JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	:	PERTH AIRPORT PTY LTD -v- QANTAS AIRWAYS LTD [No 3] [2022] WASC 51
CORAM	:	LE MIERE J
HEARD	:	13 SEPTEMBER 2021
DELIVERED	:	18 FEBRUARY 2022
FILE NO/S	:	CIV 3147 of 2018
BETWEEN	:	PERTH AIRPORT PTY LTD Plaintiff AND QANTAS AIRWAYS LTD First Defendant JETSTAR AIRWAYS PTY LTD Second Defendant AIRLINK PTY LTD Third Defendant NETWORK AVIATION PTY LTD Fourth Defendant EXPRESS FREIGHTERS AUSTRALIA PTY LTD Fifth Defendant

Catchwords:

Restitution - Quantum meruit - Reasonable remuneration for aeronautical services - Comparable transactions - Long run average cost - Building block model

Evidence - Hearsay rule - Admissibility of ACCC and Productivity Commission Reports - Whether reports are 'public documents'

Legislation:

Airports Act 1986 (Cth)
Harbors Act 1913 (SA)
Productivity Commission Act 1998 (Cth)

Result:

Remuneration determined

Category: B

Representation:

Counsel:

Plaintiff	:	Mr N J Young QC, Mr M Rush QC, Ms C Dermody & Mr P Walker
First Defendant	:	Mr J Sheahan SC, Dr B Kremer & Mr E Heenan
Second Defendant	:	Mr J Sheahan SC, Dr B Kremer & Mr E Heenan
Third Defendant	:	Mr J Sheahan SC, Dr B Kremer & Mr E Heenan
Fourth Defendant	:	Mr J Sheahan SC, Dr B Kremer & Mr E Heenan
Fifth Defendant	:	Mr J Sheahan SC, Dr B Kremer & Mr E Heenan

Solicitors:

Plaintiff	:	DLA Piper Australia - Melbourne
First Defendant	:	MinterEllison
Second Defendant	:	MinterEllison
Third Defendant	:	MinterEllison
Fourth Defendant	:	MinterEllison
Fifth Defendant	:	MinterEllison

Case(s) referred to in decision(s):

AMP Henderson Global Investors Ltd v Valuer General [2004] NSWCA 264; (2004) 134 LGERA 426

Angelopoulos v Sabatino [1995] SASC 5230; (1995) 65 SASR 1

Astway Pty Ltd v Council of the City of the Gold Coast [2008] QCA 73; (2008) 159 LGERA 335

Australian Competition and Consumer Commission v Metcash Trading Ltd [2011] FCA 967; (2011) 282 ALR 464

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd [1982] HCA 53; (1982) 149 CLR 600

BP Exploration Co (Libya) Ltd v Hunt (No 2) [1979] 1 WLR 783

Expectation Pty Ltd v Pinnacle VRB Ltd [2004] WASCA 261

Foletta v Merri Creek Quarry Pty Ltd [1951] VLR 149

Hill v Clifford [1907] 2 Ch 236

Ioannou v Demetriou [1952] AC 84; [1952] 1 All ER 179

John Nominees Pty Ltd v Dixon [2003] WASCA 51

Kane Constructions Pty Ltd v Sopov [2005] VSC 237; (2006) 22 BCL 92

Lyell v Kennedy (1889) 14 App Cas 437

Mann v Paterson Constructions Pty Ltd [2019] HCA 32; (2019) 267 CLR 560

Mercer v Denne [1904] 2 Ch 534

Mitchell v Canal Rocks Beach Resort [2002] WASCA 331

Pavey & Matthews Pty Ltd v Paul [1987] HCA 5; (1987) 162 CLR 221

PQ v Australian Red Cross Society [1992] 1 VR 19

R v Halpin [1975] QB 907; [1975] 3 WLR 260

R v Karger [2001] SASC 64; (2001) 83 SASR 1

Re HIH Insurance Ltd (in liq) [2015] NSWSC 790

Re Staples; Ex parte Baker v Staples (1996) 67 FCR 541

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234

Sopov v Kane Constructions Pty Ltd [No 2] [2009] VSCA 141; (2009) 257 ALR 182

South Australian Harbors Board v South Australian Gas Co [1934] HCA 45; (1934) 51 CLR 485

Stinchcombe v Thomas [1957] VR 509; (1957) ALR 1027

Stohl Aviation v Electrum Finance Pty Ltd (1984) 5 FCR 187

Sturla v Freccia (1880) 5 App Cas 623; [1874 - 80] All ER Rep 657

United Group Rail Services Ltd v Rail Corporation New South Wales [2009] NSWCA 177; (2009) 74 NSWLR 618

Yeoman's Row Management v Cobbe [2008] UKHL 55; [2008] 1 WLR 1752

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LE MIERE J:

Summary

1   Between 1 July and 17 December 2018 (the Relevant Period), the plaintiff, PAPL, provided aeronautical services at Perth Airport to the defendants, who I will refer to collectively as Qantas. At the time, there was no contract between PAPL and Qantas governing the price or other terms and conditions of that use. The parties' previous contract had expired on 30 June 2018. It is common ground that Qantas must pay fair and reasonable remuneration for the services provided and accepted. The question in this case is, what is the fair and reasonable remuneration to be paid by Qantas to PAPL for those aeronautical services?

2   From 1 July 2018, PAPL has invoiced Qantas for the use of the aeronautical services at rates which PAPL considered to be fair and reasonable. Qantas did not pay PAPL for the aeronautical services at the rates invoiced by PAPL. Qantas paid PAPL for the aeronautical services at rates which they considered to be fair and reasonable, which are lower than the rates charged by PAPL.

3   There are five passenger terminals at Perth Airport. They are known as Terminal 1 (T1), Terminal 1 Domestic (T1D), Terminal 2 (T2), Terminal 3 (T3), and Terminal 4 (T4). Terminal 3 was used during the Relevant Period by Qantas for domestic and international flights. One of the Qantas airlines (Jetstar) used international terminal services at T1.

4   PAPL submits that prices for aeronautical services at Perth Airport agreed between PAPL and other airlines is the best evidence for, and the most relevant, contemporaneous, objective measure of, the value of the aeronautical services used by Qantas in the Relevant Period.

5   PAPL submits that the services provided to Qantas were relevantly identical to those provided to the other contracted airlines which entered aeronautical services agreements (ASAs) with PAPL, and precisely the same facilities were used to provide airfield services and international terminal services at T1.

6   PAPL submits that in calculating a fair value for the aeronautical services the court should adopt the comparable transactions methodology of Mr Houston, an economist with expertise in competition and regulatory matters. Broadly, Mr Houston's method is

to assess the average prices paid by other airlines for aeronautical services at Perth Airport and arrive at a reasonable price to be paid by Qantas by adjusting those prices to reflect any differences in the circumstances under which the services were provided to Qantas.

7   PAPL submits that, adopting that methodology, the charges to be paid by Qantas are:[1]

(a)   rates per passenger:

(i) $17.35 for international terminal and airfield services;

(ii) $11.418 for domestic terminal services;

(iii) $6.178 for airfield services; and

(b) $11.909 per landed tonne for non-passenger aircraft.

8   PAPL submits that the reasonableness and fairness of the sum it claims (and prices sought) is confirmed by:

(a)   the prices agreed and paid by Qantas until 30 June 2018;

(b)   Qantas passenger tickets issued after 1 July 2018 continuing to include airport charges reflecting prices paid by Qantas to Perth Airport until 30 June 2018;

(c)   the per passenger economic profit earned by Qantas on flights to and from Perth Airport materially exceeding the per passenger prices claimed by PAPL for the Relevant Period; and

(d)   the comparable prices being at or close to PAPL's minimum willingness to accept (or supply) which it equates to the cost to PAPL of providing the services, calculated using a building block model.

9   PAPL used building block models to inform its discussions with airline customers on the aeronautical prices to apply over the proposed seven-year period commencing on 1 July 2018. PAPL used a similar approach to inform pricing in both the 2002 and 2011 agreements with airline customers. In those negotiations, PAPL stated that this approach, and the inputs to it, are consistent with the Aeronautical Pricing Principles (APP) established by the Commonwealth

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[1] E0013, _0008 at [17b].

government and developed by the Productivity Commission over three successive public inquiries dating back to 2002.

10   The underlying principle of a building block methodology is the calculation and summation of a return of and on capital, efficient operational expenses, and tax. Similar approaches are used by the Australian Competition and Consumer Commission (ACCC), the Australian Energy Regulator (AER) and jurisdictional regulators such as the Independent Pricing and Regulatory Tribunal (IPART) in New South Wales in setting maximum allowable prices in price-controlled infrastructure sectors.

11   Qantas submit that a fair and reasonable price should be determined by a direct assessment of the efficient costs of the aeronautical services provided by PAPL to Qantas using PAPL's building block models.

12   Qantas submit that this approach is the industry standard and was used by both PAPL and Qantas to calculate prices for the agreement which expired on 30 June 2018 and during failed negotiations to agree a replacement agreement to apply from 1 July 2018. Qantas submitted that some of the inputs used by PAPL in its building block models during the failed negotiations were incorrect or unreasonable. Qantas submitted that fair and reasonable prices should be calculated using the PAPL building block models with the adjusted inputs proposed by Qantas.

13   From 1 July 2018, Qantas paid PAPL for aeronautical services at prices it considered to be reasonable by taking the PAPL building block model and making adjustments to reflect inputs Qantas considered to be correct or reasonable. After the joint expert conclaves and reports were completed Qantas paid PAPL the difference between what it had paid during the Relevant Period and what it would have paid using the lowest price supported by its expert evidence as calculated by Mr Siolis and in the case of freighter aircraft the price per landed tonne of MTOW as used by Mr Houston in his building block model calculation. As a result, Qantas has paid to PAPL for aeronautical services at prices it submits are fair and reasonable as follows:

(a)   rates per passenger (ex GST) of:

(i) $6.97 for international passenger services using T1 and T3;

        (ii) $6.02 for domestic passenger services using T3; and

        (iii) $3.99 for domestic and international airfield services;

    (b) $10.83 for freight and non-passenger aircraft.

14   The primary relief claimed by PAPL is a claim for all unpaid amounts for aeronautical services provided by PAPL during the Relevant Period calculated by reference to the fair and reasonable price for such services or, alternatively, restitution of the enrichment received by each defendant from its use of the aeronautical services provided by PAPL during the Relevant Period.

15   However, the parties agreed that the court should deliver judgment stating the price for terminal services and airfield services that will provide fair and reasonable remuneration to PAPL. The parties will then calculate the amount due to PAPL (if any) for the Relevant Period.

16   For the reasons which follow, I find that the per passenger prices for terminal services and airfield services that will provide fair and reasonable remuneration to PAPL for the Relevant Period are:

Aeronautical service	Price
Airfield (domestic and international)	5.383
International passenger services (T1 and T3)	9.336
Domestic passenger services (T3)	8.436
Freight and non-passenger services (per landed tonne MTOW)	10.83

Overview

The plaintiff

17   The plaintiff, PAPL, is a privately held corporation owned by institutional investors. PAPL operates Perth Airport under a lease with the Commonwealth government dated 1 July 1997 pursuant to the *Airports Act 1986* (Cth) as an airport lessee company and an airport operator company. Perth Airport is the fourth busiest airport in Australia with intrastate, interstate, and international flights.

The defendants

18   The defendants, whom I will refer to collectively as Qantas, are members of the Qantas group of companies. The Qantas group is Australia's largest domestic and international airline.

19   The first defendant (Qantas Airways Limited), the second defendant (Jetstar), the third defendant (Qantas Link), and the fourth defendant (Network Aviation) conduct airline passenger services from Perth Airport. Qantas and Jetstar conduct both domestic and international airline passenger services. Qantas Link and Network Aviation conduct domestic but not international airline passenger services. The fifth defendant (Express Freighters) conducts domestic airline freight services. Jetstar, Qantas Link, Network Aviation and Express Freighters are wholly owned subsidiaries of Qantas.

Perth Airport

The airport

20   Perth Airport is located on an area of land known as the 'Perth Airport Estate' (Airport Site).

21   Other than Perth Airport, there are no commercial aerodromes that support large passenger jet aircraft in the Perth region.

Terminals

22   There are five passenger terminals at Perth Airport. They are known as Terminal 1, Terminal 1 Domestic, Terminal 2, Terminal 3, and Terminal 4.

23   Terminal 1, Terminal 1 Domestic and Terminal 2 are in a precinct known as 'Airport Central'. Terminals 3 and 4 are in a precinct known as 'Airport West'. Jetstar used Terminal 1 during the Relevant Period for international flights.

24   Terminal 3 was used during the Relevant Period by Qantas, Jetstar, Qantas Link and Network Aviation for domestic interstate and intrastate flights. Terminal 3 was also used by Qantas for international flights.

25   Terminal 4 was operated and controlled by Qantas under a lease during the Relevant Period. Terminal 4 is not the subject of a claim in this proceeding. The lease was dated 31 December 1987 and was

amended by deeds of agreement dated 15 October 1996 and 17 September 2002. The lease ran from 31 December 1987 to 30 January 2019. The lease term was until 30 December 2018, but a one-month holdover of the lease to 30 January 2019 was agreed between PAPL and Qantas.

26   During the Relevant Period, PAPL provided Jetstar with 'terminal services' at Terminal 1 and Qantas, Jetstar, Qantas Link and Network Aviation with terminal services at Terminal 3. The parties agree that access to the following items is within the definition of 'terminal services':

(a)   visual navigation aids and nose-in guidance systems for aircraft;

(b)   common use aprons;

(c)   inwards and outwards baggage systems (eg baggage make-up areas and reclaim facilities and hold and cabin luggage screening equipment);

(d)   toilets for passengers and staff;

(e)   directional signage;

(f)   flight information systems;

(g)   check-in and service desks (except to the extent provided by Qantas);

(h)   facilities to allow passengers to board aircraft including boarding gate desks;

(i)   aerobridges in Terminal 3 and Terminal 1, or where passengers do not board aircraft via an aerobridge, access to the aircraft apron and where required bussing services to the aircraft apron;

(j)   facilities in which passengers may wait prior to boarding an aircraft;

(k)   emergency and public address systems;

(l)   public areas including public amenities, lifts, and escalators, and moving walkways in Terminal 1 (Terminal 3 has no moving walkways);

(m)   forward airline support area services, such as areas to park ground service equipment; and

(n)   in relation to international passengers, public areas in Terminal 1 and Terminal 3 for passenger processing by Commonwealth government border agencies.

Airfield

27   The airfield at Perth Airport is located within the airside boundary.

28   There are two runways at Perth Airport: the main runway (north-south direction) and the cross runway (north-easterly to south-westerly direction). To access the runways, aircraft use taxiways. Aircraft also use taxiways (and taxilanes) to access aircraft parking positions.

29   The airfield also comprises the following infrastructure and areas:

(a)   remote aprons and aircraft parking;

(b)   taxilanes for aircraft to access aircraft parking positions;

(c)   aircraft storage areas;

(d)   airside roads and grounds (including directional signage);

(e)   lighting; and

(f)   ground service equipment parking areas.

30   During the Relevant Period, PAPL provided Qantas with 'airfield services', being access to and use of the areas and infrastructure referred to in the preceding paragraphs.

Other services

31   During the Relevant Period, PAPL also provided to Qantas:

(a)   infrastructure to enable Qantas to access their aircraft, facilities and premises on the Airport Site, such as landside roads, the terminal forecourt area, footpaths and passenger pick up and drop off areas for Terminal 1 and Terminal 3; and

(b)   infrastructure to support all operations in Terminal 1 and Terminal 3 and on the airfield, such as electricity, water, and sewer infrastructure.

32   The terminal, airfield and other services referred to are the 'Aeronautical Services'.

33   PAPL is the only provider of aeronautical services to regular passenger transport (RPT) aircraft for the Perth region.

Non-aeronautical business activities

34   PAPL also conducted non-aeronautical business activities from which it derived revenue, and in respect of which it incurred and paid costs, during the Relevant Period, including:

(a)   leasing designated areas in Terminal 1, Terminal 3 and other terminals at Perth Airport to retail operators;

(b)   leasing office premises to businesses within Terminal 1, Terminal 3 and other terminals at Perth Airport, and leasing industrial and office premises elsewhere on the Perth Airport Estate;

(c)   operating public and leased carparks on the Perth Airport Estate, and providing areas for car rental concessions and access to taxi and rideshare services; and

(d)   leasing designated areas within Terminal 1, Terminal 3 and other terminals at Perth Airport and elsewhere on the Perth Airport Estate for advertising.

General Aviation precinct

35   The Airport Site includes an area known as the General Aviation precinct, located adjacent to Terminal 4. The precinct primarily comprises hangars leased to smaller commercial operators (which provide charter flight services), and private aircraft. It is not generally used for regular passenger traffic operations.

36   Network Aviation operates charter flight services from the General Aviation precinct as well as from Terminal 3.

Prices and charges for Aeronautical Services

Prices and charges generally

37   PAPL charges airlines in respect of airfield and terminal services, each time an aircraft lands at or departs from the airport.

38   There are generally different prices for each of airfield services, domestic terminal services, and international terminal services. Sometimes, though, a composite price might be negotiated or agreed, for airfield services and terminal services (as occurred for the international airlines in the 2018-19 financial year, where there was a single international passenger charge which included both airfield and terminal services).

39   For aircraft carrying passengers, the amount which the airline pays PAPL for Aeronautical Services is generally calculated on a rate per passenger basis. That is, the number of passengers on the relevant flight is multiplied by the relevant price for airfield services and terminal services.

40   For aircraft not carrying passengers, or where passenger numbers are not available, the amount which the airline must pay PAPL is calculated on a rate per landed tonne basis (based around the maximum take-off weight (MTOW) of the aircraft). That is, the landed tonnage of the aircraft multiplied by the relevant price for airfield services. The relevant rate per landed tonne may change if the aircraft lands or takes off during a peak period.

41   Aircraft not carrying passengers will generally only pay the airfield charge. They generally do not use, and therefore will not be required to pay for, terminal services.

Prices and charges for the period 1 July 2011 to 30 June 2018

42   In the period between 1 July 2011 and 30 June 2018, PAPL: negotiated and agreed long-term prices and services agreements (PSAs) with all major domestic and international airlines that used Perth Airport, including Qantas; and had in place 'Conditions of Use' (CoU) for airlines which made use of Perth Airport in that period, but did not have a long-term PSA with PAPL.

43   The PSAs and the CoU (as applicable) provided the terms and conditions on which PAPL provided Aeronautical Services in this period, including the prices which PAPL charged for the Aeronautical Services.

44   PAPL entered a PSA with Qantas on 22 August 2011 (PSA). That agreement remained in force until 30 June 2018.

45   Immediately prior to 30 June 2018, the prices payable by Qantas under the PSA for Aeronautical Services were:

(a)   for terminal services at Terminal 1: [redacted] per passenger;

(b)   for terminal services at Terminal 2: [redacted] per passenger;

(c)   for airfield services (passenger aircraft): [redacted] per passenger; and

(d)   for airfield services (non-passenger aircraft): [redacted] per tonne MTOW.

46   The PSA also prescribed a price for terminal services at Terminal 3. However, for these services Qantas were also entitled to rebates under the T3 Rebate Agreement between PAPL and Qantas in 2011, in force until 30 June 2018. Taking account of these rebates, the effective price payable for terminal services at Terminal 3 by Qantas immediately prior to 30 June 2018 was approximately [redacted] per passenger.

47   The prices payable for Aeronautical Services by other airlines which entered PSAs with PAPL, immediately prior to 30 June 2018, are identified in the following tables:

Table 2.1: Prices agreed for aeronautical services at Perth Airport applying prior to 1 July 2018

Service	Basis for charge	Qantas Group 1 January 2018 to 30 June 2018	Virgin Group 1 January 2018 to 30 June 2018	Alliance 1 January 2018 to 30 June 2018	SkyWest 1 January 2018 to 30 June 2018	BARA members 1 January 2018 to 30 June 2018	
Source		[PAP.003.003.0427]	[PAP.003.003.0438] (PAPL Confidential A)	[PAP.003.052.4580] (PAPL Confidential A)	[PAP.003.052.4580] (PAPL Confidential A)	[PAP.003.004.6212] (PAPL Confidential A)	F0341, F0342, F0344, F0344, F0343
Terminal services							
Terminal 1	per pax	$13.059	[start PAPL confidential A] ■	-	-	[start PAPL confidential A] ■	
Terminal 1-D	per pax	-	■[69]	-	-	-	
Terminal 2	per pax	$17.644	■	[start PAPL confidential A] ■	[start PAPL confidential A] ■	-	
Terminal 3	per pax	$17.644[70]	-	-	-	-	
Airfield services							
Passenger aircraft	per pax	$4.773	■	■	■	■	
Freight or non-passenger aircraft	per tonne MTOW	$8.694	[end PAPL confidential A]	[end PAPL confidential A]	[end PAPL confidential A]	[end PAPL confidential A]	

Notes: All prices exclude GST.
Source: First Teng statement, attachments as noted above. I use the prices applying from 1 January 2018 to 30 June 2018, are different from those applying from 1 July 2017 to 31 December 2017 due to capital expenditure incurred in relation to the CAT III authorisation for the airfield. See Third Teng statement, para 22(b) [PAP.999.002.0025]

D0017

48   For the period prior to 30 June 2018, the prices for Aeronautical Services under the CoU were arrived at by taking the highest agreed price between PAPL and an airline (and set out in a PSA) for a

particular service, and then adding 10% to that amount. PAPL says that the increase reflected the 'spot' nature of the transactions under the CoU, and the additional risk, including not being able to recover fees, to PAPL in providing services other than under a long-term PSA.

Table 2.3: Conditions of use prices at Perth Airport between 1 January 2018 and 30 June 2019

Service	Basis for charge	CoU 1 January 2018 to 30 June 2018	CoU 1 July 2018 to 30 June 2019
Combined services			
Terminal 1 and 3	per pax		$19.616
Terminal services			
Terminal 1	per pax	$14.365	-
Terminal 1-D	per pax		$12.070
Terminal 2	per pax	$19.408	$12.070
Terminal 3	per pax	$19.408	$12.070
Airfield services			
Passenger aircraft	per pax	$5.251	$6.539
Freight or non-passenger aircraft	per tonne MTOW	$9.563	$11.909

Notes: All prices exclude GST.
Source: First Teng statement, attachments [PAP.003.008.7054] and [PAP.003.008.7065].

Heads of agreement and Development agreement

49   PAPL and Qantas entered into an agreement in writing on 10 December 2016, which set out the terms and conditions, including prices, on which Qantas could operate specified international airline passenger services from Terminal 3, and the terms on which the parties would work towards consolidation of Qantas operations in the new terminal facilities to be situated in Airport Central. Qantas acknowledged PAPL's intention to consolidate all domestic and international services in Airport Central. [redacted] (the 'Heads of Agreement').

50   PAPL and Qantas entered into a second agreement in writing on 4 May 2017, which restated the terms and conditions on which Qantas could operate specified international airline passenger services from Terminal 3, and the terms on which the parties would work towards consolidation of all Qantas domestic and international operations in the new terminal facilities to be situated in Airport Central and the cessation of operations from Terminal 3 and Terminal 4. Qantas acknowledged PAPL's intention to consolidate all domestic and international services in Airport Central. [redacted] It was known as

the Development Agreement - Terminal 3, Perth Airport (the 'Development Agreement').

Prices and charges for the period from 1 July 2018

51   The PSAs agreed between PAPL and all other airlines expired on 30 June 2018.

52   From about 2017 onwards, PAPL began consulting and negotiating with airlines on the pricing and other terms and conditions of access for the period from 1 July 2018. To support this process, PAPL created an online consultation data room in which it made available documents relevant to PAPL's aeronautical pricing proposals. The data room and supporting documents were made accessible to all airlines and to any other interested person or organisation who wished to register for access.

53   PAPL responded to queries and comments from airlines and met with airline representatives as part of the negotiation process.

54   At the conclusion, and as a result, of this process, PAPL:

(a)   concluded long-term ASAs with all major domestic and international airlines that use Perth Airport, except Qantas (with which agreement was not able to be reached); and

(b)   separately put in place updated 'Conditions of Use' (2018 CoU) for airlines or other aircraft operators which made use of Perth Airport, but did not enter into a long-term ASA.

55   The ASAs entered into with domestic carriers (such as Virgin Group, REX, and Alliance Airlines), and the 2018 CoU, set out the terms and conditions on which PAPL would provide aeronautical services to airlines in the period from 1 July 2018 to 30 June 2025, including the prices which PAPL would charge, and the airlines would pay for the aeronautical services.

56   In relation to negotiations with international airlines represented by BARA (Board of Airline Representatives of Australia Inc), one year hold-over agreements were entered into in 2018 extending the expired PSAs, with new long-term ASAs then executed in 2019 and 2020.

