



Cabinet

Minute of Decision

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Achieving Better Public Policy Outcomes at Airports: Targeted Consultation

Portfolio Transport

On 2 June 2020, Cabinet:

Airport licensing

- 1 **noted** that there is a lack of alignment between commercial incentives at airports and transport outcomes, aviation safety and security, and wider border outcomes;
- 2 **noted** that on 20 November 2019, Border Ministers agreed to seek Cabinet agreement to consult key industry stakeholders on an airport licensing regime;
- 3 **noted** that the proposed airport licensing regime aims to facilitate cooperation in achieving both public policy outcomes, and airports' commercial objectives;
- 4 **noted** that an airport licensing regime will be important given the key role that airports will play in the post-COVID-19 recovery;
- 5 **directed** the Ministry of Transport to carry out consultation with all airports on an airport licensing regime for a six-week period immediately following Cabinet approval;
- 6 **noted** that the consultation paper *Achieving Better Public Policy Outcomes at Airports* (the consultation paper), attached to the paper under CAB-20-SUB-0248, will be used to support discussions with key stakeholders and will not be publicly released;
- 7 **authorised** the Minister of Transport to make minor or technical changes to the consultation paper as necessary prior to consultation;
- 8 **authorised** the Minister of Transport to refine the licensing framework described in the paper under CAB-20-SUB-0248 as a result of the consultation process and further engagement with border agencies, prior to seeking final Cabinet approvals;
- 9 **noted** that, if agreed, an airport licensing regime will be implemented through the Civil Aviation Bill [REDACTED]
[REDACTED]
- 10 **invited** the Minister of Transport to report back to the Cabinet Economic Development Committee in July 2020 on the results of consultation, and to seek any final policy approvals at the time approval for introduction of the Civil Aviation Bill is sought;

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- 11 **invited** the Minister of Transport to issue drafting instructions to the Parliamentary Counsel Office to give effect to an airport licensing regime in anticipation of final policy decisions, in order to facilitate the introduction of the Civil Aviation Bill should airport licensing proceed;

Airport authorisation, decision-making and reframing

- 12 **agreed** to delete provisions currently contained in the Airport Authorities Act 1966 that are no longer necessary in light of changes to local government and Crown entity legislation;
- 13 **agreed** that the Bill update the provisions, including removing any provisions no longer required, relating to:
- 13.1 shifting the administrative decision regarding the authorisation of airport authorities from the Minister of Transport, to the Secretary for Transport;
 - 13.2 introducing a statutory criteria and authorisation for airports, including:
 - 13.2.1 the decision-maker having regard to the new Act;
 - 13.2.2 being satisfied that there is no reason to believe the airport authority will not comply with the new Act;
 - 13.2.3 provide for consultation with interested persons;

Other matters relating to airport regulation

- 14 **noted** that, following consultation on the exposure draft of the Civil Aviation Bill, changes to two airport regulation policies require approval for inclusion in the Civil Aviation Bill;

Airport pricing

- 15 **agreed** to provide that, following consultation, airports may set prices, but not to carry over existing Airport Authorities Act 1966 language that they may do so 'as they see fit';

Leasing

- 16 **agreed in principle, subject to** decisions on airport licensing, to consider retaining the ability for airports to terminate leases, in the context of an airport licensing arrangement;

Next steps

- 17 **agreed** that during targeted consultation on an airport licensing regime, officials may discuss the decisions on paragraphs 12, 13, 15 and 16 above with stakeholders;
- 18 **invited** the Minister of Transport to issue drafting instructions to the Parliamentary Counsel Office to give effect to paragraphs 12, 13, 15 and 16 above;
- 19 **authorised** the Minister of Transport to make final decisions, consistent with the overall policy intent, on details that arise during the drafting of the policies referred to in paragraphs 12, 13, 15 and 16, without further reference to Cabinet.

Michael Webster
Secretary of the Cabinet

[RESTRICTED]

Office of the Minister of Transport

Chair, Cabinet Economic Development Committee

ACHIEVING BETTER PUBLIC POLICY OUTCOMES AT AIRPORTS: TARGETED CONSULTATION

Proposal

1. This paper seeks agreement to:
 - 1..1. carry out targeted consultation with key industry stakeholders on an airport licensing regime
 - 1..2. two policy changes to airport regulation as a result of consultation on the exposure draft of the Civil Aviation Bill (the Bill). These changes will complement an airport licensing regime, should it be agreed.

Executive Summary

2. Airports are critical pieces of transport infrastructure. They provide significant economic and social benefits to New Zealand and have a key role in supporting the government's transport outcomes regarding economic prosperity, inclusive access, and resilience and security. Our international airports, as the primary gateway to New Zealand, will play a key role in rebuilding confidence in New Zealand as a safe destination for trade and travel post COVID-19.
3. All parties - government agencies, airports and airlines – have incentives to ensure safe, secure and efficient aviation, smooth passenger facilitation and good passenger experiences at airports and have an interest in preserving the reputation of New Zealand airports as competitive and safe destinations.
4. However, airports' short and medium term commercial incentives can compete with these objectives, leading them to at times prioritise commercial outcomes. For example, an airport may choose to invest first and more heavily in profit making parts of its business, while applying a just-in-time, or minimum required, investment approach to other parts of its business.
5. At the same time, government agencies may not always provide sufficient advance warning of their medium to long-term infrastructure needs at airports, and do not always provide a coordinated approach across agencies, making it difficult for airports to incorporate border agencies needs into their long term planning.

