01/12/2021

Transport and Infrastructure Select Committee
Parliament Buildings
Wellington

By Email: ti@parliament.govt.nz

SUBMISSION ON CIVIL AVIATION BILL

Introduction

1. Rotorua Regional Airport Limited (**RRA**) welcomes the opportunity to comment on the Civil Aviation Bill (**the Bill**).

2. RRA is a member of the New Zealand Airports Association (**NZ Airports**) and generally endorses NZ Airports' submission on the Bill. However, RRA is a regional airport, which we consider is unlikely to be a tier 1 airport. Accordingly, this submission comments on specific topics of interest to RRA and more generally the impact on smaller, less well-resourced airports.

3. RRA supports the goal of providing a fit-for-purpose regulatory framework facilitating a safe, efficient and thriving aviation industry. However, RRA has serious concerns about the level of regulation, compliance and control exerted by the Bill, which appears disproportionate and will result in limited beneficial outcomes for participants. Accordingly we consider that several aspects of the Bill must be amended and/or clarified to ensure it is fit-for-purpose and achieves the policy objectives.

4. Our key concerns include:

    a. the proposed watering down of airports' current ability to set prices, particularly provincial airports;

    b. the lack of detail, information and criteria regarding registration, and in particular the requirement that airports be registered as airport operators in order to obtain some of the benefits and protections currently provided in the Airport Authorities Act 1996 (**AAA**), but only where a "relevant government agency" requires space; and

    c. the lack of detail and criteria in which security tiers will be set and apply to regional airports.

Safety and security – clauses 4, 5 and 23

5. As an organisation with Just Culture at its heart, and a stringent focus on the safety of our customers and people, RRA welcomes the clear purpose of the Bill and that it has been given prominence over the additional purposes in clause 5, as well as the subsequent references and focus on safety and security in clause 23.

6. Notwithstanding these clear statements, we note that there continues to be ambiguity in relation to the application and responsibility of health and safety regulations to various PCBUs in the aviation sector, and consider that the Bill has missed the opportunity to clarify these matters. By way of example, RRA has recently concluded an aeronautical study assessing the benefits and need for air traffic control services/aerodrome control services at the airport. Through this process RRA identified significant regulatory uncertainty regarding its obligations and duties in respect of the surrounding airspace and the use of its airside facilities and its ability to manage and control those (i.e. through flight procedures, the necessity for air traffic control services and the interrelationship of those duties with airlines and Airways).

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7. Given the Bill's primary focus of safety, we consider further work is required by the Bill, CAA and WorkSafe to demarcate parties' health and safety responsibilities in the aviation system. Failure to do so will mean that lip service is paid to the Bill's purpose.

Repeal of section 4A of the Airport Authorities Act 1996

8. We are deeply concerned by the proposal to amend section 4A of the AAA by removing "as they from time to time see fit" from clause 231. The intent and purpose of the amendment is unclear, as are the proposed benefits.

9. Section 4A recognises the challenges and difficulties airports may have in negotiating and agreeing charges with airlines. Following consultation, airports are able to set charges as they see fit. This process is understood by all parties and works well in practice.

10. The original proposal to remove s 4A is said to be justified on the basis that "the Companies Act 1993 provides adequate basis for airports to operate their business and normal commercial undertakings, and that 4A may be hindering consultations between airports and airlines regarding landing charges".[1] Airlines have supported the proposal to remove s 4A on the basis that it provides airports excessive market power and monopolistic pricing.

11. The reality is quite different for provincial airports – other than s 4A, we have no real power and would otherwise be at the whim of airlines. The weakness of provincial airports' negotiating position and that there has been no exploitation of the current discretion, is recognised by the fact that airline opposition is focussed on the larger commercial airports.

12. In addition, the Ministry has recognised that s 4A "has not proven effective in countering the difficulties faced by small airports which often have to negotiate with one major airline customer".[2]

13. Provincial airports are essential infrastructure linking the provinces to our major cities and international destinations. All operate under financial constraints and most provide a minimal return on capital at best. Importantly, there is a severe imbalance of access to financial resources when compared to the airlines. Airports operate as a public service. In recognition of this, many are Crown joint ventures or council controlled organisations. The justification that provincial airports must operate as commercial undertakings pursuant to the Companies Act, thereby warranting the removal, or watering down of s 4A, does not reflect the legislative nor operational reality of provincial airports.

14. The second justification – that s 4A may be hindering consultation with airlines – is simply incorrect. In our case we are currently consulting with Air New Zealand to set new charges. This is a 12 stage process, agreed with Air New Zealand, which allows each party four separate opportunities to provide feedback and consider each other's views, culminating in our pricing determination being issued and the new charges being implemented. Consultation is mandatory and thorough. Restricting airports' ability to set prices as we see fit is likely to have the converse effect and result in our only major customer having limited interest in engaging in meaningful consultation with us.

15. Airports also require extensive capital investment and long term planning; indeed the Bill seeks to make this planning process more efficient and aligned with current and future users. Landing charges are one of the primary sources of income for provincial airports that lack a more widely developed precinct and tenant portfolio.