57   The prices agreed with airlines for the period 1 July 2018 to 30 June 2019 are summarised (alongside the CoU prices) in the following table:

Table 4.1: Prices at which aeronautical services were transacted at Perth Airport between 1 July 2018 and 30 June 2019

Service	Basis for charge	Virgin Group 1 July 2018 to 30 June 2019	REX 1 July 2018 to 30 June 2019	Alliance 1 July 2018 to 30 June 2019	BARA members 1 July 2018 to 30 June 2019	Conditions of use 1 July 2018 to 30 June 2019
Combined services						
Terminal 1	per pax	[start PAPL confidential A]	[start PAPL confidential A]	[start PAPL confidential A]	[start PAPL confidential A]	$19.616
Terminal services						
Terminal 1-D	per pax					$12.070
Terminal 2	per pax					$12.070
Terminal 3	per pax					$12.070
Airfield services						
Passenger aircraft	per pax					$6.539
Freight or non-passenger aircraft	per tonne MTOW	[end PAPL confidential A]	[end PAPL confidential A]	[end PAPL confidential A]	[end PAPL confidential A]	$11.909

Notes: All prices exclude GST.

58   The PSA and T3 Rebate Agreement expired on 30 June 2018. Following expiration of the PSA and the T3 Rebate Agreement there has been no contract between PAPL and Qantas in relation to the provision of aeronautical services by PAPL to Qantas, and PAPL and Qantas have not agreed on the price payable by Qantas for the aeronautical services provided by PAPL during the Relevant Period.

59   The Heads of Agreement and Development Agreement remain in force.

Building block models

60   Qantas and PAPL used building block models in negotiations in 2011 to arrive at the PSA, and in the negotiations in 2017-2018 to attempt to arrive at a new ASA. In its submissions, PAPL emphasised that whilst negotiations for new ASAs with Qantas and other airlines were informed by building block models, and the building block models put forward by PAPL were the starting point for negotiations, the final agreement was a matter for commercial negotiation. Qantas say that during the 2017-18 negotiations, PAPL evaluated offers from all airlines (not just Qantas) by reference to building block models, which were used to calculate an implied weighted average cost of capital (WACC)[2] - which gave PAPL's rate of return on the assets in the models.

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[2] The weighted average cost of capital (WACC) represents a firm's average cost of capital. The weighted average cost of capital represents the firm's required rate of return because it expresses the return that shareholders demand in order to provide the company with capital. A firm's WACC is likely to be higher if

61   PAPL's Perth Airport Aeronautical Pricing Model Methodology October 2017 document[3] states that PAPL used the building block methodology to inform its discussions with airline customers on the aeronautical prices to apply over the proposed seven-year period commencing on 1 July 2018 and a similar approach was successfully used to inform pricing in both the 2002 and 2011 agreements with airline customers. PAPL states it is confident this approach, and the inputs to it, are consistent with the APP established by the Commonwealth government and developed by the Productivity Commission over three successive public enquiries dating back to 2002.

62   The document states that the underlying principle of building block methodology is the calculation and summation of the return of and on capital, efficient operational expenses, and tax. It says that similar approaches are used by the ACCC, the AER and jurisdictional regulators such as IPART in New South Wales in setting maximum allowable prices in price-controlled infrastructure sectors. PAPL's models calculate prices each year that when applied to forecast passenger volumes create a revenue stream, the present value of which is the same as the present value of the annual building block allowable revenues.

63   The building block methodology has been adopted by PAPL to estimate the cost of providing aeronautical services. The building block model approach allows for a return on invested capital, return of invested capital (depreciation), forecast operational costs and an estimate of tax (including imputation credits). The objective of the building block methodology is to estimate the total revenue that an efficient provider will require each year over a modelling period to recover its efficient costs, including the return on invested capital consistent with the commercial and regulatory risks of the business.

64   Qantas submit that the key sticking point in the negotiations were two inputs into the building block model - WACC and accelerated depreciation. 'Accelerated depreciation' refers to the remaining useful life attributed to T3.

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its stock is relatively volatile or if its debt is seen as risky because investors will demand greater returns.
[3] F0375.

Consolidation of Qantas' operations in Airport Central

65   Qantas can only operate all their operations from the Airport Central precinct once:

(a)   new terminal facilities are constructed and available for use; and

(b)   the new runway, parallel to the main runway and to the east of Airport Central (the 'New Runway'), and taxiways connecting the New Runway to existing infrastructure, are constructed and available for use.

66   The new terminal facilities and the New Runway and taxiways connecting the New Runway to existing infrastructure will not be constructed and available for use by 31 December 2025. Due to circumstances that include the impact of COVID, construction of the new terminal facilities and the New Runway has been delayed. The New Runway will not be available for use until the financial year commencing 1 July 2026 and ending 30 June 2027. The new terminal facilities will not be available for use until the financial year commencing 1 July 2029 and ending 30 June 2030. However, Qantas do not admit that the New Runway and new terminal facilities will be ready and available for use during those financial years respectively.

67   Construction of the new terminal facilities has not commenced. A major development plan for the project must be approved by the Commonwealth Minister for Infrastructure, Transport and Regional Development (the 'Minister') before construction can commence. At the date of trial, the Minister had not approved a major development plan for the new terminal facilities. Procurement for those construction works has also not commenced.

68   No agreement has been reached with Qantas in relation to their contribution to the funding of the new terminal facilities and the New Runway and taxiways.

69   A major development plan for the New Runway project was approved by the Minister on 21 November 2020. Construction of the New Runway has not commenced. Save for the engagement of design consultants and environmental consultants, procurement for those construction works has also not commenced.

70   PAPL has not to date agreed any plan for the staging of the reconstruction works required under the major development plan to

upgrade the existing taxiway system with any airline user of Perth Airport. A major development plan for the taxiways connecting the New Runway to existing infrastructure must be approved by the Minister before construction can commence. At the date of trial, the Minister has not approved a major development plan for those taxiways. Procurement for those construction works has also not commenced.

PAPL invoices and Qantas' payments

71   PAPL invoiced Qantas for their use of aeronautical services at Perth Airport during the Relevant Period.

72   From 1 July 2018 to 30 September 2018, PAPL invoiced Qantas for their use of the Aeronautical Services at rates per passenger (ex GST) of:

    (a)   per passenger:

        (i) $17.833 for international terminal and airfield services;

        (ii) $10.47 for domestic terminal services; and

        (iii) $5.945 for domestic airfield services;

    (b)   a rate per landed tonne (ex GST) of $10.826 for airfield services for aircraft not carrying passengers; and

    (c)   a minimum rate of $224.785 (ex GST) per aircraft for airfield services during 'peak periods' (between 05:30 and 07:30 and between 15:00 and 16:00 on weekdays).

73   From 1 October 2018, PAPL invoiced Qantas for their use of aeronautical services at:

    (a)   rates per passenger (ex GST) of:

        (i) $19.616 for international terminal and airfield services;

        (ii) $12.070 for domestic terminal services; and

        (iii) $6.539 for domestic airfield services;

    (b)   a rate per landed tonne (ex GST) of $11.909 for airfield services for aircraft not carrying passengers; and

(c)   a minimum rate of $247.263 (ex GST) per aircraft for airfield services during peak periods.

74   Qantas paid PAPL part (but not all) of the invoiced amounts. Qantas paid PAPL at:

(a)   rates per passenger (ex GST) of:

(i) $10.61 for international terminal services (T1 and T3) and airfield services;

(ii) $5.35 for domestic terminal services (including regional charters) using T3; and

(iii) $3.40 for domestic airfield services (including regional charters);

(b)   a rate per landed tonne (ex GST) of MTOW of $8.684 for airfield services for aircraft not carrying passengers; and

(c)   the minimum rate per aircraft for airfield services during peak periods invoiced by PAPL (set out in [72(c)] and [73(c)] above).

75   On 2 September 2021, Qantas made an additional payment to PAPL to increase the amount paid for services (as set out in [10] above).

Expert evidence

76   Both parties adduced expert evidence from economists. Expert evidence is of critical importance in at least two respects. The first is whether PAPL had or exercised market power in negotiating prices for aeronautical services with other airlines. Those issues are important in considering whether, as PAPL submitted and Qantas denied, those prices are market prices and are the most relevant and probative facts to guide the court in its assessment of reasonable remuneration for the services PAPL provided to Qantas or alternatively are relevant to that assessment.

77   The second set of issues addressed by the experts concerns the efficient costs of PAPL providing aeronautical services calculated using PAPL's building block models. The outcome of the models depends on the inputs. The inputs include the opening asset base, capital expenditure during the pricing period, the period over which the assets are to be depreciated (the useful life of the assets) and the variables

asset beta,[4] gamma[5] and WACC. Much expert evidence was directed to what values for asset beta, gamma and WACC should be used as inputs into the PAPL building block models.

78   PAPL   adduced   evidence   from   expert   economists Gregory Houston, Dr Thomas Hird and Dr Anthony Webber. Qantas adduced evidence from George Siolis, Dr Richard Hern and Dr Martin Lally.

79   Mr Houston and Mr Siolis participated in two expert conclaves. The first concerned the value of aeronautical services provided by PAPL and addressed the issues of PAPL's market power, and the comparable prices method of valuation adopted by Mr Houston. The second concerned the cost of aeronautical services using the PAPL building block models with inputs proposed or discussed by the participants in the other conclaves. Dr Hird and Dr Hern participated in conclaves to discuss the appropriate asset beta and WACC. Mr Houston, Dr Hern and Dr Lally participated in a conclave to discuss the appropriate gamma.

80   Registrar Hosking presided over each of the conclaves and moderated the conclaves and facilitated the preparation of each of the joint expert reports which the experts produced from each conclave.

81   The experts gave their evidence in a series of concurrent evidence sessions.   Registrar Hosking lead the experts in presenting their concurrent evidence before each party had an opportunity to direct questions to each of the experts.

82   After the trial was concluded the court determined the appropriate inputs to be used in calculating prices by PAPL's building block models. With the agreement of the parties, Registrar Hosking then conferred with Mr Houston and Mr Siolis in relation to the inputs determined by the court. Mr Houston and Mr Siolis then produced an agreed outcome of the prices produced by the PAPL building block models using the inputs determined by the court and a brief report summarising the process.[6]

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[4] Asset beta will be discussed later in greater detail, for now it is sufficient to note that in broad terms asset beta measures the risk of a firm's equity or debt relative to the economy.

[5] Broadly, gamma is the value of tax imputation credits. A decrease in gamma increases the prices and an increase in gamma decreases the prices.

[6] The experts' report is E0020.

Quantum meruit - legal principles

Claim for restitution

83   PAPL's claim is for reasonable remuneration for the aeronautical services it provided to Qantas in the Relevant Period minus the amount paid by Qantas. The claim to recover a reasonable amount was referred to as a quantum meruit claim but is recognised by the parties to be a claim to recover a reasonable sum by way of restitution.

84   PAPL is entitled to reasonable remuneration for the services it provided to Qantas. The criterion for valuation has been expressed in various ways, including:

- so much in money as the plaintiff reasonably deserves to have;[7]

- the fair and reasonable value;[8]

- fair and reasonable remuneration;[9]

- reasonable remuneration;[10]

- a fair and reasonable rate of remuneration;[11] and

- such sum as the court considers just and reasonable.[12]

85   The court is not free to indulge 'idiosyncratic notions of what is fair and just'[13] when deciding what amount a plaintiff is entitled to as restitution. The court must assess the reasonable remuneration by an appropriate standard.

86   In ***Mann v Paterson Constructions Pty Ltd***,[14] Nettle, Gordon, and Edelman JJ[15] and Gageler J[16] in a separate judgment confirmed that a reasonable remuneration is a question of fact and that reasonable remuneration is usually measured at the market value of the services rendered. All their Honours referred with approval to the judgement of

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[7] *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221, 257, 259, 262.
[8] *Sopov v Kane Constructions Pty Ltd [No 2]* [2009] VSCA 141; (2009) 257 ALR 182.
[9] *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221, 257, 259, 262.
[10] *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 CLR 560 [19], [164].
[11] *South Australian Harbors Board v South Australian Gas Co* [1934] HCA 45; (1934) 51 CLR 485, 499; *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 CLR 560 [203].
[12] *Stinchcombe v Thomas* [1957] VR 509; (1957) ALR 1027, 1031.
[13] *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221, 256.
[14] *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 CLR 560 [92].
[15] *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 CLR 560 [203].
[16] *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 CLR 560 [92].

Dixon J in ***South Australian Harbors Board v South Australian Gas Co***[17] (***Harbors Board***).

87   Counsel for Qantas submitted that ***Harbors Board*** is binding authority for the proposition that the appropriate measure of reasonable remuneration where there are no other suppliers is an assessment of the efficient costs of the plaintiff in providing the relevant services, including a reasonable return on capital. PAPL denies that ***Harbors Board*** is authority for that proposition and submits that it is distinguishable from this case.

88   The *Harbors Act 1913* (SA) vested exclusive control and management of all harbours in South Australia in the South Australian Harbors Board (Board). The Board granted the Gas Company a lease of land at Osborn. By cl 15 of the lease the Board covenanted that it would within three years from the commencement erect adequate coal handling appliances for the purpose of discharging and handling coal and the lessee shall have the right of taking delivery from the plant at such point as may be mutually agreed. The lease did not stipulate the amount to be charged by the Board for the use of its plant. The Gas Company spent a large sum upon the construction of its own plant in connection with this project, but there was a significant delay in the completion of the Board's plant.

89   The Board used its plant and equipment to deliver coal both to the Gas Company and to another company, the Electric Supply Co. There were, however, differences in the system of conveyors and bins that were used for each of these customers. The relevant service performed by the Board consisted of the unshipment of coal and its delivery onto the Gas Co's conveyors by means of the Board's coal handling plant. To justify the undertaking and its financial expenditure on installing its plant, the Board had to install all appliances required for the delivery of coal to the consumers expected to use it, which included the Gas Co and the Electric Supply Co. That required the installation of plant capable of unloading a quantity of coal several times greater than that delivered to the Gas Co, because otherwise coal could not be discharged from the ship with sufficient rapidity.

90   The *Harbors Act* provided that the Board may charge for the use of its plant but required that the charges be reasonable. By the time the Board's plant was completed and put into operation, the Gas Company and the Board had been unable to agree upon the amount of the charge

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[17] ***South Australian Harbors Board v South Australian Gas Co*** [1934] HCA 45; (1934) 51 CLR 485.

that the Board would levy for its services in discharging, handling, and delivering coal to the Gas Company's new plant.

91   The Governor had made a regulation purporting to fix the amount at 3s per ton of coal delivered, with an additional 1d per tonne for tween deck vessels and with certain rebates. This regulation was revoked, and the Board passed a resolution adopting the same charges and rebates. The Board levied a uniform charge on all its customers of the amount specified in the regulation and the resolution. Subsequently, the Board claimed from the Gas Company remuneration for the use of its plant during 1930 and 1931 at the rate specified by the regulation and the resolution. The High Court held that the regulation having been revoked provided no basis for the charge. The court held that the Board was entitled to charge for its services, but the Act required the charges be reasonable. The question before the court was whether the sum sought by the Board, based on a charge of 3s per tonne plus 1d was reasonable.

92   The first judgement was delivered by Starke J. His Honour said that the reasonableness of a charge is a question of fact.[18] His Honour referred to the statement of the trial judge that the ordinary principle of assessment is the fair market value of the service, the charge ordinarily made for the same sort of service. However, his Honour observed:[19]

> But in the case of public utilities it is seldom possible to appeal to an ordinary market rate or charge, and one is necessarily driven to a consideration of the capital expended upon the public undertaking and the revenue thereof as a basis for determining the reasonableness of the charge made or claimed for the use of the same (490).

93   Justice Starke observed that on an enquiry as to the reasonableness of its charges, the Board should be allowed a fair return upon any capital expended upon the plant.

94   Justice Dixon, with whom Evatt and McTiernan JJ agreed, held that the Board was entitled to 'a fair and reasonable rate of remuneration, in other words, a quantum meruit'.[20] In a passage repeated with approval in ***Mann v Paterson Constructions Pty Ltd***, Dixon J said:[21]

[18] ***South Australian Harbors Board v South Australian Gas Co*** [1934] HCA 45; (1934) 51 CLR 485, 490.
[19] ***South Australian Harbors Board v South Australian Gas Co*** [1934] HCA 45; (1934) 51 CLR 485.
[20] ***South Australian Harbors Board v South Australian Gas Co*** [1934] HCA 45; (1934) 51 CLR 485, 499.
[21] ***South Australian Harbors Board v South Australian Gas Co*** [1934] HCA 45; (1934) 51 CLR 485.

> Upon a quantum meruit, usually the value of services is assessed by reference to charges commonly made by others for like services. But in the present case no such standard is available (501).

95   His Honour continued:[22]

> No doubt the cost of discharging coal at other wharfs by other methods cannot be excluded from consideration as altogether irrelevant, because, for example, probably it would not be considered reasonable for the Harbors Board to demand a greater sum than the Gas Company would pay if it adopted some such alternatives at Osborne. But, in the circumstances of the present case, the primary or initial factor in the estimate of a fair and reasonable rate must be the revenue expenses reasonably incurred by the Harbors Board in equipping itself to perform the services contracted for and in their performance (501).

96   Justice Dixon considered that the court was not to fix the rate for all customers, it was concerned only with the Gas Company. Nevertheless, the guiding consideration in estimating the fair and reasonable rate for the Gas Company must be the total amount of the expenditure on revenue account reasonably incurred by the Board in providing all the services performed by the plant. That amount must be reduced to a rate per ton to be of use in estimating a rate of charge. In computing the quantity of coal which should be regarded as bearing the total expenditure, his Honour did not adopt the quantity which went through the plant, because in the relevant period it did not represent the amount of custom which might reasonably have been obtained by the Board if the plant had been completed. His Honour adopted the quantity which is equivalent to the amount of coal the Board would probably have handled had the plant been in full working order. His Honour accepted that a reasonable rate of profit should be included in the charge.

97   ***Harbors Board*** is not binding authority that there is a rule or principle that where there are no other suppliers, reasonable remuneration must be assessed as the efficient costs of the plaintiff in providing the relevant services. Nevertheless, the High Court held that whilst a reasonable remuneration is a question of fact depending on all the circumstances, assessment of the efficient costs of the plaintiff in providing the services is the usual method for calculating reasonable remuneration when there is no market giving rise to a market price. In ***Harbors Board*** no other standard for assessing reasonable remuneration was considered and the report does not disclose any

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[22] ***South Australian Harbors Board v South Australian Gas Co*** [1934] HCA 45; (1934) 51 CLR 485.

evidence allowing for any other standard to be adopted. Nevertheless, the statements by Starke and Dixon JJ establish that the usual method for calculating reasonable remuneration when there is no market giving rise to a market price is the efficient costs, including profit, of the plaintiff in equipping itself to perform and in performing the services, that is return of and on capital and operating expenses.

98 PAPL submits, but Qantas do not agree, that ***Harbors Board*** can be distinguished from this case on two principal bases. The first is that, unlike PAPL, the Board was not subject to regulatory or other forms of constraint.

99 It is not correct that the Board was not subject to regulatory or other forms of constraint. Justice Starke set out relevant aspects of the regime,[23] including s 63 of the *Harbors Act*, which provides that the Board 'may make reasonable charges' for the use of its plant, Qantas submit that the Board was more heavily regulated than PAPL, in that it was subject to specific legislative direction to charge only a reasonable sum, whereas PAPL does not have its price regulated by statute. Further, Qantas submit that the distinguishing fact asserted by PAPL is not relevant. Qantas submit that in ***Harbors Board*** and in this case, the plaintiff sought a quantum meruit and in both cases there were no other suppliers of the services. Qantas submit that in that circumstance in that case and in this case, the reasonable remuneration is fixed by reference to reasonable costs (including a reasonable profit).

100 Secondly, PAPL submits this case is distinguishable from ***Harbors Board*** in that in this case there are criteria against which the reasonableness of the prices sought by PAPL can be measured, other than the efficient costs of providing the services:

(a) the prices most recently negotiated and agreed between PAPL and airlines other than Qantas (reflected in ASAs);

(b) the discount rate for the net present value calculation for unplanned capital expenditure, as recorded in the ASAs;[24]

(c) the prices paid by airlines without long term contracts, which used Perth Airport's Aeronautical Services (under Perth Airport's CoU) between 1 July and 17 December 2018;

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[23] ***South Australian Harbors Board v South Australian Gas Co*** [1934] HCA 45; (1934) 51 CLR 485, 490.
[24] See, for example, F0520 (Virgin ASA), _0053 [3.4(d)(iv)].

(d)   the charges previously paid by Qantas, and other airlines under contracts with Perth Airport which expired on 30 June 2018 (viz, the PSAs);

(e)   the airport charges passed on by Qantas to their customers; and

(f)   the profit per passenger earned by Qantas on routes to and from Perth Airport.

101   Qantas submit that PAPL's argument that there are 'criteria' against which reasonableness' can be 'measured' is a straw man built on a false premise. The false premise is that Dixon J 'left open' looking at 'the cost of discharging coal at other wharves operated by the Harbors Board'.

102   Justice Starke had identified that the Harbors Board had 'exclusive control and management of all harbors in the State and of navigation therein and of all such harbor works as are not private property',[25] and that the coal traffic at Port Adelaide was, by its determination, concentrated at one site, 'at Osborne on the Port River, alongside the works of the Electric Supply Co'. The Board leased to the Gas Company a site at Osborne that was on the other side of the Electric Supply Co's works.[26] The Gas Company 'spent a large sum upon the construction of plant on the site at Osborne', and the Board discharged coal by 'temporary devices' to the Gas Company until the Board's plant was ready.[27]

103   Qantas submit, and I accept, that there were no other 'wharves' at Port Adelaide by which the Board discharged coal. Rather, Dixon J's statement was addressed to alternative means of unloading coal at the Osborne site that might instead have been employed other than the newly built plant. That is why Dixon J said it would not 'be considered reasonable for the Harbors Board to demand a greater sum than the Gas Company would pay if it adopted some such alternatives at Osborne'. That is, if the Board had charged a sum far in excess of what it would have cost to use stevedores or the temporary methods it in fact used, it would not be a reasonable charge. It is in that context that one would look at the 'cost of discharging coal at other wharves by other methods', at Osborn, as it would assist in determining by how much the Board's new plant exceeded those costs.

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[25] *South Australian Harbors Board v South Australian Gas Co* [1934] HCA 45; (1934) 51 CLR 485,487.
[26] *South Australian Harbors Board v South Australian Gas Co* [1934] HCA 45; (1934) 51 CLR 485, 495 and 487 - 488.
[27] *South Australian Harbors Board v South Australian Gas Co* [1934] HCA 45; (1934) 51 CLR 485,496.

104   This is confirmed by Dixon J immediately proceeding to outline the context that the Gas Company had disputed the reasonableness of the Board recovering the cost of the new plant, because:[28]

> … [D]uring the first of the two years for which the Board claimed, its plant was incomplete and it performed its contract only by resort to extraneous appliances. It was evident on that ground alone that no safe guidance could be obtained from the actual cost incurred during that year. Further, in the next year, the Harbors Board had not secured the handling of anything like the anticipated proportion of the coal coming to Adelaide, and to distribute the fixed charges over the actual quantity only of coal passing through the plant would produce a rate per ton which could not fairly be demanded of the Gas Co. For these reasons and the additional reason that the plant was designed on a much larger scale than was needed to deal with the amount of coal found in the event available, his Honour said that he could not accept the actual experience of the plant during the period in question as a fair guide to the value of the services rendered (501).

105   That is also confirmed by Dixon J's reference to the dispute as being:[29]

> The service performed by the Harbors Board for which the Court was required to fix a fair and reasonable rate of remuneration consisted in the unshipment of coal and its delivery on to the Gas Co.'s conveyers by means of the Board's coal-handling plant (500).

106   Qantas further submit that the other criteria against which PAPL proposes the reasonableness of the prices sought by PAPL can be measured are not comparable, by which I take Qantas to submit that they are not appropriate criteria for assessing reasonable remuneration for the aeronautical services provided to Qantas in the Relevant Period.

107   As to PAPL's first criterion - the prices most recently negotiated and agreed between PAPL and airlines other than Qantas reflected in ASAs - Qantas say that the prices paid by other airlines for terminal services provided through other terminals are not 'comparable'. I accept that the services are not the same. Whether they are comparable is a matter of fact and degree.

108   As to PAPL's second criterion - the discount rate for the net present value calculation for unplanned capital expenditure as recorded

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[28] *South Australian Harbors Board v South Australian Gas Co* [1934] HCA 45; (1934) 51 CLR 485 (Dixon J).
[29] *South Australian Harbors Board v South Australian Gas Co* [1934] HCA 45; (1934) 51 CLR 485.

in the ASAs - Qantas submit, and I agree, that the discount rate is not relevant.

109   As to PAPL's third criterion - prices paid by airlines without long-term contracts, which used PAPL's aeronautical services (under PAPL's CoU) during the Relevant Period - Qantas say that the prices paid by airlines without contracts are not comparable; they are set 10% higher than the highest cost and involved terminals other than T3. I agree with Qantas. The CoU prices are not negotiated prices. They are unilaterally set by PAPL. They are arbitrarily set 10% above the highest prices negotiated with other airlines for services provided from other terminals.

