

## **Promoting competition in New Zealand – a targeted review of the Commerce Act 1986**

### **Submission from the NZ Airports Association**

#### **Introduction**

1 Thank you for the opportunity to provide feedback on this consultation. NZ Airports represents airports across New Zealand. NZ Airports' members operate 47 airports across the country, including the international gateways to New Zealand and the domestic airports which make up the national air transportation network.

2 Our member airports include Alexandra Airport, Ardmore Airport, Ashburton Airport, Auckland Airport, Chatham Islands Airport, Christchurch Airport, Dunedin Airport, Gisborne Airport, Hamilton Airport, Hawke's Bay Airport, Hokitika Airport, Invercargill Airport, Kapiti Coast Airport, Kaikohe Airport, Katikati Airport, Kerikeri Airport, Marlborough Airport, Masterton Airport, Matamata Airport, Motueka Airport, Nelson Airport, New Plymouth Airport, Oamaru Airport, Pauanui Airfield, Palmerston North Airport, Queenstown Airport, Rangiora Airport, Rotorua Airport, Takaka Airport, Taupo Airport, Tauranga Airport, Te Kowhai Aerodrome, Thames Aerodrome, Timaru Airport, Wairoa Airport, Wanaka Airport, Whanganui Airport, Wellington Airport, West Auckland Airport, Westport Airport, Whakatane Airport, and Whangarei Airport.

3 New Zealand's airports are essential infrastructure of national and regional significance that play a crucial role in the socio-economic wellbeing of our communities. As long-lived infrastructure, airports are focused on the long-term interests of consumers and providing the services and infrastructure required to grow local and national economies. Regulatory certainty, supported by well-designed policy and regulations, supports sound airport investment and operational performance.

4 We endorse the intent of this targeted review. We agree that "[c]ompetition law and policy needs to keep pace with market developments to address and deter conduct that harms competition and decreases productivity". The review proposes additional flexibility and powers for the Commerce Commission to support this.

5 In this submission we focus on mergers, anti-competitive conduct, and code or rule-making powers. We also provide feedback on the context for the review and the market developments we believe the review needs to consider.

6 We note that New Zealand's three largest airports (Auckland, Wellington and Christchurch) are regulated by Part 4 of the Commerce Act 1986, which is not within the scope of this review. However, we wish to make it clear, and formally submit as part of our feedback, that Part 4 as applied to airports is operating very well. The information disclosure regime has been developed over time to ensure airports have an incentive to invest in long-term aeronautical assets that serve the interests of consumers. The ability to invest is critical; global passenger demand is projected to require US\$2.4 trillion in airport infrastructure investment in the period to 2040 - more than half of that in the Asia Pacific region.<sup>1</sup> The New Zealand regime ensures our airports invest efficiently so that the sector remains globally competitive,

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<sup>1</sup> *Global Outlook of Airport Capital Expenditure*, ACI and Oxford Economics, June 2021.

resilient and adds new capacity to keep up with growing demand and encourage competition. New Zealanders consider their airports the best performing infrastructure in the country.<sup>2</sup>

7 NZ Airports therefore supports the Government's recent public emphasis on encouraging competition in markets where competition is not strong. While New Zealand has a well-established and effective regime under Part 4 for regulating markets where there is no or limited competition, as a small and geographically isolated country, many other important markets have a small number of competitors dominated by one or two unregulated players. NZ Airports believes that the greatest potential for productivity gains in New Zealand is to ensure appropriate regulatory tools are available to promote fair competition and benefits for consumers in such markets.

### **The context for the review**

8 The review is presented in the context of increasing market concentration, including “markets dominated by a few large businesses” which have been found to be not working well for consumers and “required costly sector-specific interventions”. The review also uses the Australian Competition Review, launched in August 2023, as a key reference point and identifies a key objective is to get better alignment with Australian competition policy.

9 When we consider this review’s concerns about markets dominated by a few large businesses, and the consumer outcomes that result, aviation is a glaring example in New Zealand. New Zealand’s domestic airline market is the most concentrated in the world, with Air New Zealand holding 84% of market share,<sup>3</sup> a far more concentrated market than other sectors that have come under significant focus in New Zealand such as grocery and banking. New Zealand’s three largest airports are appropriately regulated by Part 4 of the Commerce Act and all other airports are subject to pricing consultation and disclosure obligations, yet the airline sector is not subject to any form of scrutiny. The domestic airline market remains a blind spot in New Zealand’s competition policy and regulation.

10 This stands in stark contrast with Australia. There, the Qantas Group holds closer to 60% of market share, yet Australian agencies consider their situation serious enough to make it their primary focus for competition studies. The initial focus in establishing the Australian Competition Taskforce was to address airfares and airline competition. The Taskforce, Australian Treasury, Productivity Commission, Department of Infrastructure and the Australian Parliament have all done extensive work on the importance of airline competition for consumer and economic outcomes.<sup>4</sup>

11 In its efforts to explore alignment with the Australian system, we encourage this review to consider why the Commerce Act has never been utilised to consider New Zealand’s least competitive sector - domestic aviation - and what steps the review might need to take to remedy that problem.

