a *Process for amendments and clarifications of Part 4 determinations*, dated 8 March 2011 (the Part 4 amendment process), on the Commission's website. The Part 4 amendment process described the process for interested parties to request clarifications and amendments to determinations made by the Commission on 22 December 2010 under Part 4 of the Act.
5. In the Part 4 amendment process, the Commission noted that amendments to determinations should generally be avoided, and where necessary made as infrequently as possible, in order to promote certainty for suppliers and customers, an important feature of Part 4 determinations.¹ We recognised, however, that due to the complexity of the determinations that some amendments, for example to correct errors, might be required.²
6. The Commission proposed to schedule amendments to the Part 4 determinations on or about 1 November 2011, and on an annual basis thereafter.³ The process also described how interested parties could request amendments.⁴
7. The Commission has received a number of requests for changes from interested parties, including Auckland International Airport Limited (AIAL), Board of Airline Representatives NZ (BARNZ), Christchurch International Airport Limited (CIAL), New Zealand Airports Association (NZAA) and Wellington International Airport Limited (WIAL). The changes requested by the parties and the Commission's responses are listed on the Commission's web site.
8. The Airports ID Determination was made under s52P of the Act. The requirements for information disclosure determinations are further enumerated in subpart 4 of Part 4 of the Act.⁵ The Commission may amend a s52P determination under s52Q of the Act. Section 52Q requires the Commission to consult with interested parties regarding any material amendments; the Commission need not consult where the amendments are non-material.⁶

¹ Part 4 amendment process, para. 4.

² Ibid, para. 5

³ Ibid, paras. 7-9.

⁴ Ibid, paras. 10-15.

⁵ Sections 52A – 53F of the Act.

⁶ Section 52P(1).

Preliminary views

9. The Commission considers the majority of our proposed amendments are non-controversial clarifications or typographical errors. Amending the determination to correct these errors and provide more clarity and certainty is appropriate and will promote certainty and compliance. The proposed amendments are described in the table at **Attachment 1** to this paper and the draft amended Airports ID Determination being released alongside this paper.
10. The Commission has received three substantive amendment requests. We provide an explanation below of our response to these requests.

Director Certification

11. We propose to clarify the director's certification requirements to make it clear that directors are only certifying that the information complies in all material respects with the Commission's requirements.
12. AIAL and WIAL have expressed concern with the current wording of the director's certification requirement. They submitted that the requirement does not align with the concept of materiality that is provided for under NZ GAAP, which is mandated for certain financial reporting by the Financial Reporting Act.
13. We note that a materiality threshold is often applied in audit opinions, but is not for the statements signed by directors, which must not be false or misleading in a material particular.⁷ The Commission is concerned only with material, not trivial, breaches. We do not see any concern with requiring that the director's certification only assert that the attached information complies "in all material respects" with the Commission's requirements.

Addressee of audit report

14. We propose that the Airports ID Determination be amended so that the audit report is required to be addressed to directors, and that the auditor acknowledge a duty of care to the Commission.
15. The information to which the audit opinion relates is for the purpose of providing interested persons with information to assess whether the purpose of Part 4 of the Commerce Act 1986 is being met. On this basis we determined that the audit opinion should be addressed to them.⁸
16. WIAL has provided feedback from its auditor (KPMG) that the auditor's report should be addressed to directors, not interested persons, as interested persons are not a party to the audit engagement.
17. Addressing the audit report solely to directors, with no duty of care to the Commission, is not an acceptable option, as there would be insufficient assurance that the information disclosed will meet the needs of interested persons.

⁷ See section 41 of the Financial reporting Act 1993.

⁸ Commerce Act 1986, section 53A.

18. There are two alternative options that we consider would provide sufficient assurance to interested persons, while reducing compliance costs for regulated suppliers. These options were proposed by KPMG. They are either:
- addressing the audit report to directors and the Commission – KPMG have advised that this would require the Commission to be a party to the engagement letter, or
 - addressing the audit report to directors while acknowledging a duty of care to the Commission.
19. We prefer the second option as we do not consider it necessary for the Commission to be a party to the audit engagement for each supplier. In other regulatory proceedings we have been satisfied that requiring the auditor to owe a duty of care to the Commission provides adequate assurance.⁹ In this instance, the Commission would represent the interests of interested persons.
20. We welcome your views on the two options presented, in particular whether our preferred option will provide adequate assurance for interested persons.