110   As to PAPL's fourth criterion - the charges previously paid by Qantas and other airlines under contracts with PAPL which expired on 30 June 2018 (the old PSAs) - Qantas say that those charges are not comparable since they were calculated by reference to building block models in 2011 according to the then-current opening asset base, forecast expenditure, and WACC, noting that WACC will change as economic circumstances (particularly the risk-free rate) changes. I agree that the charges are not comparable. They were set at a time when the cost of providing the services was different and the negotiations were informed by different cost considerations.

111   As to PAPL's fifth criterion - the airport charges passed on by Qantas to their customers - I agree with Qantas that the charges referred to are not relevant. PAPL is referring to airport charges recorded on passenger tickets. The evidence is that these 'charges' were amounts lodged with the International Air Transport Association and could not be updated without a new contract having been made with the airport operator. The evidence does not establish that the charges were passed on to customers in any relevant sense.

112   As to PAPL's sixth criterion - the profit per passenger earned by Qantas on routes to and from Perth Airport - that is not a comparable price. Reasonable remuneration is the value of the services provided, not any profit gained by the recipient of the services in undertakings which use those services.

Standards for assessing reasonable remuneration

113   *Harbors Board* and *Mann v Paterson Constructions Pty Ltd* confirm that reasonable remuneration is usually measured at the market value of the services rendered. *Harbors Board* confirms that where

there is no market rate, the court will usually assess reasonable remuneration to be the cost of providing the services, including profit or return on capital. The cost is not necessarily the actual costs incurred but the efficient cost. Thus, in **Harbors Board**, Dixon J assessed the cost per ton of delivering coal to be not the actual cost per ton in the years in question but what the cost per ton would have been if the plant had been fully operational, that is operating efficiently.

114   In *Enrichment in the Law of Unjust Enrichment and Restitution*, AVM Lodder[30] writes that the practical reality is that the available evidence of the market value will differ between cases and there will be different ways of ascertaining that value that may be appropriate in particular cases. Lodder further says that there are several decisions that focus on the cost to the claimant of performing the services in calculating the award[31] and that this is part of a developing consensus[32] that the award is to be calculated on a cost-plus basis, that is the cost to the claimant of the work plus a reasonable profit margin.

Standards for assessing reasonable remuneration to PAPL

115   PAPL submits that the prices most recently agreed between PAPL and other airlines provide the most relevant and probative evidence to determine reasonable charges for the aeronautical services provided to Qantas. PAPL further submits that the cost to PAPL of providing aeronautical services to Qantas has only marginal relevance in assessing reasonable charges for those services and should be used as no more than a general crosscheck on the charges assessed by reference to the prices agreed between PAPL and other airlines.

116   Qantas submit that both those propositions are wrong. Qantas submit that the appropriate measure of reasonable remuneration where there are no other suppliers, as in this case, is an assessment of the efficient costs of PAPL in providing the aeronautical services, including a reasonable return on capital. Qantas submit that the efficient cost of providing the aeronautical services should be assessed using the building block models designed by PAPL which were the basis for setting prices under the expired ASA and the unsuccessful

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[30] AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution*, Hart Publishing (2012), 80 - 81.

[31] Lodder refers to **Renard Constructions (ME) Pty Ltd v Minister for Public Works** (1992) 26 NSWLR 234, 276; **Kane Constructions Pty Ltd v Sopov** [2005] VSC 237; (2006) 22 BCL 92; J Edelman and E Bant, *Unjust Enrichment in Australia* (2006) 118 - 119.

[32] **Yeoman's Row Management v Cobbe** [2008] UKHL 55; [2008] 1 WLR 1752 [42] and cases listed at fn 81 including **Sopov v Kane Constructions Pty Ltd [No 2]** [2009] VSCA 141; (2009) 257 ALR 182 [33] - [40].

negotiations for a new PSA with inputs appropriate for assessing costs in 2018.

117   Reasonable remuneration is calculated, not by reference to the loss suffered by the plaintiff or the actual gain to the defendant, but by reference to the reasonable market value of the benefit conferred on the defendant. In most cases, the efficient cost of the services (including a reasonable profit margin) will provide an accurate objective measure of the value of the benefits conferred on the defendant. Assuming the services are provided in a competitive market, efficient cost is a method of objectively ascertaining the market rate.

118   Assessing reasonable remuneration by actual costs rather than efficient costs is wrong in principle even though in some instances it may produce the same result.

119   If the services are provided in a monopolistic or other non-competitive market, the prices at which the services are or have been provided will not necessarily represent reasonable remuneration. Prices charged by a monopolistic supplier are not competitive market prices but regulatory or other restraints on the supplier might produce the same result.

120   Reasonable remuneration for the aeronautical services provided by PAPL should be assessed having regard to the following propositions. First, reasonable remuneration is a question of fact. Secondly, reasonable remuneration is usually measured as the market value of the services rendered, that is charges commonly made by others for like services. Thirdly, there is no relevant market price where there is a monopoly supplier, that is there are no charges commonly made by others for like services. Fourthly, where there is no market for the supply of like services, the usual method for assessing reasonable remuneration is the capital (including return on capital) and operating costs incurred in providing the services. Fifthly, the relevant costs are not the actual costs incurred but the efficient costs in providing the services. Sixthly, other facts may be relevant in assessing reasonable remuneration; for example, remuneration calculated in accordance with the contract price under an unenforceable contract.[33] Seventhly, prices at which a monopolistic supplier provides services to buyers may be relevant where regulatory or other restraints on the supplier produce prices that would prevail in an effectively competitive market. Eighthly, in determining whether prices charged by a monopolistic

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[33] ***Mann v Paterson Constructions Pty Ltd*** [2019] HCA 32; (2019) 267 CLR 560.

supplier subject to regulatory or other restraints are prices that would prevail in an effectively competitive market, it is relevant to compare the prices charged with the efficient cost of providing the services.

Value of aeronautical services

121   Later in these reasons I will compare the different methodologies advocated by PAPL and Qantas to be used to determine fair and reasonable prices for the aeronautical services provided by PAPL to Qantas at Perth Airport during the Relevant Period. As I have said, PAPL advocates a 'comparable transactions' approach to determine those prices whereas Qantas advocates that the prices should be the efficient cost of providing the services determined by using PAPL's building block models with appropriate inputs. The consideration of the competing methodologies requires a comparison between the outcomes of the two approaches as well as the rationale for and justification of each approach. That is in part because in determining whether prices charged by a monopolistic supplier are prices that would prevail in an effectively competitive market, it is relevant to compare the prices charged with the efficient cost of providing the services.

122   It is convenient to consider the appropriate inputs to PAPL's building block models before comparing the two methodologies. Accordingly, I will now consider the appropriate inputs to PAPL's building block model which are in contest. Those are the values for asset beta, gamma, WACC, opening asset base, operating expenditure and the remaining useful life or depreciation of Terminal 3.

123   I will first address an issue concerning admissible evidence. The parties tendered reports and submissions from or to the ACCC and the Productivity Commission. Parts of those reports were considered by some of the experts in their expert witness reports. The principal issue is whether those reports and submissions are admissible as exceptions to the hearsay rule for public documents. A second issue is whether, to the extent that the reports or submissions are not themselves admissible in evidence, the evidence of the experts referring to parts of those reports is admissible.

Admissibility of public reports

Public Documents Exception

124   During the course of trial, an issue arose between the parties as to the admissibility of a number of documents prepared by public

authorities under the common law exception to the hearsay rule for 'public documents'. The documents comprise:

(a)   four reports of the Productivity Commission on airport regulation (PC Reports);

(b)   ACCC airport monitoring reports between 2009 and 2021;

(c)   ACCC airline monitoring reports between 2009 and 2021 (together, ACCC Monitoring Reports); and

(d)   submissions of the ACCC and Qantas Airlines to the Productivity Commission (Submissions).

125   The parties agree that the ACCC reports fall within the public documents exception, though disagree the extent to which the contents are admissible. The parties further agree that the Submissions fall outside of the public documents exception. In contest is whether the Productivity Commission reports fall within the exception, and if they do the extent to which they do.

126   For the reasons that follow, I find that the PC Reports are not admissible under the public documents exception; that the ACCC Monitoring Reports are admissible under the public documents exception and that the submissions of the ACCC and Qantas to the Productivity Commission are not admissible under the public documents exception.

The rule

127   PAPL submits that there are three criteria to be satisfied, being the document is:

(a)   made for the purpose of the public making use of it, and being able to refer to it;

(b)   made under a duty to inquire into the circumstances recorded in the document; and

(c)   intended to be retained.

128   These criteria are set out in **_Sturla v Freccia_** by Selborne LJ.[34]

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[34] **_Sturla v Freccia_** (1880) 5 App Cas 623; [1874 - 80] All ER Rep 657.

129   Qantas submit there are four criteria to be satisfied. Those are set out by Lane LJ in **_R v Halpin_**[35] and are:

    (a)   the document must be brought into existence and preserved for public use on a public matter;

    (b)   the document must be open to public inspection;

    (c)   the entry must be made promptly after the events which it purports to record; and

    (d)   the entry must be made by a person having a duty to inquire and satisfy himself as to the truth of the recorded facts.

130   In my view, the criteria set out by Lane LJ referred to by Qantas are the criteria applied by Australian judges when determining whether a document is a public document.[36] Those criteria in **_R v Halpin_** are a development of the law following **_Sturla v Freccia_**.

131   PAPL submits that the rule constitutes an exception to both the hearsay and opinion rules. Qantas submit that the rule is only an exception to the hearsay rule. I do not consider that the authorities support PAPL's submission. The type of evidence that has been received under the public documents exception is evidence of fact. For example, photographs,[37] maps,[38] and records of births and marriages.[39] When it comes to reports accepted under the rule, these reports have been taken as evidence of matters such a land ownership,[40] or the fact of whether a medical practitioner has been struck off the record.[41]

132   Qantas submit that the type of evidence that is admissible under this rule is the data which a public authority was bound to collect. I accept this submission, as it is in line with the type of evidence that is historically accepted under the rule and supports the proposition that opinion evidence is not admissible under this rule.

133   All parties agree that there is an additional requirement that the duty to inquire must be one of a judicial or quasi-judicial nature.[42] I am satisfied that this is a requirement that arises from the authorities.

[35] **_R v Halpin_** [1975] QB 907; [1975] 3 WLR 260, 261 - 262.
[36] See eg **_Stohl Aviation v Electrum Finance Pty Ltd_** (1984) 5 FCR 187; **_Re Staples; Ex parte Baker v Staples_** (1996) 67 FCR 541, 544.
[37] **_John Nominees Pty Ltd v Dixon_** [2003] WASCA 51 [101].
[38] **_Foletta v Merri Creek Quarry Pty Ltd_** [1951] VLR 149.
[39] **_Lyell v Kennedy_** (1889) 14 App Cas 437, 448 - 449.
[40] **_Mercer v Denne_** [1904] 2 Ch 534, 544.
[41] **_Hill v Clifford_** [1907] 2 Ch 236.

Productivity Commission Reports

134   I am not satisfied that the Productivity Commission Reports are admissible under the public documents rule.

135   Qantas accept that the PC reports satisfy elements 1 and 2 of Lane LJ's test. I agree. The PC reports were brought into existence to promote public understanding, amongst other reasons. Further, the Productivity Commission has a statutory duty to inquire into the matters.[43]

136   As to the second element, Qantas submit that although the report itself is open to public inspection, a number of the submissions were confidential and heavily redacted, limiting the public's ability to correct the accuracy of statements. PAPL made no submissions on this point.

137   As I have decided that the third element of the test is not satisfied below, it is not necessary for me to decide this point. However, I consider that the confidential nature of the submissions does weigh against the PC Reports' admission under the rule.

138   As to the third element, Qantas submit that the language of 'an entry' implies that the public document will record information or objective data soon after an event occurs, not amount to a report making evaluations or determinations years after relevant events, from a number of competing sources. Separately, Qantas submit that the nature and contents of the PC reports are readily distinguishable from the type of evidence typically accepted under the rule. I agree. The PC reports make evaluations, assessments and recommendations on the basis of a range of submissions and evidence. In this way, they are largely matters of opinion, and not a record of data collected for a public purpose. Furthermore, while the Productivity Commission has a duty under the *Productivity Commission Act 1998* (Cth) to hold inquires and report to the Minister, the nature of those inquiries is not judicial or quasi-judicial in the sense that they are not for the purpose of determining facts. Rather, they are for the dominant purpose of making policy recommendations, rather than recording data.

139   I consider that these considerations are all related. I accept Qantas' submissions that for these reasons the PC Reports are not documents of the type admissible under the public documents rule. I am further persuaded by the submission that the Productivity

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[42] *Ioannou v Demetriou* [1952] AC 84; [1952] 1 All ER 179, 186.
[43] *Productivity Commission Act 1998* (Cth) ss 11(2), 15(1), 16.

Commission's remit is analogous to a Royal Commission, of which the findings are not admissible evidence.[44]

140   I do not accept the Productivity Commission reports (PC reports) as evidence under the public documents exception.

ACCC Monitoring Reports

141   The parties agree that the ACCC Monitoring reports are admissible under the public documents exception. I agree. The ACCC monitoring reports are distinguishable from the PC reports. Their dominant purpose is to record empirical data regarding airport and airline pricing.

142   PAPL submits that the airport monitoring reports are admissible as to findings but conclusions on the quality of airport services, prices, costs and profits, other findings, observations or conclusions are not admissible, as it was not part of the ACCC's duty of inquiry.

143   I agree with PAPL's submission that not all findings in the ACCC monitoring reports are admissible. For example, findings about the limits of its price monitoring function are not findings of identifiable data, as described above.

144   However, the conclusion that large airports face minimal constraints put to Mr Houston I find is a matter on which the ACCC had a duty to report and is therefore admissible under the rule. However, I find that this is only prima-facie evidence of the matter.[45]

Submissions

145   The parties agree that the submissions to the Productivity Commission are not admissible under the public documents exception. I agree. In particular, neither Qantas, nor the ACCC were under a statutory obligation to provide such submissions, and those submissions were not prepared with a duty to undertake inquiries.

146   I find that the submissions by Qantas and the ACCC to the Productivity Commission are not admissible under the public documents exception.

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[44] *Re HIH Insurance Ltd (in liq)* [2015] NSWSC 790.
[45] *Hill v Clifford* [1907] 2 Ch 236 (Cozens-Hard MR & Buckley LJ).

Experts use of reports

147   I find that the PC Reports are not admissible into evidence as public documents. However, passages from those reports were referred to by the experts in the course of their evidence. For example, Mr Houston and Mr Siolis refer to parts of Productivity Commission reports in their joint expert report on the valuation of aeronautical services provided by Perth Airport.[46] That evidence was admitted without objection.

148   An expert witness is entitled to draw upon the corpus of knowledge available in their field of expertise. The parts of a Productivity Commission reports which were referred to by an expert witness and received into evidence may only be used for a limited purpose. Where an expert witness bases evidence on material in an authoritative publication, it is the evidence of the witness which is before the court. The publication itself is not evidence of the truth of the statements within it. Where the witness refers to, or quotes from, an authoritative publication as correctly stating a fact or opinion, what is referred to or quoted is part of the testimony of the witness.[47]

149   Accordingly, whilst the reports of the Productivity Commission are not admissible and are not evidence in this proceeding, references to passages in those reports by an expert witness are admissible and are evidence in this proceeding of the opinion of the expert.

Gamma

Introduction

150   Gamma is a variable or input to the building block models. Most directly, gamma is a deduction to the building block allowance for corporate tax. It is a deduction to the building block allowance because it represents the proportionate extent to which the benchmark cost of corporate taxes forecast to be paid by PAPL are captured as a form of value by its equity investors, thereby reducing the cost of capital provided by those investors.[48]

151   Mr Houston is PAPL's expert on gamma and Dr Lally and Dr Hern are Qantas' experts on gamma. The experts agree that the widely accepted approach by economic regulatory bodies in Australia

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[46] Exhibit 193.
[47] *PQ v Australian Red Cross Society* [1992] 1 VR 19, 34 (McGarvie J), *R v Karger* [2001] SASC 64; (2001) 83 SASR 1 [67] (Mullighan J).
[48] C0003, _0139 at [449(a)].

has been to interpret the variable gamma as the product of two components: distribution rate and utilisation rate.[49]

152   All three experts give their opinion as to an estimate of the utilisation rate, but only Mr Houston and Dr Lally provide an estimate of distribution rate. Mr Houston and Dr Lally prepared individual reports addressing both components of gamma. In his expert report on the WACC, Dr Hern provided an estimate of the utilisation rate. All experts participated in an expert conclave and subsequently produced a joint expert report (JER) on gamma (with Dr Hern's contribution limited to the utilisation rate component).

153   Dr Lally and Mr Houston agree that the distribution rate is the proportion of imputation credits created (by the payment of corporate taxes) that are distributed to shareholders by way of franked dividends.[50] However, they disagree on how the distribution rate should be estimated.[51]

154   The experts also disagree on the definition or description of the utilisation rate, with the bases for their disagreement impacting their opinions as to the preferred estimation method:[52]

(a)   Mr Houston's preferred description is:

> the value of imputation credits distributed (to shareholders) as a proportion of their face value;

(b)   Dr Lally's preferred definition is:

> a weighted average over the utilisation rates of the individual investors, with 1 if the investor can fully utilise them and 0 otherwise;

(c)   Dr Hern's preferred description is:

> the value to investors of utilising imputation credits per dollar of imputation credits distributed or, in other words, the extent to which investors can use the imputation credits they receive to reduce their tax (or receive a refund).

155   Gamma is relevant to the market risk premium parameter in the WACC, in that the value adopted for the utilisation rate component of

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[49] E0014, _0007 at [20].
[50] E0014, _0010 at [46].
[51] E0014, _0015 at [76].
[52] E0014, _0007 at [20(b)] and _0010 at [49].

gamma must be the same value adopted in estimating the market risk premium.[53] This is the reason Dr Hern only considers the utilisation rate component of gamma, because only this component has an interaction in estimating the WACC.

Distribution rate

Dr Lally's methodology for estimating distribution rate

156   In his individual report on gamma, Dr Lally observes that distribution rate is a parameter that can vary over companies, and as such the best estimate for a particular company might seem to involve using only data for that company. However, Dr Lally suggests this is unsuitable in a building block situation because the company might alter its distribution rate in the future to manipulate the estimate. Dr Lally therefore favours using a market-wide estimate, with such an estimate weighting companies in proportion to their value. Accordingly, Dr Lally considers that in conducting such an estimation, the focus should be on the most valuable companies in Australia.[54]

157   However, in the gamma JER, Dr Lally gives a different view as to his preferred approach to estimating distribution rate. He states that given the distribution rate is a parameter specific to each company, the natural starting point in estimating it in this proceeding is the distribution rate for PAPL. Using information derived from PAPL's financial statements, Dr Lally calculates the distribution rate for PAPL as 0.986, being an estimate for its aeronautical operations.[55] Dr Lally suggests that *prima facie*, this would appear to be the appropriate estimate. However, consistent with the concern expressed in his individual report on gamma, Dr Lally acknowledges if that estimate were to be used in this proceeding, PAPL might expect it to be used in future proceedings and therefore may seek to reduce it as to increase its allowed revenues under the building block models.[56]

158   While Dr Lally acknowledges PAPL is not a listed company, he observes that it is owned by various parties including infrastructure funds, which are ultimately owned by numerous individual investors. Dr Lally suggests that as with owners of listed companies, these investors do not have a deep knowledge of the state of the company and thereby rely in part on its dividends as a signal about its profitability.

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[53] E0014, _0029 at [141].
[54] E0008, _0003 at [10].
[55] E0014, _0012 at [56].
[56] E0014, _0012 at [57].

Dividends therefore tend to be high, which in turn raises the distribution rate for the credits. On that basis, in Dr Lally's opinion, the best alternative estimate for the distribution rate for PAPL's aeronautical operations is the distribution rate for Australian listed companies in general.[57]

159   Dr Lally uses a subset of Australian Securities Exchange (ASX) listed companies, drawing on data from the financial statements of the individual companies for the period from 2007 to 2017 inclusive. Using that data, Dr Lally arrives at an estimate of 0.89. However, Dr Lally considers an adjustment should be made to exclude the impact of the foreign operations of those companies, because PAPL's aeronautical operations necessarily do not involve foreign operations. Removing the effect of foreign operations results in an increase of his estimate to 0.96.[58]

160   Dr Lally's estimate is based on a series of reports he prepared for the AER. The first report was produced in June 2018, using financial statement data for each of the 20 most valuable companies listed on the ASX, and estimated the distribution rate at 0.88. The second report was produced in October 2018, extending the set of companies to the 50 largest on the ASX, and estimated the distribution rate to be at least 0.89. A further report was produced in December 2018, which also focused on the 50 largest companies on the ASX but conducted more detailed analyses on the effect of the foreign operations on those companies, leading to an estimate for the distribution rate (in the absence of foreign operations) of 0.96.[59] At trial, Dr Lally gave evidence that he places 'essentially 100%' weight on this last report.[60] The AER's current estimate of the distribution rate of 0.90 (which has regulatory effect from 17 December 2018 but uses data to June 2018) derives from these reports prepared by Dr Lally.[61] At trial, Dr Lally gave evidence that the AER had clearly placed little weight on the last report and was holding back from adopting Dr Lally's 0.96 estimate.[62]

161   In summary, Dr Lally considers two estimates are available: 0.986 for PAPL and 0.96 for Australian listed companies in general. Dr Lally considers the latter figure of 0.96 avoids the adverse incentive problems associated with the 0.986 figure, and therefore is preferred. Further,

[57] E0014, _0012 at [58].
[58] E0014, _0012 at [58] and _0015 at [77].
[59] E0008, _0003 to _0004 at [11].
[60] ts 1773 - 1774.
[61] E0008, _0005 at [17] and F1127.
[62] ts 1773 - 1774.

Dr Lally's view is that given the estimate of 0.986 using only data from PAPL is close to his estimate for listed companies of 0.96, this provides additional support for the 0.96 figure.[63]

162   Dr Lally acknowledges an alternative approach would be to estimate the distribution rate of Australian companies in general (that is, both listed and unlisted companies). He considers there are two drawbacks to this approach. First, many of the unlisted companies are owned by one person or a small group, who are completely familiar with the true state of affairs within the company and therefore do not need to use dividends as a signal. In that context, he says dividends then tend to be lower and their distribution rates for credits accordingly lower. Dr Lally therefore concludes these companies are not good comparators for PAPL.[64]

163   Secondly, an estimate of the distribution rate for all companies would have to rely on data from the Australian Taxation Office (ATO). Dr Lally says no recent study is available using this data, and the study relied on by the IPART uses this data for 1988-2011.[65] Additionally, Dr Lally considers this data to be unreliable, in that the ATO has advised the AER not to use its data for regulatory purposes.[66] In this regard, Dr Lally refers to a note issued by the ATO to the AER dated 14 September 2018, which states (among other things):[67]

> Taxation Statistics cannot be used to estimate the quantum of franking [imputation] credits created, distributed or received by a company or group over time. This is because it has insufficient information to reliably quantify these amounts … Further, the usage rate of franking [imputation] credits is not able to be calculated from Taxation Statistics data due to the aggregated nature of the data.

164   On this issue, Dr Lally concludes that if he were to attempt to estimate the distribution rate using both listed and unlisted companies, ATO data would be the only available data for doing so and given the unsatisfactory nature of that data, he could not rely on it to form an estimate.[68]

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[63] E0014, _0013 at [61].
[64] E0014, _0012 at [59].
[65] E0008, _0007, at [22].
[66] E0008, _0007, at [22] and E0014, _0013 at [59].
[67] F1128, _0001.
[68] E0014, _0013 at [63].

Mr Houston's methodology for estimating distribution rate

165   Mr Houston suggests there are two choices of dataset to use to estimate a distribution rate:[69]

(a)   data drawn from the public records of companies listed on the ASX; or

(b)   data drawn from ATO records of all Australian companies (both listed and unlisted) that submitted tax returns.