[1] CAB-20-MIN-0248; Achieving Better Public Policy Outcomes at Airports: Targeted Consolation at [103].
[2] Ministry of Transport, Civil Aviation Bill – exposure draft commentary document.

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16. The Bill is intended to encourage better long-term planning and future development of airports. However, in conflict with that intention, the proposal to remove airports' ability to set landing charges as they see fit may significantly weaken provincial airports' ability to set prices and fairly consult and negotiate with a monopoly provider of regional air transport services. This will in turn create greater uncertainty for capital investment and reduce meaningful consultation.

17. Section 4A recognises these issues and seeks to protect the relatively vulnerable airports. Inclusion of the provision in the AAA was sound and retaining it in full continues to remain necessary for provincial and smaller airports. Conversely, diminishing airports' discretion to set charges will have no demonstrable benefit.

18. Retention of the ability to set prices following consultation, but removing "as they from time to time see fit", also creates uncertainty and the ability for legal challenge. If airports have a discretion to set charges following fair and appropriate consultation, that should be made clear by retention of s 4A in full. Removal of the words creates a degree of ambiguity and will no doubt provide fertile ground for lawyers to subsequently argue the impact of Parliament's decision to remove "as they from time to time see fit" and how that changes the current position.

19. We strongly urge the Committee to retain s4A wording in clause 231 of the Bill, or otherwise recognise that the market dynamics and statutory basis in which provincial airports operate is significantly different to the larger international airports, and retain the full discretion to set charges as seen fit for provincial airports and/or CCO operated airports.

Provision of aviation and security services – clauses 35 and 138

20. RRA supports the mechanisms provided by clauses 35 and 138 to remove the statutory monopoly regarding certain aviation and security services and expects that the Minister will be responsive to industry feedback and recommendations arising from further consultation on these matters. Over the medium term, RRA supports mechanisms such as this to engender greater competition and efficient delivery of critical aviation services to aerodromes and airlines.

21. Following the pandemic, Airways announced a proposal to withdraw aerodrome control services from seven regional airports. In relation to Rotorua Airport at least, this proposal has been withdrawn.

22. Airways' proposal and the subsequent process highlighted two key issues to us:

    a. That air traffic management services are critical to the safe and efficient operation of our airport; and

    b. In order for there to be any competition in the provision of air traffic management services, it is necessary for there to be a sufficient market warranting a new provider entering the market and for structural and regulatory barriers to be removed in order to enable a level playing field and fair competition with Airways.

23. These issues have been identified by other airports, including through Airways' recently concluded service framework consultation. The overwhelming tenor of feedback was that structural changes are necessary for the safe and efficient delivery of air traffic management services and airports do not consider there to be a genuine distinction between "contestable"/aerodrome traffic management services, and non-contestable statutory monopoly services (area control, flight control, and flight information services).

24. Given the additional purposes of the Bill (cl 4) and industry feedback, we cannot anticipate any genuine situation in which the Ministry would be justified in restricting competition by conferring upon Airways a monopoly on the provision of non-aerodrome services.

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25. We note that clauses 35 and 138 require the Minister to consult affected service providers, but that there is no corresponding obligation to consult with affected airports or airport operators before conferring a statutory monopoly.

26. We seek the complete removal of any ability for AvSec or Airways to be granted a statutory monopoly and failing this, that an obligation to consult affected airports prior to the granting of a monopoly be included in the clauses.

Security provisions and tier 2 rules

27. The Bill proposes to enable the Minister to designate the security classification of aerodromes. It is deeply concerning that the Minister and Secretary will obtain greater statutory powers to dictate and control the operations of airports, without any genuine and necessary limitation on the exercise of those powers.

28. This scepticism is only heightened by the non-existent criteria or considerations for the making of designation decisions, and the absence of any proposed Rules applying to each tier being consulted upon.

29. RRA is not opposed to additional powers being granted to the Minister, Secretary or Director, nor are we opposed to new Rules or processes per se. However, in all cases any proposed statutory powers must have a demonstrable need, be proportionate and have appropriate checks, balances and accountability/appeal provisions. Most importantly they must result in better outcomes for aviation participants.

30. The granting of these powers, and the further compliance and regulations no doubt imposed on aerodromes and others as a result, must enhance safety and security in a practicable way, without creating an unnecessary financial or regulatory burden on aerodromes. In short, any changes need to be fit-for-purpose, result in meaningful improvements and be exercised with regard to appropriate criteria, alongside accountability mechanisms.

31. It is unclear to us who will pay for the additional security costs. We anticipate that ultimately these will be passed on to passengers and customers via landing charges set by airports and airlines. Imposition of additional costs on provincial airports, which cannot be recovered from customers, will otherwise be borne by rate payers.

32. We anticipate Rotorua Airport is likely to be a tier 2 aerodrome, however there is a lack of information on how this will be assessed or designated by the Minister, what security services will be required, or how and who will provide these services. We request that further criteria be adopted and included to provide greater certainty for affected airports, together with necessary transitional periods being allowed.