Timing of Price Setting Event Disclosure

21. WIAL has requested the requirement for the disclosure of information relating to a price setting event under clause 2.5 of the Airports ID Determination be extended to 60 working days. Information relating to a price setting event is currently required to be disclosed 20 working days following a decision to reset prices. WIAL submitted that there is insufficient time to complete any legal and other independent review in 20 working days. If the requirement is not extended WIAL has indicated that Airports may delay making pricing decisions to ensure that the requirement is met.
22. We propose that the requirement to disclose information following a decision to fix or alter price be extended to 40 working days. The public disclosure of information is important to allow interested persons, in a timely manner, to determine whether the purpose of Part 4 of the Commerce Act is being met. We believe that the disclosure is achievable within the proposed 40 working day requirement given the disclosures mostly relate to information used in the price setting event consultation and the remainder of the information can generally be prepared prior to a final decision being made.
23. We request submissions on the proposed timeframe of 40 working days for disclosure of information following a decision to fix or alter prices.

Effective date of the amendment

24. The Act provides that the amendment must come into force on the date specified, which must be on or after the date on which a summary of the Commission's final decision is published in the Gazette. The Commission's preliminary view is that these changes should come into effect prior to the next scheduled information disclosure, which will be 29 February 2012.

⁹ See the *Telecom Accounting Separation Information Disclosure Requirements*, 17 May 2010, cl. 11.2(h).

Consultation

25. The Commission requests submission from parties on the proposed amendments.
26. The Commission considers some of the amendments requested to be non-material and non-controversial, and therefore do not require comment. These are noted on the attached table. Parties should, however, feel free to comment on the non-material amendments where they consider they will have a material effect.
27. Submissions are invited on the Commission's preliminary views in this paper and the draft amended Airports ID Determination by no later than **5pm on Thursday, 12 January 2012**.
28. You should send your submissions to:

Karen Murray (Manager, Regulation Branch)
c/o regulation.branch@comcom.govt.nz

Requests for confidentiality¹⁰

29. We intend to publish all submissions on our website. We therefore request that submitters provide 'unlocked' electronic copies of their submissions. Submitters should also provide a clearly labelled 'public version' of their submissions, if submissions contain confidential information or if submitters wish for the published electronic copies to be 'locked'.
30. We discourage requests for non-disclosure of submissions, as it is desirable to test all information in a fully public way. However, we recognise that there may be cases where parties in making submissions may wish to provide confidential information to us.
 - If it is necessary to include confidential material in a submission, the information should be clearly marked.
 - Both confidential and public versions of the submission should be provided to us.
 - The responsibility for ensuring that confidential information is not included in a public version of a submission rests entirely with the party making the submission.

¹⁰ Parties can also request that we make orders under s 100 of the Act in respect of information that should not be made public. Any request for a s 100 order must be made when the relevant information is supplied to us, and must identify the reasons why the relevant information should not be made public. We will provide further information on s 100 orders if requested by parties. A key benefit of such orders is to enable confidential information to be shared with specified parties on a restricted basis for the purpose of making submissions. Any s 100 order will apply for a limited time only as specified in the order. Once an order expires, we will follow our usual process in response to any request for information under the Official Information Act 1982.

ATTACHMENT 1: SUMMARY OF REQUESTS FOR AMENDMENTS AND AMENDMENTS PROPOSED BY COMMISSION

Clause reference	Description of clarification or amendment sought	Proposed amendment
1.4 Interpretation	<p>“Forecast operational expenditure” is defined in the ID Determination as the forecast “operational expenditure”, however, “operational expenditure” is defined as the operating costs after applying Part 2 of the IM Determination.</p> <p>This is a publishing error - the definition is recursive, and the term ‘operational expenditure’ should not be bold.</p>	The term “operational expenditure” in the defined term “Forecast operational expenditure” not be bolded
2.5(1)(e), 2.5(1)(f)(i)	There is nothing to distinguish between the description of “aims and objectives” under clause 2.5(1)(e) with the requirement in clause 2.5(1)(f)(i)	<p>Subclause 2.5(1)(e) relates to 10 years, subclause 2.5(1)(f) relates to 5 years.</p> <p>In clause 2.5(1)(e), the aims and objectives description should only relate to key capital expenditure projects and not ‘any proposed investments’. The Commission proposes to delete 2.5(1)(f) and clarify 2.5(1)(e).</p>
Schedule 18b (iii)	The note to Schedule 18b(iii) states that year 0 disclosure applies only if the pricing period starting year and the year of the most recent disclosure do not coincide. The pricing period starting year was FY08. The year of the most recent disclosure would be FY11.	The note in Schedule 18b(iii) requires airports to disclose the roll-forward of the asset base from the most recent disclosures to the asset base used for the price setting event where they do not coincide. This is not applicable for the clause 2.10(3) disclosure. The note and date heading to schedule 18 have been amended to make this clear.