166   In Mr Houston's opinion, the ATO data provides the best source from which to estimate a distribution rate. While Mr Houston acknowledges some data-related shortcomings associated with the ATO dataset have been recognised, his view is that the existence of such shortcomings are not confined to this particular dataset.[70]

167   Mr Houston suggests PAPL's status as an unlisted entity indicates that a benchmark distribution rate should be estimated using data that covers both listed and unlisted companies, rather than only using data for listed companies.[71]

168   Mr Houston therefore uses data for listed and unlisted companies, without adjustment, drawing on data aggregated from the ATO. Mr Houston considers that the average distribution rate of 0.70 derived from that ATO data represents the best estimate of the distribution rate.[72]

169   Mr Houston considers it is incorrect as a matter of principle for Dr Lally to exclude the foreign operations of Australian entities in deriving his preferred estimate for distribution rate using listed company data. Mr Houston observes that Dr Lally's analysis appears to be the only available assessment of the empirical effect of foreign operations on Australian distribution rates, with the results standing in contrast to the opinions of some market participants.[73]

170   Mr Houston suggests that if the court were to find that the distribution rate should be estimated by reference to a subset of ASX listed entities, then the best estimate of the distribution rate is 0.90, being that adopted by the AER at relevant time. Mr Houston's opinion in this regard is informed by the AER's detailed approach to estimating

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[69] E0014, _0013 at [65].
[70] E0014, _0013 at [66].
[71] E0014, _0013 at [69].
[72] E0014, _0013 at [70] and _0015 at [78].
[73] E0014, _0014 at [71] - [73].

the distribution rate (which does not exclude the effect of companies' foreign operations), as well as the reliance of other regulators on this value.[74]

Utilisation rate

Dr Lally's methodology for estimating utilisation rate

171   Dr Lally's methodology for estimating the utilisation rate stems from the starting point that the utilisation rate is a parameter that arises within the 'Officer model' used by Australian regulators to estimate the cost of equity capital and the adjustment to company taxes. The 'Officer model' refers to a 1994 paper in which Australian finance academic, Professor Officer, developed a framework for assessing the impact of imputation credits on the value of a company by introducing into the standard company valuation model a parameter called 'gamma'.[75]

172   Dr Lally observes that because Officer does not provide a formal derivation of his model, it is therefore not possible to determine unambiguously from his paper how utilisation rate is defined. Further, the Officer model assumes that investors can only invest in assets within their own country, which implies that foreign investors cannot invest in the Australian market. Dr Lally concludes that consistent with this premise, the estimate of the utilisation rate should recognise only Australian investors and since almost all of these investors can use the imputation credits, the utilisation rate should be 1.[76]

173   Dr Lally acknowledges that the assumption in the Officer model about foreign investors is inconsistent with the empirical fact that investors can and do invest in assets in other markets without any explicit restrictions. However, in Dr Lally's view investors have a 'home bias' towards assets in their home market. Dr Lally considers attempting to incorporate this home bias in a theoretical model is problematic, and all models make assumptions that imperfectly reflect reality to some degree. He considers the choice is then between a model that assumes investors can only invest in assets within their home country, such as the Officer model, and a model that assumes no restrictions and no home bias. Dr Lally concludes that consistent with using this model in this proceeding, the utilisation rate should be 1.[77]

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[74] E0014, _0014 at [74] - [75].
[75] E0014, _0010 at [43].
[76] E0014, _0021 to _0022 at [115].
[77] E0014, _0022 at [116].

174   Dr Lally acknowledges that while many Australian regulators
share his view that the utilisation rate is a weighted average over the
rates at which investors in the Australian market can use imputation
credits, since foreign investors are present in the Australian market,
these regulators recognise their existence. Accordingly, ascribing a
utilisation rate of 1 to Australian investors and 0 to foreign investors,
their estimate of the utilisation rate is the proportion of Australian
equities owned by Australian investors.[78] If the presence of foreign
investors is to be recognised, Dr Lally favours the AER's estimate in its
December 2018 Guidelines (which use data to June 2018) of 0.65.[79]

Mr Houston's methodology for estimating utilisation rate

175   Mr Houston considers there are two approaches for estimating the
utilisation rate, each associated with different conceptual interpretations
of gamma.   One interpretation being that gamma represents a
redemption or utilisation concept, with utilisation rate measuring the
rate at which imputation credits are redeemed by investors.
Mr Houston suggests that under this interpretation, the utilisation rate is
estimated as the proportion of imputation credits actually used by
investors either to redeem tax credits or offset tax liabilities.[80]

176   In contrast, Mr Houston presents the view that gamma can also be
taken as representing a market value concept, with utilisation rate
measuring the price that an investor would be willing to pay for an
imputation credit.   Under this interpretation, the utilisation rate is
estimated by reference to investor behaviour, as measured by 'dividend
drop-off' studies or an examination of derivative prices.[81] Dividend
drop-off studies measure the extent to which share prices drop at the
time a stock goes ex-dividend. The average amount by which share
prices fall on ex-dividend days is expected to capture the removal of the
value of the dividend and imputation credit from the share price. Put
another way, the fall in the share price on ex-dividend days measures
the market value of the dividend and imputation credit. To estimate the
market value of the imputation credit, the value of the dividend is
subtracted from the fall in share price on the ex-dividend day.[82]

177   Mr Houston notes IPART takes the view that it is conceptually
appropriate to both interpret and estimate the value of distributed

[78] E0014, _0022 at [117].
[79] E0014, _0022 at [119].
[80] E0010, _0015 at [54].
[81] E0010, _0015 at [55].
[82] E0010, _0016 at [62] - [63].

imputation credits by reference to their market value, stating in its most recent review published in February 2018 that:[83]

(a)   the value of gamma should be interpreted as the market value of dividends and capital gains that investors would be willing to forgo in exchange for imputation credits; and

(b)   dividend drop-off studies are currently the best method to estimate the market value of gamma.

178   Mr Houston concludes that the best estimate of utilisation rate is 0.35, a value derived by means of the most recently available dividend drop-off study, undertaken by the then named SFG, and adopted by IPART.[84]   This is in line with IPART's approach of preferring the market value concept, estimated using a dividend drop-off study.[85]

Dr Hern's methodology for estimating utilisation rate

179   In estimating the utilisation rate, Dr Hern places primary reliance on the 'equity ownership approach', which he suggests is the approach on which most Australian regulators rely (except IPART).[86]   In Dr Hern's opinion, consistent with the views of Australian regulators, he takes a 'pragmatic' view of the Officer model, which is to recognise the presence of foreign investors in the Australian market.   Dr Hern therefore estimates the utilisation rate as equal to the proportion of Australian equities owned by local investors as of June 2018.[87]

180   In his report on WACC, Dr Hern estimated the utilisation rate as 0.60, which was calculated as the median of six Australian regulators' utilisation rates.[88]

181   Dr Hern explains that during the course of the expert conclave on gamma he had the opportunity to further reflect on the utilisation rate data that was available as of end June 2018, and subsequently formed the view that the most reliable data available at that time was that from the Australian Bureau of Statistics of All Equity data, and published by the AER.[89]

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[83] E0010, _0029 at [131] and F0423.
[84] E0014, _0020 at [105].
[85] E0010, _0029 at [134].
[86] E0014, _0023 at [123] and _0026 at [126].
[87] E0014, _0026 at [127].
[88] E0014, _0025 at [124] and E0006, _0035 at [90].
[89] E0014, _0025 at [124].

182   In his report on WACC, Dr Hern referred to the AER's April 2018 Murraylink decision, which favoured a point estimate of 0.60 of the utilisation rate drawn from a range of historical values up to September 2016 of 0.57 to 0.68. Soon after, the AER published its July 2018 Draft Guidelines, which favoured a point estimate of 0.60 of the utilisation rate drawn from a range of historical values up to September 2017 of 0.60 to 0.70. Dr Hern suggests a further examination of this data shows that the average of the point estimates for each quarter over the last five and ten years to September 2017 were 0.65, to the nearest 0.05. He notes that the AER's December 2018 Guidelines (then updated to include data to June 2018) also favoured a utilisation rate of 0.65.[90] Dr Hern estimates the utilisation rate as 0.65 as of end of June 2018.[91]

Analysis of gamma issues

Distribution rate

183   Given the concerns associated with estimating the distribution rate for a company using only data for that company, and consistent with the view expressed by Mr Houston and initially expressed by Dr Lally, using a market-wide estimate is the preferable approach.

184   In the context of this proceeding, the appropriate data set to use in undertaking a market-wide estimate is data drawn from the public records of companies listed on the ASX. The ATO has expressly advised the AER that the ATO's taxation statistics cannot be used to estimate the quantum of imputation credits created, distributed or received by a company over time, or the usage rate of imputation credits.[92] Accordingly, ATO data appears unreliable in forming a market-wide estimate and given the advice from the ATO to the AER, it would not be prudent to do so.

185   Further, Dr Lally's opinion that despite being unlisted, the ownership structure and dividend tendencies of PAPL are analogous to a listed company, is persuasive. Accordingly, the best estimate for the distribution rate for PAPL's aeronautical operations is the distribution rate for ASX listed companies.

186   Dr Lally's analysis to exclude the foreign operations of Australian entities appears to be the only available assessment of the empirical

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[90] E0014, _0025 to _0026 at [125].
[91] E0014, _0028 at [139].
[92] F1128, _0001.

effect of foreign operations on Australian distribution rates. Further, Dr Lally acknowledges that the AER has placed little weight on the report in which he undertook such analysis, in determining its December 2018 estimate of the distribution rate of 0.90.

187   In that context, I am not persuaded that it is appropriate to adopt Dr Lally's adjustment for the effect of foreign operations. I consider the best estimate of distribution rate for PAPL as at 1 July 2018 is 0.90. This is closely comparable to Dr Lally's unadjusted estimate of 0.89, consistent with the AER's December 2018 Guidelines and as such, consistent with Mr Houston's opinion that if the court were to find the distribution rate should be estimated by reference to a subset of ASX listed entities, the best estimate of the distribution rate is 0.90.

Utilisation rate

188   I am not persuaded to adopt Dr Lally's methodology for estimating the utilisation rate. While it may be theoretically consistent with the Officer model, in the context of the task at hand in this proceeding, it would be inappropriate to disregard the fact that foreign investors do invest in Australia. Further, to adopt such an approach and determine a utilisation rate of 1 would be inconsistent with the approach taken by relevant Australian regulators.

189   I am also unpersuaded by Mr Houston's market value approach to estimating utilisation rate. Conceptually, I prefer the description of utilisation rate as a weighted average over the utilisation rates for individual investors. Practically, if a dividend drop-off approach were to be adopted, there are a wide variety of models which may be used, leading to a wide range of results.[93] I also accept there are a number of other practical issues and concerns with the dividend drop-off approach, as identified by Dr Lally and Dr Hern in the JER on gamma and in their evidence at trial. Further, while I accept IPART has adopted a dividend drop-off estimate, the majority of Australian regulators do not use this approach.

190   Dr Hern's 'pragmatic' view of the Officer model, consistent with the views of Australian regulators, is preferable in the context of this proceeding. Dr Hern adopts an equity ownership approach, estimating the utilisation rate as equal to the proportion of Australian equities owned by local investors as of June 2018, which appears to be the approach most regulators have placed reliance on (except IPART).

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[93] E0014, _0023 at [120].

Dr Hern estimates the utilisation rate as 0.65 as of end June 2018, consistent with the AER's December 2018 Guidelines. This is Dr Lally's preferred estimate if the presence of foreign investors is to be recognised. I adopt those views and consider the best estimate of utilisation rate as at 1 July 2018 is 0.65.

Gamma

191   Having determined the best estimate of distribution rate is 0.90 and the best estimate of utilisation rate is 0.65, the value for gamma (being the product of the distribution rate and utilisation rate) is 0.585.

Asset Beta

Introduction

192   The asset beta measures the level of underlying risk of a company's operations. The asset beta is a key company specific input into the risk adjusted return that investors must expect to receive before they would willingly provide the investments necessary for a commercial enterprise to operate. This risk adjusted return is commonly referred to as the WACC. The asset beta for PAPL is an input into the WACC for PAPL.[94]

193   Both the asset beta and the equity beta are measures of the 'relative risk' of an equity investment with uncertain returns compared to the wider market of equity investments. The asset beta is not a measure of absolute risk.[95]

194   Asset beta measures the relative sensitivity of assets to shocks that systematically affect the overall return on the market portfolio. A higher asset beta implies a higher sensitivity of that asset's returns to system wide shocks to the market return (positive and negative).[96]

195   Dr Hird is PAPL's expert on asset beta and Dr Hern is Qantas' expert on asset beta. The experts prepared individual reports on asset beta, participated in an expert conclave and subsequently produced a JER on asset beta.

196   The experts use different methodologies to estimate asset beta. Even where there is consistency between the steps in their

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[94] E0015, _0012 at [1].
[95] E0015, _0012 at [3].
[96] E0015, _0012 at [8].

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methodologies, there are a number of decisions required to be made as a matter of judgement.

197   The experts agree on the following points:[97]

(a)   PAPL's asset beta should be estimated based on a set of comparator airports where the comparator airport is publicly listed and traded in a liquid market;

(b)   a robust relative risk assessment of PAPL against the comparator airports is necessary for estimating PAPL's asset beta from the estimated asset betas for the comparator airports;

(c)   regulatory precedent is a relevant cross-check of the results derived from (a) and (b);

(d)   Dr Hern's 'Tier 2' sample and Sydney Airport (in combination) can be used to estimate an asset beta for PAPL provided that a robust relative risk assessment is performed;

(e)   PAPL has similar non-demand risk than Sydney Airport or Dr Hern's Tier 2 sample;

(f)   the New Zealand Commerce Commission's (NZCC) model can be used to estimate the asset beta for comparator airports (although Dr Hird disagrees with Dr Hern's amendments to that model); and

(g)   'demand risk' is an important risk factor.

198   The experts disagree on the following points:[98]

(a)   the most relevant comparator airports and the weight that should be applied to these;

(b)   the estimation technique to use to estimate asset beta for individual comparator airports;

(c)   PAPL's relative risk factors compared to comparators; and

(d)   the implications of regulatory precedents on PAPL's asset beta.

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[97] E0015_0004.
[98] E0015_0005.

199   Accordingly, it is necessary to make findings on the following key 'decision points', which underpin the experts' methodologies:[99]

    (a)   the relevant comparator set of listed airports for which an asset beta may be estimated;

    (b)   aspects of the estimation technique used to estimate the asset betas of the comparators;

    (c)   the measurement and application of PAPL's relative risk factors, in particular, demand risk; and

    (d)   as a 'cross-check', any implications of regulatory precedent.

Dr Hird's methodology to estimating asset beta

200   Dr Hird adopts the NZCC's methodology to estimating airport asset betas, including the NZCC's identification of a sample of 26 comparator airports for which asset beta estimates are available. Dr Hird considers the NZCC's approach, especially having regard to a wide range of comparator airports, as robust and its methodology as transparent including by the publishing of the spreadsheet used for its calculations of asset beta.[100]

201   Dr Hird updates the NZCC's asset beta estimates from 2016 (which are estimated using weekly and 4-weekly asset betas), to cover the 10-year period from 1 July 2008 to 30 June 2018. He also estimates asset betas over a longer 15-year period from 1 July 2003 to 30 June 2018. Dr Hird estimates the asset betas using the NZCC's approach of breaking down longer averaging periods into consecutive five-year periods, where asset betas are computed for each five-year period and then averaged.[101] Under his approach, Dr Hird estimates the asset beta for Auckland Airport by reference to the local stock market, consistent with the NZCC's methodology and in his opinion, Australian and international regulatory precedent more generally.[102]

202   Dr Hird's results are set out below.[103] His point estimate of the average asset beta for the 26 airports in the NZCC sample is 0.67.[104]

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[99] C0003, _0081 to _0082 at [283] and C0004, _0089 to _0090 at [387] - [388].
[100] E0001, _0025 at [80].
[101] E0001, _0026 to _0027 at [83] - [85].
[102] E0011, _0024 at [43(a)].
[103] E0001, _0027 at [86] and Table 4-1.
[104] E0001, _0043 at [150].

Table 4-1 Asset betas for companies in NZCC comparator sample

Ticker	Name	NZCC Beta 2006-2016^	2008-18	2003-18	2013-2018
AIA NZ Equity	Auckland	0.710	0.791	0.806	0.918
SYD AU Equity	Sydney	0.360	0.373	0.480	0.332
FLU AV Equity	Vienna	0.408	0.329	0.428	0.250
694 HK Equity	Beijing	0.748	0.607	0.882	0.593
600004 CH Equity	Guangzhou	0.823	0.892	0.804	0.986
357 HK Equity	HNA	0.938	0.755	0.825	0.474
600009 CH Equity	Shanghai	0.813	0.823	0.788	0.775
000089 CH Equity	Shenzhen	0.873	0.788	0.813	0.994
600897 CH Equity	Xiamen	0.863	0.879	0.833	1.099
KBHL DC Equity	Kobenhavns Lufthavne	0.325	0.350	0.350*	0.478
ADP FP Equity	Aeroports de Paris	0.545	0.507	0.543	0.430
FRA GR Equity	Frankfurt	0.573	0.471	0.525	0.365
TYA IM Equity	Toscana	0.258	0.222	0.376	0.211
SAVE IM Equity	Venezia	0.413	0.308	0.388	0.146
GMRI IN Equity	GMR (India)	0.693	0.591	0.826	0.442
8864 JP Equity	Airport Facilities (Jap.)	0.535	0.534	0.511	0.583
9706 JP Equity	Japan Airport	0.795	0.905	0.810	1.227
MAHB MK Equity	Malaysia Airports	0.858	0.887	0.878	1.038
MIA MV Equity	Malta	0.543	0.570	0.493	0.657
OMAB MM Equity	GAdP Norte (Mexico)	0.710	0.821	0.817	0.830
GAPB MM Equity	GAdP Pacifico (Mexico)	0.675	0.759	0.780	0.852
ASURB MM Equity	GAdP Sureste (Mexico)	0.665	0.722	0.649	0.790
AERO SG Equity	Belgrade	1.155*	1.125	1.125*	1.327
FHZN SW Equity	Zurich	0.578	0.608	0.538	0.663
AOT TB Equity	Airports of Thailand	0.908	0.991	0.843	1.199
TAVHL TI Equity	TAV (Turkey)	0.340	0.428	0.423	0.480
Average		**0.65**	**0.66**	**0.67**	**0.70**

*Source: New Zealand Commerce Commission [PAP.500.058.1311], Bloomberg, CEG analysis. ^The NZCC estimates weekly and 4-weekly asset betas for 2006-2011 and 2011-2016. This results in four different asset beta estimates for each airport. The NZCC practice is to take an average of these four separate asset betas I follow this method in this table. * Belgrade receive 50% weight in the Commission's average because it only has stock data available from 7 February 2011. I give it the same weight in the 2003 to 2018 period but give it full weight in 2008-2018 period because it has data for most of that period. I also give 50% weight on Kobenhavns Lufthavne for 2003 to 2018 period because data is not available in the first 5 years from 2003-2008.*

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203   The NZCC estimated average asset beta at 0.65. It then made a downward 0.05 adjustment (resulting in an adjusted average asset beta of 0.60) based on a presumption that aeronautical cash-flows are slightly lower risk than airport wide cash flows.[105]

204   Dr Hird considers PAPL has a materially higher demand risk than the NZCC sample average and for any airport in the sample.[106] Further, Dr Hird does not consider there is a strong case for imposing a decrease (eg 0.05) on the NZCC sample average asset beta. His view is that even if one accepts the NZCC's logic for a decrease when estimating the sample average asset beta, that same logic suggests, if anything, a positive adjustment is required for airports with high risk aeronautical operations (as he says is the case for PAPL).[107]

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[105] E0001, _0034 at [115].
[106] E0001, _0034 at [121].
[107] E0001, _0035 at [123].

205   Dr Hird uses the relationship between passenger numbers and Gross Domestic Product (GDP) at each airport to estimate how sensitive passenger numbers are at that airport to the overall business cycle. He refers to this as 'demand betas' and says it provides him with a measure of systematic demand risk at each airport. In Dr Hird's opinion, for an airport with relatively high fixed costs, it is reasonable to assume that the majority of the risk it faces (volatility in returns) is due to volatility in demand. He therefore considers that a comparison of this metric across airports is likely to be a good proxy for the overall level of risk that each airport faces.[108]

206   PAPL contends that Dr Hird's approach to measuring demand risk conforms with observations of, and the approach adopted by, the ACCC when it was responsible for the regulation of airports in the early 2000s. For example, PAPL refers to an ACCC decision for Melbourne Airport in August 2000, in which it observed:[109]

> However, the volatility of passenger numbers is relevant when considering relative differences in systematic risk between Australian airports. In particular, it is the extent to which this volatility is correlated with movements in the broader economy, as proxied by changes in GDP, which is most likely to mirror what is captured by an asset beta.

207   Dr Hird estimates passenger traffic demand betas for the following periods:

(a)   10 calendar years from 2008 to 2017; and

(b)   15 calendar years from 2003 to 2017,

having chosen those periods to be consistent with the asset beta estimates. He notes including the 2018 calendar year would require using data from after June 2018.[110]

208   Dr Hird only includes airports in his analysis with traffic data long enough to cover the full time period (ie 10 and 15 years). He provides a sensitivity in Appendix C to his first report that includes all comparator airports irrespective of whether the data for the airport covers the full time period and states his conclusions do not change under that sensitivity.[111] In Appendix C to his first report, Dr Hird also

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[108] E0001, _0017 to _0018 at [45]-[46] and _0059 at [196].
[109] C0003, _0100 to _0101 at [336] and F0032, _0011.
[110] E0001, _0037 at [126] - [127].
[111] E0001, _0037 at [130].

disaggregates total PAPL demand beta into RPT and non-RPT passengers. Dr Hird explains RPT flights are defined as regularly scheduled flights that are open for booking by the public and non-RPT flights as dominated by charter flights serving mining operations (generally with 'fly-in fly-out' workforces).

209   Dr Hird considers Appendix C illustrates that non-RPT flights have extremely high demand beta, which is around double that of RPT. However, the combined demand beta is only modestly higher than the RPT demand beta (reflecting the dominance of RPT traffic). Dr Hird concludes this serves to illustrate the importance of the mining sector to PAPL's non-RPT traffic and, presumably, also to its RPT traffic.[112] Dr Hird refers to the evidence of PAPL's witness, Mr James Gorton, in support of his conclusions.[113]

210   Dr Hird's estimated demand betas over 2003 to 2017 when the sample is restricted only to airports with data over the full period are as set out below.[114] The NZCC sample average demand beta is 1.43, while Dr Hird determines PAPL's demand beta as 5.58, being 4.15 units higher than the average.[115]

Figure 5-1: 2003 to 2017 (15 years of data for each company)
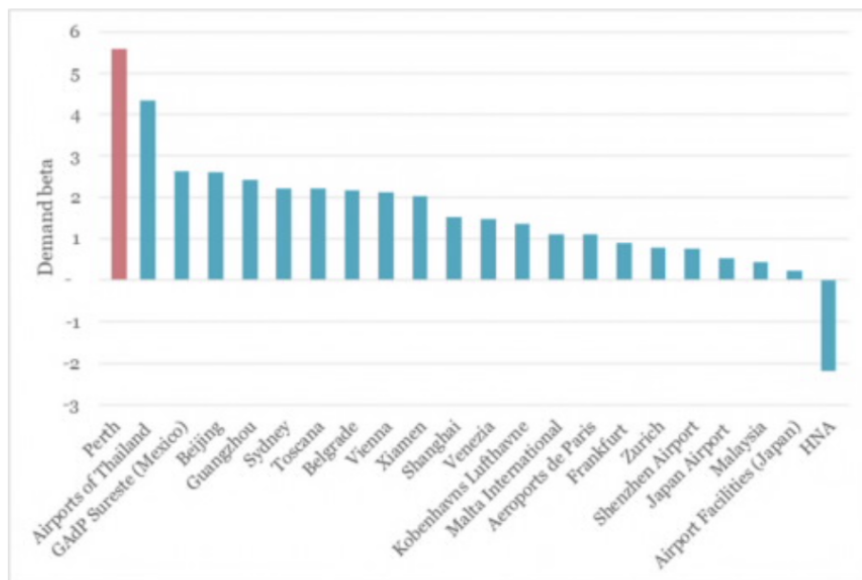
Source: Airports' and regulators' traffic statistics [PAP.500.059.3240], CEG analysis.

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[112] E0001, _0040 at [137] - [138].
[113] D0005, _0006 to _0011 at [20(a)] - [25] and [28] - [29].
[114] E0001, _0037 to _0038 at [132] and Figure 5-1.
[115] E0001, _0040 at [140] and Table 5-1.

211 Dr Hird concludes PAPL also has the equal highest (with Airports of Thailand) demand beta when the 10-year period 2008 to 2017 is used.[116] The NZCC sample average demand beta is 1.72, while Dr Hird determines PAPL's demand beta as 5.13, being 3.41 units higher than the average.[117]

Figure 5-3: 2008 to 2017 (10 years of data for each company)
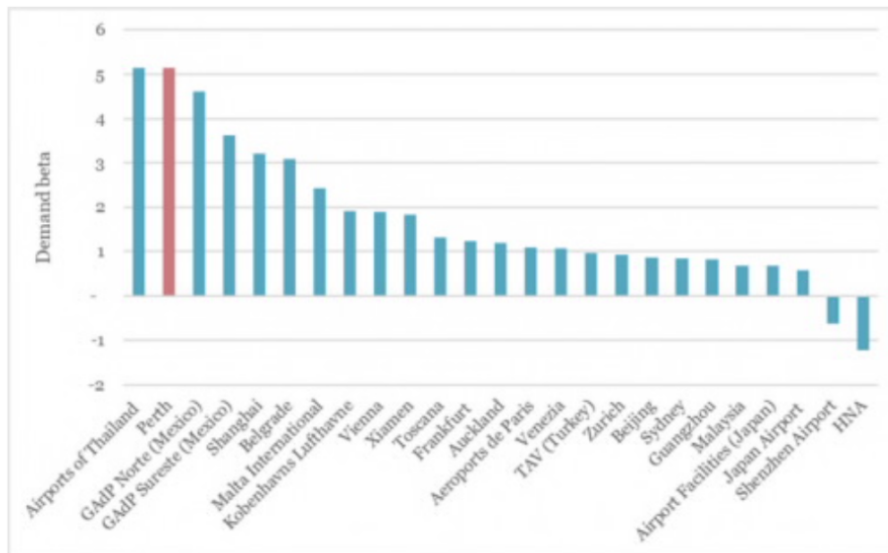
Source: Airports' and regulators' traffic statistics [PAP.500.059.3240], CEG analysis.

