Air New Zealand Limited
Post-conference cross-submission to the Commerce Commission

Commerce Act 1986, Part 4

Section 56G Review of Wellington International Airport Limited

17 August 2012

Table of contents

1 Executive summary

1 This cross-submission responds to questions and issues that were raised at the Wellington Airport Conference (**Conference**) held by the Commerce Commission (**Commission**) on 7 August 2012 as part of its review of Wellington International Airport Limited (**WIAL**) under s 56G of the Commerce Act 1986 (the **Act**).

2 The Commission has correctly established the statutory framework in which the s 56G review sits, which can effectively be summarised as the Commission answering the question "Is information disclosure regulation effective (and if so, how effective) at promoting s 52A(1) outcomes in markets for the supply of specified airport services?".

3 One important issue that arose during the Conference was the relationship between information disclosure regulation, the s 56G reviews and the input methodologies determined by the Commission (**Airports IM Determination**). We have set out in depth our understanding of the relevance of the Airports IM Determination under Part 4 information disclosure regulation as it applies to suppliers of specified airport services. In particular, we address:

(a) the role of input methodologies in information disclosure;

(b) the role of input methodologies in a s 56G review; and

(c) the role of input methodologies in price setting by regulated airports.

4 Finally, this submission also addresses a number of more technical issues that were raised at the Conference. Where relevant, Air New Zealand (**Air NZ**) has made specific suggestions for changes to improve the effectiveness of information disclosure regulation.

5 The context of information disclosure is relevant to assessing whether (including the extent to which) information disclosure regulation has promoted the purpose in s 52A.

6 The Commission noted that:

> *It seems to me, hearing the parties' views today and reading the submissions of parties, the airports and the airlines are coming from very different legislative perceptions and histories to this.*

7 As alluded to in the quotation above, Air NZ has comprehensively set out its views on the legislative and regulatory framework that was in place prior to the current Part 4 regime in a number of forums, including previous submissions to the Commission (including in relation to the s 56G review, but also more broadly).

8 This cross-submission will not repeat these views. In response to the comments by the airports at the conference, however, Air NZ reiterates that it stands behind its previous submissions on the inadequacy of the previous regulatory regime and the problems that Part 4 was designed to (at least partially) address.

9 BARNZ's description of the consultation process in WIAL's most recent price-setting event is fair and accurate. Air NZ did not experience any material difference in the consultation process as a result of information disclosure regulation. Unlike what would be expected in workably competitive markets, the process continued to be characterised by what the Commission rightly described as "*the same negotiating position, the same position on market power to impose prices"*[1], which meant:

(a) an absence of negotiation;

(b) an absence of a commercial agreement;

(c) an absence of agreed pricing; and

(d) in place of the above, a unilaterally-imposed decision by WIAL.

10 WIAL continued to rely on its statutory right to price as it sees fit, rather than engaging with customers with a view to reaching a commercial agreement that was informed and incentivised by the Part 4 information disclosure regulatory regime.

[1] Commission, Airports s 56G Wellington Airport Conference Transcript (7 August 2012) at 121 (**Transcript**).

2 Introduction

11 This cross-submission follows the Conference held by the Commission on 7 August 2012 as part of its review of WIAL under s 56G of the Act.

12 The cross-submission responds to questions and issues that were raised at the Conference, and should be read in conjunction with our initial submission to the Commission of 29 June 2012 and our cross-submission of 20 July 2012. Where relevant, we have framed our responses in accordance with the Commission's useful summary of the questions and issues raised at the Conference.

13 Air NZ would welcome the opportunity to discuss these issues further with the Commission, and looks forward to the Commission's draft report for WIAL.

14 Our contact person for this submission is:

John Whittaker - General Manager Alliances and Government Relations

john.whittaker@airnz.co.nz

Air New Zealand Limited, 185 Fanshawe Street, Auckland

3 Statutory framework

3.1 The Commission's task under s 56G

15 The Commission's task is to assess the effectiveness of Part 4 information disclosure as a stand-alone regulatory tool for the promotion of workably competitive market-consistent outcomes in markets for the supply of specified airport services. What s 56G requires of the Commission is for it to answer the question "Is information disclosure regulation effective (and if so, how effective) at promoting s 52A(1) outcomes in markets for the supply of specified airport services?".

16 Addressing this question requires the Commission to closely examine relevant markets in order to assess the nature of the pressures and incentives actually faced by regulated suppliers, and the market outcomes that result from those incentives and pressures. The nature and purpose of information disclosure regulation informs the nature of the Commission's task under s 56G. Put simply, information disclosure regulation is intended to have substantive outcomes. It is intended to place (de facto) pressure on regulated airports to price in accordance with certain principles, and behave in a certain way. This is the nature of economic regulation, and the clear rationale for inclusion of specified airport services in the Part 4 regulatory regime: to (better) promote the outcomes listed in the Part 4 purpose statement for the long-term benefit of consumers. Answering the question at the heart of the Commission's s 56G review requires an assessment of both specific incentives faced by regulated suppliers and actual market outcomes.

17 In this context, it is unhelpful and uninformative to refer to catchphrases such as "de facto price control" to characterise particular approaches that the Commission may adopt. Indeed, this phrase is starting to be used as a catch-all term for outcomes under information disclosure regulation that regulated airports are likely to find unfavourable. If information disclosure regulation is working effectively, then at least some outcomes that might be considered "de facto" pressure on prices would be expected to eventuate. For that reason, there is no manifest intention on the part of Parliament to avoid "de facto price control" in markets for the supply of specified airport services.[2] Accordingly, no meaningful weight can be afforded to concerns based on bald assertions of de facto price control.

18 The timing of the s 56G review does not narrow the statutory task set to the Commission. It is required to draw meaningful conclusions about incentives and outcomes. While there has been some comment that the Commission should shy away from drawing firm conclusions, to do so would be a failure to discharge properly the Commission's statutory function. Given that there is no requirement to make a formal recommendation to the Minister, there is little need for the Commission to caveat its conclusions. The Commission is required to reach a firm view on what the evidence reveals, and has the statutory power to verify and test

[2] In fact, pressure on prices (and other outcomes) that is completely de facto rather than relying on formal legal obligations is precisely the intent of information disclosure regulation.

conclusions if the nature of the primary evidence is indicative rather than determinative.

19 Given the nature of the Commission's task under s 56G, the Commission would be also failing to discharge its statutory obligations if:

(a) It assumes that information disclosure regulation is fit for purpose. This presupposes the very question the Commission is required to answer in its s 56G report.