6. Airports are currently subject to the Airport Authorities Act 1966, which provides for the establishment and operation of airports by airport authorities. It sets out the powers and responsibilities of airport authorities, local authorities and the Crown in relation to airports, including the requirement to operate commercially. It establishes consultation requirements for airport pricing and certain capital expenditure.
7. Airports receive a number of legal rights under the Airports Authorities Act as part of their operation (for example, the ability to access land, change leases etc.). Through submissions on the Bill, submitters have raised concerns about these powers and the ability they give airports to override a number of rights around things like leases, with little consultation.
8. In part, airports have these rights, because alongside them they have legal obligations to manage risks at airports. However, airport obligations are not always clear, and are not supported by appropriate graduated compliance mechanisms.
9. The Airport Authorities Act does not clearly set out airport responsibilities in relation to security and border requirements, or asset management, to meet transport outcomes. This is left to other legislation, which has limited powers.
10. Much of the legislation requiring airports to provide space and facilities¹ does not specify what this looks like, leading to areas being provided which may not be sufficient to deliver outcomes needed and achieve efficient passenger facilitation.
11. Interventions are not sufficiently flexible, scalable or coordinated. The regulatory tools for ensuring effective compliance and cooperation by airports are limited and, in many cases, ineffective.
12. The not always aligned incentives, and issues with the regulatory framework, can lead to inadequate space, infrastructure and investment being prioritised for facilities that would contribute to government objectives and needs. The ability for the government and the sector to work together to achieve public policy outcomes at the border is particularly important in the COVID-19 recovery phase, where additional border requirements and investment are likely to be an essential element of the recovery and the rebuilding of international passenger confidence.
13. The Bill provides a once in a generation opportunity to reshape the civil aviation regulatory system, including the regulation of airports.
14. The exposure draft released in 2019 proposes to carry over some provisions in the Airport Authorities Act that provide for airport authority status while removing some obsolete provisions. The review of the Airports Authorities Act presents an opportunity to assess the overall regulatory framework which applies to airports, and consider whether additional measures could incentivise airports, airlines and government (transport, aviation safety and security, and border agencies) to work together more effectively to achieve policy objectives and meet airports needs.

¹ Including the Customs and Excise Act 2018, the Biosecurity Act 1993, the Immigration Act 2009, and Civil Aviation Rules.

15. Given the impact of COVID-19 on the economy and the critical role that airports will play in the recovery, and the chance to future-proof against new potential threats, I consider addressing these issues to be more important than ever.
16. For this reason I propose an airport licensing regime. One of the objectives of the licensing regime will be to enable government agencies, including aviation regulators and border agencies, and airports to work together more strategically to achieve public policy objectives, while giving airports more certainty about government strategic objectives in their commercial decision making.
17. I am currently developing the Bill to repeal and replace the Civil Aviation Act 1990 and the Airport Authorities Act. An airport licensing regime would build on those provisions transferred from the Airports Authorities Act into the Bill.
18. I propose that officials conduct a three-week targeted consultation on the airport licensing proposal.
19. The exposure draft sought feedback from industry on provisions relating to airports and airport authorities, particularly that many of these provisions may no longer be needed due to changes in other regulatory regimes. As a result of this consultation, I propose that the Bill omit these provisions and only retain such provisions as are demonstrably required.
20. I also propose amendments to two previous government decisions relating to airports: airport pricing and leasing.
21. These issues were a key focus of submissions on the exposure draft of the Bill. As a result of submissions, I propose the following refinements to previous Cabinet decisions:
 - 21..1. Rather than omitting the entire provision which states airports may set prices as they see fit, I suggest retaining that, following consultation, “airports may set prices” while omitting the more contentious words “as they see fit”.
 - 21..2. I propose retaining the provision which allows an airport to cancel a lease without paying compensation to a lessee, subject to decisions on airport licensing.
22. We intend to consult on these changes as part of consultation on the airport licensing regime.

Background

Government has important public policy objectives at airports

23. Airports are critical pieces of transport infrastructure and create entry points into New Zealand. They provide significant economic and social benefits to New Zealand. They are among the largest investments a city and region can make, and have a key role in supporting the government’s transport outcomes regarding economic prosperity, inclusive access, and resilience and security.

