

SUBMISSION ON THE COMMERCE COMMISSION'S PROCESS AND ISSUES PAPER

AIRPORT SERVICES - SECTION 56G REPORTS

1. The New Zealand Airports Association ("**NZ Airports**") makes this submission on the Process and Issues Paper on Airport Services - section 56G Reports ("**Process and Issues Paper**") on behalf of the three Airports that are subject to the Information Disclosure Regime ("**ID Regime**") under Part 4 of the Commerce Act - namely, Auckland International Airport Limited, Wellington International Airport Limited and Christchurch International Airport Limited ("together, **Airports**").
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EXECUTIVE SUMMARY

3. NZ Airports believes that information disclosure is the appropriate form of regulation for the Airports, albeit as the Commission is aware, we have some reservations about input methodologies being applied in the ID Regime. We appreciate that section 56G of the Commerce Act 1986 ("**Act**") requires the Commerce Commission ("**Commission**") to undertake a review of the effectiveness of the ID Regime ("**Review**"), "as soon as practicable" after an airport sets any new price in or after 2012. This submission, and NZ Airports' subsequent engagement in the review process, is intended to assist with improving the robustness of the ID Regime.
4. The Review is a challenge, given that the ID Regime is in its infancy, and given that the outcomes of the Review could have significant consequences for a key infrastructure sector. The reality is that the Review comes too early to allow any determinative conclusions to be reached. Given that the ID Regime has only just begun, there is currently insufficient evidence for the Commission to conduct a fair and robust review of whether the ID Regime is providing incentives for Airports to meet the purpose of Part 4.
5. However, these challenges can be met with an appropriately targeted scope and timeframe for the Review. They can also be met by the Commission explicitly acknowledging that, at best, the Review can be a progress report only.
6. It is therefore encouraging that the Commission recognises some of the limitations on the Review. For example, an insufficient time series of data results from annual disclosures at this early stage means that any conclusions drawn about historical performance will be limited. Further, the merits review could mean that the ID Regime impacts differently in the future.

7. We also agree that the Review is not a comparative exercise, and therefore strongly endorse the Commission's view that it should not assess whether other forms of regulation could be more effective at promoting the purpose of Part 4.
8. However, NZ Airports has some concerns regarding the Commission's proposed approach to the Review, as follows:
 - (a) The Review has an unnecessarily tight timeframe which is unworkable for Airports (and which will require Airports to divert significant resources away from other parallel processes). Although the Commission amended the indicative timetable for the ID Review in its letter dated 20 June 2012, it remains too compressed.
 - (b) The Commission is yet to produce any summaries and analysis of performance of the Airports in accordance with Section 53B(2) of the Act. The Commission's obligation to prepare these summaries and analysis is a key part of the regulatory regime, which should logically take place *prior* to the Review to provide an opportunity for airports to consider the Commission's views. NZ Airports does not understand how the Commission can adequately report on the effectiveness of the ID Regime when an important component is missing.
 - (c) In our view, the appropriate focus of the Review is on whether the ID Regime is being effective in allowing the assessments anticipated by the purpose of information disclosure. For example, has the ID Regime helped to promote better understanding of airport performance, greater transparency and a better understanding of what is required to meet the Part 4 purposes statement? It is difficult to answer these questions without the guidance that would be provided by section 53B reports.
 - (d) The Process and Issues Paper appears to interpret the "effectiveness" of the ID Regime on the basis of whether it has had an immediate impact on pricing decisions. Some of the questions proposed for WIAL evidence this intent and are particularly problematic. In taking this approach, the Commission is placing too much emphasis on whether Airports are adopting the Commission's input methodologies ("**IM**") for pricing, and not enough emphasis on the ID Regime itself. Accordingly, the approach proposed in the Process and Issues Paper is inconsistent with:
 - (i) the requirement to assess the effectiveness of the ID Regime (as opposed to assessing the application of IMs in pricing); and
 - (ii) the Commission's own interpretation of the purpose of the ID Regime in the Information Disclosure (Airport Services) Reasons Paper ("**ID Reasons Paper**"), which is that it is not the role of information disclosure regulation to directly influence airport conduct.
9. Essentially, the Commission appears to be asking whether the ID Regime has been effective at exceeding its statutory purpose, which is limited to ensuring the availability of sufficient information to assess whether the purpose of Part 4 is being met.
10. Accordingly, NZ Airports submits that the Commission should reconsider its approach by:
 - (a) allowing more time for the Review (while still conducting it as soon as practicable). In this submission we propose an alternative timetable that would

allow the Commission to prepare its summaries and analysis, and would allow Airports sufficient time to fully engage in the Review; and