Table 5-1: Estimated Perth dummy variable and statistical significance

Period	Demand beta – NZCC sample	Perth Airport	Perth Airport premium
2003-2017	1.43	5.58	4.15
2008-2017	1.72	5.13	3.41

Source: Airports' and regulators' traffic statistics [PAP.500.059.3240], CEG analysis.

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212 Dr Hird finds PAPL is exposed to the highest underlying demand risk of any airport in the NZCC sample, suggesting PAPL's asset beta is higher than all of the airports in the sample.[118]

213 Dr Hird then uses three methods for arriving at an asset beta for PAPL:[119]

(a) applying judgement to select a percentile (the 85th percentile) within the distribution of asset betas from the sample;

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[116] E0001, _0039 at [135] and Figure 5-3.
[117] E0001, _0040 at [140] and Table 5-1.
[118] E0001, _0043 at [150].
[119] E0001, _0043 at [151].

(b)   the use of academic estimates of the relationship between demand betas and asset betas (ie starting with the average asset beta from the sample of 0.67 and adjusting this upwards based on academic estimates of the impact of higher demand beta on observed asset betas); and

(c)   deriving an adjustment consistent with the UK Competition Commission's adjustment to the asset betas at Gatwick and Stansted airports (based on evidence of higher demand betas at these airports relative to Heathrow airport).

214   Dr Hird's application of those methods result in the following estimates of asset beta for PAPL's aeronautical services, which he presents with and without the 0.05 decrement applied by the NZCC:[120]

Table 7-9: Summary of estimates

	Estimate	NZCC decrement
85th percentile (upper third) of NZCC sample	0.84 to 1.05	0.79 to 1.00
Academic literature	1.05 to 1.22	0.98 to 1.14
UKCC precedent	0.94 to 0.95	0.94 to 0.95*
UKCC precedent applied to NZCC sample	1.05	1.00

*Source: NZCC [PAP.500.058.1311], Bloomberg, UKCC [PAP.500.058.6665], Airports' and regulators' traffic statistics [PAP.500.059.3240] and CEG analysis. *No decrement for lower alleged risk of aeronautical revenues is appropriate here because any adjustment is already captured in the UKCC decision for each UK airport.*

215   Dr Hird says these results suggest a range of 0.84 to 1.23 if the NZCC decrement is not applied and a range of 0.79 to 1.14 if it is. He concludes a point estimate of 0.9 is a reasonable estimate (ie a 0.23 uplift from the 0.67 average asset beta of the 26 airport sample). However, Dr Hird considers reasonable minds might differ in a range of 0.79 to 1.22.[121]

216   In Dr Hird's second report (which he prepared in response to Dr Hern's report on asset beta), Dr Hird considers the impact of differences in sample selection and estimation method (particularly the use of local/regional indices in estimation method). Dr Hird

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[120] E0001, _0054 at [188] and Table 7-9.
[121] E0001, _0054 at [189] - [190]. In the asset beta JER, Dr Hird explains the uplift (which he then refers to as 0.22, rather than 0.23) implied a 13% weight was given to demand risk in determining an airport's asset beta (ie an implicit assumption that other elements of beta risk (eg operating leverage and discount rate) were the same for all airports and those factors determined 87% of total beta risk). Dr Hird considers this was a conservative adjustment and a higher weight to demand risk could reasonably be applied (see E0015, _0213 at [608]).

summarises the impact of differences arising from those factors in the table below:[122]

Table 3-1: Impact of key differences in sample selection and estimation method

Estimation method*	NZCC	NZCC	NZCC	Dr Hern
Sample	NZCC with Dr Hern exclusions (20)	Dr Hern's narrow sample + Japan+ China (13)	Dr Hern's narrow sample (6)	Dr Hern narrow sample (6)
High range	1.01	0.98	0.84	0.55
Low range	0.34	0.34	0.34	0.35
Average	0.71	0.68	0.52	0.48

* The NZCC estimation method uses a local market index for Auckland Airport, while Dr Hern's estimation method uses the local and regional market indexes for Auckland Airport. All estimates using the NZCC estimation method are based on a simple average of 5, 10 and 15 year betas (following Dr Hern's weighting method) listed in the three right hand columns from Table 4-1 of my first asset beta report [PAP.500.100.0158]. Dr Hern's asset beta estimates are taken from his asset beta report for Qantas: paragraph 71 for Sydney and Table 3.2 and Table 3.3 for others [QAN.999.015.0001].

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217   The far-left column is the NZCC sample set less Dr Hern's exclusions for illiquid/delisted stocks (that is, a sample set of 20). The next column to the right is Dr Hern's sample set of six plus Japanese and Chinese airports. The two columns to the right are Dr Hern's sample set of six, applying NZCC methodology and Dr Hern's methodology.[123]

218   Dr Hird observes the low end of the sample range is stable moving left to right, but the top end of the range almost halves, which Dr Hird says is due to Dr Hern's methodology (in particular, the impact of indices used for Auckland Airport).[124]

219   Dr Hird also considers demand beta estimates across sample sets and PAPL's estimated asset beta relative to that assessment. Dr Hird's best estimate of PAPL's asset beta would be around, or more than, 0.90 irrespective of the sample set against which demand risk is assessed, as illustrated in the table below:[125]

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[122] E0011, _0028 at [47] - [48] and Table 3-1.
[123] E0011, _0028 at [48].
[124] E0011, _0029 at [49].
[125] E0011, _0029 to _0030 at [52] and Table 3-2.

Table 3-2: Estimating Perth Airport beta based on relative risk

Estimation techniques		NZCC	Hern, Auckland based on:		Hern
			NZSX	50% weight to regional index	
Sample		NZCC (20)	Hern (6)	Hern (6)	Sydney (1)
		Inputs to calculation			
Perth relative demand risk (x times)	a	3.27	4.17	4.17	4.32
Sample average asset beta	b	0.71	0.53	0.48	0.42
	Formulae	**Outputs – estimates of Perth Airport asset beta**			
Perth asset beta if demand risk is 25% of total risk	=(1.0-0.25)×b +a×0.25×b	1.11	0.95	0.85	0.77
85th percentile/top 3rd		0.93 to 0.94	NA	NA	NA
Academic literature	b+(1+0.29×a)	1.38	1.17	1.05	0.95
UKCC	b+0.09×a	1.00	0.91	0.85	0.81

The first row is found by taking the average of my estimates of 10 and 15 year demand betas for Perth Airport and dividing this by the sample average (also for 10 and 15 year demand betas). The next row is the sample average of 15, 10 and 15 year asset betas for the 20 liquid and not delisted stock identified by Dr Hern. The NZCC estimation technique (first column) uses only weekly and monthly estimates and only local stock market indexes. The second and third columns of figures distinguishes between Dr Hern's sample with Auckland Airport's asset beta estimated relative to the NZSX (second column of figures) and Dr Hern's preferred estimate (third column of figures). The fourth column of figures uses Dr Hern's estimate for Sydney only. The third row of data is calculated from the first two as per the formula in the same row in the second column of the table. The derivation of the bottom three rows follow the same process as described in sections 7.1 to 7.3 of my first asset beta report. I report NA for the 85th percentile/top third estimates when using Dr Hern's samples because these have a maximum of 6 comparators which is too small to derive a meaningful estimate in this manner. [PAP.500.100.0158]

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220 The row labelled 'Perth asset beta if demand risk is 25% of total risk' is an alternative Dr Hird develops in his second report to illustrate:

> [M]y 0.90 asset beta estimate is, if anything, conservative even if demand risk only accounts for a fraction of total beta risk.

221 The formula for this row assumes that demand risk is 25% of total beta risk and PAPL has similar beta risk on other dimensions to the sample average. The formula assigns PAPL 75% of the sample average beta risk (second row of numbers) and scales up the remaining 25% for the relative demand risk of PAPL (first row of numbers).[126]

222 In his second report, Dr Hird agrees with Dr Hern's view that it is reasonable to exclude six illiquid and delisted airports from the NZCC sample,[127] but does not otherwise change his views regarding the appropriate sample set. This change to the comparator set results in a

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[126] E0011, _0030 to _0031 at [54] and _0063 to _0064 at [165] - [167].
[127] E0011, _0023 at [42(c)(iv)].

range of estimated asset betas from 0.34 to 1.01, with an average of 0.71.[128]

223   In the JER on asset beta, Dr Hird agrees Dr Hern's Tier 2 sample (five airports) and Sydney Airport (in combination, ie the sample set of six) can be used to estimate an asset beta for PAPL, provided a robust relative risk assessment is performed.[129]

224   Dr Hird presents the below table which summarises his approach to translating the sample average of empirically estimated asset betas for a comparator set into a relative risk adjusted estimate of PAPL's asset beta:[130]

Table 2-2: Risk adjusted sample average asset betas for a range of samples and estimation techniques.

	Comparator average empirical asset beta	Perth Airport demand risk relative comparator average risk*	Range for Perth Airport asset beta**
Sydney (1)	0.40	4.32	0.6 - 0.8
Tier2 (5)	0.54	4.33	0.8 - 1.1
Tier2 + Japan (7)	0.61	5.24	0.9 - 1.5
Tier2+Japan+Sydney (8)	0.58	4.92	0.9 - 1.3
Tier2+Japan+Sydney+China (13	0.68	4.28	1.0 - 1.4
NZCC liquid sample (20)	0.71	3.30	0.9 - 1.3

*Based on average of 10 and 15 year demand betas. ** Derived based on the sample average asset beta adjusted for Perth Airport's relative demand risk (as shown in the middle column of figures).

225   The column on the left shows the sample average asset beta estimates for a range of different samples. The middle column shows PAPL's demand risk relative to the sample average (PAPL's demand beta divided by the sample average demand beta). The column on the right shows the range for the sample average beta adjusted to be consistent with PAPL's relative risk (using the formulae and weights Dr Hird describes in response to Question 7 of the JER, as described below).[131]

226   To address various scenarios in the JER, Dr Hird uses a formula to calculate adjusted asset beta based on a weight to demand risk of 13% to 33%.[132]

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[128] E0011, _0028 at [47].
[129] E0015, _0004 at [3].
[130] E0015, _0024 at Table 2-2.
[131] E0015, _0023 to _0024 at [39].
[132] E0015, _0213 at [608] - [609].

227   Using that formula, Dr Hird presents the results in the table below. The first three columns show the sample average asset beta estimates for a range of different samples, the fourth column shows PAPL's demand risk relative to the sample average (PAPL's demand beta divided by the sample average), and the fifth to seventh columns show the range for the sample average demand beta adjusted to be consistent with PAPL:[133]

Table 14-1: Risk adjusted sample average asset betas for a range of samples and estimation techniques.

	Sample average asset betas			Perth	Risk adjusted sample average asset betas		
	Estimation method				Estimation method		
	Hird	Hern except local index*	Hern	relative risk	Hird	Hern except local index*	Hern
Sydney (1)	0.40	0.42	0.42	4.32	0.6 - 0.8	0.6 - 0.9	0.6 - 0.9
Tier2 (5)	0.54	0.55	0.49	4.33	0.8 - 1.1	0.8 - 1.2	0.7 - 1.0
Tier2 + Japan (7)	0.61	0.61	0.57	5.24	0.9 - 1.5	0.9 - 1.5	0.9 - 1.4
Tier2+Japan+Sydney (8)	0.58	0.59	0.55	4.92	0.9 - 1.3	0.9 - 1.4	0.8 - 1.3
Tier2+Japan+Sydney+China (13)	0.68	0.69	0.62	4.28	1.0 - 1.4	1.0 - 1.5	0.9 - 1.3
NZCC liquid sample (20)	0.71	0.70	0.59	3.30	0.9 - 1.3	0.9 - 1.2	0.8 - 1.0

* 100% weight to local index for all non-European comparators. Regional index for Western European comparators only

228   Dr Hird uses this table to illustrate various scenarios comprised of different combinations of sample sets and estimations in the JER.

229   For example, Dr Hird explains how his estimate of the asset beta for PAPL would have been different, had he been instructed that PAPL has the same level of relative demand risk as estimated by Dr Hern.[134] Dr Hird indicates using his NZCC liquid sample set of 20 comparators, Dr Hird's estimation method, but Dr Hern's position regarding PAPL having 'middling' demand risk, would result in an estimated asset beta of 0.71 (ie the bottom left cell of the table).[135] This is the only scenario of those posed in the JER in which Dr Hird does not estimate an asset beta for PAPL consistent with 0.9.[136]

230   In relation to regulatory precedent, Dr Hird considers that regulatory decisions show no downward or upward trend over time and

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[133] E0015, _0213 to _0214 at [612].
[134] E0015, _0220.
[135] E0015, _0220 at [631] - [634].
[136] E0015, _0246 at [728].

PAPL's risk has increased since the last regulatory determination of Perth Airport's asset beta as 0.7 in 2000, with growing exposure to the Western Australian mining sector.[137]

231   Dr Hird observes that from June 2003 to June 2018, the annual volatility of the Western Australian economy was four times that of the New South Wales economy and 3.7 times that of the Australian economy. Dr Hird suggests this difference in volatility in the state economies is consistent with his measured difference in demand risk for the capital city airports. That is, he considers PAPL has more than four times the demand risk of Sydney Airport.[138]

232   Dr Hird considers this relative volatility flows directly from the importance of the mining sector to the Western Australian economy.[139] Dr Hird considers the Western Australian economy to be eight times more correlated with national GDP than the New South Wales economy during the same period. At trial, Dr Hird gave evidence that:[140]

> Essentially, to put it pretty simply, when the mining sector in WA is booming, the Australian economy is booming. When the WA mining industry is in the dumps, Australia's economy is in the dumps.

233   Dr Hird also observes that according to the Australian Bureau of Statistics, the mining sector directly accounts for 40% of real gross value added in Western Australia.[141] Dr Hird comments that this is direct value added in the mining industry. That is, the figure does not capture economic activity in other industries that are driven in support of the mining industry, suggesting that 40% is an understatement of the true importance of mining to the Western Australian economy.[142] Dr Hird considers that PAPL is heavily dependent (both directly and indirectly) on the Western Australian mining sector and this materially raises its risk relative to Sydney Airport.[143]

Dr Hern's methodology to estimating asset beta

234   Rather than adopt a methodology as applied by a regulator, Dr Hern's methodology to estimating asset beta appears somewhat bespoke. Dr Hern's approach to estimating asset beta starts with

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[137] E0015, _0191 at [539] - [540].
[138] E0015, _0039 at [72] and ts 886.
[139] E0015, _0040 at [73].
[140] ts 886.
[141] E0015, _0040 at [73], Figure 4-2 and Figure 4-3.
[142] E0015, _0041 at [74].
[143] E0015, _0041 at [76].

identifying a small set of 'best' comparator airports that he considers are most similar to PAPL in terms of country risk factors. In Dr Hern's opinion, this step is consistent with the approach adopted by many European and Asian regulators.[144]

235   Dr Hern identifies Sydney Airport to be the best or 'primary' comparator for PAPL because it is the only listed airport in Australia, therefore shares the same country risk, and is most similar in terms of macroeconomic risk, regulator regime and tax rules. Additionally, Dr Hern identifies five 'Tier 2' comparators to cross-check his primary comparator, which he considers are exposed to similar country risks as Australia.[145]   Dr Hern does not consider airports operating in developing economies as being comparable to PAPL.[146] In Dr Hern's opinion, it is crucial to ensure comparator airports are selected carefully, with focus given to airports most comparable to PAPL in terms of country risks, as well as other risk characteristics such as demand and revenue risk and operating leverage (ie degree of fixed costs).[147]

236   To select the countries that have similar risks to Australia, Dr Hern identifies listed airport comparators from countries that have similar sovereign credit ratings as Australia[148] during the entire 15 year period from 2003 to 2018.[149] That is, listed airports from countries with a Moody's sovereign credit rating of Aaa (highest) to Aa3 (three notches below Aaa) during that period. The airports that satisfy this criterion are Auckland Airport (New Zealand), Vienna Airport (Austria), Aeroports de Paris (France), Fraport (Germany) and Zurich Airport (Switzerland).[150]

237   During the course of the trial, Dr Hern gave evidence that a further reason for excluding Japanese airports from his comparator set (in addition to his sovereign credit rating test) was because the majority of the revenue of Japanese airports comes from merchandise services, as opposed to aeronautical services.[151]

238   To estimate comparators' asset betas, Dr Hern employs the ordinary least squares statistical technique to estimate the equity betas,

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[144] E0005_0013 at [26], _0024 at [50] and _0025 to _0026 at [56] - [57].
[145] E0005_0013 at [26], _0027 at [60], and _0030 at [65].
[146] E0005, _0024 at [50].
[147] E0015, _0062 at [149].
[148] E0005_0028 at [61].
[149] ts 1174 - 1175.
[150] E0005, _0029 at [64].
[151] ts 1191.

using different data frequencies, estimation windows and market indices. Dr Hern estimates comparator asset betas using daily, weekly and four-weekly returns, but his preferred estimate is on daily data frequency, to which he attributes 50% weight, and 50% weight to the combined weekly and four-weekly data.[152] Dr Hern uses five-year, ten-year and 15-year estimation windows. For European comparators, Dr Hern estimates asset betas using a European index and for Auckland Airport he uses both the New Zealand local market index and the regional Asia-Pacific market index.[153]

239   Dr Hern's use of the regional Asia-Pacific market index (as opposed to only the local market index) in estimating the asset beta for Auckland Airport is a material point of difference in the experts' estimation techniques. Dr Hern states he uses the two indices because evidence on market integration (ie of New Zealand within the Asia Pacific region), ownership structure of Auckland Airport suggesting investors with diversified portfolios beyond the New Zealand market, and market index size (as Auckland Airport itself accounts for 6% of the local index) suggests some weight should be placed on both the local and regional index.[154]

240   Dr Hird describes Dr Hern's approach to estimating the asset beta for Auckland Airport as 'novel', 'without precedent' and as significantly understating the beta risk for Auckland Airport, with the ultimate effect of reducing the upper bound for Dr Hern's Tier 2 comparator set from around 0.87 to 0.55.[155]

241   Table 3.1 below sets out Dr Hern's estimated asset betas for Sydney Airport, as his primary comparator for PAPL:[156]

Table 3.1: Sydney Airport Asset Beta

Sydney Airport Asset Beta	Daily	Weekly/4-Weekly
2003-2018 (15yr)	0.50	0.48
2008-2018 (10yr)	0.43	0.37
2013-2018 (5yr)	0.42	0.33
Range	**0.33-0.50**	

Note: Sydney Airport's asset beta is calculated based on Australian local market index
Source: Dr Hern's analysis. Dr Hern Empirical Beta Estimates.xlsx. [QAN.999.005.1140]

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[152] E0005, _0033 to _0034 at [70]-[72] and Tables 3.1 and 3.2.
[153] E0005, _0030 at [66].
[154] E0005, _0031 at [66(C)] and E0015, _0089 to _0093 at [232] - [238].
[155] E0011, _0032 at [57].
[156] E0005, _0033 at [70] and Table 3.1.

242   Within the range of 0.33 to 0.50, Dr Hern's point estimate for Sydney Airport is 0.42 based on a five-year estimation period and daily returns data.[157]

243   Table 3.2 and Table 3.3 below set out Dr Hern's estimated asset betas for his Tier 2 comparators from Europe and New Zealand:[158]

Table 3.2: European Tier 2 Airport Comparators Asset beta

Data frequency	Estimation window	Vienna	AdP	Frankfurt	Zurich
Weekly/4-Weekly	2003-18 (15yr)	0.55	0.52	0.65	0.49
	2008-18 (10yr)	0.42	0.57	0.57	0.52
	2013-18 (5yr)	0.28	0.47	0.47	0.53
Daily	2003-18 (15yr)	0.37	0.62	0.57	0.35
	2008-18 (10yr)	0.29	0.59	0.46	0.43
	2013-18 (5yr)	0.21	0.5	0.41	0.53
Average		**0.35**	**0.55**	**0.52**	**0.48**
Range			0.35 – 0.55		

Note: I estimate European Airport's asset beta based on European regional market index
Source: Dr Hern's analysis. Dr Hern Empirical Beta Estimates.xlsx. [*QAN.999.005.1140*]

Table 3.3: Auckland Airport Asset beta

Auckland Airport Asset Beta	NZ local index		Asia-Pacific regional index	
	Daily	Weekly/4-Weekly	Daily	Weekly/4-Weekly
2003-2018 (15yr)	0.87	0.81	0.18	0.21
2008-2018 (10yr)	0.86	0.79	0.21	0.22
2013-2018 (5yr)	0.98	0.92	0.21	0.23
Average Asset Beta		0.54		

Source: Dr Hern's analysis. Dr Hern Empirical Beta Estimates.xlsx. [*QAN.999.005.1140*]

244   In Dr Hern's opinion, as set out in Table 3.4 below, his empirical analysis of asset betas for his comparators indicates an asset beta of:[159]

(a)   0.33 to 0.50, with a point estimate of 0.42, for Sydney Airport; and

(b)   0.35 to 0.55, with an average of 0.50 for his Tier 2 cross-check comparators.

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[157] E0005, _0033 at [71].
[158] E0005, _0034 at [72], Table 3.2 and Table 3.3.
[159] E0005, _0035 at [75].

Table 3.4: Summary of Empirical Asset Beta Estimates for Sydney Airport and Tier 2 Comparators

Primary comparator	
Sydney	0.33 – 0.50 (point est.= 0.42)
Tier 2 comparators (cross-checks)	
Auckland (New Zealand)	0.54
Vienna (Austria)	0.35
AdP (France)	0.55
Frankfurt (Germany)	0.52
Zurich (Switzerland)	0.48
Range/Average	**0.35-0.55 (average = 0.5)**

Note: We estimate asset betas across different windows (5, 10 and 15 year) and frequencies (daily and weekly/4-weekly). Index for Sydney is local, for European comparators is regional and for Auckland is an average of local and regional

Source: Dr Hern analysis. Dr Hern Empirical Beta Estimates.xlsx. [QAN.999.005.1140]

245   To position PAPL's asset beta relative to the comparators, Dr Hern assesses PAPL's relative risk by examining a number of risk factors, including demand and revenue risk, operating leverage and other business risk measures.[160]

246   In Dr Hern's opinion, he considers adjusting comparator beta evidence for these risk factors to be inherently difficult and the key method of taking into account material differences in risk is to select an appropriate set of 'best' comparators that are exposed to similar risks as PAPL. He suggests the relative risk assessment then serves to confirm that the selected comparators are indeed comparable to PAPL.[161]

247   In Dr Hern's opinion, variation in passenger numbers does not reflect the best measure for the demand risk at airports. His view is that the relevant measure of 'demand' in demand risk should be based on revenues or operating profits, as opposed to passenger numbers. Dr Hern therefore assesses the demand risk of PAPL and his comparators using changes in revenues and operating profits relative to changes in GDP.[162]

248   Based on this measure of demand risk, Dr Hern's view (as set out in Figure 9-13 below) is that PAPL's asset beta risk is likely to be
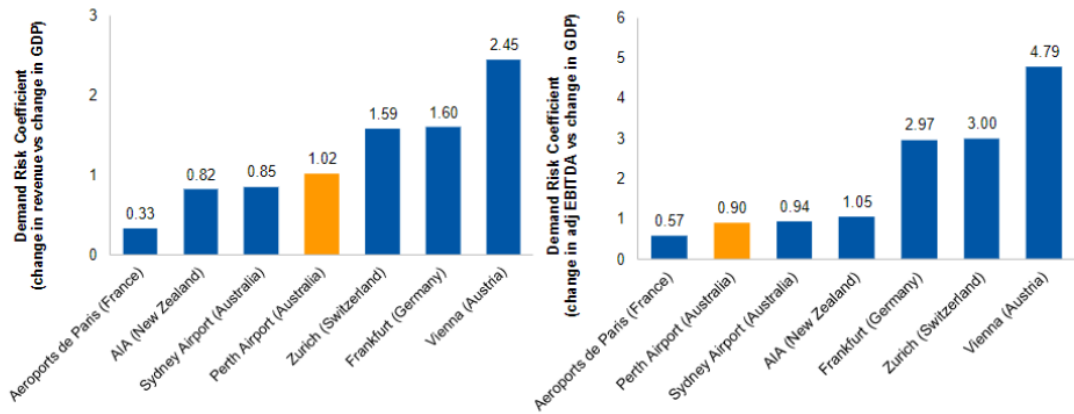
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[160] E0005, _0014 at [27] and _0035 to _0036 at [76] - [77].
[161] E0015, _0027 at [46].
[162] E0005, _0036 at [80] - [88] and E0015, _0172 to _0173 at [487] - [488].

slightly higher than Sydney Airport's but in line with the median of his Tier 2 comparators, all else equal:[163]

Figure 9-13: Perth Airport's demand risk is slightly higher than Sydney Airport and lies broadly in the middle of my tier 2 comparators

Note: these proxies consider the correct variables that drive investor returns - revenues and operating profits - but are still an imperfect measure of demand risk, because correlation with GDP is a poor proxy of correlation with market return in Australia (as explained in Section 9.2.2.)