Clause reference	Description of clarification or amendment sought	Proposed amendment
Schedule 21	There is a mismatch between the information required to be certified under clause 2.7(2) and the information that is certified under Schedule 21.	The director certification detailed in schedule 21 has been amended to align to clause 2.7(2).
Schedule 1b(ii) RIV calculation	It is unclear whether the term 'proportionate' used in this schedule refers to the proportion of the year that the asset is available.	Include a definition for 'proportion of year available' and revised the term 'proportionate regulatory value' to clarify.
Schedules 9a, 10a Allocator types	It is unclear whether the allocator in 9a and 10a is meant to refer to (a) a description of, or (b) the numeric value of, the metric.	Amend the defined term 'allocator' to clarify the requirement. Also added an explanatory note in schedules 9 and 10.
Schedule 10a, Clause 1.4 Operating costs	Operating costs relating to excluded assets are not separately identified in schedule 10a. It is not clear if they are intended to be captured in 'net revenues' for excluded assets in Schedule 4b(viii).	Operating costs should exclude costs relating to excluded assets. The definition of operating costs in the ID Determination is amended to exclude costs incurred in providing 'excluded services' as defined in the IM Determination'.

Clause reference	Description of clarification or amendment sought	Proposed amendment
Clauses 2.3(1)(a)(ix), 2.10(1)(b), Schedule 9 Transitional year disclosure	It is unclear whether multiple versions of schedule 9 should be completed in the transitional year.	Three versions of schedule 9 are required in the transition year: <ul style="list-style-type: none"> • in respect of the initial RAB value (effectively for the year ended 2009) under clause 2.10(1)(b)(i) • in respect of the RAB value for the year ended in 2010 under clause 2.10(1)(b)(ii) • in addition, a disclosure is required for the 2011 disclosure year under clause 2.3(1)(a)(ix). To assist in preparing the transitional disclosures, we have proposed adding two sheets to the template workbook: 'S9.Asset Allocation (2010)', 'S9.Asset Allocation (2009)'.
Schedule 14 Passenger survey sampling requirements	It is not clear whether the error requirement specified in clause 2.4(3)(c) is to apply to the total surveys performed in the year or for the individual surveys performed each quarter.	Amend the margin of error requirement specified in clause 2.4(3)(c) so that it applies to total surveys completed during the disclosure year. A note has also been included in schedule 14 to notify readers that the quarterly survey results may not be statistically correct.
Schedule 2b(i) Long term credit spread	It is unclear when Schedule 2b(i) should be completed.	Add a note in schedule 2b(i) to clarify it is only required to be completed at the end of a disclosure year where the weighted average original tenor of the airport's qualifying debt and non-qualifying debt is greater than five years.
Schedule 4 RAB value	The segmented information requires disclosure of RIV and not RAB at the present time, so cell C51 (which requires the airport to align the Roll Forward RAB with the segmented information) is not valid at the present time.	Add a note in schedule 4 to clarify that the RAB must correspond with the total assets value disclosed in schedule 9 Asset Allocations.

Clause reference	Description of clarification or amendment sought	Proposed amendment
Schedules 4b(viii), 23b(iii) Assets held for future use	For each of the four individual input columns of the table, it is unclear whether the value calculated in the last row should be carried forward to the first row from one disclosure year to the next.	<p>The end of year balance for each column is required to be rolled forward to the next year. A note has been included to highlight this requirement in schedules 4 & 23:</p> <ul style="list-style-type: none"> • ‘Holding Costs, Net Revenues, and Tracking Revaluations entries in the ‘Assets held for future use—additions’ line relate to the value incurred during the disclosure year’ and • ‘Each category value shown in the ‘Assets held for future use’ line (Base Value, Holding Costs, Net Revenues, and Tracking Revaluations) is carried forward into the following year’s disclosure as ‘Assets held for future use—previous year’.
Schedule 6a Actual to forecast expenditure	These cells could be linked to the appropriate references in Schedule 18 for ease of use.	<p>We have:</p> <ul style="list-style-type: none"> • Changed the input cells to calculation cells, with calculations based on the disclosures in 6b; • Added row 66 to identify the index number (1–5) of the pricing period forecast year that corresponds to the current disclosure year.
Schedule 12 Comment	The explanatory note for the comment seems to relate to schedule 11 rather than schedule 12.	We have moved the note from schedule 12 row 72 to schedule 11 row 80.