24. Our international airports, as the primary gateway to New Zealand, will play a key role in rebuilding confidence in New Zealand as a safe destination for trade and travel post COVID-19.
25. The government has a number of policy objectives that it seeks at airports, including:
- contributing to the COVID-19 economic recovery and rebuild through, when appropriate, the support and promotion of New Zealand as a safe and attractive place to travel to and trade with
 - contributing to government's transport outcomes as described in the proposed new Civil Aviation Act, including:
 - the operation of a safe and secure civil aviation system
 - an accessible, safe, sustainable, resilient, and productive transport system
 - an efficient, effective and innovative civil aviation system
 - the safety and security of travellers, and the wider public
 - protecting New Zealand from pests and diseases at the border
 - preventing the import and export of prohibited goods, and
 - the management of non-citizens seeking to enter New Zealand.
26. Airports can be profitable businesses, but at the same time, the movement of people and goods through airports create significant risks that need to be managed. As demonstrated during the response to COVID-19, airport operators play an important role in helping government manage these risks, and meet its broader policy objectives. Airports, for example, must provide sufficient space, infrastructure and facilities for aviation and border agencies² and other essential services to carry out their roles to enable the safe, secure and efficient movement of people and goods through our airports.

Airport infrastructure needs to adapt to changes in passenger volumes and the international situation to continue to meet these objectives

27. Up to March 2020, airports, aviation, and border agencies had been dealing with greater passenger volumes. Passenger arrivals into New Zealand by air increased by approximately 54 percent from 4.6 million to 7.7 million - between 2010 and 2019.
28. While this increase in passenger volumes provided significant economic benefits, it also put pressure on airports to facilitate a greater number of passengers, and on aviation and border security agencies to meet safety, security and efficiency objectives at airports.

² Aviation Security Service, New Zealand Customs Service, Biosecurity New Zealand (MPI) and Immigration New Zealand (MBIE).

29. With COVID-19 border restrictions from late March 2020, most international airlines have suspended commercial passenger services to New Zealand. International passenger numbers have effectively reduced to zero. Even as alert levels progressively reduce, border restrictions are likely to remain in place in some form, for some time. Any recovery of international passenger aviation is likely to be slow for a number of reasons, including fear of opening borders too early, and low demand due to economic recession.
30. Air freight services continued during the level four and level three lockdown period, albeit at a reduced rate, and are likely to increase over the next few months. However, given the anticipated slow recovery, significant financial impacts will be felt by airports and the aviation sector, both internationally and domestically, for some time.
31. In this recovery period, with the rebuilding and reforming of the aviation sector, and consideration of what it may mean for how borders operate, including the role of health screening, it is more crucial than ever that the government, airlines and airports work closely to ensure the recovery is optimised and focussed on wider public policy objectives.

Current settings may undermine delivery of public policy objectives at airports

There can, at times, be misalignment between commercial incentives of airports and aviation safety and security, and wider border outcomes

32. Airports have always had an interest in achieving the policy objectives mentioned above. All parties, including government, airports and airlines wish to see safe, secure and efficient aviation, passenger facilitation and good passenger experiences at airports. All parties have an interest in preserving the reputation of New Zealand airports as competitive and safe destinations. The sector has worked well together during the COVID-19 response phase, and it is critical that this continues as all parties have important roles to play in the COVID-19 recovery phase.
33. While there is high-level alignment, and collaboration in dealing with specific issues, past experience has shown that the incentives which drive airport decisions are not always sufficiently aligned with wider policy objectives over the medium and long term.
34. Airports have strong commercial incentives to make profit, pay dividends, and maximise shareholder value. Rebuilding revenue streams and returning to profitability will be essential for airports once passengers start returning.
35. Commercial imperatives have led at times airports to prioritise space, infrastructure and investment in profit-making activities (e.g. car parking, retail, hotels and business centres) or aviation infrastructure that derives a profit, over government (transport outcomes, aviation safety and security, and border security) objectives and infrastructure needs.

Free and frank

There has been inconsistent coordination and communication between airports, airlines and government agencies which can hinder collaboration

36. On occasions, problems in working together to achieve outcomes in and around airports have been exacerbated by poor communication and coordination between airports, airlines and government agencies regarding future investment, infrastructure and space needs at airports.
37. Government agencies have not always provided sufficient advance notice of their medium to long-term infrastructure needs to airports, and have not always provided a coordinated approach across agencies in relation to needs. This makes it hard for airports to effectively incorporate aviation security, and border agency needs in their medium to long-term infrastructure planning, and contribute to broader transport outcomes.
38. On some occasions, there is limited engagement and little warning by airports of infrastructure planning, or when new air services come online or services are increased. This makes it difficult for border and aviation security agencies and other service providers, including fuel suppliers to plan effectively for increases in demand for services.

The current regulatory levers are not sufficient to encourage better alignment of incentives and more effective collaboration

39. Airports are currently subject to the Airport Authorities Act 1966, which provides for the establishment and operation of airports by airport authorities. It sets out the powers and responsibilities of airport authorities, local authorities and the Crown in relation to airports, including the requirement to operate commercially. It establishes consultation requirements for airport pricing and certain capital expenditure.
40. Airports receive a number of legal rights under the Airport Authorities Act as part of their operation (for example, the ability to access land, change leases etc.). Through submissions on the Bill, submitters have raised concerns about these powers and the ability they give airports to override a number of rights around things like leases, with little consultation.
41. In part airports have these rights, because alongside them they have legal obligations to manage risks at airports. However, these obligations are not always clear, and are not supported by appropriate graduated compliance mechanisms.
42. Airports are required to provide space and facilities to aviation security and border agencies under a number of different pieces of legislation, including the Customs and Excise Act 2018, the Biosecurity Act 1993, the Immigration Act 2009, and Civil Aviation Rules. However, the regulatory tools for ensuring effective compliance and cooperation by airports are limited and, in many cases, have proved ineffective.