- (b) more carefully confining the scope of the Review and the relevant questions to be asked. In our view, the correct approach to determining the "effectiveness" of the ID Regime:
 - (i) is to focus on the purpose of information disclosure and the relevant specific requirements of information disclosure set out in Part 4 of the Act. Effective achievement of those matters should translate into an information disclosure regime that is effectively meeting the Part 4 purpose statement; and
 - (ii) to the extent that the individual price setting process of each Airport is relevant, assess whether Airports still have incentives to engage with airline customers on tailored approaches that help to promote the Part 4 purpose statement. Consistent with the views of the Australian Productivity Commission, slavish adherence in pricing to the IMs set for the ID Regime would in fact indicate regulatory failure (see paragraph 42(c) below).
11. Consistent with the foregoing, the Commission should prepare one report in which it addresses the effectiveness of the ID Regime in relation to all Airports. A separate report for each airport wrongly implies that the Commission will reasonably be in a position to draw conclusions about the performance of each airport from a snapshot.
 12. Finally, although on its face the Commission's indication that Airports must provide additional information as part of the Review is not problematic, NZ Airports does not understand *why* the Commission has signalled a strong need for information beyond that required under section 56G of the Act. Intuitively, the ID Regime itself should produce all relevant evidence. Greater clarification of how information outside of the disclosures will assist the Commission with meeting its statutory purpose would be helpful. That said, charging and cost recovery benchmarking to international airports may help to demonstrate that the Airports are already efficient by international standards, such that it is unrealistic to expect that the ID Regime would have an immediate and noticeable impact on airport performance.

PROPOSED TIMING OF THE REVIEW AND REPORT

13. The Commission sets out its proposed process for carrying out the Review and preparing its Reports to Ministers at paragraphs 15 and 16 of the Process and Issues Paper, with the following sequential steps:
 - (a) reviewing the information already disclosed under Part 4 of the Act and the price-setting disclosure as it becomes available for each Airport;
 - (b) reviewing the information disclosed in consultation during this review process and in response to any requests for information under its information-gathering powers under the Act;
 - (c) holding a conference prior to preparing draft reports to ensure that it has all the relevant information, and to test the views and ensure it understands any differences of opinion;
 - (d) issuing draft reports;
 - (e) inviting submissions on its draft reports;

- (f) inviting cross-submissions on its draft reports; and
 - (g) preparing a final report on each of the airports to the Minister.
14. NZ Airports appreciates that the Commission is committed to a fulsome consultation process. However, we have serious reservations about the proposed timing.
15. Section 56G of the Act requires the Commission to report to the Minister of Commerce and the Minister of Transport on how effectively information disclosure regulation is promoting the purpose in section 52A of the Act in respect of specified airport services "as soon as practicable" after any new price for a specific airport service is set or altered. The Commission considers it is required to commence the Review now, for the following reasons:
- (a) the trigger for reporting to Ministers has been met (that is, Airports are resetting their prices);
 - (b) price setting event disclosed information will be available;
 - (c) the Commission anticipates that the likely impact of ID regulation would be seen in Airports and Airlines behaviour in price setting rounds, and in forecast returns based on the prices set;
 - (d) the Commission has historical and forecast information disclosed under Part 4 of the Act; and
 - (e) if the review is delayed, it would likely be until after the pricing period after the 2012 price changes and this would be inconsistent with section 56G of the Act.
16. We agree that the trigger for reporting to Ministers has been met and that, given the statutory requirements, it is not feasible to wait until after the 2017 price setting events to commence the Review (although that would in fact be the best way to robustly test the effectiveness of the ID Regime).
17. However, NZ Airports believes that commencing the Review is not "practicable" at this stage, given the Commission will only be able to make its assessment based on an historical price setting disclosure addressing a price setting process undertaken prior to contemplation of the ID Regime, a single annual disclosure and the recent price setting disclosure, the first reflecting consideration of the new regime. In our view, at the very least, a review of the ID Regime is not practicable until:
- (a) annual disclosures and summaries are prepared by the Commission ("as soon as practicable") in accordance with section 53B(2) of the Act, as discussed below; and
 - (b) the interpretation of IMs is settled. The appropriateness of the IMs is a matter that is currently before the courts in the merits review proceedings, the results of which could have a material impact in understanding whether the ID Regime is effective at promoting the purpose of Part 4. There are not yet clear standards on which to assess performance, and any assessment now could prove to be flawed if the IMs are subsequently changed - this is especially so given the Commission's apparent proposal to focus on whether the IMs have been applied in pricing. This risk could be mitigated if the Review focussed more on the mechanics of the ID Regime, and less on the individual price setting decisions of each airport.