Clause reference	Description of clarification or amendment sought	Proposed amendment
Schedule 13 Baggage (outbound) & Baggage reclaim	The number of bags processed in the passenger busy hour is determined at present using a notional calculation. The asterisk on the Schedule appears to apply to both capacity and bags processed, but the wording is less clear.	<p>The disclosed number of bags processed should be the total processed by the Airport and other parties. Any estimate should be reasonably derived, and noted in the commentary box.</p> <p>The text in the note cells has been changed to: 'Please describe in the capacity utilisation indicators commentary box how notional capacity and bags processed have been assessed'.</p>
Schedules 18, 19	Year 1 in schedule 19 is different to the date used for year 1 in Schedule 18. This may create some confusion for the reader.	<p>The date formula in schedule 19 was incorrectly linked to the year of most recent disclosure.</p> <p>To reflect the terminology used in schedule 6b, the year headings in both schedules 18 & 19 have been re-labelled as 'Pricing Period Starting Year', 'Pricing Period Starting Year +1', etc.</p>
Schedule 23b(ii) Works under construction	Cell N90 is not adding in a share of the opening Works Under Construction balance nor is it shaded as a calculation cell. Opening allocated balances do not flow into cells L85 and 86.	<p>The reason for requiring allocation of Works under Construction is to allow interested persons to reconcile their assessment of capital expenditure with the roll-forward of the RAB (from ID Reasons Paper, para 3.143).</p> <p>An opening balance cell N89 is now added.</p>

Clause reference	Description of clarification or amendment sought	Proposed amendment
Schedules 9, 10 Allocators	Parties have requested additional asset allocator rows	The number of asset allocator rows and cost allocator rows has been increased from 22 to 60.
Schedules 9b(i), 10b(i) Changes in asset allocators	These schedules contain space for three changes in cost allocators. While in some years there may well be no changes, in other years there may be many. Parties have requested an additional sheet where necessary.	Space has been added for a further four changes. There is room to expand the table back into the previous page if necessary.
Schedule 16d	There is not enough space for all the international airlines operating at Auckland Airport to be listed.	<p>The Commission will take guidance from regulated suppliers on the number of rows required. We have:</p> <ul style="list-style-type: none"> • Increased the number of airline disclosure cells from 10 local + 10 international to 20 local + 20 international. • Moved the note, previously located alongside the entry cells, up into a new row 149.
Schedule 18b(iii) Forecast capital expenditure	There are too few entry rows for 'capital expenditure by key capital expenditure project'	The number of entry rows has been increased to 20.
Schedule 23b(iv) Land	Parties have requested additional categories for the breakdown of land.	The number of land categories has been increased from 7 to 15.

Clause reference	Description of clarification or amendment sought	Proposed amendment
Schedule 18	Parties have requested changes to the classification of information on schedule 18.	<p>For the transitional disclosure in accordance with clause 10(3) factors that do not appropriately fit in the specified categories should be entered in the 'other factors' box.</p> <p>For future disclosures, new lines have been included in schedule 18 for 'revenue requirement not applicable to price setting event' and 'revenue smoothing adjustment' with associated definitions included in clause 1.4. 'Forecast total revenue requirement' has also been defined. A requirement to disclose information relating to 'revenue requirement not applicable to price setting event' has also been included.</p>
1.4 Interpretation	<p>The ID determination defines RAB (tax value) and provides that "... The RAB (tax value) for the previous disclosure year in the initial disclosure year will not be greater than the RAB value."</p> <p>This creates inconsistencies with clause 4.1(3)(b) of the IM determination which requires depreciation to be calculated by applying the tax rules.</p>	<p>Sub clause (b) of the RAB (tax value) definition has been included in error. The Airports IM determination does not allow for RAB (tax values) to be capped by the RAB value as was provided for in the EDBs, as was explained in the Commission's reasons paper.</p> <p>The Commission has removed sub clause (b) of the defined term RAB (tax value)</p>