Source: Dr Hern's analysis

249   Dr Hern acknowledges that while in his opinion operating profit may conceptually be a better measure, it is an accounting definition of economic profit and as such is susceptible to differences in accounting approaches.[164]

250   In the asset beta JER, Dr Hern considers a demand risk proxy that looks at absolute volatility of revenues and operating profits, instead of looking at how this volatility correlates with local GDP growth, noting that this remains an imperfect proxy of demand risk, given it looks at historical variation of revenues or profits while beta risk is inherently a forward looking measure. However, Dr Hern suggests this addresses the conceptual issue that, in his opinion, correlation with GDP is a poor proxy of correlation with the market return in Australia.[165]

251   At trial, Dr Hern presented a further demand risk analysis using a regression of passenger growth against stock market return.[166]

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[163] E0015, _0173 at [489] and Figure 9-13.
[164] E0005, _0037 to _0038 at [85].
[165] E0015, _0173 at [490].
[166] F1435.

252   As set out in Figure 9-14 below, using these alternative proxies of demand risk does not change Dr Hern's conclusions that PAPL is slightly higher risk than Sydney Airport and lies broadly in the middle of his Tier 2 comparator set:

Figure 9-14: Using an alternative proxy of demand risk based on standard deviation of revenues and operating profits does not change my conclusions that Perth airport is slightly higher risk than Sydney Airport and lies broadly in the middle of my Tier 2 comparator set
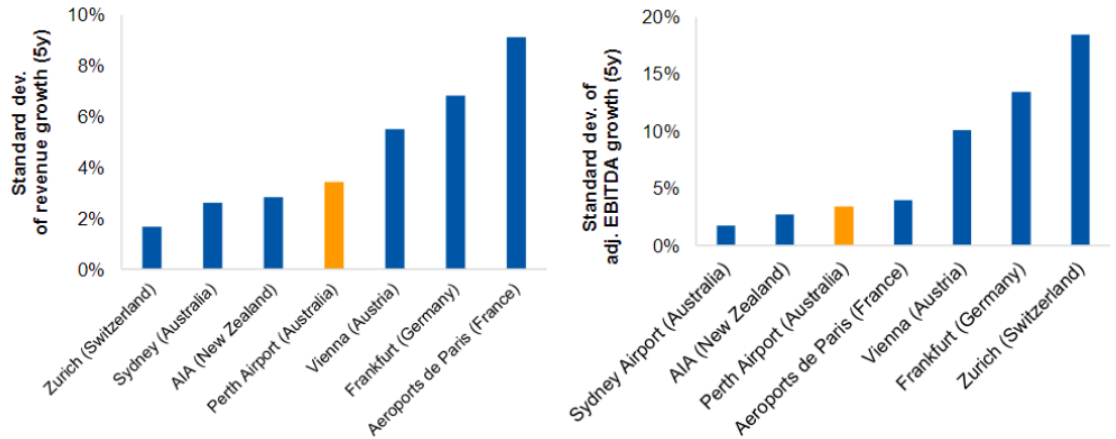
Source: Dr Hern's analysis

253   Dr Hern considers that a higher level of operating leverage indicates a higher risk company on the basis that for companies with high operating leverage, operating profit should change more than proportionately when revenues change, all else equal.[167]   Dr Hern estimates the operating leverage for his comparators using a 10-year average.[168]   Based on his operating leverage estimates as set out in Figure 3.6 below, Dr Hern concludes PAPL's asset beta risk is likely to be higher than Sydney Airport, but in line with the median of his Tier 2 comparators, all else equal:[169]

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[167] E0005, _0040 at [93].
[168] E0005, _0040 at [92] and [94].
[169] E0005, _0042 at [95] and Figure 3.6.

Figure 3.6: Relative Risk of Airports based on Operating Leverage Supports Perth Airport in the Middle of Tier 2 Comparators
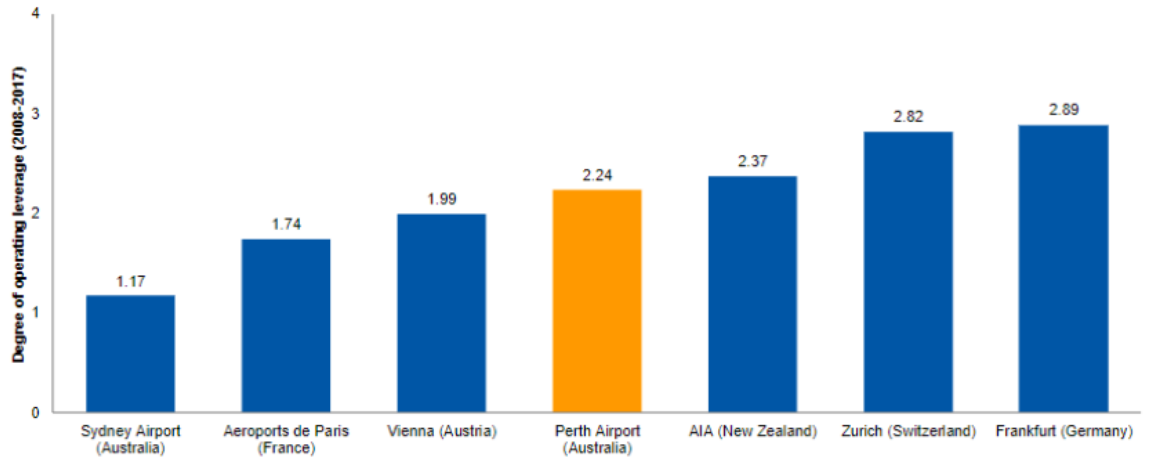
Note: I calculate the operating leverage as the ratio between the 2008-2017 average of annual EBIT growth and annual revenue growth to avoid volatility in annual changes. For Sydney Airport, however, my analysis is based on data for 2013-2017 only, because Sydney Airport Group's company data prior to 2012 appears to be unrepresentative of Sydney Airport's business. Only starting in 2012/13, when Sydney Airport Group have divested its international assets, all of the Sydney Airport Group's revenues are derived from Sydney Airport. See Sydney Airport Annual Report 2008-2012. [QAN.999.005.9315], [QAN.999.005.9419], [QAN.999.005.9513], [QAN.999.005.9211], [QAN.999.005.9605].
Source: Dr Hern's analysis of Bloomberg data. Dr Hern Operational Leverage analysis.xlsx. [QAN.999.005.1154]

254   In addition to demand risk and operating leverage, Dr Hern considers how the airports' share of aeronautical and non-aeronautical revenues could affect their asset betas. Dr Hern concludes that since most of the comparator airports have 'similar shares' of revenue from aeronautical activities as set out in Figure 3.7 below, differences between the nature of aeronautical and non-aeronautical revenues that may contribute to risk are likely to be immaterial:[170]

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[170] E0005, _0043 at [98] and Figure 3.7.

Figure 3.7: Most of the comparator airports derive around 40 to 60 per cent of their revenues from aeronautical activities
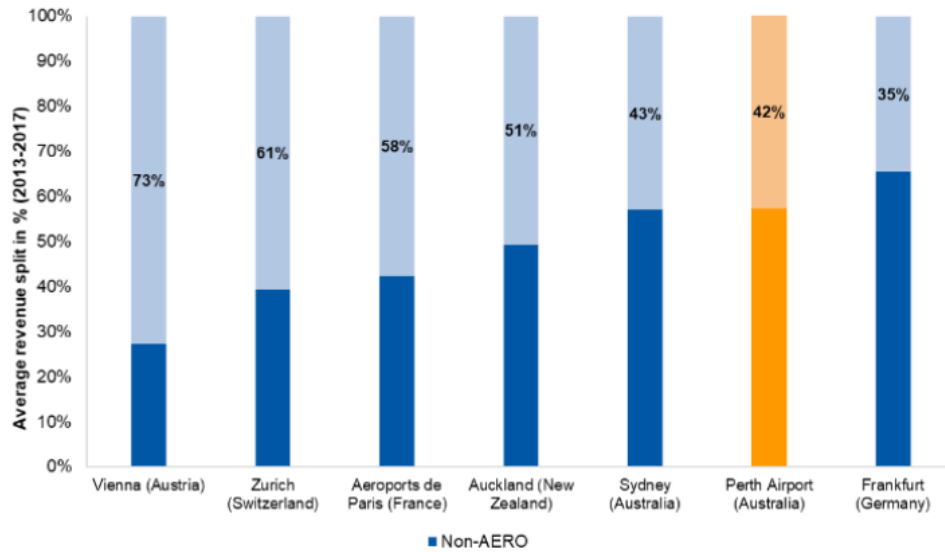
Source: *Dr Hern Other Relative Risk Analysis.xlsx [QAN.999.005.1155].*

255   In Dr Hern's view, another factor that characterises the risk profiles of airports is how diversified their customer bases are (referred to as 'customer concentration risk'). Dr Hern suggests this can be measured by the number of airlines operating at the airports.[171] As set out in Figure 3.8 below, PAPL had an average of 24 airline customers over the period 2008 to 2017, which is similar to Auckland Airport, but lower than other Tier 2 comparators. While PAPL had fewer airlines than other Tier 2 comparators, Dr Hern believes it is plausible that having 24 airlines operating at Perth Airport represents a sufficiently diversified portfolio of airlines that could achieve a majority of the diversification benefit, and that PAPL's risk on customer concentration is not materially different from the Tier 2 comparators.[172]

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[171] E0005, _0043 at [99].
[172] E0005, _0044 at [101] - [102].

Figure 3.8: Airline concentration: Perth Airport has more than 20 airlines as its Customers, Similar to Auckland Airport, but Lower than Other Tier 2 Comparators
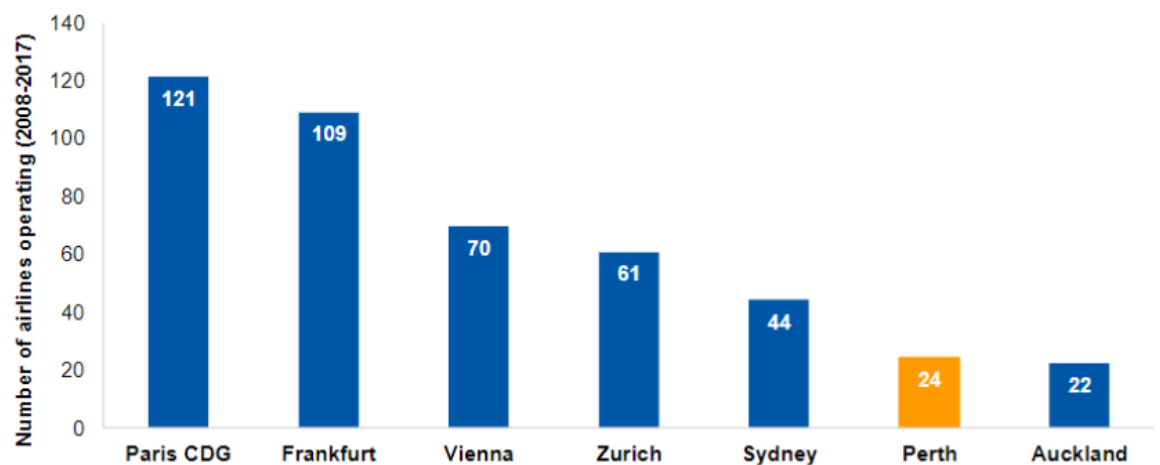
Source: Dr Hern analysis. Dr Hern Other Relative Risk Analysis.xlsx, [QAN.999.005.1155]

256   Dr Hern assesses PAPL's relative risk against his comparator set by examining risk factors including demand risk and operating leverage (which Dr Hern considers to be primary risk factors) and other business factors (which Dr Hern considers to be second risk measures), as follows:[173]

(a)   PAPL's demand risk is slightly higher than Sydney Airport's and lies towards the middle of the Tier 2 comparator set;

(b)   PAPL's operational leverage is slightly higher than Sydney Airport's and lies towards the middle of the Tier 2 comparator set;

(c)   PAPL's share of aeronautical revenues is similar to Sydney Airport and lower than the average of the Tier 2 comparator set, suggesting slightly higher risk; and

(d)   PAPL's customer concentration is higher than the hub airports in the Tier 2 comparator set, but it is plausible that it is sufficiently diversified, suggesting similar or marginally higher risk.

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[173] E0005, _0045 to _0046 at [103].

257   At trial, Dr Hern gave evidence that there were no precise or identified weightings he attributes to these various risk factors, other than to say:[174]

     (a)   the demand risk element was of primary importance;

     (b)   at a higher level 'more weight' was given to the revenue and operating profits volatility analysis but 'some weight' was given to the customer concentration analysis;

     (c)   'less weight' was given to operational leverage; and

     (d)   'no weight at all' is given to the proportion of aeronautical and non-aeronautical revenue.

258   Based on his relative risk analysis, Dr Hern concludes that PAPL's asset beta should be slightly higher than Sydney Airport's asset beta and in line with the middle of his Tier 2 comparator set. Dr Hern considers this supports an asset beta estimate for PAPL in the range of 0.50 and 0.55.[175]

259   To cross-check his estimated asset beta range, Dr Hern reviews the ACCC's determination in the early 2000s for Perth Airport and Sydney Airport and beta determinations from other developed economies.[176] The ACCC last determined an asset beta of 0.7 for Perth Airport and asset betas in the range of 0.6 to 0.7 for other Australian airports, as shown in Figure 3.10 below:[177]

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[174] ts 1293 - 1295.
[175] E0005, _0045 to _0046 at [103] - [105].
[176] E0005, _0014 at [29] and _0046 at [106].
[177] E0005, _0047 at [107] and Figure 3.10.

Figure 3.10: ACCC's Asset Beta Determinations for Australian Airports
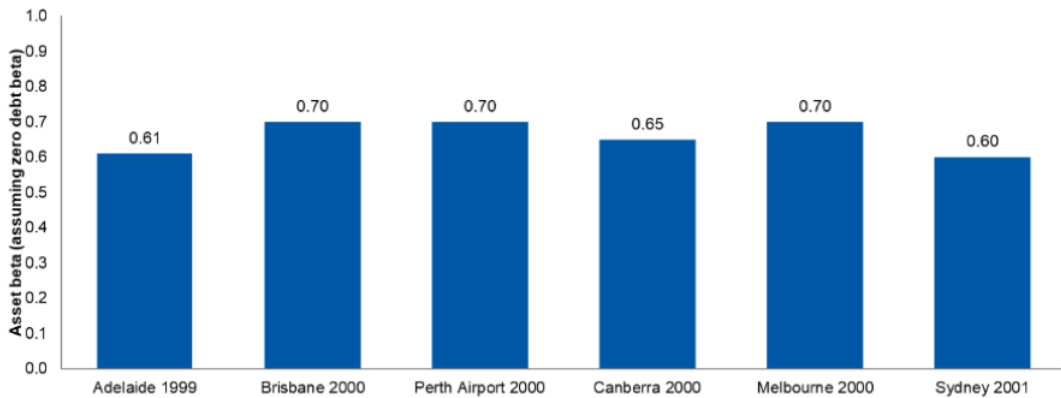
Source: Dr Hern analysis. Dr Hern Regulatory Determinations Analysis.xlsx , [QAN.999.005.1156]; ACCC (June 2002) Preliminary View, AirServices Australia, Proposed Price Increase, [QAN.999.004.1099], p.26, Figure 8.1; ACCC (May 2001) Sydney Airports CorporationLTD Aeronautical Pricing Proposal Decision, [QAN.999.004.0857], p.187; ACCC (Aug 2000) Melbourne Airport Multi-User Domestic Terminal, New Investment Decision, [QAN.999.004.1160], p.10-11.

F1079
F0882
F0838
F0883

260   In considering the evolution of asset beta estimates and asset beta regulatory determinations (including internationally), Dr Hern's view is this suggests that asset beta for airports have generally declined over time by at least 0.1. In Dr Hern's opinion, this suggests that PAPL's asset beta is unlikely to be higher than 0.6 when adjusted for the general decline in airport asset betas over time, relative to the ACCC's determination for Perth Airport of 0.7 in 2000.[178]

261   Overall, Dr Hern concludes the asset beta for PAPL as of 2018 lies in a range of 0.5 to 0.6, as summarised in Figure 3.16 below:[179]

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[178] E0005, _0050 at [112] and _0053 at [119].
[179] E005, _0054 at [120] and Figure 3.16.

Figure 3.16: My Estimate for Perth Asset Beta Is of 0.5-0.6, based on Empirical Evidence and Regulatory Precedent
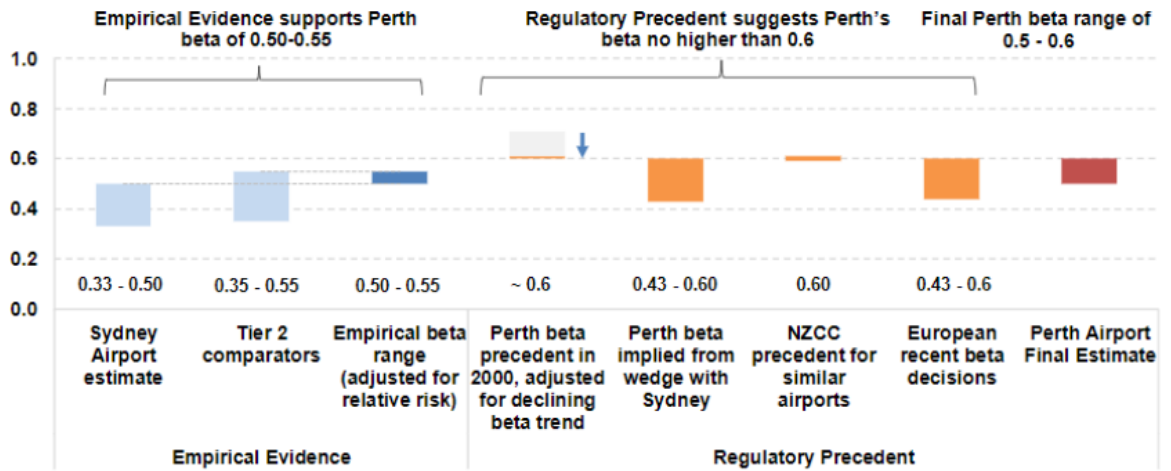
Source: Dr Hern illustration

Analysis of asset beta issues

Comparator set

262   Dr Hern's approach is to identify a small set of 'best' comparator airports that he considers are most similar to PAPL in terms of country risk factors. It is clear Dr Hern considers this to be an important step in his methodology, in light of his view that the relative risk assessment then serves to confirm that the selected comparators are indeed comparable to PAPL.[180]

263   Dr Hern identifies Sydney Airport as his 'primary' comparator and Auckland Airport, Vienna Airport, Aeroports de Paris, Fraport and Zurich as his 'Tier 2' comparators to cross-check his primary comparators.

264   There are a number of difficulties with Dr Hern's approach. First, Sydney Airport and a number of the Tier 2 comparator airports do not in fact appear to be 'best' comparators to PAPL. This emerges both from consideration of the nature of the airports (for example, in terms of size, international hub status, extent of international operations and passenger numbers) and in the course of undertaking the relative risk assessment (for example, customer concentration risk).

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[180] E00015, _0027 at [46].

265   Secondly, at a conceptual level, the views presented by Dr Hern regarding the necessity for similar country risks are unpersuasive. Thirdly, the sovereign credit rating threshold Dr Hern employs to determine countries with similar risks to Australia appears arbitrary and to be a technique not generally employed by regulators. Dr Hern only identifies a Singaporean energy regulator, an Italian energy regulator and a Spanish energy regulator as having explicitly used sovereign credit rating criteria to select relevant comparators.[181]

266   It is preferable to start from Dr Hird's and the NZCC's sample set of 26 comparator airports for which asset beta estimates are available. As agreed between Dr Hird and Dr Hern, it is then appropriate to exclude the six illiquid and delisted airports, resulting in a sample set of 20 airports.

267   As to the issue of the Japanese airports, Japan Airport Terminal Co Ltd and Airport Facilities Co Ltd, I accept PAPL's submission that the fact non-aeronautical services comprise a significant part of Japan Airport Terminal Co Ltd's operations is not a basis for excluding it as a comparator. Dr Hern's primary and Tier 2 comparators each earn a significant amount of their revenues from non-aeronautical activities.[182] PAPL did not make the same submission in respect of Airport Facilities Co Ltd given it is in a position where almost all of its revenues come from non-aeronautical services, placing it in a different position from Japan Airport Terminal Co Ltd.[183] I consider Airport Facilities Co Ltd should be excluded from the sample set, and that the preferred sample set is the remaining 19 airports.

Aspects of estimation technique

268   The key issue to be determined in relation to estimation technique is whether the estimate of the asset beta for Auckland Airport should be estimated by reference to a local index or regional index.

269   Dr Hern considers that evidence on market integration, ownership structure and market index size suggest some weight should be placed on both the local and regional index.[184] Dr Hern attributes 50% weight to each, resulting in a significantly lower estimate for Auckland Airport than if only the local index was used.[185] Dr Hern considers none of the

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[181] E0005, _0028 at [62].
[182] C0003, _0090 to _0091 at [305] and E0005, _0043 at [98] and Figure 3.7.
[183] ts 1943.
[184] E0005, _0030 at [66C].
[185] E0005, _0034 at Table 3.3.

alternatives (as to the use of local and/or regional indices) are necessarily 'wrong' and acknowledges the choice of approach is a matter of judgement.[186]

270   I am not persuaded by Dr Hern's view that use of a regional index to estimate the asset beta for Auckland Airport is appropriate in this case. PAPL submits, and it was accepted by Qantas, that neither the NZCC nor any other regulator has previously sought to estimate the asset beta for Auckland Airport in that way.[187] PAPL also submits Dr Hern has not previously assessed the asset beta for Auckland Airport that way in any of his previous reports, including in four reports he prepared in 2018 and in others around that time.[188]

271   It does not appear to be the conventional approach to use a regional index when estimating asset betas for New Zealand airports and I am not persuaded by the rationale presented by Dr Hern for doing so in this proceeding. I consider only a local index should be used to estimate the asset betas for New Zealand airports.

272   As to questions of estimation technique pertaining to data frequencies and estimation windows, I prefer the methodological choices adopted by Dr Hird, consistent with the NZCC methodology. Applied to the comparator set of 19 airports, this results in a range of estimated asset betas from 0.34 to 1.01, with an average of 0.72.[189]

Relative risk assessment

273   It is necessary to undertake the relative risk assessment in order to position PAPL within the range of the estimated asset betas for the comparator airports. The experts agree demand risk is of primary importance.

274   I am not persuaded by Dr Hern's views in relation to measuring demand risk. Dr Hern's opinion as to the appropriate measure or proxy of demand risk changed over the course of his reports, through to the evidence he gave at trial, and also differs from opinions he has given in other reports. Dr Hern also acknowledged difficulties with the options he has put forward. For example, operating profit being susceptible to differences in accounting approaches.

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[186] E0015, _0093 at [238].
[187] ts 1931, 2055.
[188] E0011, 338 at [80] - [86] and ts 1931.
[189] F1183, modified to remove any weighting to Airport Facilities Co Ltd.

275   More generally speaking, Dr Hern's explanations regarding alleged differences in context in relation to different views and approaches he has adopted in estimating asset betas in other reports, as against the opinions and approaches he puts forward in relation to estimating the asset beta for PAPL in this proceeding was, on the whole, unpersuasive.

276   I consider there is merit in Dr Hird's measurement of demand risk based on income elasticity of demand, assessing the sensitivity of demand in passenger numbers to GDP. Dr Hird employs various methods to apply that measure, in order to position PAPL within the range of the estimated asset betas for the comparator airports. For example, the selection of a percentile within the range, use of academic estimates, deriving an adjustment consistent with regulatory adjustments, and using a formula to calculate adjusted asset beta. It is clear that an exercise of considerable judgement, informed by analysis and assessments, is required in respect of applying demand risk and in estimating the asset beta for PAPL.

Implications of regulatory precedent

277   The last regulatory determination of Perth Airport's asset beta was 0.7 in 2000. Dr Hern's view is asset beta for airports have generally declined over time by at least 0.1. I am not persuaded by the reasoning and evidence Dr Hern refers to in support of that opinion and note it appears inconsistent with opinions expressed by Dr Hern in other contexts.