(b) It restricts its assessment to:

i. whether sufficient information is being disclosed under its specific s 52P determination; or

ii. whether WIAL and other regulated airports are complying with the requirements of information disclosure regulation,

as s 56G manifestly requires more than an assessment of the information that is currently being disclosed. It requires an assessment of supplier behaviour and market outcomes. If the 'sufficiency' of the s 52P determination was an issue, then this would have been stated expressly in s 56G and in all likelihood s 56G would have been made to apply to all sectors subject to information disclosure regulation and not just markets for the supply of specified airport services. As it is, the Commission can review and amend its s 52P determination at any time independently of s 56G.[3]

(c) It merely assesses whether current behaviours and outcomes are "commercial". The case law emphasises that "commercial" and "competitive" are not synonymous,[4] and the "commercial" nature or otherwise of particular market outcomes (or "commercial" judgement exercised by a regulated supplier in its decision making) is manifestly not the appropriate test under Part 4. The phrase "commercial" also does not equate to the promotion of the long-term benefit of consumers. WIAL's claims of commercial "concessions" and "agreements" are, therefore, largely irrelevant to the Commission's assessment. Even if these claims were true, the Commission's analysis is required to be deeper.

(d) It relies on the status quo under Airport Authorities Act 1966 (**AAA**) disclosure as a benchmark that represents a working regulatory regime that promotes the outcomes listed in Part 4. If anything, given the clear intention to change the regime applying to regulated airports, and the assumption in the legislation of acute monopolisation,[5] it should be assumed that the AAA disclosure regime was highly ineffective. Reaching the view that there has been no change in market outcomes between the AAA era and the most recent price-setting event, which WIAL appears to

[3] See Commerce Act 1986, s 52Q.
[4] Air New Zealand Limited v Wellington International Airport Limited [2009] NZCA 259 at [36]-[37].
[5] Commerce Act 1986, ss 52 and 56B.

be largely suggesting is the case, therefore represents a failure of the Part 4 regime to provide appropriate incentives. The appropriate initial benchmark is the input methodologies, as argued below.

3.2 Counterfactual analysis

20 Statements from the Commission Chair at the Conference have raised the issue of the relevance of counterfactual analysis. At the Conference, the Chair stated:[6]

> *And it seems to me that when we report back to the Ministers we have to make an assessment of two worlds, one with and one without Information Disclosure Regulation, what if any difference has occurred as a result of that.*

21 Air NZ takes this "assessment of two worlds" to be a reference to formal counterfactual analysis of the kind that the Commission undertakes with respect to merger clearances (for example). We agree that counterfactual analysis of this kind can be usefully deployed in a regulatory context (as the Commission has previously), and has particular relevance in the case of the s 56G review.

22 Air NZ considers that the Commission is not limited by s 56G or the wider statutory context as to the kind of assessment that it may undertake. In this case, a formal "with or without" analysis would appear to be both relevant and useful to the Commission's central task, as it can be used to demonstrate the likely effect of the imposition of Part 4 information disclosure regulation on markets for the supply of specified airport services. Any difference between the factual of Part 4 information disclosure regulation and the counterfactual of no information disclosure regulation coming out of the Commission's counterfactual analysis will reveal whether, and the extent to which, Part 4 information disclosure regulation is promoting the purpose of Part 4 in relevant markets.

23 It should be relatively straight forward for the Commission to undertake cogent counterfactual analysis in this case. A "before and after" assessment, focusing on the differences between the final price-setting event subject to AAA disclosures and the first subject to Part 4 information disclosure regulation ought to provide a useful proxy for an accurate "with or without" assessment. The historical situation of a price-setting event subject to AAA information disclosure only is therefore likely to represent the most relevant counterfactual for the purposes of the Commission's s 56G analysis.

24 This approach will minimise debate over the nature of the appropriate counterfactual, and will allow the Commission to proceed with an appropriate degree of confidence that it can identify the effects of Part 4 information disclosure regulation on regulated airport behaviour and wider market outcomes. If, for instance, the behaviours and outcomes are substantively similar with respect to the final price-setting event subject to AAA disclosures and the first subject to Part 4 information disclosure regulation, then the Commission will be able to conclude with

[6] Transcript at 119, lines 30-34.

confidence that Part 4 information disclosure regulation has had no appreciable impact on the promotion of Part 4 outcomes (as measured in part by the expectations set in the Commission's previously determined input methodologies). This assessment of the change in the promotion of Part 4 outcomes goes to the very heart of the Commission's task under s 56G.

25 Air NZ's experience has been that WIAL's behaviour and decisions changed very little between the 2007 and 2012 price-setting events. Most importantly, on the two building blocks which have the most significant impact on pricing – asset valuation and cost of capital – there was no real change:

(a) for asset valuation, WIAL effectively adopted an MVEU valuation – as it did in the 2007 price-setting event – by taking MVAU and including conversion costs; and

(b) for cost of capital, WIAL adopted a WACC of 9.51% (set at 10.51%, less a 1% "concession") in 2012, compared to 9.5% in the 2007 price-setting event.

4 The relevance of input methodologies under information disclosure regulation under Part 4

26 This section sets out Air NZ's understanding of the relevance of the Commission's input methodology determinations under Part 4 information disclosure regulation as it applies to suppliers of specified airport services. In particular, it addresses:

(a) the role of input methodologies in information disclosure;

(b) the role of input methodologies in a s 56G review; and

(c) the role of input methodologies in price setting by regulated airports.

4.1 Input methodologies

27 Input methodologies, along with the limited "merits" appeal rights that go with them, were the key innovation introduced by the 2008 amendments to the Act. At the time, these innovations received a high degree of support from the regulatory community:[7]

> *Most submitters supported the general intent of the bill, considering that the proposed amendments to the principal Act would be likely to promote regulatory certainty and accountability.*

28 The purpose of input methodologies is set out in s 52R of the Act:

> *The purpose of input methodologies is to promote certainty for suppliers and consumers in relation to the rules, requirements, and processes applying to the regulation, or proposed regulation, of goods or services under this Part.*

29 Accordingly, input methodologies, once determined, reduce regulatory flexibility in a way that is intended to provide clarity and predictability for consumers and regulated suppliers as to the rules, requirements and processes that the Commission will apply in discharging its functions under Part 4 of the Act. Input methodologies also provide consistency and certainty for all parties – suppliers and consumers – interested in Part 4 regulation.

