

Submission on the Civil Aviation Bill

Submitted to:

Transport and Infrastructure Committee

2 December 2021



Commerce Commission submission on the Civil Aviation Bill

Introduction

1. The Commerce Commission (the **Commission**) appreciates the opportunity to make a submission to the Transport and Infrastructure Committee (the **Committee**) on the Civil Aviation Bill (the **Bill**). The Bill repeals and replaces the Civil Aviation Act 1990 (**Civil Aviation Act**) and the Airport Authorities Act 1966 (**Airport Authorities Act**).
2. The Commission is, among other things, responsible for enforcement of the Commerce Act 1986 (the **Commerce Act**). The Commission has previously made a public submission on the May 2019 exposure draft of the Bill. We provided comments on the exposure draft's proposals for international air agreements, so far as they related to the Commerce Act, and on the draft's implications for airport regulation under Part 4 of the Commerce Act (**Part 4**).
3. This submission only addresses the Bill's implications for airport regulation under Part 4, in particular: the interaction between airport consultation obligations under the Bill and consultation pursuant to decisions made under Part 4; and consequential amendments to the Commerce Act proposed in Schedule 9 of the Bill that change the scope of airport services regulated under Part 4.
4. In our submission we propose some relatively minor, but nevertheless important, wording changes to the text in Schedule 9. Given these are relatively straightforward technical drafting changes to the Bill, we do not wish to make an oral submission to the Committee, but we would be pleased to provide any further assistance the Committee may require.

Executive summary

5. We support clauses 231 and 232 of the Bill, because we consider that they effectively address the interaction between consultation obligations under the Bill, and consultation pursuant to decisions made under Part 4. However, we propose minor drafting changes to clarify the intent.
6. We support amending s 56A of the Commerce Act (in Schedule 9 of the Bill), given that key definitions in the Airport Authorities Act will no longer exist once that Act is repealed. However, we recommend addressing the removal of those definitions through the following changes to Schedule 9 of the Bill.
 - 6.1 Schedule 9 should not amend the current definition of 'specified airport services' in s 56A(1) of the Commerce Act, as this would result in what we understand to be an unintended policy change to the scope of airport services regulated under Part 4.
 - 6.2 The current Airport Authorities Act definitions for 'aircraft and freight activities', 'airfield activities' and 'specified passenger terminal activities' should be imported into s 56A(2) of the Commerce Act, as this would ensure that the repeal of the Airport Authorities Act will have no practical effect on Part 4's definition of 'specified airport services'.

Context

7. The Commission is New Zealand's primary competition, consumer and economic regulation agency. We enforce the country's competition and consumer laws and regulate industries that have little or no competition. Among other things, the Bill amends laws that relate to information disclosure regulation in the airports sector under Part 4 of the Commerce Act.
8. At present, under subpart 11 of Part 4, certain services supplied by the companies operating Auckland International Airport, Wellington International Airport and Christchurch International Airport are subject to information disclosure regulation. As a result of being subject to information disclosure regulation, these airport companies must publicly disclose information concerning their activities (including airport charges). These three regulated airports are defined in Part 4 as 'specified airport companies', and the scope of services supplied by those specified airport companies that is subject to information disclosure regulation is defined in terms of 'specified airport services' (see s 56A(1) of the Commerce Act). All three specified airport companies also supply a range of services not subject to regulation under Part 4.
9. The Commerce Amendment Act 2018 amended subpart 11 of Part 4 of the Commerce Act. One of the amendments was to create a process whereby the Minister could, following a Commission inquiry, recommend an Order in Council to impose different types of regulation on specified airport services in addition to information disclosure regulation (see sections 56F-56K of the Commerce Act). These different types of regulation are negotiate/arbitrate regulation, default/customised price-quality regulation and individual price-quality regulation. The parameters of those types of regulation are set out in other provisions in Part 4. The precise way in which a different type of regulation would apply to specified airport services under Part 4 would be determined by the Commission following the Order in Council.
10. In our submission on the exposure draft of the Bill, we noted that the draft Bill proposed imposing obligations on airport companies to consult substantial airport customers concerning charges and capital expenditure plans. We submitted that it was possible that some aspects of these new consultation obligations under the draft Bill might conflict with negotiate/arbitrate regulation or price-quality regulation under Part 4, should such types of regulation be introduced for specified airport companies in the future. We submitted that, if the airports' charges or capital expenditure were to be determined pursuant to Part 4 by the Commission or an arbitrator after an extensive decision-making process (including consultation with stakeholders), then it would be inappropriate (and redundant) for the airports to also be obliged to consult on those matters with their customers.
11. We therefore proposed that the relevant consultation provisions in the Bill (clauses 204 and 205 of the exposure draft), should be made subject to regulation imposed on specified airport companies under Part 4, where those requirements are in conflict. Doing so would recognise the changes to potential forms of economic regulation of airport services introduced by the Commerce Amendment Act 2018.