278   Dr Hird considers that regulatory decisions show no downward or upward trend overtime and that PAPL's risk has increased since 2000, with growing exposure to the Western Australian mining sector. I accept that PAPL's risk has likely increased since 2000 and that PAPL is dependent on the Western Australian mining sector.

Estimated asset beta

279   Having preferred the methodological choices adopted by Dr Hird and arrived at a final comparator set of 19 airports, this results in a range of estimated asset betas from 0.34 to 1.01, with an average of 0.72.

280   I accept PAPL's relative risk has likely increased since the last regulatory determination of its asset beta at 0.7. Having considered all of the experts' evidence, including as to demand risk and other

measures to be considered in the context of the relative risk assessment, I conclude PAPL has higher demand risk than the average of the comparator set. I conclude the best estimate of asset beta for PAPL is 0.75.

WACC

Introduction

281   The WACC is one of the building block model inputs. The WACC provides compensation for investors tying up their capital in the provision of aeronautical services at Perth Airport. The value of capital used to provide aeronautical services is given by the regulatory asset base. The risk faced by investors tying up capital in providing those services determines the level of required compensation. This remuneration for risk is measured by the WACC, which allows investors to earn a return reflective of the risks of providing the services.[190]

282   Dr Hird is PAPL's expert and Dr Hern is Qantas' expert on WACC. The parties instructed the experts to estimate a WACC for aeronautical services provided at Perth Airport for the Relevant Period under a building block method. As the WACC is a forward looking estimate, this means it is necessary to estimate the WACC as at 30 June 2018. The experts prepared individual reports on WACC, participated in an expert conclave and produced a JER estimating the WACC.

283   The experts agree on the following key points:[191]

(a)   Both experts estimate a 'nominal vanilla post tax' WACC using the same formula, with the three key inputs being cost of equity, cost of debt and leverage.

(b)   Both experts use the capital asset pricing model (CAPM) to estimate cost of equity. The CAPM develops the cost of equity from four parameters:

(i)   the risk-free rate, which is the required return on an asset that has zero risk (often proxied by the yield on government bonds);

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[190] E0016, _0011 at [3].
[191] E0016, _0006 to _0007.

(ii)   the market risk premium, which is the risk premium (the expected return above and beyond the risk free rate) that investors require for holding a market wide diversified portfolio of assets;

(iii)   the asset beta, which is a measure of the risk of a particular asset, assuming 0% debt leverage; and

(iv)   leverage, which is calculated as the debt proportion of total assets.

(c)   Leverage should be set based on the average leverage of the comparator set used to estimate the asset beta.

284   The experts disagree on the following key points:[192]

(a)   the methodology and estimate of the risk free rate;

(b)   the methodology and estimate of the market risk premium;

(c)   the relationship between the risk free rate and market risk premium;

(d)   the methodology and estimate of the cost of debt; and

(e)   the estimate of the overall WACC.

285   Accordingly, it is necessary to make findings on the following parameters:

(a)   the risk free rate;

(b)   the market risk premium;

(c)   the cost of debt;

(d)   the comparator set to be used to determine leverage; and

(e)   the overall WACC.

Dr Hird's methodology for estimating WACC

286   Dr Hird's preference is to base his WACC parameter estimates on precedent that has evolved in contested regulator proceedings that set prices for the use of large infrastructure assets, and where the

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[192] E0016, _0007 to _0008.

methodology used is sufficiently transparent to be replicated. Dr Hird observes that since 2002, no Australian regulator has published a methodology for estimating the WACC for an airport. As such, he has regard to international regulatory precedent for airport specific WACC parameters (asset beta, leverage and credit rating) and Australian regulatory precedent to estimate parameters that reflect Australian market conditions (risk free rate, market risk premium and the debt risk premium for Australian corporations).[193]

287   Dr Hird estimates the asset beta for PAPL as 0.9, following the NZCC's method for defining comparator airports and estimating their asset betas. Dr Hird also bases his estimate of leverage (19%) and credit rating (BBB+), which are airport specific WACC parameters, largely on NZCC precedent with some modifications.[194]

288   Dr Hird derives his 19% leverage estimate from the average leverage estimate of the NZCC comparator set of 26 airports. Specifically, this is the average leverage across the 26 airports for the 10-year periods of 2006 to 2016 (as estimated by the NZCC) and 2008 to 2018 (as estimated by Dr Hird), as set out in Table 4.2 below:[195]

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[193] E0003, _0010 to _0011 at [21].
[194] E0003, _0011 at [22].
[195] E0003, _0024 at [77] and Table 4-2.

Table 4-2: Leverage for companies in NZCC comparator sample²⁵

Ticker	Name	NZCC 2006-2016^	2008-18	2003-18	2013-2018
AIA NZ Equity	Auckland	0.25	0.25	0.24	0.21
SYD AU Equity	Sydney	0.47	0.45	0.37	0.39
FLU AV Equity	Vienna	0.33	0.33	0.22	0.22
694 HK Equity	Beijing	0.30	0.33	0.22	0.25
600004 CH Equity	Guangzhou	0.03	0.00	0.01	0.00
357 HK Equity	HNA	0.02	0.12	0.08	0.23
600009 CH Equity	Shanghai	0.03	0.02	0.01	0.00
000089 CH Equity	Shenzhen	0.02	0.00	0.00	0.00
600897 CH Equity	Xiamen	0.00	0.00	0.00	0.00
KBHL DC Equity	Kobenhavns Lufthavne	0.18	0.18	0.20	0.15
ADP FP Equity	Aeroports de Paris	0.28	0.26	0.25	0.23
FRA GR Equity	Frankfurt	0.33	0.40	0.29	0.40
TYA IM Equity	Toscana	0.06	0.08	0.05	0.09
SAVE IM Equity	Venezia	0.16	0.18	0.16	0.19
GMRI IN Equity	GMR (India)	0.49	0.61	0.45	0.78
8864 JP Equity	Airport Facilities (Jap.)	0.35	0.36	0.35	0.34
9706 JP Equity	Japan Airport	0.20	0.18	0.17	0.09
MAHB MK Equity	Malaysia Airports	0.13	0.17	0.11	0.28
MIA MV Equity	Malta	0.17	0.12	0.16	0.06
OMAB MM Equity	GAdP Norte (Mexico)	0.04	0.06	0.04	0.06
GAPB MM Equity	GAdP Pacifico (Mexico)	0.00	0.01	0.01	0.02
ASURB MM Equity	GAdP Sureste (Mexico)	0.00	0.01	0.01	0.03
AERO SG Equity	Belgrade	0.00	0.00	0.00	0.00
FHZN SW Equity	Zurich	0.30	0.23	0.35	0.13
AOT TB Equity	Airports of Thailand	0.26	0.19	0.22	0.00
TAVHL TI Equity	TAV (Turkey)	0.46	0.44	0.42	0.36
Average⁺		**0.19**	**0.19**	**0.17**	**0.17**

*Source: New Zealand Commerce Commission [PAP 500 058 1311], Bloomberg, CEG analysis. * Belgrade receives 50% weight in the Commission's average because it only has stock data available for half of the 10 year period. We give it the same weight in our 2003 to 2018 period but give it full weight in our 2008-2018 period because it has data for most of that period. ^ "NZCC 2006-2016" column obtained from Table 34 of NZCC decision. I used the average of the NZCC's "2006-2011" and "2011-2016" columns: NZCC, Input methodologies review decisions, Topic paper 4: Cost of capital issues, December 2016, p. 246 [PAP 500 055 0002].*

289   Dr Hird explains that credit ratings affect the debt risk premium estimate, in that businesses with better quality credit ratings have a lower likelihood of defaulting on their debt, and the debt that they issue will therefore be less risky for debt holders.[196] In 2016, the NZCC set a benchmark A- credit rating to the three major New Zealand airports based on its own regulatory precedent. That is, using the same credit rating from its previous decisions, in preference to estimating the credit rating based on airports in the asset beta comparator sample. Dr Hird considers the credit ratings of the NZCC comparator sample and concludes there was insufficient information to determine a credit rating consistent with the sample.[197]

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[196] E0003, _0026 at [80].
[197] E0003, _0026 to _0028 at [81] - [87].

290   Dr Hird instead assumes the NZCC correctly determined that an A- credit rating is appropriate for the New Zealand airports regulated by the NZCC at 19% leverage.   He then undertakes analysis to determine whether this is appropriate for PAPL, given the relative volatility of passenger numbers at the respective airports.   From this analysis he concludes that a credit rating of less than A- is likely to be appropriate, but exactly how much lower than A- is difficult to estimate.[198]

291   Dr Hird observes PAPL's actual credit rating at 30 June 2018 was BBB, but he does not adopt this as his estimate.   He considers the rating reflects the idiosyncratic funding decisions taken by PAPL.   Dr Hird's view is that his debt leverage estimate needs to be consistent with his asset beta estimate, and his credit rating estimate needs to be consistent with his debt leverage estimate.   Dr Hird considers a range from BBB to A- is an appropriate range for the credit rating.   He adopts the midpoint of this range (BBB+) as his point estimate.[199]

292   For the non-airport specific WACC parameters of risk free rate, market risk premium and the debt risk premium, Dr Hird adopts the 2018 methodology used by IPART to calculate the WACC for regulated large infrastructure businesses in New South Wales.   Dr Hird adopts IPART's methodology because it he considers that it is a robust and transparent methodology, which is more accurate than the methodology of any other Australian economic regulator.[200]

293   Dr Hird explains each regulator in Australia has its own methodology for estimating the WACC, and that key methodological differences relate to the use of short term or long term estimates of risk free rate, market risk premium and the debt risk premium within the WACC calculation.   In Dr Hird's view the key issues are:[201]

(a)   Equity parameters (risk free rate and market risk premium): Whether to combine a short term estimate of the risk free rate (for example, based on prevailing Commonwealth government bond yields at the time of the regulatory decision) with a long term estimate of the market risk premium (for example, based on 100 years of observed excess returns on the stock market relative to the historical yields on government bonds).

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[198] E0003, _0028 at [88] - [89].
[199] E0003, _0028 to _0029 at [90] - [93].
[200] E0003, _0011 at [23]-[24] and _0029 at [94] - [95].
[201] E0003, _0030 at [96].

Alternatively, whether to combine a long term risk free rate with a long term estimate of the market risk premium and a short term risk free rate with a short term estimate of the market risk premium.

(b)   Debt parameters (risk free rate and debt risk premium): Whether to estimate the cost of debt based on the observed prevailing risk free rate and the debt risk premium on corporate bonds within the benchmark credit rating. Alternatively, whether to use long term average of these estimates (for example, 10-year averages).

294   In Dr Hird's view, regard should be had to both short and long term estimates because he considers this reduces the potential for an error in one type of estimate to disproportionally affect the final WACC. Dr Hird says regardless of whether a short term or a long term approach is adopted, it is important that it is implemented in an internally consistent fashion. In Dr Hird's opinion, it is important that whichever approach is adopted does not inappropriately mix short term and long term estimates. For example, Dr Hird considers in estimating the cost of equity, an approach that uses a short term estimate of the risk free rate and a long term estimate of the market risk premium would not be appropriate.[202]

295   In that context, Dr Hird considers the WACC methodology set out by IPART in 2018 to be appropriate because IPART has regard to both short and long term estimates of risk free rate and market risk premium parameters and pays attention to internal consistency when combining these parameters. Dr Hird considers that IPART's approach contrasts with that of other Australian regulators, such as the AER and the West Australian Economic Regulation Authority (ERA), which he says do not adopt internally consistent approaches for estimating the WACC.[203]

296   In relation to its 2018 methodology, IPART explains that in the past decade, deviations from the historic average market risk premium have been persistent. IPART justifies its use of a midpoint of 6% as the historic market risk premium because, over long periods (eg many decades) the average market risk premium value is fairly steady at about 6%. However, it states that the current market risk premium has been mostly above 6% since 2008, and above 8% for most of the time

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[202] E0003, _0030 at [97].
[203] E0003, _0031 at [99] - [100].

since 2011. IPART considers some weight needs to be given to this fact, so calculates both a historic and current market risk premium.[204]

297   IPART derives its benchmark risk free rate from the 10-year Commonwealth government bond yields published by the Reserve Bank of Australia (RBA). In the context of the cost of debt, the use of a 10-year maturity reflects an assumed debt term of 10 years, which IPART applies to all of the industries it regulates. Dr Hird considers it appropriate to apply a 10-year debt term to PAPL's aeronautical services because the relevant assets have long asset lives, such that it would be prudent for it to issue long term debt in order to reduce financial risks over the life of its assets.[205]

298   Dr Hird considers the overwhelming regulatory precedent in Australia is to estimate cost of debt by reference to 10 years of corporate debt costs, including IPART, the AER and all but two of the state-based regulators. In Dr Hird's opinion, the only regulators that do not rely on nine to 10 years of data are the ACCC and the Queensland Competition Authority (QCA), noting that the QCA has signalled it is likely to adopt a 10-year trailing average. Those two regulators have relied solely on a short period of debt data (one or two months). Dr Hird observes that conversely, Dr Hern's cost of debt estimate relies on an average of five years of data and one or two months of data. Dr Hird considers this approach is not consistent with the approach of any Australian regulator.[206]

299   IPART calculates the long term debt risk premium using a 10-year trailing average of the 10-year BBB debt risk premium published by the RBA. That is, the long term debt risk premium as at a particular estimation date is equal to the average over each of the 10 years prior to the estimation date. The short term debt risk premium is calculated as a 5-year trailing average of the 10-year BBB debt risk premium published by the RBA. The average of both estimates is adopted as the final debt risk premium estimate.[207]

300   As set out above, IPART adopted 6% as its point estimate of the long term market risk premium, which Dr Hird says is broadly consistent with AER and ERA estimates.[208]

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[204] F0873, _0055.
[205] E0003, _0031 to _0032 at [103] - [104].
[206] E0009, _0011 at [21].
[207] E0003, _0032 at [106].
[208] E0003, _0032 to _0033 at [107] - [108].

301   IPART attributes 50% weight to long term market risk premium and 50% to short term market risk premium,[209] resulting in an average market risk premium of 7.2%.

302   IPART calculates its short term market risk premium of 8.3% based on six approaches, five of which are variations of a dividend discount model (also referred to as a dividend growth model), and one based on market indicators. The short term market risk premium estimate takes the weighted average of the market indicators (one third weight) and the median of the five dividend discount model estimates (two thirds weight).[210]

303   Table 2-1 below sets out the parameters adopted by Dr Hird and his calculation of the WACC for PAPL as at 30 June 2018:[211]

Table 2-1: WACC parameters and calculations as at 30 June 2018

Parameter	Short term	Long term	Average
Risk free rate	2.8	3.7	3.3
Debt risk premium (credit rating BBB+)	2.1	2.6	2.4
Cost of debt (=risk free rate + debt risk premium)	4.9	6.3	**5.7**
Risk free rate	2.8	3.7	3.3
Equity beta ($1.11 \ldots = \frac{\beta_a}{1-L} = \frac{0.90}{1-0.19}$)	1.11...	1.11...	1.11...
Market risk premium	8.3	6.0	7.2
Cost of equity (=risk free rate + equity beta × market risk premium)	12.0	10.4	**11.2**
Leverage	19%	19%	19%
Weighted average cost of capital (WACC)	**10.7**	**9.6**	**10.2**

Source: IPART [PAP.500.055.0975], NZCC [PAP.500.055.0002], CEG analysis

304   Dr Hird's WACC estimate for PAPL as at 30 June 2018 is 10.2%.

305   In relation to Dr Hern's approach to estimating WACC, Dr Hird considers that Dr Hern adopts a range of different methods to estimate each WACC parameter, reflecting a bespoke estimate adopted by Dr Hern in this proceeding.[212]   In Dr Hird's view, Dr Hern's bespoke methods in this proceeding are materially different to Dr Hern's

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[209] E0009, _0032 at [88].
[210] E0003, _0032 to _0033 at [107] - [108].
[211] E0003, _0012 at Table 2-1.
[212] E0009, _0011 at [20].

approach in reports filed in other proceedings before airport and other regulators.[213]

Dr Hern's methodology for estimating WACC

306   Dr Hern's WACC estimate for PAPL as at 30 June 2018 is 6.3 to 7.3%, with a point estimate of 6.8%, as shown in Table 2.1 below. This is based on a cost of equity of 7.6%, a cost of debt of 4.8% and leverage of 30%.[214] Dr Hern's leverage estimate is based on the average leverage of the six comparator airports that he relies on to estimate PAPL's asset beta.[215]

Table 2.1: My Nominal, Vanilla WACC Estimates for Perth Airport for the Period 1 July 2018 to 17 December 2018

		Lower bound	Upper bound	Average
RfR (nominal)	A	2.7%	2.8%	2.8%
Leverage	B	30%	30%	30%
Asset beta	C	0.50	0.60	0.55
Equity beta	D=C/(1-B)	0.71	0.86	0.79
MRP	E	6.1%	6.3%	6.2%
Cost of equity (nominal, post-tax)	F=A+D*E	7.1%	8.2%	7.6%
Cost of debt (nominal, pre-tax)	G	4.3%	5.2%	4.8%
WACC (nominal, vanilla)	**H=F*(1-B)+G*B**	**6.3%**	**7.3%**	**6.8%**

Source: Dr Hern WACC and Cost of Equity analysis.xlsx [QAN.999.003.0004].

307   Dr Hern estimates the risk free rate using two approaches. First, Dr Hern estimates the risk free rate using a short run 20 to 60 day average of 10-year Commonwealth government bond yields, which he says is consistent with most Australian regulatory precedent.[216]

308   Dr Hern selects short run averages based on his view that it is widely accepted that the risk free rate changes over time as monetary conditions in financial markets evolve. In Dr Hern's opinion, unlike the market risk premium, there is a directly observable proxy for the risk free rate in the form of government bond yields with daily observations available, and there is therefore no need to go back in time to obtain a robust estimate. In Dr Hern's view, a short run average therefore provides a both robust estimate and an up-to-date market view on the

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[213] E0009, _0012 at [24].
[214] E0006, _0012 at [23] and _0014 at [31] and Table 2.1.
[215] E0006, _0014 at [30].
[216] E0006, _0012 at [25].

prevailing risk free rate from 2018, as opposed to older outdated rates which would not reflect market conditions in 2018.[217]

309   Dr Hern suggests using the prevailing risk free rate as measured by short averaging periods is the most common approach in Australian regulatory decisions up to 2018. Dr Hern observes that as set out in Table 4.5 below, five of seven Australian regulators use averaging periods of 11 to 40 days, and as such, IPART's longer averaging periods appear to depart from the general approach:[218]

Table 4.5: Australian Regulators RfR Approach

Regulator Determination	RfR	Tenor	Averaging Period
ACCC (2018)[1]	2.6%	10-year	20 days
ERA (2018)	2.4%	5-year	20 days
AER (2018)	2.8%	10-year	11 days
QCA (2018)[2]	2.4%	10-year[3]	20 days
ICRC (2018)	2.8%	10-year	40 days
OTTER (2018)	2.9%	10-year	Average of: i) 40-day period; ii) 10 averages over the past 10 years of yields, including current year
IPART 2018 "WACC Method"			
IPART (2018)[3]	3.3%	10-year	Length of regulatory period for short-run RfR and 10-years for long-run RfR

Note: [1] The 2018 ACCC decision assumed RfR of 2.6 per cent based on the value proposed by the parties and did not explain the methodology used to derive this estimate. A previous ACCC (draft) decision from 2017 sets out that the ACCC's approach to estimating the RfR has been to rely on a 20-day average of 10-year government bond yields;[2] see notes in Table 4.3 – for consistency report RfR for 10-year tenor; [3] see notes in Table 4.3 – follow same approach but additionally assume regulatory period equal to 5 years for consistency with Dr Hird (cell C33) and select RfR from cells C67 and D67
Source: ACCC 2018 Glencore decision [QAN.999.002.0990], p.148; ACCC (Apr 17), ARTC Hunter Valley Access Undertaking Draft Decision [QAN.999.002.0378], pp.135-136; ERA 2018 decision [QAN.999.002.5816], p.13; AER 2018 Murraylink decision [QAN.999.002.2141], pp.3-30 and 3-31; IPART (Aug 20), Spreadsheet WACC model [QAN.999.002.6977], tab "WACC calculator"; QCA 2018 decision [QAN.999.002.8823], p.75; QCA 2018 decision appendices [QAN.999.002.8609], p.26; ICRC 2018 decision [QAN.999.002.6460], p.93; OTTER 2018 decision [QAN.999.002.7632], pp.165-169.

310   Dr Hern explains that the second method he uses to estimate the risk free rate takes into account market expectations of future risk free rate in the form of forward rates. Under this approach, he applies an uplift to the short run averages to reflect the expected increases in Australian 10-year government bond yields over the period of June 2018 to December 2018. To calculate this expected increase, Dr Hern relies on forward rates which he says reflect the market expectations of

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[217] E0006, _0040 to _0041 at [105].
[218] E0006, _0041 at [106].

yields over the 6 months after June 2018. By subtracting the spot risk free rate from these forward yields, he obtains a market measure of the expected increase in yield over the relevant period. Dr Hern observes a similar method was used recently in the UK by the Competition and Markets Authority and the UK water regulator, as well as the Civil Aviation Authority in 2014. Dr Hern concludes on a 0.04% uplift to the historical data for the relevant period.[219]

311   Dr Hern concludes on a risk free rate of 2.7% to 2.8%, which he says is consistent with Australian regulators' estimates in the period up to 2018, which range from 2.4% to 3.3%.[220]

312   Dr Hern estimates the market risk premium by placing primary reliance on long run historical data. In Dr Hern's view, this is also the approach used by most Australian regulators with the exception of IPART.[221] Dr Hern relies on a dataset which provides Australia's historical stock returns and 10-year government bond yields going back to 1883. In his individual report on WACC, Dr Hern uses a utilisation rate of 0.60 and adds this to the historical returns.[222] Dr Hern applies what he refers to as a 'Blume' averaging method to the historical market risk premium data, alongside arithmetic and geometric means.[223] Dr Hern concludes on a market risk premium range of 6.1% to 6.3% in nominal terms, which he says is consistent with Australian regulatory precedent other than IPART,[224] as set out in Table 4.3 below:[225]

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[219] E0006, _0043 at [109] and Table 4.7.
[220] E0006, _0044 at [44].
[221] E0006, _0013 at [26].
[222] E0006, _0035 at [89] - [90].
[223] E0006, _0037 at [96] and Table 4.2.
[224] E0006, _0013 at [26].
[225] E0006, _0038 at [99] and Table 4.3.

Table 4.3: Hern and Australian Regulators MRP Historical Evidence

	Final Decision	Historical Evidence	Arithmetic	Geometric
Hern	n.a.	**6.1% - 6.3%**	**6.0% - 6.5%**	**4.2% - 5.0%**
ACCC (2018)	6.0%	6.0%	5.2% - 6.2%	3.5% - 4.8%
ERA (2018)	6.0%	5.3% - 6.1%	6.1% - 6.7%	4.2% - 5.3%
AER (2018)	6.5%	5.2% - 6.5%	6.0% - 6.5%	4.2% - 5.0%
QCA (2018)[1]	6.5%	5.6%-6.3%	n.a.	n.a.
IPART (2018)[2]	7.2%	6.0%	n.a.	n.a.

Note: I do not include ICRC and OTTER because, as discussed, these regulators refer to AER.[1] QCA numbers are Ibbotson and Siegel estimates under 10-year RfR tenor; [2]IPART evidence calculated as of June 2018 and averaging the current and long-term data – as discussed in section 7.1, I do not consider IPART's estimates to be a decision, but present here under the final decision column for comparability.
Source: ACCC 2018 Glencore decision [QAN.999.002.0990], pp.151-154; ERA 2018 decision [QAN.999.002.5816], pp.57 and 65; AER 2018 Murraylink decision [QAN.999.002.2141], pp.3-15 and 3-37; IPART 2018 WACC review [QAN.999.002.6762], p.52; IPART (Aug 20), Spreadsheet WACC model

313   As set out above, Dr Hern relies on short run averages to estimate the risk free rate, and places primarily reliance on long run historical data to estimate the market risk premium. Dr Hern's approach in combining a long term measure of the market risk premium with a short term measure of the risk free rate, is a material point of difference between the experts.

314   Dr Hern estimates PAPL's cost of debt as the sum of the risk free rate, debt premium and debt issuance costs. He estimates the debt premium for PAPL based on 1 month to 5-year averages of historical debt premia derived from a BBB+ rated 10-year corporate debt benchmark index. In Dr Hern's view, his choice of a BBB+ rated benchmark index is consistent with the credit ratings for relevant comparator airports. Dr Hern combines this debt premium with a risk free rate estimated from 10-year government bond yields over the same period. Dr Hern adds debt issuance costs to his risk free rate plus debt premium estimates, on the basis that a range of 9.5bps to 12.5bps (as suggested by Australian regulatory precedent) is appropriate for debt issuance costs.[226] Overall, Dr Hern estimates a nominal cost of debt for PAPL of 4.3% to 5.2% over the relevant period, as set out in Table 5.4 below:[227]

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[226] E0006, _0053 at [138] - [140].
[227] E0006, _0013 at [27] - [28] and _0054 at [142] and Table 5.4.