Registration regime

33. The Bill proposes a licencing and registration regime under Part 7, including the requirements to implement (and consult on implementation) of capital development and spatial plans. The objectives of the registration regime include providing certainty to airports about government strategic objectives and enabling a mechanism for government agencies to be provided space within airports. According to the Ministry, this will "move airports from a system of authorisation through an Order in Council to a system of administrative approval by the Secretary of Transport, and give the Ministry greater oversight of ongoing compliance".[3]

34. The above statement by the Ministry belies the manner in which an airport obtains authorisation to operate. The reality is that airports are approved to operate by the Director, through the issuing of a Part 139 aerodrome operator certificate, approval of an exposition (and associated safety and emergency documentation), and the imposition of any conditions of operation. The current process works well and ensures accountability to the Ministry, via the Director and CAA.

[3] LEG-21-MIN-0115; Minute of Cabinet Decision, at [51].

35. The registration regime proposed by the Bill appears far more onerous and entirely unnecessary if the goal is to simply ensure government agencies are provided adequate space at airports and to ensure consultation and enforcement of the same. The reality is that the Director can ensure this by imposing conditions on the operator certificate, by requiring the provision of security or biosecurity services.

36. Under the Bill, the trigger for registration is whether a relevant government agency has space requirements (cl 221(1)). For regional airports, in which no security services are currently required, it is possible that no relevant agency will require space, thereby meaning that there is no requirement to register as an airport operator.

37. The ability to avoid the requirement for registration is in many ways perceived to be positive by RRA. Many of the powers and protections previously granted under the AAA, and now conferred under the Bill (such as setting charges, public works and bylaws provisions) are based on an aerodrome being registered as an airport operator. This means it is likely that RRA will need to register as an airport operator to obtain those benefits, when it would otherwise be unnecessary. This will impose an unnecessary regulatory burden and provide the Secretary with a degree of control which is entirely gratuitous and unwarranted in comparison to the supposed problem to be solved, or objective of the registration regime – being to ensure government agencies have space (primarily AvSec) at regional airports.

38. We see no reason for the powers and protections, formerly conferred by the AAA and the definition of "airport authority" to be linked to registration and therefore request that the definition of "airport operator" be amended to include both unregistered and registered airport operators, with corresponding changes to bring an unregistered airport operator within the regime of the Bill, but excluding it from the spatial planning and enforceable regulatory undertaking provisions.

39. The current certification process, of approval via the Director, is sufficient. We see no reason for the registration regime at all, and certainly no justification for the Secretary to be able to cancel, suspend or refuse registration on any grounds other than safety and security concerns (a regulatory oversight already performed by the CAA and reflecting the purpose of the Bill).

PWA implications

40. We support the proposed consultation thresholds and appreciate the intent to force strategic cooperation and better public policy objectives, while providing certainty to airports. However, we are sceptical that it will result in the desired outcomes and are concerned that, more than anything, it will result in additional compliance and costs on airports and other parties.

41. We adopt and support NZ Airports' submission regarding the requirement to distinguish and carve out the application of the public works provisions on land acquired on the open market, and removing LINZ's ability to determine whether land is surplus. We consider these changes are necessary to ensure consistency with the Public Works Act 1981.

42. Again, we note that the obligation to consult, the ability to vary leases, and the provisions regarding the offer-back regime are predicated on an airport being a registered airport operator. We do not consider that unregistered airports should be excluded from the obligations and powers granted under the Bill.

Accountability of Secretary

43. At present, save for judicial review, aviation participants have limited ability to hold the Secretary, Director and Minister to account for their decisions. Commencing legal proceedings against a government agency, department or Minister is a significant and important decision, particularly for a rate payer owned regional airport.

44. The Bill proposes granting significant powers to the state to require enforceable undertakings, issue improvement notices, suspend licences, search homes and marae, indemnities to inspectors for breaches, and generally exercise powers restricting an airport's ability to operate.

45. Clauses 78, 79 and 444 grant rights of appeal to the District Court in respect of the issuing of aviation documents and "specified decisions" of the Director. We consider that decisions of the Secretary, for example to suspend or cancel registration (clause 225) or decisions on enforceable regulatory undertakings (clause 244), should have a right of appeal to the District Court as well, if these provisions are maintained.

46. Likewise, in relation to registration, while we would expect this process to be straightforward, with an appropriate transitional period, there is no information about how registration will be assessed by the Secretary and no ability to ensure proper application of the Secretary's powers and discretions (notwithstanding our objection to the entire registration regime). We consider that appeal rights to the District Court should be conferred in respect of all powers and decisions exercised by the Director and Secretary.

Conclusion

47. Overall we are concerned that, despite extensive planning and consultation, the Bill introduces additional compliance and regulatory mechanisms which have little prospect of achieving the specified policy objectives and that will impose increased costs and operational uncertainty on airports. If these concerns are borne out, it will ultimately be at the expense of passengers, economic prosperity and, more often than not, regional New Zealand.

48. We also wish to appear before the Committee to speak to these issues.

Yours Sincerely,

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Chairman

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