4.2 The role of input methodologies in information disclosure regulation

30 The purpose of information disclosure regulation is to "ensure that sufficient information is readily available to interested persons to assess whether the purpose of [Part 4] is being met".[8] Information disclosure regulation is a form of economic regulation that is intended to influence (indirectly) the behaviour of regulated suppliers, and therefore promote the specific market outcomes listed in s 52A(1)(a)-(d) that are consistent with outcomes in workably competitive markets.

[7] Commerce Amendment Bill (201-2) (select committee report) at 2.
[8] Commerce Act 1986, s 53A.

31 Information disclosure regulation is intended to achieve these ends not by legally mandating prices and other outcomes as would be the case with price-quality control regulation or (possibly) negotiate-arbitrate regulation. Rather, information disclosure regulation promotes desirable market outcomes indirectly by providing a credible basis for assessment of the actual behaviour of regulated suppliers, creating pressure on regulated suppliers to behave consistently with the promotion of those desirable market outcomes.

32 In addition to their effect on the decisions (including pricing) of regulated suppliers, input methodologies contribute to the information disclosure regulatory regime by informing two key processes:

(a) the preparation of information for disclosure (by regulated suppliers); and

(b) the assessment of disclosed information (by the Commission and other interested persons).

33 Adherence to input methodologies in respect of these processes promotes clarity and predictability in respect of any assessment undertaken by the Commission (or other interested persons), as input methodologies promote certainty in relation to:

(a) the inputs (i.e., the building blocks) that the regulated airports' pricing decisions will be assessed against by the Commission and by other interested persons more generally under s 53A;

(b) the inputs that should be considered (and adopted, unless there are compelling justifications to the contrary) by regulated airports in making pricing decisions and other conduct; and

(c) how regulated suppliers should prepare the information they are required to disclose under Part 4.

34 Input methodologies serve to ensure an additional level of robustness and credibility in respect of the Part 4 regulatory regime: expectations are clear, and assessment is effective. This additional level of credibility and robustness is what was intended by Parliament:[9]

> *The input methodologies required for robust information disclosure (such as asset valuations, revaluations, and allocation of common costs) would be binding, while methodologies such as pricing principles and how to calculate the cost of capital (which are required for monitoring and analysis) would be in the form of guidelines against which the disclosed information would be assessed.*

35 In addition, the Commerce Amendment Bill was amended by the Commerce Committee to ensure that the Commission could use input methodologies not

[9] Commerce Amendment Bill (201-2) (Regulatory impact statement: airport regulation).

applied by regulated suppliers when discharging its monitoring and analysis functions:[10]

> *New section 53P(2) [sic] has also been amended to allow the Commission to use their own input methodologies for monitoring and analysing information.*

36 Input methodologies are therefore an essential component in allowing information disclosure to credibly and effectively promote the purpose of Part 4. In addition to their important role in the s 56G review process, discussed below, input methodologies also provide a principled basis for the Commission's specific monitoring and analysis powers, which is an integral part of the information disclosure regime:

> *information disclosure, combined with annual analysis by the Commission and the requirements for a review, will impose some disciplines on pricing behaviour*

37 In this way, input methodologies provide additional credibility to the analysis of the performance of individual regulated suppliers, their relative performance, and the changes in their performance over time, by establishing a principled and objective basis for any such analysis.[11] They are an essential component of the new regulatory regime established by Parliament.

4.3 The role of input ethodologies in a s 56G review

38 Section 56G of the Act requires the Commission to:

(a) review the information that has been disclosed by suppliers of specified airport services under subpart 4;

(b) consult with interested parties; and

(c) report to the Ministers of Commerce and Transport as to how effectively information disclosure regulation under Part 4 is promoting the purpose in section 52A in respect of the specified airport services.

39 This is a key aspect of information disclosure regulation as it applies to specified airport services. In form, the s 56G review is expressly referred to in Part 4 as a specific aspect of information disclosure regulation,[12] and the substance of the review confirms this. As an essential aspect of information disclosure regulation, input methodologies are directly relevant to the Commission's s 56G review. Section 52R expressly states that input methodologies apply to "regulation", and in the context of specified airport services this must include the 56G review.

[10] Commerce Amendment Bill (201-2) (select committee report) at 6. The context makes clear that this is intended to be a reference to s 53F(2), rather than s 53P(2).
[11] See Commerce Act 1986, s 53B(2)(b).
[12] We note that s 56G falls under the heading in Subpart 11 titled "How information disclosure regulation applies". The headings of Parts and sections are indications that can be considered in ascertaining the meaning of legislation: Legislation Act 1999, s 5.

40 Input methodologies therefore seek to promote certainty in the context of s 56G in the same way they do in respect of information disclosure regulation generally. The best way for input methodologies to promote certainty in relation to a 56G review is for the Commission to use input methodologies as the primary basis for assessing whether information disclosure regulation is effectively promoting the purpose of Part 4. This is, after all, precisely what input methodologies are intended to do in the context of information disclosure regulation.

41 This approach is consistent with the Commission's statement that:[13]

> *we anticipate that given the timing of this review, the likely impact of ID regulation would be seen predominantly in the behaviour of the airports and airlines in price setting rounds, and in the forecast returns based on the prices set.*

42 Input methodologies provide a credible, objective baseline for assessment of supplier behaviour. This is clearly the case in respect of information disclosure generally, and to the extent that similar assessment of regulated supplier behaviour is a necessary component in the assessment of the promotion of the specific Part 4 outcomes, it would be surprising if the Commission failed to draw on input methodologies as directly relevant to its function. Given the essential nature of input methodologies to an informed, objective and consistent assessment of regulated supplier behaviour, the Courts would likely consider input methodologies to be a mandatory relevant consideration under s 56G.