Clause reference	Description of clarification or amendment sought	Proposed amendment
Schedules 2, 6 and 10	Parties cannot breakdown operating costs into three cost classifications in the initial year, as they were not prepared on that basis.	<p>It would not be appropriate for operating costs by category to be disclosed in the 2011 year if information was not prepared on this basis during that year. Clause 2.10(5) had included transitional provisions for this but only for schedule 6.</p> <p>NZAA submitted on 5 November 2010 that they agreed to the Commission's decision to require the disclosure of operating expenditure categories.</p> <p>Transitional provisions that do not require cost breakdown have been included.</p>
Clause 2.5	There is a degree of uncertainty with regard to the timing of a price setting event (triggering the 20 working day clock on disclosure).	The clause is amended to clarify that the time commences on the date of the decision to fix or alter prices.
Clause 2.5	There is insufficient time to complete the disclosure following a price setting event and it is requested that the period to disclose is extended to 60 working days from 20 working days.	The requirement to disclose information following the date of the decision to fix or later prices is extended to 40 working days.
Clause 2.6	Auditors have provided feedback that the audit report needs to be addressed to directors and not interested persons	Amend the audit requirements so that the audit report can be addressed to directors with a duty of care to the Commission acknowledged in the report
Schedules 21, 22 and 23	The concept of materiality is not included in the director's certification	The director's certifications are amended to include the concept of materiality

Clause reference	Description of clarification or amendment sought	Proposed amendment
Schedules 4b(iv), 23b(i) Indexed revaluation	The indexed revaluation calculation does not fully reflect the IM determination	Amend schedule 4b(iv) and schedule 23(i) to include adjustments for 'revalued land', 'assets with nil physical asset life', 'asset disposals' and 'lost asset adjustment' and include definitions where necessary
Schedules 4b(v), 23b(ii) Works under construction	The works under construction roll-forward does not fully reflect the IM determination.	Amend schedule 4b(v) and schedule 23b(ii) to include adjustments 'offsetting revenue' and 'adjustment resulting from cost allocation' and include definitions where necessary
Schedule 5(i) Summary	The definitions of terms used in schedule 5(i) do not relate to the purpose of the disclosure	Amend defined terms 'net operating revenue' and 'operating expenditure' and include definitions for 'market value of asset disposals' and 'other related party transactions' and amend schedule 5 so these terms and 'related party capital expenditure' are used.
Clause 2.10(1)(b)(i)	The references in clause 2.10(1)(b) do not fully reflect the IM determination.	Amend clause 2.10(1)(b) to align with the IM.
Schedule 7 Segmented information	The RIV components in segmented information table do not include an Allowance for long term credit spread entry. This means the formula for airport business Regulatory profit/tax differs from that in Schedule 2	Insert a row "Allowance for long term credit spread" in schedule 7
Schedule 7 Segmented information	The RIV components in segmented information table are listed in inconsistent order.	The row sequence be changed to provide consistency with schedule 4.

Clause reference	Description of clarification or amendment sought	Proposed amendment
Schedule 7 Segmented information	The explanatory note does not accurately reflect the requirement.	The schedule 7 note be changed from “* Corresponds to the Regulatory Profit Statement” to “* Corresponds to values reported in the Regulatory Profit Statement and the Report on Return on Investment.”
Schedules 9a, 10a Public information	There is an extraneous heading	The heading ‘Public Information’ be removed.
Schedule 4b(iv) Indexed revaluation	The term ‘year’ has been used in some instances where it should be ‘disclosure year’.	The term ‘year’ be replaced with ‘disclosure year’ in: <ul style="list-style-type: none"> • D83 (to ‘RAB value—previous disclosure year’); and • D121 (to ‘Assets held for future use—previous disclosure year’).
Schedule 4b(viii) Assets held for future use	Parties have requested an explanatory note to make it clear that the asset class category total should correspond to the RAB roll forward values.	A clarifying note be inserted as follows: “* Corresponds to values in RAB roll forward calculation.”
Schedule 13 Terminal categories	There is no explanation of ‘Common Area’.	A clarifying note be added to the column heading “Common Area” inserted: “† For functional components which are normally shared by passengers on international and domestic aircraft.”
Schedule 18b(iv)	The label in totals row incorrectly lists ‘Total operational expenditure’ instead of ‘Forecast operational expenditure’.	The label in row 155 be changed to reflect the defined term ‘Forecast operational expenditure’.

Clause reference	Description of clarification or amendment sought	Proposed amendment
Schedule 23a Initial RAB value	Tautology.	The label 'Initial RAB value—year ended 2009' be removed and replaced with the defined term 'Initial RAB value'.
Schedule 4b(v) Works under construction	The allocated capital expenditure is not linked to an input cell.	This is a publishing error - change from an input cell to a calculated cell
Schedule 4 RAB value	The indexed revaluations are not linked to input cells.	This is a publishing error - change from an input cell to a calculated cell
Schedule 4b(iv) Indexed revaluation	Cells J83 and N83 not linked to correct input cells.	This is a publishing error - change cell references accordingly.
Various	Typographical errors	Various amendments to typographical errors be made