

**Further submission to the ACCC
following the pre-decision conference held on
18 October 2010 in relation to the applications
for authorisation of an alliance between Virgin
Blue Group and Air New Zealand Limited**

Wellington International Airport Limited

29 October 2010

INTRODUCTION

This submission is presented by Wellington International Airport Limited (*WIAL*) following the pre-decision conference held on 18 October 2010 in relation to this matter and in (brief) response to the applicants' submission dated 11 October 2010 on the ACCC's Draft Determination (the *applicants' October submission*).

IN PRINCIPLE, WIAL NO LONGER OPPOSES AUTHORISATION ON THE ASSUMPTION THAT, IF APPROVED, THE ACCC WOULD INCLUDE AUTHORISATION CONDITIONS AT THE CAPACITY LEVELS PROPOSED BY THE APPLICANTS

As the ACCC will know, an important development in this matter since the ACCC released its Draft Determination has been the applicants' decision to propose conditions that would attach to any authorisation granted by the ACCC. The wording that the applicants have put forward appears in Annexure R to the applicants' October submission.

WIAL has considered the terms of the authorisation conditions proposed by the applicants. The applicants have also kindly provided WIAL with the confidential version of Annexure R that they provided to the ACCC. The confidential version is **attached**, for ease of reference, as well as to provide confirmation to the ACCC (to the extent that confirmation may be necessary) that these figures have indeed been provided to WIAL.

In WIAL's view, the proposed authorisation conditions represent a material change to the arrangement that the applicants were initially proposing. It is a change that WIAL welcomes.

One of WIAL's primary concerns regarding possible authorisation of the applicants' proposed alliance was that the removal of direct competition between the applicants ran the risk of reducing capacity and increasing prices, particularly on trans-Tasman routes to and from Wellington.

However, an authorisation that required the applicants to commit to maintaining and, over time, to growing capacity on the Tasman routes would assuage WIAL's concerns to a large measure and would mitigate to a substantial degree the potential detriment that WIAL believes the alliance proposal would otherwise cause. Since capacity and price are strongly correlated, appropriate capacity commitments by the applicants should act as a protection against unilateral price increases.

On that basis, WIAL advises that, in principle, it no longer opposes authorisation of the alliance, provided that the ACCC grants any authorisation on terms materially the same as those proposed by the applicants in Annexure R. For the avoidance of doubt, those terms should be based on the capacity numbers disclosed to WIAL in the confidential version of Annexure R.

HOWEVER, WIAL WOULD ASK THE ACCC TO GIVE CAREFUL CONSIDERATION TO A ROBUST FRAMING OF AUTHORISATION CONDITIONS

WIAL's residual concern is that, if the ACCC decides to grant authorisation, the precise terms of the authorisation conditions imposed by the ACCC should be robust.

To that end, there are four particular issues that WIAL wishes to raise and which WIAL respectfully suggests the ACCC consider further as regards the wording proposed by the applicants in Annexure R.

Issue 1: "Make available" must be clarified to mean flown

- 9 WIAL has some general concerns with the conditions set out in clause 2 of Annexure R. In particular, what does the term "make available" mean in clause 2?
- 10 The conditions as currently drafted could be interpreted as being that the applicants could simply put the seats on sale and then not actually fly them if they are not sold. As the conditions do not commit the applicants to anything regarding pricing or service levels, they could conceivably argue that they have complied with the condition to "make available" a stated number of seats, even if those seats are offered for sale at unacceptably high prices or at inconvenient times.
- 11 The simple solutions to this issue are either to define "make available" as being "flown seats" or to replace the use of "make available" with a clearer term.

Issue 2: The third and fifth year nominated sectors Alliance seat capacity

- 12 WIAL notes that the obligations under clause 2(b) of Annexure R are to make available certain capacity in years 3 and 5 across the nominated groups as a whole. As currently worded, that condition could be met by putting the additional capacity wholly on one or some of the nominated sectors and not at all on others.
- 13 WIAL acknowledges and accepts that the placement of additional capacity can and should involve both elements of route performance and competition between airports to accommodate that capacity. WIAL has some residual concern, however, that the driver of the placement of new capacity will be the actual or perceived potential competition from other airlines on a route. This may result in the least competitive routes receiving no growth such that prices could be increased above efficient levels.
- 14 For that reason, WIAL suggests that the ACCC consider imposing some element of third and fifth year capacity obligations in respect of each nominated sector, rather than (or as well as) an obligation applying to all of them as a group.
- 15 Further, the proposed conditions do not appear to impose any obligation regarding Year 4. As currently drafted, once the increased capacity has been provided in year 3, the applicants would be free to reduce capacity back to the base level for year 4. WIAL presumes that the intention was for the Year 3 minimum commitments to apply in Year 4 as well, and asks the ACCC to ensure that the authorisation conditions reflect that underlying intention.

Issue 3: "Material change in market conditions"

- 16 This definition includes the situation (see paragraph (c) of the definition) where services are commenced or materially increased (whether by the applicants or another operator) on a sector that is a "substitute" for a nominated sector resulting in a material additional increase in the seat capacity on the combined sectors. WIAL presumes that the reference to "combined sectors" means the nominated sector and its "substitute", but suggests that this point is clarified in the drafting.

- 17 WIAL also suggests that the ACCC amend paragraph (c) of this definition to identify what counts as a potential substitute. WIAL presumes that the clause is intended only to capture flights to or from the Gold Coast serving as substitutes in relation to corresponding routes to or from Brisbane (a situation referred to in the applicants' October submission). In WIAL's view, the definition should expressly state that these are the only routes that serve as "substitutes" for each other or alternatively specify a maximum distance between airports that would be considered necessary for those airports to be considered substitutes.

Issue 4: The definition of "exceptional circumstances" is imprecise

- 18 WIAL also has some concerns with the definition of "exceptional circumstances". As presently drafted, the expression seems ill-defined in (at least) two respects. WIAL notes that the existence of "exceptional circumstances" does not give the applicants a unilateral right to change capacity without ACCC approval, but in WIAL's view the definition should be clear and relatively tight to avoid frequent requests for variations that the ACCC would need to consider.
- 19 First, the definition of "exceptional circumstances" says that it includes the matters listed, but that implies that there must be other matters not listed that might also count as "exceptional circumstances". In WIAL's view, such a definition is simply too loose; it should spell out all the "circumstances" that are to count as "exceptional" for the purposes of allowing the applicants to revert to the ACCC and secondly it should define more tightly the meaning of a "force majeure event".
- 20 Regarding the process to be followed for applications made to vary the conditions, WIAL would ask that the ACCC consider incorporating a requirement for the applicants to consult with relevant interested parties (including WIAL) so that they have the opportunity to comment on, and to provide input regarding, any variation application.

WIAL MAKES NO FURTHER COMMENT ON THE APPLICANTS' OCTOBER SUBMISSION

- 21 Purely for the record, WIAL records that, in light of the authorisation conditions that the applicants are now willing to propose, WIAL sees no reason to address the substance of the applicants' October submission in any detail. However, WIAL should not be taken as necessarily accepting all or any of the points set out in the applicants' October submission, except to the extent expressly set out above.

EXCLUDED FROM PUBLIC REGISTER

Annexure R - Confidential