43 The inherent relevance of input methodologies to a s 56G review can be demonstrated with reference to an assessment of pricing and (relatedly) profitability, which the Commission has rightly identified as central to its task under s 56G. Reference to the cost of capital input methodology provides a natural point of comparison for analysis of regulated supplier profitability and pricing. It is difficult to see the cost of capital methodology as anything other than relevant to the Commission's task. This is confirmed by the legislative history:[14]

> *Ministers have decided that the review should take place after the next price re-set (in 2012). It is expected that the knowledge of an impending review (combined with robust information disclosure) will influence the price setting by airports.*

44 The Commission is, in our view, entitled to draw on other relevant information, methodologies, rules, requirements, processes, and assessment tools as part of its s 56G review. There is no express limitation on the range of information and matters that the Commission can take into account,[15] and as a matter of good practice the Commission ought to take sufficient steps to ensure that it is fully

[13] Commission*, Airport Services – s 56G Report: Process and Issues* (31 May 2012) at 4.
[14] Commerce Amendment Bill, Report of the Ministry of Economic Development (4 July 2008) at 52
[15] Although the administrative law limits of relevance and reasonableness clearly do apply.

informed of the relevant issues. The Commission has broadly expressed powers to assist in achieving this.[16]

45 Input methodologies are, therefore, not the sole source of information informing the Commission's analysis. Indeed, Air NZ's initial submission of 29 June 2012 set out a number of different measures for assessing whether profits are excessive (and by extension, how to determine a normal profit).[17] The broad nature of the Commission's powers of review under s 56G serve to confirm the ability of the Commission to draw on other sources of information, for specified airport services, to the extent the Commission considers them to be relevant. Notwithstanding this, input methodologies remain the natural and primary point of reference for the Commission and are therefore essential in assessing the effectiveness of information disclosure regulation in promoting the purpose of Part 4.

4.4 The role of input methodologies in price setting

46 Given the importance of input methodologies to s 56G, Air NZ sets out its views on the proper role of input methodologies in price setting.

47 Input methodologies do not have a direct role in price setting by regulated airports. The only legal obligation on regulated airports with respect to input methodologies is that they apply those input methodologies in the preparation of information for disclosure in accordance with the Commission's requirements. This does not dictate the outcomes impact directly on regulated airport pricing practices; there is no direct regulatory control over the pricing of specified airport services. The regulated airports retain, as a matter of law, the right to price as they see fit.[18]

48 Notwithstanding this statutory right, input methodologies can and should play an important role in the context of price setting by regulated airports. As noted above, information disclosure is intended to influence the price-setting processes of regulated suppliers and market outcomes in practice by exposing the gap between regulated suppliers' behaviour and outcomes expected in a workably competitive market, including the specific outcomes set out in s 52A(1)(a)-(d). Input methodologies play a vital role in this process by providing a clear, legitimate and objective benchmark against which to assess regulated airports' behaviour in terms of the desirable outcomes. Airports may still depart from the standards and expectations imposed by information disclosure regulation, but (if regulation is effective) they will be strongly incentivised to do so in practice only where they have a compelling justification for such departure in terms of the specific outcomes to be promoted under the Part 4 purpose statement.[19] The Commission will assess, and other airports, airline customers and the wider interested public will pass judgement on, the credibility of those justifications as part of information disclosure regulation generally, and in the current context the s 56G process in particular.

[16] See Commerce Act 1986, s 53ZD.
[17] Air New Zealand, Submission to the Commerce Commission (29 June 2012) at 21-22.
[18] Airport Authorities Act 1966, s 4A(1).
[19] The strength of these de facto incentives is a key question in the Commission's s 56G review.

49 WIAL has adopted a different interpretation of the relevance of input methodologies to its price-setting processes: that input methodologies are completely irrelevant. For example, WIAL notes concerns expressed by airline customers that it has departed markedly from the processes and outcomes that would be anticipated if information disclosure regulation, and the input methodologies that underpin that regulation, had influenced WIAL's price setting, but states in reply that:[20]

> *The implication of [these] positions is that, contrary to the Government's intent, WIAL should regard the information disclosure regime as being the same as price control.*

50 This materially misrepresents the airlines' positions; airlines have never considered that the information disclosure regime is "the same as price control". Indeed, the statutory right for regulated airports to price as they see fit clearly precludes this. By mischaracterising the airlines' position to an absurdity, then dismissing that false argument, WIAL avoids the real issue: the extent to which its pricing decisions have been influenced by, and promote the purpose of, Part 4. Elsewhere WIAL states:[21]

> *Wellington Airport did take into account the Commerce Commission's Input Methodologies (IM) during its consultation process; however, Wellington Airport is under no obligation to use the IM parameters as a basis for setting charges.*

51 This may accurately reflect the strict legal position, but it does not auger well for a regulatory model premised on "self-initiated behaviour change". We consider this demonstrates a fundamental misunderstanding of the nature of Part 4 regulation on WIAL's behalf. Part 4 is intended to influence regulated airport behaviour to promote Part 4 outcomes. However, as explained above, it is unnecessary to go as far as advocating legal price control to be genuinely dissatisfied with WIAL's behaviour, process and outcomes from a regulatory perspective. The dissatisfaction of WIAL's airline customers is based on the admitted[22] failure of information disclosure regulation to influence WIAL's behaviour.

52 If information disclosure regulation had been operating effectively during the last price-setting round, WIAL would have seriously engaged with the idea that its outcomes would have been assessed against the benchmarks established by input methodologies, and the broader question of whether its pricing processes and outcomes are likely to promote the purpose of Part 4.

53 However, the prospect of informed assessment by the Commission and other interested persons (including through a s 56G review) was not sufficient to disincentivise WIAL from not only deviating from the input methodologies, but failing to present a compelling or any reasonable justification for that deviation. WIAL's primary reason for not acting consistently with the relevant input methodologies is the narrow, rather legalistic view that it is not required to adopt them.

[20] WIAL, *Final Pricing Document* (1 March 2012) at 23 (**WIAL FPD**).
[21] Steve Sanderson (Chief Executive Officer, WIAL), Letter to Air NZ (1 June 2012).
[22] WIAL FPD at 23.

54 While we note that WIAL commissioned third party reports as part of the price-setting process, WIAL did not – as it could have – provide these third parties with terms of reference that required or encouraged consistency with the input methodologies.[23] We would expect that under effective information disclosure regulation, the impact of disclosure and assessment would have incentivised WIAL to ensure that any third party advisors followed the input methodologies where possible; much as the same as WIAL's own decision should be influenced under effective information disclosure regulation.

55 Additionally, the sheer weight of independent expert evidence and consultation put into the input methodologies should have entitled them to more weight, rather than being dismissed in the face of a single (and more favourable) commissioned opinion.

56 This did not occur. As a result, many of the results differed greatly from those under the input methodologies. For example, the margin of the Sapere uncertainty adjusted estimate of post-tax weighted average cost of capital over the equivalent midpoint determined by the Commission was 4.1%, after allowance for model error. Sapere acknowledged that the majority of this difference (2.3%) was a direct result of the higher parameter estimates chosen by Sapere.[24] The Sapere figure formed the basis for WIAL's decision on cost of capital.[25]

57 We would therefore expect to see WIAL's failure to engage with input methodologies, or indeed to independently deliver pricing outcomes that are broadly consistent with outcomes that would be expected if input methodologies applied, as a central feature of the Commission's assessment under s 56G.