43. In some limited cases, agencies can seek fines when an airport is non-compliant with their duties or obligations under transport or border legislation. However, these tend to be small, for example \$25,000 in Customs legislation and \$30,000 under Civil Aviation Rules. These amounts do not provide sufficient incentive when dealing with an airport with annual revenue in the hundreds of millions of dollars.
44. In the event of non-compliance, agencies can also take drastic measures, such as suspending revoking, or varying an airport's aviation document or other approval to operate as a port of entry. However, this would be a drastic measure at larger international airports, such as Auckland, where such action would effectively shut down air transport operations and have widespread adverse outcomes for New Zealand.
45. Under Civil Aviation Rules, a holder of an aerodrome operator certificate must establish a programme for maintaining the aerodrome facilities in a condition that does not impair the safety, security, regularity, or efficiency of aircraft operations.
46. The requirements focus on more narrow and shorter term issues around risk to aviation safety and security and, also in a shorter term context, the regularity and efficiency of flights. However, they do not encourage longer term thinking and incentivise investment in asset maintenance that delivers on broader transport outcomes like reputation, resilience, productivity and accessibility.
47. Auckland, Wellington and Christchurch airports are subject to an information disclosure regime under the Commerce Act 1986. Among other things, the Commerce Commission reports on whether airports are investing in assets appropriately, efficiently, and at a quality that reflects consumer demands. However, the Commission does not review or approve aeronautical decision making as such.
48. The Airport Authorities Act does not clearly set out airport responsibilities in relation to security and border requirements or asset management that meets transport outcomes. This is left to other legislation, which, as outlined above, has limited powers. This adds to the perception and risk that security and border requirements are seen as add-ons and not as a key requirement and responsibility of operating an airport.
49. The Government is exploring options to ensure there is adequate fuel supply resilience at Auckland International Airport and other nationally significant airports following the Government Inquiry into the Auckland Fuel Supply Disruption.

Proposed approach for addressing the issues

There is an opportunity to address these issues through the Civil Aviation Bill

50. I am currently developing a Civil Aviation Bill (the Bill) to repeal and replace the Civil Aviation Act 1990 and the Airport Authorities Act 1966. This work has demonstrated that the current airport authorisation process in the Airport Authorities Act is no longer fit for purpose.

51. The Bill provides an opportunity to assess the overall regulatory framework and to consider whether additional measures could incentivise airports, airlines and government to work together more effectively to achieve policy objectives and meet airports needs.

Previous decisions

52. The Border Sector Governance Group, comprising Chief Executives of the border agencies³, discussed a range of options to facilitate collaboration between government and airports and proposed that Border Ministers⁴ meet to discuss options and a way forward.
53. On 20 November 2019, Border Ministers met and agreed that I seek Cabinet approval for officials to discuss an airport licensing regime with key stakeholders.
54. Given the impact of COVID-19 on the economy and the critical role that airports will play in the recovery, and to future-proof against new potential threats, I consider addressing this to be more important than ever.

An airport licensing regime

55. I propose an airport licensing regime, building on those provisions transferred from the Airports Authorities Act into the Bill. One of the objectives of the licensing regime will be to enable government agencies, including aviation regulators and border agencies and airports to work together more strategically to achieve public policy objectives, while giving airports more certainty about government strategic objectives in their commercial decision making.
56. Under this proposal, a person operating an airport would need a licence for that airport from the Secretary of Transport (the Secretary). The legislation would set eligibility criteria for holding a licence, including criteria that the applicant is capable of effectively performing its airport licensee obligations.
57. Airport licensee obligations would be graduated depending on the class of airport: operators of small domestic airports would be subject to minimal requirements, while airports critical for the national economy and for achieving aviation security and border outcomes would be subject to greater requirements.

Licensed airports would be required to undertake the following:

58. They must engage with aviation regulators, security and border agencies in their strategic and spatial planning, including increases/changes in air services. Agencies would also be required to outline their medium- to long-term needs and requirements to support the airport's infrastructure planning. This would ensure that both airports and agencies discuss their future needs, and provides agencies with more advanced warning of increases in capacity needed at those airports.

³ The Border Sector Governance Group comprises of Chief Executives of the Ministry of Transport, the Aviation Security Service, Ministry for Primary Industries, Customs, and Immigration New Zealand (Ministry of Business, Innovation and Employment).

⁴ Border Ministers comprise of the Ministers of Transport, Customs, Biosecurity, and Immigration.