Section 53B(2) reports

18. Section 53B(2) requires the Commission, as soon as practicable after any information is publicly disclosed, to publish a summary and analysis of that information. The Commission's letter to NZ Airports dated 20 June 2012 expressed the view that the tasks required of the Commission under sections 53B(2) and 56G are distinct, serve two different purposes and are intended for a different audience. The Commission characterised the purpose of section 53B(2) summaries as:
- ...to provide guidance and assistance to interested parties regarding the information disclosed."
19. We agree. The purpose of these reports is to promote greater understanding of the performance of regulated suppliers, their relative performance, and the changes in performance over time.
20. As with the section 56G process, the section 53B(2) summaries form an important part of the ID Regime, which encourages outcomes consistent with the Part 4 purpose statement by encouraging self-initiated behaviour change by airports, if necessary. Accordingly, if the Commission identifies areas of concern in its summaries, airports may wish to take action to address any identified concerns. As noted in the Ministry of Economic Development's advice to the Commerce Committee considering the Bill:
- ... information disclosure, **combined with annual analysis by the Commission** and the requirements for a review, will impose some disciplines on pricing behaviour.¹
- [emphasis added]
21. Although distinct, the Commission's summaries and the ID Review process are therefore inextricably interlinked.
22. The Commission has yet to issue any summaries, despite the fact that disclosures have been made. The absence of summaries suggests that the Commission is comfortable that the "soon as practicable" test has not been satisfied in relation to the section 53B(2) reports. NZ Airports remains firmly of the view that section 53B(2) reports should logically come first when properly viewed as an important component of an effective ID Regime under part 4 of the Act.
23. The Commission has previously acknowledged the importance of the section 53B(2) reports:²
- The requirement to publish a summary and analysis confers an ongoing, active role on the Commission in respect of the information disclosure regime after the information disclosure requirements have been set. The Commission considers that its summary and analysis obligations will contribute to ensuring that sufficient information is made available to interested persons.
24. However, in the absence of any such reports, airports have received no guidance from the Commission on their performance. Accordingly, there has been no opportunity to engage in self-initiated behaviour change (if required), in response to the reports. The result is that the basis on which the effectiveness of the ID Regime can be robustly assessed has been significantly eroded.
25. It is now too late for the Commission to remedy this deficiency (given that it is not realistic to defer the review until after the next price setting event). However, the

¹ Departmental Report, 4 July 2008, at page 50.

² ID Final Reasons Paper, at para 2.46.

reports would still provide valuable evidence for the review, and should be undertaken prior to its commencement.

26. We therefore encourage the Commission to further consider whether it is appropriate to report to Ministers on the effectiveness of the ID Regime, when an important component of the regime has not yet been implemented. At the very least, it would seem that any report to Ministers would need to expressly acknowledge this limitation in the implementation of the ID Regime.

Timeframes

27. NZ Airports also believes that the Commission's proposed timeframe for the Review is unworkable for the following reasons:

- (a) it does not give airports an opportunity to meaningfully engage with the Commission. Responding to the Commission requires significant resources, which the Airports will have to reassign from other work to prioritise responses. Even then, NZ Airports is concerned that Airports will not be able to dedicate sufficient resources in the proposed timeframe to provide comprehensive submissions to the Commission. This is because during the period required for the initial and later submissions for the Review, the airports are all engaged in responding to other regulatory requirements, including:
- (i) Commerce Act price setting disclosure and annual financial reporting (AIAL);
 - (ii) Commerce Act annual information disclosure (WIAL); and
 - (iii) Airport Authorities Act consultation, annual financial reporting and Commerce Act price setting disclosure (CIAL).
- (b) the proposed timetable has the potential to further influence the pricing outcome for CIAL, as submissions, cross submissions, a conference and the Commission's draft report are timetabled to occur *prior* to CIAL setting aeronautical pricing and pricing disclosure. Good process would require all price setting events to be completed first (although we acknowledge that the Act does not explicitly require the Commission to wait).

28. NZ Airports proposes the following alternative timetable for a WIAL specific review, which as a minimum, ensures that the Commission's Report on WIAL is not released prior to CIAL's price setting event. If the Commission accepts our submission that it is not yet reasonably practical to undertake the Review (see paragraph 17 above), then a fresh timetable would need to be developed:

Process	Commission's revised indicative timeframes for WIAL	NZ Airports proposed timeframes for WIAL	NZ Airports proposed timeframes for a single report (taking into account CIAL's proposed PSE and pricing disclosure)
Process and Issues paper	31 May 2012	31 May 2012	31 May 2012
Submissions on the Process and Issues Paper	29 June 2012	Due 29 June 2012	29 June 2012
Cross submissions on the Process and Issues Paper	13 July 2012	13 July 2012	13 July 2012