[23] Although some third party reports did refer to the Commission's input methodologies, this was predominantly as a point of contrast.
[24] Sapere Research Group, *Estimation of the Weighted Average Cost of Capital for Wellington International Airport Limited* (15 April 2011) at 14-15.
[25] FPD at 48.

5 Responses to technical issues raised at the conference

5.1 Litigation costs

58 The Commission has asked that cross-submissions address:

(a) How should airports treat the cost of litigation?

(b) How should airports treat the cost of Part 4 judicial review and merits appeals litigation?

59 WIAL has included its costs of conducting the merits review appeals as forecast operating costs in the FPD. Under WIAL's building block model, operating costs have been included as a component of total aeronautical costs, which are taken into account in calculating WIAL's required revenue over the term of the price-setting event.[26]

60 WIAL's Second Information Pack sent to airlines on 23 May 2011, which contains the operating expenditure forecast for 2013-2017, noted that "consultation and regulatory costs", which included "participation in a judicial and merits review of the Commerce Commission input methodologies"[27] would increase by $327,000 between 2010 and 2012. WIAL endorsed this approach in the FPD, and the Revised Pricing Proposal before that.

61 Simply put, the higher the forecast operating costs, the higher the required revenue. WIAL's inclusion of forecast litigation costs, including the merits review appeals, has therefore resulted in higher required revenue than would otherwise be the case.

62 Under s 52T, which sets out the matters covered by input methodologies, the input methodologies relating to particular goods or services must include, to the extent applicable to the type of regulation under consideration, regulatory processes and rules, such as the specification and definition of prices, including identifying any costs that can be passed through to prices (which may not include the legal costs of any appeals against input methodology determinations under Part 4 or of any appeals under sections 91 and 97).

63 The Commission has not determined input methodologies for specified airport services that identify any costs that can be passed through to prices. We note that the Commission has previously stated that:[28]

> *The 'rules and processes' referred to in s 52T(1)(c) are not applicable to information disclosure regulation as these relate solely to how price-quality regulation operates.*

64 Air NZ submits that the rules and processes referred to in s 52T(1)(c) are not "solely" applicable to price-quality regulation. Section 52T expressly notes that the

[26] FPD at section 31.2.
[27] WIAL, Second Information Pack sent to Airlines at 7.
[28] Airports IM Reasons Paper at section 2.8.3

various input methodologies should be tailored "to the extent applicable to the type of regulation under consideration". The treatment of pass-through costs – specifically the legal costs of any merits review appeals – is still relevant in an information disclosure context. Interested persons should be able to assess the spending of the airports on the merits review proceedings; further, the prospect of this scrutiny should indirectly incentivise the airports to improve the efficiency of their spending. If an airport chooses to pass through 100% of its merits review costs to consumers, an effective information disclosure regime should allow interested persons to judge the airport for doing so.

65 The express statutory language is very clear that the legal costs of any appeals against input methodology determinations under Part 4 or of any appeals under ss 91 and 97 are not appropriate to be passed on to consumers. Effectively, the Act has deemed that the passing through of these costs does not promote the purpose of Part 4. A consistent philosophy should apply across all regulated sectors.

66 Notwithstanding that (i) the Airports IM Determination is silent on the passing through of legal costs for appeals, and (ii) regulated airports may price as they see fit, the Commission is not precluded in this s 56G review from considering WIAL's decision to incorporate these costs into its forecast operating expenditure and whether this decision (i) promoted the purpose of Part 4, and (ii) was effectively influenced by information disclosure regulation. There should be a presumption that the decision does not promote Part 4, given the principle expressed in the Act.

67 With respect to question 7 of the Commission's list of questions and issues arising from the Conference, Air NZ considers this to be one specific way in which the effectiveness of information disclosure regulation could be improved. The Airports IM Determination and the Airports ID Determination should be amended to clarify that the legal costs of any appeals against input methodology determinations under Part 4 or of any appeals under section 91 or section 97 should be specified as a separate item.

5.2 WIAL's distinction between inputs and outcomes

68 In submissions and at the Conference, WIAL expressed the view that the Commission's assessment ought to focus on "outcomes" rather than "inputs". For example at the Conference WIAL's Chief Financial Officer stated:[29]

> *…while the MVEU conversion cost was used [by WIAL] as an input to what we believe is the principal valuation for setting of prices, ultimately the outcome, the final outcome of pricing had a number of concessions on WACC and certain things, smooth price path and certain things which ultimately the overall effect of return on assets is lower. So yes, it was an input to pricing but the output is the more important point that should be considered.*

[29] Transcript at 35, lines 2-10.

69 Air NZ agrees that market outcomes are a vital piece of the Commission's assessment. Consistency or otherwise of actual outcomes with input methodologies and workably competitive market outcomes is key to the Commission's assessment. However, if WIAL's distinction is intended to imply that inputs are not important to an assessment under s 56G, Air NZ strongly disagrees.

70 Inputs into pricing decisions, and other inputs that inform regulated airports behaviour, are also vitally important:

(a) in their own right, as indicative of the incentives faced by regulated suppliers to alter their behaviour and seek particular outcomes. Air NZ suspects that an examination of inputs in WIAL's recent pricing decision will reveal to the Commission that WIAL is motivated by so-called "commercial" imperatives rather than anything analogous to competitive pressure. This reveals something important about the incentives faced by WIAL, and whether information disclosure regulation has in fact influenced WIAL to act in a manner consistent with workably competitive market outcomes; and

(b) in respect of any assessment of outcomes, as the true nature of specific outcomes may be obscured if those outcomes are viewed in isolation. The true relevance of any outcomes will only be apparent if the relevant inputs are properly understood. For example, if the Commission's cost of capital estimate is applied to an over-inflated regulatory asset base, then returns may appear appropriate when the detail reveals a monopolistic level of profitability. An assessment of inputs is therefore necessary for an assessment of outcomes and behaviours.

71 Indeed, if the outcome was the same in each case, as WIAL's CFO appears to suggest, and that was all that mattered, then it raises the very important question as to why WIAL felt compelled to depart from the guidance provided by input methodologies. Answering such a question, which is the very purpose of the s 56G review, requires an examination of relevant inputs.

72 WIAL's primary concern appears to be that in the course of any assessment into inputs, its failure to apply the Commission's input methodologies will form the basis of criticism against it. This represents an unduly narrow understanding of the relevance of input methodologies in the price-setting process. Failure to apply an approach consistent with input methodologies:

(a) is indicative evidence of a lack of effectiveness of the information disclosure regime; but

(b) this provisional conclusion can be displaced if regulated airports can demonstrate that the inputs actually used are appropriate given the purpose of Part 4.