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59. They must meet any requirements specified by the Chief Executives and/or directors of aviation regulators and security or border security agencies, for the provision of border and security services for that airport. This is not a new requirement, but rather links to the current requirements in the aviation security and border sector agencies' legislative frameworks which allow government to place these requirements on airports.
60. They must engage with Government on its role in supporting the purposes of the Civil Aviation Act, and ensure that infrastructure planning contributes to transport outcomes, including achieving an accessible, safe, sustainable, resilient, and productive transport system. This ensures airports consider broader transport outcomes and "come to the table" and be held to any commitments they make.
61. They must provide, and implement, action plans, if required, for how the airport is going to meet the safety and border security requirements. Airports required to provide an action plan would be required to engage with the agencies, airlines, and other relevant parties, in developing the plan. Action plans would need to be accepted by the Secretary of Transport, after approval by the relevant agencies.
62. This would put more rigour around the licence obligations, by setting out a process for an action plan to be developed by an airport that transparently lays out how it will meet its obligations, including aviation safety and security, and border security requirements. It is also intended to ensure government agencies outline their future needs and requirements, and align these where possible, to support the airport with effective infrastructure planning.
63. Where possible these action plans should align with the timing of airport master planning. The Secretary sign-off would occur after development with, and approval by, agencies. The Secretary for Transport has been chosen as the government role best positioned to consider both agency needs and the economic sustainability of airports.
64. An airport licencing regime is not intended to limit border or security agencies' powers under other legislative regimes related to airports (including approvals and planning). It is designed to support those systems and the Civil Aviation Act and fill a regulatory gap by acknowledging the role of multiple regulatory systems. It will provide for a coordinated approach between agencies by encouraging long term engagement and planning to ensure all parties' needs are accounted for.
65. Airports would have to report on compliance with airport licensee obligations, and action plans and milestones. Changes to milestones would need to be negotiated. This is intended to provide some flexibility for airports to be able to manage unforeseen consequences, or changes to agencies requirements, but also to prevent unnecessary delays.
66. If the airport materially contravenes an airport licensee obligation (e.g. an action plan or milestone), the regulator can censure the airport, require the licensee to submit a remedial plan, give a direction, or in extreme cases, suspend or cancel the licence. Contraventions would also be enforceable in a court, and give rise to pecuniary penalties and other orders. This would provide a range of incentives to encourage compliance.

67. I believe a licensing regime will provide a greater balance of incentives between government objectives and airports' commercial objectives. This approach recognises that significant commercial benefits are derived from operating airports, and that airports should also play a key role in supporting transport outcomes and managing the risks of these ports operating.
68. This becomes increasingly important during the COVID-19 recovery phase to the new normal and in preparedness for any future significant events. Health screening may become a feature of border controls like security, or biosecurity screening. Airports will need to address these new requirements, as well as re-establishing then ramping up traditional border requirements as passenger numbers begin to increase over time, while also rebuilding their own commercial businesses.

Benefits and costs

69. The benefits for delivery of government outcomes are that it:
- provides greater assurance that airports can enable any new requirements that are critical to ensuring the border can remain open and that confidence can grow in New Zealand's ability to facilitate the safe movement of passengers and goods through our airports
 - enables greater resilience in dealing with any future significant events
 - provides for better transport, aviation safety and security, and border outcomes
 - leverages off the purposes of the proposed new Act and other legislative frameworks and requirements
 - encourages greater transparency
 - requires engagement between parties and others like airlines
 - provides more negotiation power for the agencies, but also enables airports and agencies to agree pragmatic solutions as there is greater surety plans and timeframes will be met
 - ensures border agencies can plan their medium to long-term service delivery needs with confidence because space, infrastructure and facility requirements are agreed, and
 - provides better incentives for compliance.
70. The benefits of licensing for airports are that it:
- provides for coordination and early, cross-agency, engagement and communication around aviation safety and border security requirements, including any new health requirements
 - aligns with an airport's own master planning
 - leaves it to the airport to develop a plan that works for it and the agencies
 - enables airports and agencies to agree pragmatic solutions as there is greater surety that plans and timeframes will be met

- facilitates the take-up of new border technologies and processes that could result in more effective or simplifies passenger processing at airports, and
- gives airports assurance they are meeting the regulatory obligations required of them by legislation.
- should also facilitate better on-going relationships between airports and agencies, which could create efficiencies and further benefits for all parties.

71. [Redacted]

Commercially sensitive information

72. This option would have administrative costs to run for government agencies. This is anticipated to be a small cost (1-2 FTE) and would be funded by airports that are part of the legislative requirements through regulated fees and charges.

73. I note, however, that airports and agencies already put considerable resource into working together.

74. An airport licensing regime has a strong role in our recovery programme for COVID 19, as well as being important for the ongoing interaction between government and airports. It will help ensure that both parties achieve mutually beneficial outcomes for the immediate period and in the long term.

Other options considered

75. I considered other options, including using existing powers under each agency's legislation, or enhancing those powers. Both options are outlined in more detail in the attached consultation paper, alongside the proposed option.

76. Upon initial analysis, while these options may provide more regulatory incentives, neither achieve the objective of ensuring government and airports work together more strategically to achieve public policy objectives. Nor do they give airports the certainty they need about government agency requirements into the future to inform their commercial decision making.