Section 53B(2) summaries and analysis for WIAL and AIAL		Prior to 20 July 2012	Prior to 22 August 2012
Preliminary issues paper for conference and section 53B(2) summaries and analysis for CIAL	31 July 2012	22 August 2012	22 November 2012
Conference	7 August 2012	5 September 2012	17 December 2012
Draft report	21 September 2012	11 October 2012	28 January 2013
Submissions on draft report	Due 19 October 2012	Due 30 November 2012	19 March 2013
Cross-submissions on draft report	Due 26 October 2012	Due 14 December 2012	4 April 2014
Final report to Ministers	1 December 2012 - 31 December 2012	February 2013	May 2013

29. Should the Commission find NZ Airports' proposed timetable unacceptable, we reiterate our concerns discussed above regarding the unworkability of the Commission's timeframes. At a minimum, NZ Airports requests:
- (a) a two week period for preparation for the conference and for preparing cross-submissions following relevant submissions; and
 - (b) a six week period for preparation of a submission on the draft report.
30. We also note that the Commission's revised indicative timetable does not include issuing specific questions for AIAL and CIAL or the submission and cross-submission process in relation to those proposed separate reviews. Accordingly, the complete proposed timetable remains unclear. However, if the Review is limited to a single report in relation to WIAL with an appropriate scope, NZ Airports' proposed timetable is suitable (subject to our view in paragraph 17 above).
31. In our view, NZ Airport's proposed timetable (and appropriately focussed scope as discussed in the next section) will:
- (a) provide the Commission with adequate time to prepare section 53B(2) summaries and analysis (although we accept that the Commission may have to push back the process if it cannot meet this deadline);
 - (b) provide the airports with a more workable timeframe in which to meet regulatory and reporting deadlines;
 - (c) provide airports' with more appropriate and workable timeframes to give comprehensive consideration to submissions and reports;
 - (d) will not diminish the timeliness of the Commission's Report required by section 56G of the Act; and
 - (e) will increase the prospect of a robust report that is valuable to Ministers and is less vulnerable to challenge.

WHAT IS "EFFECTIVE" INFORMATION DISCLOSURE?

32. Section 56G(1)(c) of the Act requires the Commission to report to the Ministers of Commerce and Transport about how effectively information disclosure is promoting the

purpose in section 52A of the Act. This requirement must be interpreted in the context of the statutory provisions that govern the ID Regime. By apparently focussing on whether the ID Regime has had an immediate and direct impact on pricing consultations and decisions, the Commission is at risk of wrongfully assessing whether the ID Regime has been effective at exceeding its statutory purpose.

33. The Commission has not set out a full analysis of the key legal test to be assessed by the Review, namely, how effectively information disclosure is promoting the Part 4 purpose statement. It has simply stated that the reports to Ministers require an assessment of:
- (a) Airport's performance (historical and projected) under section 52A(1) to identify whether the objectives in (a) to (d) are occurring; and
 - (b) The extent to which information disclosure regulation under Part 4 has had an impact on the airport's performance and conduct.
34. The approach to the Review set out at paragraph 25 of the Process and Issues Paper appears reasonable. However the approach outlined at paragraph 28 goes too far. In particular, we do not understand the Commission's proposal to consider performance of airports *against* the IMs. IMs are solely required to be applied by airports to produce annual information disclosure.
35. We also note that the Commission's proposal at paragraph 27 to "...ask interested persons for their views on the impact of ID regulation, if any, on the airports' conduct/behaviour since ID regulations came into force ..." appears to be an inappropriate approach to assessing the effectiveness of information disclosure under the Review. The Commission should instead be asking interested persons whether sufficient information is available to enable them to form a view on airport performance.
36. The Process and Issues Paper suggests the Commission has determined that the "effectiveness" of information disclosure is determined by whether its IMs for information disclosure have had an immediate and direct impact on pricing decisions, such that objectives (a) to (d) are being achieved.
37. NZ Airports submits that this is a flawed starting point to the extent that it implies that there is a problem that needs fixing. As the purpose of information disclosure reinforces, the ID Regime is an evidence gathering mechanism to allow assessment of whether the Part 4 purpose statement is being met. NZ Airports trusts that the Commission is open to the view that the ID Regime may have no immediate impact on pricing because:
- (a) It is not the purpose of information disclosure to have that effect; and/or
 - (b) Airport conduct is already consistent with the Part 4 purpose statement.
38. Such an approach directly contradicts the Commission's interpretation of the purpose of the ID Regime set out in the ID Reasons Paper:³

As discussed above, information disclosure provides a means for regulators and other interested persons to assess whether regulated suppliers face incentives to achieve outcomes consistent with outcomes produced in workably competitive markets such that the objectives listed in paragraphs (a) to (d) of s 52A are achieved. **An effective information disclosure regime provides transparency to interested persons on the performance of regulated**

³ Commerce Commission, ID Reasons Paper 22 December [2.24 and 2.29-2.30].

suppliers, and provides an ongoing source of information so that trends can be identified and monitored over time.