73 The issue for WIAL is that its justification for departing from the guidance provided by the input methodologies is either that input methodologies are not binding (a point that is irrelevant in the present context) or that its position has a commercial

justification. While information disclosure regulation does not seek to displace genuinely commercial arrangements (as opposed to one-sided commercial "judgements"), commercial arrangements still need to be assessed against the purpose of Part 4. The "commercial" nature of a regulated airport's decision is insufficient justification where the standard is outcomes consistent with outcomes in workably competitive markets, such that the long-term benefit of consumers is promoted.

5.3 Cost allocation vs cross-subsidy

74 One pricing issue that was discussed in the Conference was the common charge for domestic and international passenger use of terminals; in particular, the issue was whether WIAL's decision to impose the same charges on domestic and international passengers for terminal use was justified.

75 Specifically, the Commission requested that cross-submissions address the perceived divergence of focus on pricing efficiencies as opposed to cost allocation:[30]

> *a distinction drawn between cost allocation approach, which I think is what the airline is talking about, and efficient pricing which I think Wellington is talking about, and there seems to be between those two different things, there's different views being expressed. So, I would find it helpful if someone could spell out how that works.*

76 Air NZ does not consider that its views on the alignment of international and domestic passenger charges are based on cost allocation, rather than pricing efficiencies. Our views are grounded in the outcomes that would be expected in a workably competitive market, particularly the objectives set out in s 52A(1)(a)-(d).

77 First, we note that the overall effect of the new pricing is a substantial increase across the regulated services, and in this respect the "excess profit" limb of s 52A(1) is most relevant. This needs to be closely assessed by the Commission.

78 Underneath this overall increase, however, the changes to pricing of international and domestic terminal charges raise real questions as to their consistency with the efficiency outcomes in ss 52(1)(b)-(c) of the Act:

(a) Section 52A(1)(b) requires that incentives for suppliers to improve efficiency and provide services at a quality that reflects consumer demands must be promoted.

(b) Section 52A(1)(c) requires that outcomes promoted must ensure that suppliers share the benefits of efficiency gains in the supply of regulated services with consumers of those services, including through lower prices.

79 WIAL's comments on this point at the Conference focused on Ramsey pricing, and showed less regard to what it described as "cost reflective" pricing.[31] Ramsey

[30] Transcript at 115.
[31] Transcript at 112.

pricing represents one dimension of efficiency only. It is unlikely to be in the long-term interests of consumers in all cases, and is probably inconsistent with a workably competitive market, which would better promote other aspects of efficiency (dynamic rather than static).

80 Air NZ considers that WIAL has supported an unnecessarily narrow interpretation of pricing efficiency. Instead, we support an emphasis on the text of s 52A, which involves an assessment of efficiencies that is broader than simply charges that are consistent with Ramsey pricing.

81 WIAL's conflation of international and domestic passenger charges is inconsistent with the purpose of Part 4 in the following respects:

(a) The imposition of a single uniform terminal charge is not consistent with outcomes in a competitive market. In a competitive market where a supplier was charging prices that were not cost reflective then consumers would move to a supplier that was cost reflective (ie a supplier of regional terminal services would arise with a profitable business supplying regional terminal services at a lower price).

(b) In a workably competitive market, an international terminal supplier with excess capacity would actually supply its excess capacity at a price lower than the domestic price in order to sell that capacity.

(c) If, over time, it becomes efficient to increase the use of international assets for domestic purposes, the extent to which domestic passengers pay for the international assets should be reflected appropriately as this shift takes place. We would expect any pricing impacts to occur gradually and proportionately, over time, rather than WIAL's drastic shift to a combined assets approach.

(d) Despite it being considerably more efficient to service domestic passengers, the benefits of these efficiencies are most definitely not being shared with customers. Instead, domestic charges are increasing substantially.

(e) By basing the charges for domestic passengers on the international-centric Rock development, domestic passengers are effectively required to pay for a number of activities that do not reflect consumer demands, such as customs screening and aviation security. It is inefficient – and inconsistent with the promotion of service provision at a quality that reflects consumer demands – to charge assets to consumers that do not use them.

82 This also highlights the need for pricing principles to cover the recovery of costs from both international and domestic aspects, which despite not being differentiated in the definition of specified airport services, differ from each other in a number of respects that are relevant to s 52A.

5.4 Improved disclosure of pricing information

83 As the Commission noted in the Conference,[32] under the current information disclosure, regulated airports are required to disclose some pricing information. WIAL's pricing decisions in the most recent price-setting event, as set out in paragraph 81 above, have demonstrated that without clear and appropriate principles against which to assess WIAL's pricing decisions, WIAL has no incentives not to set prices to the detriment of the long-term interests of end users.

84 Air NZ has considered possible responses to this problem within the existing Part 4 framework and suggests three feasible solutions:

(a) **Amend the existing cost allocation input methodology** to determine how regulated airports should disclose the extent to which the costs involved in the supply of specified airport services are reflected in the prices set by regulated airports. While the current cost allocation input methodology is focused primarily on the allocation of costs between regulated and non-regulated activities, the Commission has the clear power to determine input methodologies that relate to the allocation of costs between distinct regulated activities. An amended cost allocation methodology could determine, for example, that costs for specified passenger terminal activities should be separated and allocated into international, domestic and shared cost centres. This would be an effective and efficient response.

(b) **Determine a pricing methodology**. The Commission cannot require that a regulated airport use a particular pricing methodology, although (as with cost of capital) it can choose to develop a pricing methodology for use in assessing the pricing methodology used by a regulated airport.[33] The current Airports IM Determination does not include a pricing methodology. Air NZ would support a pricing methodology, as discussed in Air NZ's initial submission.[34]

(c) **Amend the existing information disclosure determination.** Although regulated airports are required to disclose certain elements of their pricing decisions under the current information disclosure regulation, WIAL's pricing decisions have showed that this is not effective. One response would be to amend and strengthen the information disclosure determination to require additional information. This additional information could seek to make transparent how the regulated airport's pricing practices treat international and domestic assets, costs and charges, so that interested persons can realistically assess the basis for these pricing decisions.

[32] Transcript at 92.
[33] The need for a pricing methodology in information disclosure is actually more acute than with price-quality control, because the price-cap that is inherent in price-quality control does most of the work to ensure that prices are consistent with s 52A.
[34] Air New Zealand, Submission to the Commerce Commission (29 June 2012) at 30-31.