77. [Redacted]

Free and frank

78. [Redacted]

Free and frank

79.

[REDACTED]

Free and frank

I propose targeted consultation on an airport licensing regime

80. While a number of proposed changes to the provisions of the Airport Authorities Act were subject to public consultation through the 2019 exposure draft of the Bill, airport licensing has not been consulted on.

81. I propose that officials conduct a three-week targeted consultation on the airport licensing proposal immediately after Cabinet approval.

82. As the proposal relates directly to airports rather than the wider community, I intend the attached consultation paper be used to initiate conversations with stakeholders, rather than being used for wider public consultation.

83. I propose that engagement be limited to key aviation stakeholders, including:

- Auckland International Airport
- Wellington International Airport
- Christchurch International Airport
- Dunedin International Airport
- Queenstown International Airport
- Invercargill Airport
- NZ Airports Association
- Air New Zealand
- Qantas
- New Zealand Airline Pilots Association
- Board of Airline Representatives New Zealand.

84. A key purpose of targeted consultation is to understand the costs to and impact on airports, to inform the final regulatory impact assessment that will support final policy decisions.

85. I will report back to Cabinet on the outcome of consultation, and whether to proceed with the airport licensing regime. If agreed, an airport licensing regime would be included in the Bill to align with other changes relating to airport authorities. I do not consider that this consultation will hold up the Bill in any significant way. My officials will continue to engage with border agencies on the details of how a licensing regime would work.

86. Policy decisions will be sought when I seek Cabinet agreement to introduce the Bill. The parliamentary process will provide further opportunity for interested parties to comment on the proposal.

International comparisons

87. It is difficult to compare international regimes due to the different ways that airports are owned, operated and regulated. For instance, in the United States most commercial airports are owned by state or federal government meaning airport and government objectives are closely aligned.
88. The closest comparable regimes are likely to be Australia and the United Kingdom (UK), both of which regulate airports in a more comprehensive way than New Zealand.
89. At the UK's largest airports, the UK Civil Aviation Authority is charged with ensuring that the airport is meeting its safety and security requirements, as well as ensuring it meets the needs of airport users including in relation to cost and quality of service. The airports hold a license, which, similar to the regime I am proposing, allows for graduated compliance mechanisms, and the ability to address concerns outside of the areas of safety, security and border requirements.
90. Australia's main airports are required to submit master plans which set out the long term development plans at airports. Much like the action plans I am proposing, these master plans are developed and agreed in consultation with government departments, and provide a framework to support coordinated development at airports to meet public policy objectives.

Airport authorisation – decision-making and reframing

91. The Airport Authorities Act, which is largely unchanged since the 1920s, provides for two routes to becoming an airport authority:
- 91..1. any local authority, with the prior consent of, and subject to any conditions prescribed by the Governor-General by Order in Council, may establish, improve, maintain, operate, or manage airports
- 91..2. the powers conferred on a local authority may, with the prior consent of, and in accordance with conditions prescribed by the Governor-General by Order in Council, be exercised by any other person or association of persons referred to in the Order in Council. If the person authorised under the Order in Council is a Company, then this person becomes an "airport company" under the Act.
92. Airport authority status is not a pre-condition to operating an airport, but airport authority status has value to airport operators. At a high level, airport authorities are more easily able to access compulsory land acquisition powers, have some special powers to deal with airport land and their tenants, can receive land from the Crown or local authorities without giving rise to offer-backs, and can make bylaws in relation to traffic on their land and over the airport. They also have obligations, including consulting with their customers over airport charges, and must be operated or managed as a commercial undertaking.

93. The 2019 exposure draft of the Bill sought comment on the authorisation process and the need to retain the current powers and provisions for airports. The feedback has been useful to identify those provisions that need to be retained – and those provisions that should be left out of the Bill. In particular, provisions authorising local authorities and the Crown to hold interests in, or manage or operate, airports (whether individually or as part of joint ventures) are obsolete, and introduce unnecessary complexity when read alongside the Local Government Act 2002 and the Public Finance Act 1989.
94. I propose that the Bill omit these provisions and only retain such provisions as are demonstrably required. The submissions on the 2019 exposure draft of the Bill provide a good basis for determining between the important and the superfluous, but I have asked my officials to carry out targeted consultation on these provisions alongside the finalisation of the Bill.
95. It is also clear that the current authorisation process is antiquated and inconsistent with modern approaches to statutory decision-making, in terms of the nature of the decision, the lack of statutory criteria or process, and the decision-maker:
- a) *Nature of the decision* - the Legislation Act 2019 takes a new approach to the boundary between legislative and administrative powers, based on the underlying nature of the decision. In line with that approach, this power is, and should be reframed as, an *administrative* power.
 - b) *Criteria and process* – statutory criteria and process for authorisation should be included in the Bill. I propose that the decision-maker have regard to the purpose of the new Act, and that the decision-maker is satisfied that there is no reason to believe that the airport authority will not comply with the Act, and provide for consultation with persons likely to be interested in the decision.
 - c) *Decision-maker* – the decision-maker could be either the Minister or the Secretary of Transport.⁵ The guidance from LDAC is that administrative decisions that relate to matters of significant public policy are best made by a Minister, whereas more technical decisions applying set criteria are more suited to officials. On balance, the consequences of becoming an airport authority are limited and do not give rise to significant matters of public policy, so the appropriate decision-maker is the Secretary.⁶
96. As a result of this reframing, the Bill will omit many of the existing superfluous decisions, and instead provide for a process for any person (including companies, local authorities, the Crown, and associations) to apply to be authorised. Once authorised, powers and duties will apply in relation to those airports.