12. The Bill as introduced to the House has been amended to address our earlier submission about the interaction between consultation obligations under the Bill and consultation pursuant to decisions about negotiate/arbitrate regulation or price-quality regulation under Part 4.
13. In addition, as part of doing so, the Bill includes a consequential amendment to the definition of 'specified airport services' in Part 4. In this submission we comment on those amendments.

Clauses 231 and 232: interaction of consultation provisions under the Bill and Part 4

14. The Bill repeals the Airport Authorities Act after a transitional period of 5 years. Clause 231 of the Bill is based on sections 4A and 4B of the Airport Authorities Act. It provides that an airport operator may set charges for the use of the airport or for the services or facilities of the airport. Clause 232 is based on sections 4C and 9B of the Airport Authorities Act, and relates to airport capital expenditure plans. Both clauses 231 and 232 contain provisions relating to consultation obligations of airport operators: in setting their airport charges, and in proposing their capital expenditure plans, respectively.
15. Clauses 231(5) and 232(4) specifically address the interaction between these consultation obligations and Part 4. These clauses provide that, if under Part 4 an airport operator is a specified airport company, and its specified airport services are subject to negotiate/arbitrate regulation or price-quality regulation, consultation that has occurred or will occur with the airport's substantial customers for the purposes of Part 4, may be treated as consultation for the purpose of the relevant clause of the Bill. In addition, clause 231(8) also provides that clause 231 does not limit the application of Part 4, and clause 252(3) deals with exemptions from certain requirements in clauses 231 and 232.
16. We support clauses 231 and 232 of the Bill, because we consider that they address the points we made in our submission on the exposure draft relating to the interaction of consultation obligations under the Bill, and consultation pursuant to decisions made under Part 4.
17. However, we propose a minor drafting change to both clauses 231(5) and 232(4) to clarify that the exception to the consultation obligations would apply whether or not the consultation undertaken for the purposes of Part 4 is undertaken by the airport itself. This recognises the role that the Commission or an arbitrator might play in implementing additional types of regulation under Part 4. The proposed change to both clauses 231(5) and 232(4) would be identical as follows.

If the airport operator is a specified airport company as defined in section 56A of the Commerce Act 1986 and specified airport services of the operator are subject to negotiate/arbitrate regulation or price-quality regulation under Part 4 of that Act, consultation about those specified airport services that has occurred or will occur with the substantial customer for the purposes of that Act, whether by the airport operator or otherwise, may be treated as consultation for the purpose of this section

Schedule 9: amendment to the definition of ‘specified airport services’ in Part 4

Definition of ‘specified airport services’ under Part 4

18. Section 56A(1) of the Commerce Act currently defines ‘specified airport services’ as follows:

specified airport services means all of the services supplied by specified airport companies in markets directly related to the following activities (whether for international or domestic flights):

- (a) aircraft and freight activities;
- (b) airfield activities;
- (c) specified passenger terminal activities;
- (d) any other services declared to be specified airport services by Order in Council made under section 56M [of the Commerce Act].

19. Section 56A(2) of the Commerce Act states that:

In subsection (1) [of s 56A], **aircraft and freight activities**, **airfield activities**, and **specified passenger terminal activities** have the same meanings as in section 2 of the Airport Authorities Act 1966.

The Bill’s proposed changes to Part 4’s definition of ‘specified airport services’

20. Schedule 9 of the Bill replaces the definition of ‘specified airport services’ in section 56A(1) of the Commerce Act, and repeals s 56A(2) of the Commerce Act, as follows:

In section 56A(1), replace the definition of specified airport services with:

specified airport services means—

- (a) activities within the definition of identified aerodrome activity in section 218 of the Civil Aviation Act 2021; and
- (b) any other services declared to be specified airport services by Order in Council made under section 56M

Repeal section 56A(2).

21. The proposed new definition of specified airport services differs from the current definition in two important respects.
- 21.1 The new definition conceptually changes Part 4 airport regulation from regulating *services* in certain markets to regulating *activities*. The current definition of specified airport services relates to services supplied by specified airport companies in markets directly related to certain activities, rather than the regulated services being directly defined in terms of certain activities.
- 21.2 The activities listed in the Bill’s new defined term ‘identified aerodrome activity’ are similar to the list of activities found by combining the Airport Authorities Act’s current definitions for aircraft and freight activities, airfield activities and specified passenger terminal activities. However, the list of activities is not precisely the same.
22. We understand that the proposed amendments to the definition of ‘specified airport services’ do not reflect an intentional policy change to the scope of airport regulation

under the Commerce Act. Rather, the reason for these proposed amendments is because the Bill:

- 22.1 repeals the Airport Authorities Act after a 5 year transition period, and therefore after that transition period the definitions referred to in s 56A(2) will no longer exist; and
 - 22.2 the Bill rationalises a number of defined terms from the Airport Authorities Act and the current Civil Aviation Act, which the Bill repeals and replaces.
23. Absent a deliberate policy change to the scope of airport services regulated under Part 4, we consider that any actual or potential change to the definition of ‘specified airport services’ would be problematic. Among other things:
- 23.1 specified airport companies might need to spend time, effort and cost checking whether any assets employed and/or costs incurred in supplying regulated airport services change from being part of the regulated cost or asset base to being unregulated (or vice versa), and checking whether the allocation of costs and assets that are shared between regulated and unregulated services changes;
 - 23.2 if there are any asset or cost allocation differences, those changes could possibly affect the regulated airports’ internal accounting systems, disclosed data, and the assessment of trends in airport performance undertaken by ourselves and industry stakeholders.