12 This question is also asked by many New Zealanders. In 2024 Consumer New Zealand looked at a range of issues to do with the market concentration of airlines in New Zealand. In its letter to the Minister of Commerce, the organisation raised the reluctance of industry stakeholders to speak out about the impact Air New Zealand’s market dominance can have on them and specifically said “*over the course of*

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<sup>2</sup> Ipsos Global Infrastructure Index.

<sup>3</sup> Reference: Sabre. New Zealand is the least competitive country in the world for domestic aviation of those with between 5m and 100m domestic seats operating annually. Second is Bolivia where one airline holds 84%, followed by Turkey where one airline holds 69% of the market, followed by Argentina and Nepal with one airline in each country holding a 67% market share.

<sup>4</sup> See: <https://treasury.gov.au/publication/p2024-553588>, <https://treasury.gov.au/review/competition-review-2023/aviation>; <https://www.pc.gov.au/research/completed/aviation-modelling>; <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/articles/opinion-piece-why-many-pay-too-much-flights-and-how-make-them>; [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Economics/Economicdynamism/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/Economicdynamism/Report)

*our investigations and research into this market, we have heard several allegations from key industry players relating to Air New Zealand misusing its market power. These allegations are deeply concerning, but as the parties making these allegations rely on Air New Zealand for significant parts of their ongoing business, we have been unable to publish them.”* This should prompt real reflection in the context of this review, as should feedback from regional airlines on their experiences trying to compete with the national carrier. We would encourage officials as part of their ongoing work to ensure the voice of smaller airports, regional airlines and the communities they serve are sought, heard and acted on.

## **Mergers**

13 The review’s concerns regarding merger proposals resonate with airports. We are primarily involved in merger consultations in the form of proposals to authorise and reauthorise airline codeshare and alliance agreements under the Civil Aviation Act 1990. The competition considerations for airline alliances are difficult to distinguish from any other sector subject to the Commerce Commission’s jurisdiction. These agreements share the same qualities as traditional mergers in the ways they influence the airline market, offerings to consumers, and the consolidation of market power. However, the Ministry of Transport is responsible for considering airline codeshares and alliances and advising the Minister on whether to approve them.

14 Airports often submit in support of these proposals when we see evidence that they will serve the interests of consumers by providing more airline seat capacity than might otherwise exist. New Zealand operates within a highly competitive, global aviation market, and these arrangements can demonstrate positive outcomes for our connectivity and for consumers. However, some alliance proposals create significant competition risks for the already constrained and concentrated New Zealand aviation market.

15 Airline codeshares and alliances have the same considerations and challenges that the review identifies in merger proposals, including:

- the challenges in conducting and relying on a forward-looking analysis of competition impacts, compared with the counterfactual (highlighted by post-merger reviews of that analysis)
- market participants overestimating the ability and likelihood of third parties to exercise countervailing buyer power, as well as the likelihood and extent of potential entry and expansion by other airlines. This often takes the form of airlines citing New Zealand’s open skies policy and the existence of fifth freedom carriers that could conceivably operate on New Zealand routes, while there is no evidence to show any beneficial competitive impact
- the very real challenge of creeping or serial acquisitions that form part of airlines’ consolidation strategies.

16 To date there has been no process from the Ministry of Transport to evaluate the compounding effect of airline codeshares and alliances on New Zealand consumers. Each proposed alliance or codeshare is evaluated solely on its own merits, not as part of a wider competitive landscape. This is of particular importance because the domestic market is directly impacted by international alliance arrangements. In 2024, around 55% of international seat capacity at Auckland Airport was controlled by Air New Zealand or one of its joint venture partners. Air New Zealand has a relationship with all major Australian airlines and every current airline that has shown a historic willingness to enter the New Zealand domestic aviation market. Combined with Air New Zealand’s 86% domestic market share, this creates a

dominant market position.<sup>5</sup> In light of the condition of the aviation market described above, this is a serious issue.

17 We highlight this for two reasons: to reinforce the basis of the review's considerations on mergers, from the experience of a specific sector; and to encourage the reviewers to consider the benefits of rationalising airline codeshare and alliance assessments into the Commerce Commission. We acknowledge that the regime for authorising airline alliances was considered as part of the review of the civil aviation regime and that the Civil Aviation Act 2023 (soon to enter into force) now contains improved tests and procedures for considering airline alliances. However, we believe the fundamental issue remains unaddressed. The allocation of decisions on airline codeshares and alliances to the Ministry of Transport, rather than the Commerce Commission, leads to a disjointed understanding of overall aviation market issues between the two agencies, which do not appear to liaise with or consult each other on their work.