...

However, the Commission considers that it is important to distinguish this influence from the purpose of information disclosure as provided for in s 53A of the Act. While some incentive effects will flow from any information disclosure regime, the Commission's information disclosure framework has been developed to ensure that sufficient information is readily available to interested persons to assess whether the purpose of Part 4 is being met.

Some submitters have argued that the Commission is setting de facto price control of airport services. This is incorrect. The Commission appreciates that Airports are able to charge as they see fit. The information required by the Commission's ID Determination is based on the information listed in s 53(2) (which is not an exhaustive list) and is considered necessary to assess whether the purpose of Part 4 is being met.

39. This strongly suggests that the immediate focus of the Review should be on whether the ID Regime is being effective in allowing the assessments anticipated by the purpose of information disclosure. For example, has the ID Regime helped to promote a better understanding of airport performance, greater transparency, and a better understanding of what is required to meet the Part 4 purpose statement? It is difficult to answer such questions without the guidance that the section 53B(2) reports would provide.
40. NZ Airports submits that the effectiveness of information disclosure should be assessed by reference to:
- (a) the purpose of information disclosure - that is, the promotion of transparency; and
 - (b) annual monitoring and reports for better understanding of performance.
41. Interpreting the effectiveness of the regime therefore primarily requires an assessment of whether sufficient information on performance is available and whether airports are adjusting behaviours as and when information disclosure reveals that change is required. NZ Airports believes that the ID Regime is currently at a point where it is too early to make such an assessment. This should not however mean that a proper Review be substituted by a short-cut process that asks whether there has been an immediate and direct effect on prices, as this would be asking whether information disclosure is effective at controlling pricing, which is far beyond the statutory purpose of the ID Regime.
42. NZ Airports is concerned that by not appropriately focussing the scope of the Review in this way, a number of points of confusion have arisen which require clarification. For instance, we note the following:
- (a) the Commission appears to be focused on recent and expected financial performance to measure Airports' profitability since information disclosure was implemented, in order to assess how effectively the ID Regime is promoting the Part 4 purpose statement. However, this approach suggests that the Commission is primarily interested in limb (d), limiting excessive profits. Accordingly, the Commission appears to be giving too much weight to profitability at the expense of adequately assessing whether all four limbs of the purpose statement are being promoted. NZ Airports remains of the view that the purpose statement requires priority to be given to objective (a) - that is, incentives to innovate and invest. Clifford J agreed with this interpretation in *WIAL v Commerce Commission*, stating that when developing the new Part 4 purpose statement, "...the Government chose to add, and give prominence

to, a new outcome, namely that regulated firms were to have incentives to innovate and invest";⁴ We also note that in its recent review of the price monitoring regime for Australian airports, the Australian Productivity Commission primarily focussed on whether airports had appropriate incentives to invest.⁵

The level of investment by airports, and their ability to meet the demand for services at an efficient price, are key issues for this inquiry.

- (b) A focus on profitability and returns carries high risk of flawed assessments. NZ Airports has repeatedly warned the Commission about the dangers of "snapshot" assessments of returns, which has recently been endorsed by the Australian Productivity Commission:⁶

While a business' WACC may remain relatively stable, its rate of return should vary across time. It is economically efficient for a business to charge lower prices when it has excess capacity, to attract demand for its infrastructure. In these periods, the rate of return will be lower. As capacity tightens or congestion rises, prices rise to temper demand, and to encourage new investment. As prices rise, so too does the rate of return. As new investment expands capacity again, the rate of return falls, and so on.

While rates of return may vary over time, a business must earn its WACC *on average* to make investment attractive. But if a regulator acts to curtail high rates of return, while ignoring periods of low returns, then the business will not earn the returns needed to attract investment funds. This movement by a regulator only against high returns is known as "asymmetric truncation".

- (c) It is not clear how the Commission's proposal to granularly assess the decisions made in pricing consultations will assist the Commission in understanding how the ID Regime promotes the purpose of Part 4. On its face, this approach appears to assume that the effectiveness of the ID Regime is determined by whether or not airports apply information disclosure IMs for pricing purposes. This directly contradicts the purpose of a light-handed ID Regime, which is to provide market participants with incentives to reach appropriate outcomes themselves. Appropriate questions, for example, would be whether information disclosure is not interfering with airports and airlines appropriately engaging on what new investment is required, its timing, how it should be paid for, and whether information disclosure is providing evidence of this occurring. Again, the Australian Productivity Commission has provided authoritative guidance on why a focus on the application of building blocks in pricing is flawed:⁷

Importantly, the removal of the price cap regime has allowed airports and airlines to agree on prices and service level agreements, rather than having a regulator supplant business investment decisions. In the end, while the detailed aspects of the building block model may inform negotiations, the parties agree on price, not the underlying variables. The model is a starting point, and may be used to 'test' the reasonableness of offers made during commercial negotiations. As such, the final price set may not emerge as the result of the scientific application of formula, but rather a balance of issues (including the bargaining power brought to bear) during tough commercial negotiation. In effect, the price contains more 'information' about the use of market power. Given this, it is appropriate to observe the final prices that emerge from negotiations (rather than any ambit claims that may be made

⁴ Para 88 of the Judgment.