⁵ The Director will have the separate role of issuing an aviation document for the airport, focussed on safety and security. It is very unusual for administrative decisions to be made by Order in Council

⁶ This accords with the approach for granting international air services licences under the Bill, where the Minister makes only those decisions on restricted scheduled air services or where the New Zealand does not have an air services agreement.

97. These decisions are consistent with, but independent of, the airport licensing. The changes should be made even if the licensing approach is not implemented following targeted consultation. If the licensing approach is confirmed, the Bill will simply include additional criteria for approval, some changes in language, and the addition of intervention powers associated with the licence.
98. The Bill will include transitional provisions enabling current airport authorities a smooth path to reauthorisation under the new regime. Decisions on this and other transitional issues are covered in more detail in the companion paper Civil Aviation Bill – Drone Intervention and Minor Policy Matters.

Other matters relating to airport regulation

99. The exposure draft of the Bill also reflected Cabinet decisions on two key policy matters relating to airport regulation: airport pricing, leasing, and the requirement to act commercially.
100. These matters were a key focus of submissions on the exposure draft and subsequent representations made to me and, in the case of pricing, there has been some media interest.
101. As a result of those submissions I propose that Cabinet refine its previous decisions.

Airport pricing

102. Section 4A of the Airport Authorities Act currently provides that (following consultation) Airports can “set prices as they see fit”.
103. In 2016 Cabinet agreed to remove 4A, a decision which carried forward when this government agreed to release an exposure draft of the Bill in 2019 [CAB-19-MIN-0167 refers]. The decision to remove section 4A, was on the basis that the Companies Act 1993 provides adequate basis for airports to operate their business as normal commercial undertakings, and that 4A may be hindering consultations between airports and airlines regarding landing charges.
104. Reflecting Cabinet decisions, the exposure draft of the Bill did not carry over 4A. This change attracted the most attention from airports and airlines, who have strong and opposing views.
105. Airports argue that section 4A is necessary to ensure airlines pay charges legitimately set by airports and that it helps promote constructive and consistent engagement with airlines on pricing and investment. Airports argued that removal would result in long, drawn out Court battles and would delay the build of critical infrastructure.
106. In contrast, airlines have submitted that section 4A enables airports to exercise market power, and price monopolistically, and that removal would provide needed re-balancing to ensure fairer discussion between airlines and airports.
107. Officials have reviewed industry submissions made on 4A, and consulted with the Ministry of Business, Innovation and Employment and the Commerce Commission.

108. I believe it is more appropriate that any further thought to the balance between airlines and airports on price setting should be considered through competition law settings. I am recommending, however, that the words “as they see fit” be removed from the statement in the Civil Aviation Act that airports may set prices, and include the words “following consultation”.
109. Such a provision would emphasise the importance of consultation, and with the airport licensing regime changes around border sector and aviation security outlined above, may encourage more collaborative engagement.

Leasing

110. The exposure draft of the Bill did not carry over the provisions of section 6 of the Airport Authorities Act 1966 that enable airports to cancel leases on their property without compensation to the leaseholder. This was done on the basis that airports could manage their portfolio in the same manner as other landlords with multiple tenants, and that termination provisions could be included in lease arrangements.
111. Airlines support the removal of the provisions relating to airport leasing. In its submission on the exposure draft of the Bill, the Board of Airline Representatives New Zealand (BARNZ) note that airports are entirely able to enter into lease contracts, with termination clauses and limitations on the use of the land as required. BARNZ suggests that airports, as monopolies, are able to (and do) use their monopoly powers to extract favourable terms in their leases, and they have no need of even more protection from statute. The Auckland Fuel Disruption Inquiry noted that Auckland Airport’s ability to terminate leases may have contributed to under-investment in fuel infrastructure on airport land.
112. Airports have submitted that airport powers regarding leasing should be retained. The New Zealand Airport Association states that the powers regarding leasing reflect the unique position of airports as land owners. It notes that airports are often required to react to regulatory change, and need the flexibility to adjust airport layout and infrastructure in order to do so. This may require the termination of leases in order to repurpose the affected area for airport purposes.
113. I consider that, in the context of a licensing regime that requires airports, in consultation with border and aviation agencies, to manage their medium term infrastructure plans in a way that is cognisant of the needs of the border agencies, some provision for airports to revoke leases when needed is justifiable, so as long as it is tied to changes in border or aviation safety and security regulatory requirements. I therefore propose that Cabinet agree in principle that the power is retained, subject to decisions on airport licensing.