Our recommended changes to the Bill

- 24. We support amending s 56A of the Commerce Act, given that key definitions in the Airport Authorities Act will no longer exist once the Act is repealed. However, we recommend addressing the removal of those definitions through the following changes to Schedule 9 of the Bill.
 - 24.1 The Bill should not amend the current definition of specified airport services in s 56A(1) of the Commerce Act.
 - 24.2 The current Airport Authorities Act definitions for aircraft and freight activities, airfield activities and specified passenger terminal activities should be imported into s 56A(2) of the Commerce Act.
- 25. Specifically, we recommend deleting the proposed new definition of “specified airport services” in Schedule 9 of the Bill and inserting a new s 56A(2), such that the relevant part in Schedule 9 reads:

~~In section 56A(1), replace the definition of specified airport services with:~~

~~specified airport services means—~~

~~(a) activities within the definition of identified aerodrome activity in section 218 of the Civil Aviation Act 2021; and~~

- (b) ~~any other services that are declared to be specified airport services by Order in Council made under section 56M~~

~~Repeal section 56A(2).~~

Replace section 56A(2) with:

In subsection (1),—

aircraft and freight activities means the activities undertaken (including the facilities and services provided) to enable, within a security area or areas of the relevant airport, the servicing and maintenance of aircraft and the handling of freight transported, or to be transported, by aircraft; and includes—

- (a) the provision within a security area or areas of the relevant airport, of any 1 or more of the following:
 - (i) hangars:
 - (ii) facilities and services for the refuelling of aircraft, flight catering, and waste disposal:
 - (iii) facilities and services for the storing of freight:
 - (iv) security, customs, and quarantine services for freight:
- (b) the holding of any facilities and assets (including land) acquired or held to provide aircraft and freight activities in the future (whether or not used for any other purpose in the meantime)

airfield activities means the activities undertaken (including the facilities and services provided) to enable the landing and take-off of aircraft; and includes—

- (a) the provision of any 1 or more of the following:
 - (i) airfields, runways, taxiways, and parking aprons for aircraft:
 - (ii) facilities and services for air traffic and parking apron control:
 - (iii) airfield and associated lighting:
 - (iv) services to maintain and repair airfields, runways, taxiways, and parking aprons for aircraft:
 - (v) rescue, fire, safety, and environmental hazard control services:
 - (vi) airfield supervisory and security services:
- (b) the holding of any facilities and assets (including land) acquired or held to provide airfield activities in the future (whether or not used for any other purpose in the meantime)

specified passenger terminal activities means the activities undertaken (including the facilities and services provided) in relation to aircraft passengers while those passengers are in a security area or areas of the relevant airport; and includes—

- (a) the provision, within a security area or security areas of the relevant airport, of any 1 or more of the following:
 - (i) passenger seating areas, thoroughfares, and airbridges:
 - (ii) flight information and public address systems:
 - (iii) facilities and services for the operation of customs, immigration, and quarantine checks and control:
 - (iv) facilities for the collection of duty-free items:
 - (v) facilities and services for the operation of security and Police services:
- (b) any activities undertaken (including the facilities and services provided) in a passenger terminal to enable the check-in of aircraft passengers, including services for baggage handling:

- (c) the holding of any facilities and assets (including land) acquired or held to provide specified passenger terminal activities in the future (whether or not used for any other purpose in the meantime);—
but does not include the provision of any space for retail activities.

26. We consider that this approach would:

- 26.1 be consistent with the existing policy intent for the scope of airport services regulated under Part 4;
- 26.2 avoid any costs and other risks that might be caused by making a change to Part 4's definition of 'specified airport services'; and
- 26.3 avoid introducing any terminological inconsistency within the Bill, as any legacy terminology from the Airport Authorities Act remains within the Commerce Act.

27. Although the Part 4 definition of specified airport services would use terms not used in the Bill (eg, 'airfield'), we expect that using these terms solely in Part 4 should create no problem. Those terms are themselves undefined in the Airport Authorities Act, and are already well understood by regulated airport stakeholders.

Conclusion

- 28. It is our view that the Bill should be amended to ensure that there is no change to the scope of airport services regulated under Part 4. We also recommend minor drafting changes to clauses 231(5) and 232(4) to clarify their intent.
- 29. We thank the Committee for this submission opportunity and would be pleased to provide any further assistance that the Committee may require. If the Committee has any specific questions on this submission please contact Simon Thomson, Strategy, Policy and Performance Manager (simon.thomson@comcom.govt.nz or 04-924-3791) or Calum Gunn, Principal Adviser, Economic Regulation (calum.gunn@comcom.govt.nz or 04-924-3681).