⁵ Australian Productivity Commission Inquiry Report, "Economic Regulation of Airport Services", 14 December 2011, at page 97 ("**PC Report**").

⁶ See page 127 of the PC Report.

⁷ See page 129 of the PC Report.

relating to model parameters at various stages) when monitoring for market power purposes.

43. Accordingly, NZ Airports requests that the Commission provides:
- (a) a clear objective framework that sets out how the assessment of whether information disclosure is effectively promoting the Part 4 purpose statement will be made;
 - (b) a more careful explanation of how price consultation information can appropriately assist the Commission to understand how effectively the new information disclosure regulation promotes the purpose statement;
 - (c) clarification that an Airports' choice to adopt an IM for pricing is unlikely to have any relevance to the question of whether the ID Regime is effective; and
 - (d) confirmation that the Commission intends to appropriately balance its consideration of how information disclosure regulation is promoting each of the limbs of the purpose statement.
44. NZ Airports submits that appropriately addressing the above points requires the following matters to be incorporated or reflected in the assessment framework:
- (a) Information disclosure promotes the Part 4 purpose statement by ensuring sufficient information is available to interested parties to assess airport performance. Accordingly, the Commission's focus should be on whether the purpose of information disclosure is being effectively met, namely whether the airports are disclosing sufficient information to allow interested parties to make their own assessments of whether the purpose of Part 4 is being met, by asking the following types of questions:
 - (i) What has the quality of airports' disclosure been like since the implementation of the ID Regime - that is, is the machinery of the regulation operating correctly, or does something need to be changed or improved?
 - (ii) Are the Airports' disclosures enabling interested parties to make an assessment against the Part 4 purpose statement?
 - (iii) (Had they been prepared) whether the section 53B(2) reports have contributed to a shared understanding of whether airports are performing consistently with the part 4 purpose statement?
 - (b) The Commission's focus should be on what the information disclosed by Airports reveals about how the outcomes in section 52A (a) to (d) are being promoted/achieved. This should primarily be done by assessing Airports' performance as per the information disclosed, although we agree with the Commission that this will be challenging at this point in the process in the absence of annual performance information over time. We note that the historical price setting event disclosures do not assist in this regard, because the ID Regime was not in place at the time those price setting events occurred. Indeed, section 56G explicitly directs the Commission to focus on the disclosed information. If that assessment reveals any concerns, it does not follow that the ID Regime is ineffective. In fact, if the ID Regime promotes the identification of areas of concern, then this suggests that it is effective. The Commission would then need to carefully consider whether there is any evidence that problems or concerns are likely to persist over time, such that

the effectiveness of the ID Regime is brought into question. NZ Airports strongly doubts whether such evidence exists at this stage.

- (c) Assessment of price setting events should not be examining the substance of the pricing consultations but should be more appropriately confined to examining the nature and process of engagement between airports and airlines under the AAA regime and whether pricing is unduly influenced. For example, it would be appropriate to ask whether IMs are unduly impacting on consultation, such that tailored commercial solutions to pricing and investment are being prejudiced. Conversely, it would be inappropriate to ask why IMs for information disclosure have not been applied for pricing purposes.
- (d) In our view, the Commission should explicitly acknowledge that, given the very short time that the ID Regime has been in force, it is not possible under the Review to reach any definitive conclusions about the extent to which regulated suppliers face incentives to achieve outcomes consistent with those produced in workably competitive markets, such that the objectives listed in paragraphs (a) to (d) of section 52A are being achieved.

SEPARATE REPORTING PROCESS

- 45. The Commission is proposing to prepare separate reports for each of the three Airports at different stages of the proposed Review process. NZ Airport's queries whether the Commission's proposed approach is consistent with the correct interpretation of section 56G.
- 46. The Commission appears to be focussed on the trigger for the Review, which is when any airport sets prices. However, it has not addressed the requirement for the report to be on the specified airport services, which by definition includes all services subject to information disclosure regulation.
- 47. A single report is also consistent with the correct focus of the Review being about the effectiveness of the ID Regime as a whole, and not the individual price-setting performance of each Airport. On this basis our view is that the appropriate approach is for the Commission to produce one Report, which assesses the effectiveness of the ID Regime in relation to all Airports.
- 48. The Commission's view that separate reports are required appears to be motivated by its inappropriate focus on the individual conduct and decision-making of each airport in pricing consultations.