5.5 Small aircraft and runway charges

85 At the conference Air NZ outlined its concern about the impact of the restructure of runway prices on consumers using and operating smaller aircraft. This concern does not only relate to peak pricing, but also to off-peak pricing.

86 Runway prices have historically been based on MCTOW (Maximum Certified Take Off Weight) factors, which reflect the fact that smaller and lighter aircraft require a significantly smaller runway footprint and cause lower runway maintenance costs. (ie they require a lower RAB and cause lower opex).

87 New Zealand is very well served with regional turbo prop services. An independent 2011 study by Hazeldine and Gillen[35] concluded that New Zealand is better served regionally, in terms of coverage, than Australia, Canada and US states. It also showed that New Zealand, along with Sweden, has amongst the cheapest regional fares globally, with Australian fares 15% higher on average and US and, especially, Canada more expensive again.

88 The corollary of New Zealand regional markets being so well served is that these markets include the most marginally economic services operated by Air NZ. Even where Air NZ is a sole supplier, many of these services operate on very low margins using the relatively high cost per seat B1900D aircraft.

89 The increases in runway charges will make some regional services less viable and result in the exit from some routes. Air NZ exited the Whakatane/Wellington route in February 2012 and a number of other routes remain under review as a result of these charges.

90 This issue contains many contending issues:

(a) The Commission elected not to determine a pricing input methodology (or other appropriate mechanism to effectively address this issue).

(b) Section 52A promotes the long term benefit of consumers … by promoting outcomes that are consistent with outcomes produced in competitive markets.

(c) Efficient pricing will likely reflect opportunity cost on constrained assets, but could be as low as marginal cost on unconstrained assets.

(d) It is recognised that in competitive markets prices will not always fully reflect allocated costs. However it is also a feature of competitive markets that where suppliers charge users at greater than cost then new suppliers emerge to exploit this opportunity.

91 Air NZ believes that pricing which reflects the promotion of the purpose of Part 4 of the Act will have the following features for unconstrained assets:

[35] Hazeldine and Gillen *The Competitiveness of Air New Zealand's Regional Services: a Report for Air New Zealand,* 2011.

(a) It will closely reflect fully allocated costs for each class of users.

(b) It may contain Ramsey pricing elements within each class of users.

92 We reiterate our significant concern that the change in pricing principles adopted by WIAL:

(a) does not reflect competitive markets, as it relies on competitors not entering the market to exploit opportunities created in the turbo prop market;

(b) will result in premature loss of regional services, which is inconsistent with the purpose of the Part of the Act; and

(c) is based on purported constraints, which do not exist during the 2012-17 period

5.6 WIAL's risk of outcomes on forecasts

93 One issue raised by the Commission was the extent to which WIAL takes (or passes on) the risks of an incorrect forecast. This is closely related to WIAL's treatment of wash-ups. The Commission asked:

> *whether it's appropriate for the Commission to take into account or to remove from its conception of the revenue for profitability assessment the terminal wash-up that has been implemented as a reduction in prices for the forthcoming period but it is, of course, essentially in one sense a refund of payments made in the previous period, thus there is the question of whether it's appropriate to count it, in effect, by taking the prices after the reduction as being applicable to the assessment of the actual kind of profitability that Wellington Airport is achieving in the current period*

94 Air NZ stated that its preference was for revenue to be recognised when it is actually earned, meaning that it should be recognised in terms of the previous period.

95 Although this question has a technical aspect, it highlights a much broader issue. When WIAL is deciding how (or whether) to incorporate a wash-up into its revenue, it is making this decision as a monopoly supplier in a market which has minimal competition. Revenue should only be recognised in one period. But interested persons, including the Commission in the context of a s 56G review, can assess the merits of WIAL's decision as soon as it is made; for example to consider if the decision promotes the purpose of Part 4. In this sense, there is a distinction between "what" is decided and "how" that decision is given effect.

96 With respect to WIAL's concerns that it holds the risk for under-recovery, this concern does not fully acknowledge the advantages that WIAL has been granted from the arguably generous cost of capital determined by the Commission. Although this cost of capital is not binding on WIAL – as evidenced by WIAL's excessive cost of capital used in the FPD – the Commission's cost of capital

provides WIAL with material leeway in the way its revenue and profitability is assessed. Since the cost of capital reflects the risk-reward dichotomy, the perceived risks that WIAL raises have already been allowed for through a cost of capital with a midpoint on the generous side.

97 It is also instructive, when considering risk, to review the outcomes of the 2008-2012 pricing period against WIAL's forecasts at the time charges were set in 2007:

Pax Numbers (Intl)	2008	2009	2010	2011	2012	
2007 Forecast	590	604	619	650	683	
Actual	603	611	627	655	718	
Variance	13	7	8	5	35	68
Pax Numbers (Dom)						
2007 Forecast	4,059	4,140	4,223	4,350	4,480	
Actual	4,418	4,645	4,491	4,480	4,474	
Variance	359	505	268	130	-6	1,256
Revenue Requirement						
2007 Forecast	$ 43,838	$ 46,104	$ 48,210	$ 51,107	$ 54,184	
Actual revenue	$ 44,662	$ 48,732	$ 50,430	$ 52,953	$ 57,006	
Variance	$ 824	$ 2,628	$ 2,220	$ 1,846	$ 2,822	$ 10,340
Operating Expenses						
2007 Forecast	$ 10,684	$ 10,816	$ 10,937	$ 12,153	$ 13,357	
Actual	$ 11,549	$ 12,483	$ 13,171	$ 14,648	$ 15,892	
Variance	$ 865	$ 1,667	$ 2,234	$ 2,495	$ 2,535	$ 9,796

98 To summarise, while WIAL's operating expenses have been $9.8m more than forecast, this is more than offset by revenue being $10.3m more than forecast. It should also be noted that the forecast revenue requirement was based on application of a 9.5% WACC (9.3% prior to the changes to the corporate tax rate) against a land asset valued using MVEU and incorporating some $120 million of value which had not been recognised as income. Advice received by the airlines at the time was that a WACC of 8.5% was appropriate (8.3% prior to the changes to the corporate tax rate).

5.7 Cost of capital

99 The Commission has sought views on two specific issues relating to WACC:

(a) Should it use the March 2011 or the April 2012 estimate as a basis for its profitability estimate?

(b) Should it use the midpoint or the 75th percentile?