Consultation

114. The following agencies were consulted on earlier versions of this paper: the Civil Aviation Authority, the Commerce Commission, the New Zealand Customs Service, the Department of Internal Affairs (Local Government), the Ministry of Business, Innovation and Employment (Radio Spectrum Management, Competition and Consumer, Energy Markets, Immigration, and Tourism), the Ministry of Defence, the Ministry of Justice, the Ministry for Primary Industries, New Zealand Police, the State Services Commission, the Transport Accident Investigation Commission, the Treasury, and the Office of the Privacy Commissioner. The Department of the Prime Minister and Cabinet has been informed.

Financial Implications

115. There are no financial implications from the proposal to consult.

Legislative Implications

116. The proposals, if agreed, will be implemented through the Civil Aviation Bill [REDACTED]

Confidential

Impact Analysis

117. The consultation paper functions as an interim Regulatory Impact Assessment. The Ministry of Transport's Quality Assurance panel has reviewed the consultation paper and confirms that it is likely to lead to effective consultation and support the delivery of Regulatory Impact Analysis to inform subsequent decisions. The panel notes that consultation is expected to elicit the more detailed information on potential implications for stakeholders that will be necessary in order to complete a final Regulatory Impact Analysis.

Human Rights, Gender and Disability perspective implications

118. There are no human rights, gender and disability perspective implications associated with this paper.

Publicity

119. No publicity is planned on the targeted consultation with stakeholders.

Proactive Release

120. I intend to proactively publish this Cabinet paper on the Ministry of Transport's website, consistent with the Official Information Act 1982, at the same time as the Cabinet paper seeking final decisions on the airport licensing policy is published.

Recommendations

121. The Minister of Transport recommends that the Committee:

Airport Licensing

1. **note** that there is a lack of alignment between commercial incentives at airports and transport outcomes, aviation safety and security, and wider border outcomes
2. **note** that on 20 November 2019, Border Ministers agreed to seek Cabinet agreement to consult key industry stakeholders on an airport licensing regime
3. **note** that the airport licensing regime aims to facilitate cooperation in achieving both public policy outcomes, and airports' commercial objectives
4. **note** that an airport licensing regime will be important given the key role that airports will play in the post COVID recovery
5. **direct** the Ministry of Transport to carry out targeted consultation on an airport licensing regime for a three-week period immediately following Cabinet approval
6. **note** that the attached consultation paper will be used to support discussions with key stakeholders and will not be publicly released
7. **agree** that the Minister of Transport may make minor or technical changes to the consultation paper as necessary prior to consultation
8. **agree** that the Minister of Transport may refine the licensing framework described in this paper as a result of the consultation process and further engagement with border agencies, prior to final Cabinet approvals
9. **note** that, if agreed, an airport licensing regime will be implemented through the Civil Aviation Bill – [REDACTED]
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10. **invite** the Minister of Transport to report back to Cabinet on the results of consultation and seek any final policy approvals at the time approval for introduction of the Civil Aviation Bill is sought
11. **invite** the Minister of Transport to issue drafting instructions to the Parliamentary Counsel Office to give effect to an airport licensing regime in anticipation of final policy decisions, in order to facilitate the introduction of the Civil Aviation Bill should airport licensing proceed

Airport authorisation, decision-making and reframing

12. **agree** to delete provisions currently contained in the Airport Authorities Act 1966 that are no longer necessary in light of changes to local government and crown entity legislation

- 13. agree** that the Bill update the provisions, including removing any provisions no longer required, relating to:
- 13.1. shifting the administrative decision regarding the authorisation of airport authorities from the Minister of Transport, to the Secretary for Transport
 - 13.2. introducing a statutory criteria and authorisation for airports including:
 - 13.2.1. the decision-maker having regard to the new Act,
 - 13.2.2. being satisfied that there is no reason to believe the airport authority will not comply with the new Act, and
 - 13.2.3. provide for consultation with interested persons

Other matters relating to airport regulation

- 14. note** that, following consultation on the exposure draft of the Civil Aviation Bill, changes to two airport regulation policies require approval for inclusion in the Civil Aviation Bill

Airport pricing

- 15. agree** to provide that, following consultation, airports may set prices, but do not carry over existing Airport Authorities Act 1966 language that they may do so 'as they see fit'

Leasing

- 16. agree** in principle, subject to decisions on airport licensing, to consider retaining the ability for airports to terminate leases, in the context of an airport licensing arrangement
- 17. agree** that during targeted consultation on an airport licensing regime official discuss the decisions on recommendations 12, 13, 15 and 16 with stakeholders
- 18. invite** the Minister of Transport to issue drafting instructions to the Parliamentary Counsel Office to give effect to recommendations 12, 13, 15 and 16
- 19. authorise** the Minister of Transport to make final decisions, consistent with the overall policy intent, on details that arise during the drafting of the policies referred to in recommendations 12, 13, 15 and 16, without further reference to Cabinet.

Authorised for lodgement

Hon Phil Twyford
Minister of Transport