ADDITIONAL INFORMATION GATHERING POWERS

- 49. The Process and Issues Paper suggests that Airports and other interested parties will need to provide the Commission with information other than the disclosures required under Part 4 of the Act. The Commission justifies its approach on the basis that additional information may assist the Commission in its Review by providing insights into how effectively information disclosure regulation is promoting the purpose of Part 4 in terms of an Airport's performance (in terms of the purpose of Part 4) and/or an Airport's conduct in relation to a price setting event.
- 50. NZ Airports is surprised that the Commission has strongly signalled a need for further information in its Process and Issues Paper. NZ Airports queries why the Commission would need information beyond the disclosed information specifically referred to in section 56G of the Act. In our view, the Act suggests that the disclosures should be sufficient to allow the Commission to report to the Ministers on the effectiveness of the ID Regime as required by section 56G. We are concerned that the Commission's

starting point may imply that the ID Regime created by the Act is not effective (which we strongly disagree with).

51. However, if the Commission concludes that section 56G intended for it to review information beyond that specifically disclosed under the ID Regime, any additional information sought in accordance with the Commission's broad information gathering powers under the Act should be demonstrably relevant to the assessment of how effectively the ID Regime is promoting the Part 4 purpose statement. That is, it should be clear how the information will assist the Commission in meeting its statutory purpose. The Commission is at risk of embarking on a wider ongoing consultation process with no point of reference for the relevant assessment required by section 56G. For example, raising questions about the reasonableness of WIAL's valuation used in pricing tells us nothing about the effectiveness of the ID Regime. The more relevant question is whether WIAL has properly applied the asset valuation IM when making its disclosures.
52. The Commission also indicates it will use benchmarking for the Review. In our view, there seems to be little value in separate domestic benchmarking between the Airports given that the information disclosed under the ID Regime and the Commission's section 53B(2) reports allow comparative analysis (to the extent that comparisons can be made).
53. Comparisons between airports in different jurisdictions can be fraught because of the many different variables experienced by airports, including demand factors and asset/cost profiles. However, there could be benefit to be gained in comparing New Zealand regulated airports with overseas airports as a check on any assessments of the information disclosed. In particular, it is likely to demonstrate that New Zealand airport charges are low and the airports are operationally efficient, and that it is unrealistic to expect that the ID Regime would have an immediate and noticeable impact on airport performance.

THE COMMISSION'S RECOMMENDATIONS

54. NZ Airports supports the Commission's indication that the Review will not:
 - (a) consider how effectively the ID Regime is promoting the purpose of Part 4 relative to other types of regulation provided for under Part 4, or relative to no regulation; or
 - (b) recommend what, if any, alternative type of regulation should apply.
55. The purpose of information disclosure is to ensure that sufficient information is readily available to interested persons to assess whether the purpose of Part 4 is being met. The purpose of the section 56G Review is to determine whether information disclosure is effective in achieving that purpose. NZA Airports believes that the Commission has correctly interpreted the Review as being limited to assessing the effectiveness of the ID Regime (albeit as set out above we are concerned about the intended scope).

56. NZ Airports believes that although the ID Regime is having a positive impact, the only certain conclusion the Commission will be able to draw is that a much longer time-series of information is required in order to form any conclusive view about the effectiveness of the ID Regime. In our view, the Commission should acknowledge that the ID Regime has only just commenced and it is therefore looking to identify 'lead indicators' of whether the ID Regime is working, which may need to be further assessed in the future.

SPECIFIC QUESTIONS RELATED TO WIAL

57. NZ Airports does not seek to specifically address the questions the Commission has asked regarding WIAL. However, the questions have raised a number of concerns regarding the Commission's approach, as follows:
- (a) NZ Airports is concerned that the specific questions regarding WIAL have not been preceded by and separated from a consultation process regarding the appropriate scope of the Review. It raises doubt as to whether the Commission is truly open to feedback on the appropriate scope of the Review.
 - (b) The topics of the questions regarding WIAL do not align with the outcomes listed in (a) to (d) in the purpose statement. For example, the current questions focus on whether WIAL is investing efficiently or innovating appropriately, rather than whether WIAL has the incentives to invest or innovate in the first place.
 - (c) The Commission's performance and behavior measures appear to be too narrow to adequately assess impact of the ID Regime on promoting all four limbs of the purpose statement. Rather, the focus on performance suggests the Commission is primarily interested in limb (d) - that is, limiting excessive profits, and that this focus is at the expense of the other limbs of the purpose statement (one of which the Court held to be more important than the others, as discussed earlier). When the Commission is looking at performance and behaviour, the Commission should clearly demonstrate the basis on which such performance and behaviour is relevant to assessing whether information disclosure is promoting the purpose statement.
 - (d) The Commission appears to be establishing a process to review WIAL's pricing consultation, which is outside the review process contemplated under the Act.
 - (e) In relation to which airports would provide a useful benchmark for assessing the performance of WIAL, see above at paragraph 52.
58. We attach a schedule of proposed revised questions, which we believe are consistent with a more appropriate scope of review (**Attachment One**).