100 Air NZ considers that the more recent estimate is the most appropriate basis for the profitability estimate. This incorporates up-to-date values for the relevant inputs and, as noted by BARNZ during the Conference, is very close to the estimate

determined for BARNZ during the consultation process. Air NZ does not consider any adjustments are necessary to this estimate as this would simply undermine the extensive analysis undertaken during the input methodologies development process.

101 As noted above, and in light of the impact of non-aeronautical services on airport performance, Air NZ considers the cost of capital assessed by the Commission as generous and providing more than adequate returns. On this basis, the midpoint is the appropriate basis for an assessment of profitability. Using the 75th percentile for this assessment would not provide an appropriate balance between the s 52A "limbs".

5.8 Assessing non-aeronautical services

102 The Commission has sought views on:

(c) What impact will the incentive scheme have on investment and revenues for the non-aeronautical activities?

(d) What benefits would the provision of further information on costs and revenue for non-aeronautical services provide?

103 At the Conference, the Commission raised the issue of looking beyond aeronautical services into non-aeronautical services to judge sharing of economies of scope. This was raised in the context of the incentive scheme, although it applies more broadly across all specified airport services. Air NZ strongly supports this approach, as set out in our initial submission and cross-submission on the process and issues paper.

104 Doing so would not constitute a shift from dual-till regulation to single-till regulation. Nor would it extend the scope of regulation. Rather, it would involve the Commission using its current powers to inform a more accurate assessment of whether specified airport services were being supplied in a way that promotes the purpose of Part 4.

105 Economies of scope are relevant to all aspects of the purpose statement in s 52A, and it is difficult to see how they will be assessed without consideration (even at a high level) of non-aeronautical services. At the conference, WIAL acknowledged that economies of scope play an important role in incentivising investment.[36] In respect of efficiencies, the information disclosed by regulated airports should allow interested persons to assess whether (and to what extent) economies of scope have incentivised efficiency gains in the supply of specified airport services, and whether (and to what extent) any such efficiency gains have been shared with consumers.

[36] Transcript at 93-94.

5.9 Valuation

106 During the development of the input methodologies and information disclosure regime for airports, Air NZ submitted on a number of occasions that allowing airports to value their own assets was likely to prove problematic in practice, particularly in establishing the regulated asset base. For example, after the workshop on the Commission's Emerging Views Paper, in which there was a divergence of views between various regulated airports and valuers as to how MVAU would be applied, Air NZ submitted that:

> *There is a much deeper concern, however, that – terminology issues aside – the valuers did not appear to understand or fully appreciate how the Commission's interpretation of MVAU would need to apply in practice. In fact, some of the valuers appeared to give the impression that, even if they were asked to undertake an MVAU assessment as defined by the Commission, they would continue to apply a "valuer MVAU" approach*[37]

107 The valuations and methodologies adopted by WIAL in the price-setting process are consistent with this concern. Despite the clear guidance provided in the Airports IM Determination, information disclosure was not effective in incentivising WIAL to apply MVAU appropriately. Instead, an MVAU + conversion costs (i.e., MVEU) approach was adopted.

5.10 Capacity constraints

108 The Commission has sought views on the following:

> To what extent are there capacity constraints for parking and check-in desks at WIAL, and could alternative market mechanisms (other than congestion charging) be used to manage this capacity?

109 Air NZ does not consider there are capacity constraints for aircraft parking or check-in facilities at Wellington International Airport. Management of competing demand for facilities between different operators is a common feature of airport operations around the world. Generally this is done via operational protocols established in airport "Conditions of Use" such that all users have visibility of the basis on which allocation decisions are made and can be assured that their needs can be accommodated. This was the basis on which WIAL proposed to manage its facilities in a 2008 Draft Policies for Use document which was unfortunately not proceeded with.

[37] Air NZ, Post-Workshop Cross-Submission on the Input Methodologies (Airport Services) Emerging Views Paper, p 20.

5.11 Excess/over-investment in quality

110 Air NZ considers WIAL's new international terminal facility (the Rock) one example of an investment to a standard in excess of what is required. As BARNZ discussed in its initial submission to this s 56G review process:[38]

> *The Rock was an extraordinarily complex and expensive project. BECA, WIAL's Project Engineers, issued a media release describing it as an 'enormously complex' engineering design which 'stretched the ingenuity of BECA's structural team to the full'.*
>
> *As noted above, the remainder of the terminal is constructed on clean geometric lines, which were specifically adopted so as to reduce construction costs and allow incremental extension of the building at low cost as required. The Rock's design has dramatically departed from this concept.*

111 The quality issue then is not just the extent to which the terminal is "over-built" but also the impact of that investment on future expansion of the terminal.

112 Another example of over-investment for all customers' needs is the provision of RESAs, as described in section 4.3.7 of our cross-submission. Air NZ acknowledges that different operators may require different facilities to be provided but considers it incumbent on the airport operator then to ensure that those operators face the full cost consequences of those choices, rather than spreading costs across all users.

5.12 Airport regulation in Australia and the UK

113 Sapere Research Group has provided a report describing recent developments in Australian and UK airport regulation and concludes that "there is a high degree of alignment between the current New Zealand Part 4 approach and the direction of airport regulation in both Australia and the UK."[39] This conclusion is based on a "trend towards commercial negotiations and agreements, supported by information disclosure requirements, and backed by the threat of *ex post* enforcement if necessary."[40] Sapere does note that the three largest airports in the UK – those with substantial market power or dominance (similar to that held by the regulated airports) – remain subject to price controls.

114 What Sapere fails to note is the key difference between the Australian and UK regimes and the New Zealand regime where Part 4 information disclosure operates subject to other constraints. Unlike in those other jurisdictions New Zealand airports retain a statutory authority under the AAA to price as they think fit which the Courts have ruled provides no restraint on monopoly pricing.

[38] BARNZ, BARNZ Responses to Commerce Commission questions relating to WIAL (28 June 2012) at 18.
[39] Sapere Research Group, Recent developments in airport regulation in Australia and the UK and implications for New Zealand (20 July 2012) at 4.
[40] Ibid at 3.

115 In many ways the movement of the Australian and UK regimes described by Sapere could be characterised as being from a strict price control environment to one where negotiated outcomes are sought with recourse if necessary to a fully independent "referee" operating within a well-defined framework. This is in stark contrast to the New Zealand regime where, as evident during WIAL's recent price setting process, the airports act as both player and referee. As Mr Fitzgerald commented during the conference in the context of its land valuation – "…that decision in the context of price setting is one for Wellington Airport."[41]

[41] Transcript at 53, lines 7-9.