18 Given this Government's renewed focus on ensuring all competition settings in markets critical for productivity are fit for purpose, we urge this review to reconsider the airline alliance authorisation regime. It is more closely aligned with the Commerce Commission's overall mandate and set of expertise. Assigning codeshares and alliances authorisations to the Commission would have the additional benefit of building greater alignment with the Australian system, where such proposals are assessed by the ACCC. At the very least, the Ministry of Transport should be required to formally consult the Commission, and the Commission to provide a written opinion on competition and consumer impacts of these proposals.

### **Anti-competitive conduct**

19 The review describes concerns from some sectors that the provisions in the Commerce Act which allow for beneficial collaboration need to be enhanced. We have previously provided views on this as part of the Commission's consultation on its collaboration and sustainability guidelines.<sup>6</sup>

20 Emissions reduction in aviation will require significant technical and infrastructure collaboration across the sector. Our previous submission to the Commission explores some examples of what this might need to look like, but there are likely to be challenges ahead that we cannot yet conceive of. With this in mind, we do see benefits in stronger guidance to provide limited 'safe harbours' for collaboration, including more engagement with different sectors to explore examples and case studies. We believe much of this can be done within current settings.

### **Code or rule-making powers**

21 The review suggests industry codes or rules could be a useful addition to the Commerce Commission's toolkit, as a way to intervene in a market following a market study, or in place of one where a full study is not considered desirable.

22 Our views are mixed on this proposal. Consistent with our position that more flexible regulatory tools should be available to address competition issues in concentrated markets, we can see the attractiveness of an intervention that is faster and more efficient than primary legislation, and which can be targeted at specific competition or market structure problems. However, we do not believe this tool should be used to avoid a market study in areas where the need is clear for a full evaluation of the market. This could lead to substandard outcomes due to the lack of groundwork and information gathering prior to the intervention. With this in mind, the nuance of any drafting for these powers needs to be carefully considered. Codes and rules should be considered primarily as part of the follow up toolkit from a market study, and less often as an alternative to a market study. If industry codes or rules are to be used as an

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<sup>5</sup> Air New Zealand also has codeshare arrangements with eight airlines on the SYD-CHC service.

<sup>6</sup> <https://nzairports.co.nz/submissions/commerce-commission-collaboration-and-sustainability-guidelines/>

alternative to market studies, then the legislation will need to carefully set out an appropriate investigation or inquiry process (falling short of a full market study) to establish it as an appropriate intervention, and criteria for the Commission (or Minister) to apply to be satisfied that a market study is not required.

23 There are other well-established, flexible regulatory measures that could form part of an intervention toolkit which have been utilised in the Australian system for many decades. For aviation, this includes the monitoring of airfares, on-time performance and cancellation data. This monitoring occurs pursuant to a statutory provision in the Competition and Consumer Act 2010 that allows the Government to direct the ACCC to conduct price monitoring and reports for a specified industry (i.e. the power is not confined to aviation).

24 The Ministry of Transport has started to collect and publish on-time performance and cancellation data, but only for limited routes. The Civil Aviation Act 2023 includes powers for an Order in Council to be made requiring disclosure of information about prices and performance. While this is a step in the right direction for aviation, it does not include obligations for the Ministry of Transport to report on any disclosures required. Extending this process and establishing airfare price monitoring and reporting by the Commission (as part of a broader power or duty for the Commission to conduct price monitoring and reporting for a specified industry) would align with this consultation's objectives, as evidenced by the Australian system:

- it would have a direct impact on the market, serving as a chilling effect on prices through increased transparency;
- it would support critical information gathering and analysis for the Commerce Commission. In Australia's case, the airfare and performance data from the Bureau of Infrastructure and Transport Research Economics (BITRE) has been a key resource for the ACCC's analysis of the Australian airline market.

25 When we consider:

- New Zealand has the least competitive domestic aviation market in the world
- The domestic airline market is the least competitive business sector in New Zealand, worse than banking or grocery, and is subject to insufficiently monitored market consolidation practices;
- Australian agencies, which this review considers its benchmark for competition policy, have an enormous focus on Australia's airline market, and yet there has been no action to date from New Zealand's Commerce Commission.

26 We submit that empowering the Commerce Commission to undertake airfare monitoring would be a logical objective which would satisfy many of the concerns of this review about the state of competition in New Zealand and the tools available to promote it. While a full market study would be preferable due to the serious state of the airline market and to inform how any new regulatory tools should be appropriately used to maximise benefits for consumers, the fact that such monitoring mechanisms are well established in Australia means they could reasonably be activated without requiring the resource commitment or time that a full study entails.

## **Conclusion**

27 Thank you for the opportunity to comment on this consultation. These are complex issues. We share the overall objective to improve New Zealand's prosperity through greater competition, particularly in areas where New Zealand's scale and isolation has contributed to markets dominated by fewer, larger players. Our full network of international, regional and small airports and their commercial and local government owners appreciate opportunities to provide feedback on our insights operating in such a market. Please reach out if we can clarify or add to any of the commentary provided in this submission.

**Contact:**

Billie Moore, Chief Executive

Privacy of natural persons