**ATTACHMENT ONE: PROPOSED REVISED QUESTIONS REGARDING WIAL
UNDER THE SECTION 56G ID REVIEW⁸**

Strengths and weaknesses of the information disclosure regime

1. What are the additional costs to WIAL of complying with information disclosure?
2. What are the benefits to WIAL, airlines and other consumers of WIAL's services of using the information disclosed?
3. What additional information (not captured in responses to the questions above) would better help you assess whether the purpose of Part 4 is being met by the information disclosure regime?
4. What information disclosed by WIAL in accordance with the ID Determination is not required to help you assess whether the purpose of Part 4 is being met?
5. Would (or do) the Commission's summaries and analysis under section 53B(2) help you to assess whether the purpose of Part 4 is being met?

Meeting the purpose of Part 4

6. What does the information disclosed so far in accordance with the ID Determination say about WIAL's performance in relation to the Part 4 purpose statement? This requires consideration of:

Is the long term benefit of consumers being promoted?

7. Is it possible, at this stage, to draw any conclusions about whether the *long-term* benefit of consumers is being promoted?

Do airports have Incentives to innovate and to invest?

8. Where and when do any capacity constraints occur at WIAL, and is additional investment necessary to address these constraints?
9. What factors outside WIAL's control have contributed to the capex and opex forecast for the PSE, recognising that only one PSE has taken place?
10. How reasonable are WIAL's opex and capex forecasts for the PSE, recognising that only one PSE has taken place?
11. To what extent does the demand forecast presented by WIAL as part of the PSE, accurately reflect expectations of future demand, and why, recognising that only one PSE has taken place?
12. How reasonable is WIAL's demand forecast for the PSE ?
13. What research and development (R&D) or innovation activities have been undertaken or are forecast to be undertaken by WIAL and what was the outcome of these activities (if they have been undertaken), or the expected outcome?

Do airports have incentives to improve efficiency and to provide services at a quality that reflects consumer demands?

⁸ Note that the questions would also be applicable to all Airports under a single Review.

14. Does the disclosed information demonstrate that WIAL is employing efficient pricing principles?
15. How does the pricing information disclosed by WIAL reflect previous and future expectations of efficiency gains?
16. Does the disclosed information tell us anything about the extent airlines and other consumers of WIAL's services have been able to make price-quality trade-offs that best meet their needs?
17. How do airlines and other consumers of WIAL's services expect their demand to change in response to the pricing information disclosed by WIAL in the second PSE, including the introduction of peak pricing?
18. What impact will WIAL's proposed prices, pricing structure and associated incentives have on demand and revenues?
19. What does the disclosed information reveal about quality in services?
20. What, if any, aspects of quality do you think should or could be improved (or potentially lowered) at WIAL?
21. Do the current ID requirements capture the right measures of quality?

Are airports sharing with consumers the benefits of efficiency gains, including through lower prices?

22. What does the information disclosed in accordance with the ID Determination tell us about whether efficiency gains will be shared with consumers?

Limitations on the ability to extract excess profits.

23. What is an appropriate level of target return for WIAL, and why is the level appropriate?
 - (a) What is an appropriate level to reflect normal performance, and why?
 - (b) What is an appropriate level to reflect superior performance, and why?

24. How should we assess profitability, given the airports inter-temporal use of wash-ups, discounts and other discretionary mechanisms?

Effectiveness of the ID Regime

25. Based on the information disclosed in accordance with the ID Determination, is there any evidence that WIAL may not be meeting the purpose of Part 4?
26. If there is such evidence, is there any further evidence to suggest that the ID Regime will not be effective at encouraging WIAL to address those concerns?
27. If there is such evidence, is there any way that the ID Regime could be improved to address these concerns? For example, will the Commission's annual monitoring and analysis assist?

Overseas comparator airports

28. What airports, if any, provide a useful benchmark for assessing the performance of WIAL, and why, taking account of the fact that only one PSE has taken place for all the relevant airports? Please provide any relevant benchmarking data if possible.
29. Please explain how you think benchmarking is useful or relevant to assessing whether the purpose of Part 4 is being met.