Table 5.4: My Notional Cost of Debt Estimate for Perth Airport

Parameter	Value (%)
RfR + debt premium	4.2% - 5.1%
Debt issuance costs	0.10% - 0.13%
Perth Airport Notional Cost of debt	**4.3% - 5.2%**

*Source: Dr Hern Cost of Debt and Leverage analysis.xlsx [**QAN.999.003.0002**].*

315   Dr Hern observes that while it is common for the cost of debt to be estimated by regulators using the sum of a risk free rate and a debt premium, he cross-checks his estimate with the reported cost of debt incurred by PAPL. Dr Hern concludes his estimate is consistent with PAPL's actual nominal cost of debt but does not place primary reliance on PAPL's reported cost of debt because it reflects company specific financing decisions, which may not match that of an efficient airport. Dr Hern acknowledges it is not common for airports or other regulators to estimate the cost of debt based on actual financing costs in the context of building block pricing decisions.[228] However, he considers PAPL's actual cost of debt is a relevant cross-check.[229]

316   Dr Hern considers IPART's approach to WACC leads to significantly higher estimates of the risk free rate, market risk premium and debt premium parameters than all other Australian precedent from 2018.[230]

317   In relation to Dr Hird's contention that short run estimates of risk free rates should be combined with short run estimates of the market risk premium (and likewise for long run estimates), Dr Hern considers Dr Hird's view to be inconsistent with all other Australian regulators (excluding IPART), where combining a short run risk free rate with a long run market risk premium is the standard.[231]

318   In relation to Dr Hird's cost of debt estimate, Dr Hern observes that Dr Hird's long run estimate is based on a 10-year average, which effectively assumes that PAPL would have issued debt in equal amounts going back 10 years, including historically high debt premiums from the 2008 financial crisis. Dr Hern comments that this would not be problematic if PAPL as of June 2018 actually had debt outstanding that was issued during the 2008 financial crisis and had to

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[228] E0008, _0013 to _0014 at [29].
[229] E0006, _0047 at [118].
[230] E0006, _0015 at [35].
[231] E0006, _0074 to _0075 at [201] - [204].

pay this high interest going forward. With reference to the analysis Dr Hern undertakes in relation to PAPL's actual debt, he concludes Dr Hird is overstating the cost of debt for PAPL by including historically high debt costs from the 2008 financial crisis period.[232]

Analysis of WACC issues

Market risk premium

319   The primary area of disagreement between Dr Hird and Dr Hern in relation to the market risk premium is whether:[233]

(a)   it is appropriate to combine a long term measure of the market risk premium with a short term measure of the risk free rate; or

(b)   consistency requires that a long term measure of the market risk premium be combined with a long term measure of the risk free rate, with regard also to be given to short term (or prevailing) measures of the market risk premium combined with short term measures of the risk free rate.

320   Dr Hern pairs a short term (one or two month) estimate of the prevailing risk free rate with a long term (many decades) estimate of the historical average market risk premium. Dr Hird pairs a prevailing risk free rate plus a prevailing market risk premium, and a historical average risk free rate plus a historical average market risk premium.[234]

321   Dr Hird considers that movements in the prevailing government bond rate often move in the opposite direction to the prevailing market risk premium. That is, the two parameters are inversely related. Dr Hird suggests that when government bond rates are unusually low, equity market premiums tend to be unusually high (and vice versa). Dr Hird states there are two internally consistent solutions to this problem. First, pair a prevailing risk free rate with a prevailing estimate of the market risk premium, such as is derived from a dividend growth model or similar model. Further or alternatively, pair a long run historical average of the market risk premium with a long run estimate of risk free rates.[235]

322   In support of his opinion regarding the importance of internal consistency, Dr Hird refers to an appeal of an AER decision that was

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[232] E0006, _0075 to _0076 at [208] - [211].
[233] C0003, _0017 to _0018 at [383].
[234] E0009, _0017.
[235] E0009, _0019 at [41] - [42].

determined by the Australian Competition Tribunal in 2009. Subsequently, IPART changed its approach to ensure internal consistency between risk free rates and the market risk premium estimate in order to, in Dr Hird's view, maintain consistency with the Tribunal's decision.[236] Dr Hird explains IPART did this in two ways, giving 50% weight to the following methods:[237]

(a)   first, by ensuring a prevailing estimate of the market risk premium was derived in the same market conditions as the prevailing risk free rate was estimated; and

(b)   second, when using the long run historical market risk premium this was paired with a long run historical estimate of the risk free rate.

323   Dr Hern explains that instead of assuming the risk free rate and market risk premium move inversely, his model is based on the assumption that it is best to estimate the market risk premium independently of the risk free rate on the basis that there is little evidence to support inverse correlation. Dr Hern explains his model is also based on the assumption that there is no better estimate of the market risk premium than the evidence based on long run historical returns.[238]

324   However, Dr Hern has previously expressed the opinion that combining short run and long run averages for individual parameters, such as the risk free rate and the market risk premium, can lead to significant bias in the final WACC estimate.[239] Dr Hern has also previously encouraged a regulator to take into account the IPART precedent of estimating the cost of equity using a combination of long term average and current market data.[240]

325   Dr Hern's view is that, like him, most Australian regulators (with the exception of IPART) estimate the market risk premium by placing primary reliance on long run historical data. However, it is apparent from tables and figures Dr Hern himself produces that the majority of Australian regulators do place some weight on dividend growth models, which estimate short term market risk premiums.[241]

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[236] E0009, _0019 to _0021 at [43] - [51].
[237] E0009, _0021 at [50].
[238] E0016, _0056 at [160].
[239] F0173, _0026 to _0027.
[240] F0224, _0032 to _0034.
[241] E0006, _0071 at Figure 7.5 and E0016, _0071 at Table 3.6.

326   As is the case with Dr Hern's evidence regarding asset beta, Dr Hern's explanations regarding alleged differences in context in relation to different views and approaches he has adopted in estimating WACC in other reports, as against the opinions and approaches he puts forward in relation to estimating WACC in this proceeding was, on the whole, unpersuasive.

327   Dr Hird's views (and therefore those of IPART) in relation to estimating WACC are more persuasive than Dr Hern's. The IPART approach appears to appropriately take into account the benefits of internal consistency between time periods and, having regard to both short and long term estimates, reduce the potential for error in one type of estimate disproportionally affecting the final WACC.

328   The gamma experts agree that the value adopted for the utilisation rate component of gamma must be the same value adopted in estimating the market risk premium. Accordingly, having determined the best estimate of utilisation rate is 0.65, it is necessary to ensure that value is adopted in estimating the market risk premium.

329   Adopting a utilisation rate of 0.65 in estimating the market risk premium pursuant to Dr Hird's (and therefore IPART's) methodology results in a short term market risk premium estimate of 9.2%, a long term market risk premium estimate of 6.2% and an average estimate of 7.7%.

Risk free rate

330   In light of the conclusions set out above, in relation to risk free rate, Dr Hird's (and IPART's) methodology is to be preferred.

331   Further, I am not persuaded that Dr Hern's two stage process used to estimate risk free rate is appropriate in the context of this proceeding.

332   Accordingly, the average risk free rate estimate is 3.3%.

Cost of debt

333   I accept Dr Hird's views that the 10-year debt term applied by IPART is broadly consistent with Australian regulatory precedent, and more consistent with Australian regulatory precedent than the averaging periods used by Dr Hern.

334   For the reasons Dr Hern himself identifies, it does not appear appropriate to have regard to PAPL's actual debt costs and the period in which debt was actually issued.

335   Again, Dr Hird's (and IPART's) estimate of debt risk premium is to be preferred, with an average of 2.4%.

336   Combining the average risk free rate estimate of 3.3% with the average debt risk premium estimate of 2.4%, the average cost of debt estimate is 5.7%.

Comparator set to determine leverage

337   The experts agree that leverage should be determined based on the average leverage of the comparator set used to estimate the asset beta.

338   Having determined the preferable comparator set is 19 airports, the appropriate estimate of leverage is 20%, being the average leverage of the comparator set.

WACC estimate

339   I determine the overall WACC estimate is 9.6%, based on the following parameters:

(a)   risk free rate of 3.3%;

(b)   leverage of 20%;

(c)   asset beta of 0.75;

(d)   equity beta of 0.94; and

(e)   market risk premium of 7.7%,

resulting in a cost of equity of 10.5% and a cost of debt of 5.7%.

Opening Asset Base and Operating Expenditure

Introduction

340   'Opening asset base' and 'operating expenditure' are inputs into a building block model calculation.

341   The parties' respective experts on the value of the aeronautical services were both instructed to use aeronautical pricing models (building block models) originally prepared by PAPL.

342   The aeronautical pricing models are contained within Excel spreadsheets and there are separate pricing models for the airfield, Terminal 3 and Terminal 1 International. Mr Teng gave evidence on behalf of PAPL that the same spreadsheets the experts were instructed to use are versions of PAPL's aeronautical pricing models for the 2017-2018 negotiation period.

343   The spreadsheets contain a number of inputs into the models, including opening asset base, forecast operating expenditure and depreciation of assets. Each of those inputs impact the resulting building block model calculations.

344   The opening asset base for the models that relate to the airfield and Terminal 1 International are in issue because Qantas seeks a reduction of some $21.05m and $18.4m to those asset bases respectively. The opening asset base for the Terminal 3 model is not in issue.

345   The forecast operating expenditure for the airfield, Terminal 1 International and Terminal 3 models is in issue, because Qantas seeks a reduction to PAPL's forecast operating expenditure for each of those models. The reductions Qantas seeks include removal of 'marketing costs' and a 10.83% reduction to the remaining forecast operating expenditure, based on PAPL's reported reduction in actual aeronautical operating expenditure between the 2016 to 2017 financial year (FY17) and the 2018 to 2019 financial year (FY19).

346   Qantas' proposed reductions to PAPL's forecast operating expenditure apply to the whole of the pricing period of the models (1 July 2018 to 30 June 2025), and for FY19 involve reductions of:

(a)   'marketing costs' equating to approximately:

(i) $513,000 for Terminal 1 International;

(ii) $152,000 for Terminal 3;

(iii) $893,000 for the airfield;[242] and

(b)   10.83% to the remaining forecast operating expenditure,[243] equating to:

(i) $883,494 for Terminal 1 International;

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[242] D0019, _0007 to _0009 and _0012 to _0014 at [25] - [31], [48] and [57] - [58].
[243] D0019, _0014 to _0015 at [58] - [59] and [63].

(ii) $404,547 for Terminal 3; and

(iii) $1.728m for the airfield.[244]

347   Given it is Qantas who seek reductions to the asset bases and forecast operating expenditure, it is convenient to set out Qantas' position first.

Qantas' position

348   Qantas consider the capital expenditure in the opening asset bases incurred during the PSA pricing period (1 July 2011 to 30 June 2018), and the forecast operating expenditure, must be shown by PAPL to be reasonable and efficient.[245] Qantas contend PAPL bears the burden of proving the costs in question were reasonably incurred and reasonable in amount, so as properly to be included in an efficient asset base.[246]

349   Qantas' contention appears to be founded on the basis that there is a certain level of disclosure 'reasonably to be expected' in the context of the terms of the PSA, and the 'open and transparent' negotiation and consultation process for a new ASA. Qantas submit PAPL has not discharged that burden so far as some discrete items of expenditure are concerned.[247]

350   Qantas further submit PAPL has not shown the opening asset bases during the previous pricing period and the forecast operating expenditure to be reasonable and efficient, and that PAPL did not serve any evidence in chief to substantiate such reasonableness and efficiency.[248]

Opening asset base

351   Qantas refer to a paper titled 'Perth Airport Opening Asset Base – Updated January 2018' that was published by PAPL and made available to airlines (including Qantas) on the consultation website in early 2018. Qantas suggest the paper outlines the primary drivers for the methodology used by PAPL to calculate the opening asset base as follows:[249]

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[244] C0003, _0152 at [28].
[245] C0004, _0128 at [590].
[246] C0004, _00131 to _0132 at [605].
[247] C0004, _0128 at [591].
[248] C0004, _0128 to _0129, at [591] and [593].
[249] C0004, _0129 at [594] - [595].

... the opening asset base as at 1 July 2009 (the starting point of the current agreements), <u>efficient capital expenditure</u> between FY10 and FY18, depreciation, indexation and the <u>allocation of asset values</u> between aeronautical and non-aeronautical activities. (Qantas' emphasis)

352   Qantas explain the methodology used is identified as a 'roll forward methodology', whereby the asset base at the start of a year 't+1' is calculated by 'rolling forward' the asset base from the start of the previous year 't', adding the value of capital assets commissioned in year 't' as at the commissioning date, adding indexation for year 't', and subtracting depreciation for year 't'.[250]

353   Qantas consider the differences between the parties as to the opening asset bases concern two matters. First, efficient capital expenditure during the term of the PSA. Secondly, re-allocation of land and non-land assets between aeronautical and non-aeronautical.[251]

354   Qantas' position is the opening asset base should only include capital expenditure incurred during the term of the PSA where that expenditure was necessary and efficient or otherwise agreed by Qantas following consultation. Further, that any reallocation of assets from aeronautical to non-aeronautical or vice versa, must be justified with sufficient supporting information. Particularly reallocations of land assets that result in a net increase in aeronautical land value and simultaneous net decrease in aeronautical land area.[252]

355   Without setting out the provisions of the PSA that underpin Qantas' position (and are confidential as between the parties), Qantas' position can be summarised as follows. Qantas consider the process provided for in the PSA regarding unplanned capital expenditure and the ability to recover such expenditure in certain circumstances, following consultation and agreement with airlines, clearly contemplates that substantive information about projects could and must be made available by PAPL in a timely way to ensure input from Qantas and other stakeholders and that PAPL did not follow this process.[253] As was put to a PAPL witness in cross-examination, Qantas suggest that PAPL did not seek to avail itself of the process under the PSA to increase charges to recover overspend and unplanned capital expenditure.[254]

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[250] C0004, _0129 at [596].
[251] C0004, _0129 at [597].
[252] C0004, _0129 at [598].
[253] C0004, _0129 to _0131, at [599] - [605].

356   Qantas submit PAPL's witness, Mr Teng, agreed that if PAPL had sought to recover capital expenditure from airlines under the mechanism in the PSA, PAPL would have been required to provide information of quite a detailed nature in respect of such expenditure to airlines.[255]

357   Qantas contend that by including unrecovered capital expenditure in the opening asset base for the next pricing period, PAPL avoided the need to provide detailed information to, and seek agreement from, airlines in respect of such expenditure.[256]

358   Qantas refer to statements made by PAPL in the Perth Airport Opening Asset Base paper.[257] Those statements include:[258]

> Some of the projects delivered should have been foreseen by Perth Airport, and formed part of the Indicative Capital Plan. In these cases, Perth Airport would have been remunerated for them from the first day of the last agreement. Perth Airport's failure to forecast these projects means it has not benefited from revenue it would have received and now seek to recover. Other projects emerged during the agreement but did not meet the recovery criteria and, in some cases, Perth Airport simply chose not to pursue recovery given the time taken to negotiate these matters and in others, recovery did not proceed due to airline resistance.

359   Qantas consider that the dispute about the opening asset bases specifically relates to unrecovered overspend on projects in the Indicative Capital Plan (as referred to in the PSA), unplanned capital expenditure, and the reallocation of land and non-land assets.[259]

360   Qantas rely on two witness statements from Mr Ricky Allan West, Senior Commercial Manager at Qantas, in support of their position.[260] Qantas explain Mr West reviewed and tested the capital expenditure in the opening asset base that was incurred during the term of the PSA for reasonableness and efficiency. Qantas contend Mr West gave evidence of the processes he followed and his methodology, and on the amounts that he considered should be removed from the opening asset base inputs and the reasons for the deductions.[261]

[254] ts 562.
[255] C0004, _0136 to _0137 at [630].
[256] C0004, _0137 at [632] - [633].
[257] C0004, _0137 at [633].
[258] F0406, _0005 to _0006.
[259] C0004, _0132 at [607] and [609].
[260] C0004, _0128 at [592], D0009, D0019.
[261] C0004, _0128 to _0129 at [592], D0009, _0005 at [25], _0023 at [112(b)] and [112(d)], _0024 at [114(b)], D0019, _0015 to _0019 at [66] - [81].

361   Qantas describe Mr West's evidence as being that Qantas had not been afforded the opportunity to work with PAPL to avoid or minimise the variation in actual aeronautical capital expenditure above the total aeronautical capital expenditure in the Indicative Capital Plan, and to reach agreement with PAPL on the asset reallocations. Further, that absent such agreement, the asset allocations as at 1 July 2009 should be 'rolled forward' into the opening asset base for PAPL as at 1 July 2018.[262]

362   In an email sent from Mr Teng of PAPL to Mr West in 2018, Mr Teng sought to quantify the variation between agreed and actual capital expenditure included in the opening asset bases.[263] Mr West adjusted the variation amounts in Mr Teng's email for indexation and depreciation (and deducted the amount related to a project not in issue between the parties), and then deducted the adjusted variation amounts from the opening asset base for the airfield (-$21.05m) and Terminal 1 International (-$18.4m).[264]

363   Qantas acknowledge Mr West agreed that the PSA did not provide for a situation where PAPL would not be able to recover unplanned capital expenditure incurred during the term of the PSA in the next pricing period, simply because there had been no consultation with Qantas while the PSA was on foot.[265] Put another way, the PSA did not preclude PAPL recovering unplanned capital expenditure incurred during the term of the PSA during the next pricing period.

364   However, Qantas contend that PAPL's approach to recovery of such capital expenditure incurred during the term of the PSA without proper consultation or agreement from airlines, by including it in the opening asset base for the next pricing period and failing to provide sufficient information to enable the expenditure to be tested for reasonableness and efficiency, is inconsistent with the terms of the PSA[266] and APP 1(c).[267]

365   APP 1(c) relevantly provides that prices should:[268]

    (i)   be established through commercial negotiations undertaken in good faith with open and transparent information exchange between the airports and their [airline] customers …; and

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[262] C0004, _0133 to _0134 at [613], D0019, _0017 at [73] - [74].
[263] C0004, _0133 at [611].
[264] C0004, _0134 at [616]-[617], D0009, _0023 at [112(b)], _0024 at [114(b)], D0019, _0019 at [81].
[265] C0004, _0137 at [634]; ts 38 - 39.
[266] F0137.
[267] C0004, _0137 at [635].
[268] F0066, _0001.

> (ii)   reflect a reasonable sharing of risks and returns, as agreed between airports and their [airline] customers (including risks and returns relating to changes in passenger traffic or productivity improvements resulting in over or under recovery of agreed allowable aeronautical revenue) …

366   With reference to the above, Qantas contend that in those circumstances a clear demonstration of the propriety of the expenditure, both its fact and its quantum, is called for. Qantas submit the burden of Mr West's evidence is that that has not occurred, and for the same reasons Mr West cannot be satisfied the costs are properly claimed, the court cannot be either.[269]

Operating expenditure

367   Qantas refer to a paper titled 'Perth Airport Operating Expenses Forecast – Updated January 2018', which was published by PAPL and made available to airlines (including Qantas) on the consultation website in early 2018. Qantas suggest the paper outlines the methodology used by PAPL to prepare its 10 year aeronautical operating expenditure for Perth Airport (FY18 to FY27) and that it provides a breakdown by asset (Terminal 1 International, Terminal 3, the airfield etc).[270]

368   Qantas refer to the witness statements of Mr West, in which he describes the scope of the dispute about the forecast operating expenditure as limited to the allocation of marketing costs as an aeronautical cost, and efficient employee costs.[271]

369   Qantas submit that as part of his role, Mr West regularly undertakes and oversees calculations of efficient aeronautical operating expenditure to be used as inputs to building block models used in pricing negotiations with airports for aeronautical services. Qantas explain that during negotiations with PAPL in 2017-2018, Mr West reviewed and tested the forecast aeronautical operating expenses inputs for the Terminal 1 International, Terminal 3 and airfield models for appropriate allocation as aeronautical expenses and for efficiency.[272]

370   Mr West describes certain information in PAPL's January 2018 paper to be 'of a very high level' and lacking sufficient detail to permit

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[269] C0004, _0137 at [635].
[270] C0004, _0138 at [636].
[271] C0004, _0138 to _0139 at [640], D0009, _0022 at [110(f)] and [112(d)], D0019, _0002 at [4] - [5].
[272] C0004, _0139 at [641] - [642].

an assessment of whether the full time equivalent numbers and employee costs were efficient and cost effective, and whether the aeronautical allocation of those costs, and their allocations to Terminal 3 and the airfield were reasonable and appropriate.[273] Subsequent to the provision of the January 2018 paper, Mr West and Mr Teng exchanged correspondence and Mr Teng provided further information regarding those issues.

371   In his fourth witness statement filed on 17 May 2021, Mr Teng provided a breakdown of marketing costs, which include the categories below:[274]

(a)   Advertising & Publicity (Airline Marketing and promotions undertaken by the Aviation Business Development Team, non specific PAPL Marketing in the West Australian and allocated (split) based on a driver of the proportional percentage of revenue of Retail, GT, Property & Aeronautical business areas);

(b)   Communications (Corporate communications to the public through website hosting and social media outlets, printed publications etc the allocation is (split) proportionally based on revenue);

(c)   Corporate Image (Corporate image including rebranding allocated (split) proportionally based on revenue, along with terminal Christmas and Easter festive decorations allocated (split) proportionally by Terminal floor space);

(d)   Market Research (Terminal ASK market surveys allocated (split) proportionally by terminal floor space);

(e)   Donations & Sponsorships (all corporate donations including local school and government donations as well as donations to telethon which are allocated (split) by revenue, also includes the AAA sponsorship which is 100% aero to runways);

(f)   Airline Incentives (payments to airlines to assist with new route development or increased capacity, 100% aero);

(g)   Stakeholder events (annual stakeholder event, allocated (split) proportionally by revenue;

(h)   Corporate hospitality (costs associated with stakeholder engagement, 100% aero).

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[273] D0019, _0009 at [35].
[274] D0025, _0010 at [29].

372   During the trial, Mr Brian Pereira, Chief Financial Officer of PAPL, gave evidence that 'AAA' is the Australian Airports Association of Australia. Mr Pereira accepted it would be fair to describe AAA as an industry body (of which PAPL is a member) that represents the interests of privately owned airports and in that capacity, may make submissions on behalf of its members to the Productivity Commission.[275]

373   Qantas submit that in early 2021, for the purpose of preparing his second witness statement, Mr West recalculated the efficient aeronautical operating expenditure for Terminal 1 International, Terminal 3 and the airfield using a different methodology (from that which he used in 2018) and information that was available to him as at 21 March 2021. Qantas further submit it is Mr West's evidence that this new methodology is the one he would use today.[276]

374   Mr West says he would consider the FY17 actual aeronautical operating expenditure data and would only make two adjustments to it. First, he would make an adjustment to remove marketing costs, as he continues to be of the view that airport 'marketing' costs are not an aeronautical operating expense and should not be included in the aeronautical operating expenditure forecast for the terminals or the airfield. Mr West would pro-rate the $1.9 million deduction for marketing costs across those assets based on their proportion of total forecast aeronautical operating expenditure for Perth Airport in FY17.[277]

375   Secondly, Mr West would consider the actual reduction in aeronautical operating expenditure actually achieved by PAPL since FY17 as reported to the ACCC and published in the annual airport monitoring report. Mr West's proposed adjustment is:[278]

> … based on PAPL's stated commitment to delivering 'incremental cumulative efficiency savings in total operating cost of $15 million over three years from FY18 to FY20' in its operating expenses forecast for Perth Airport.

376   Mr West calculated PAPL's reported reduction in actual aeronautical operating expenditure between FY17 and FY19 to be approximately 10.83%. He would therefore reduce the adjusted aeronautical operating expenditure for each asset for FY17 by 10.83%. Mr West would increase the adjusted figures each year in the models

[275] ts 672.
[276] C0004, _0141 at [654], D0019, _0013 to _0014 at [54].
[277] D0019, _0013 at [55] and [57] - [58].
[278] D0019, _0014 at [60].

(which cover a seven year period) by 2.5% per annum to take account of inflation and wage growth.[279]

377   Mr West also performed two calculations of the efficient aeronautical operating expenditure for Perth Airport for FY19. The first calculation was performed by Mr West in 2018,[280] and the second calculation was performed by Mr West in 2021 using a different methodology. Qantas submit that in the 2021 calculation, Mr West deducted amounts for marketing costs from the FY17 actual aeronautical operating expenditure for Terminal 1 International, Terminal 3 and the airfield and made an adjustment for efficiency.[281]

378   Qantas further submit that Mr West chose the FY17 and FY19 data points because the actual aeronautical operating expenditure for FY17 had been provided by PAPL in the January 2018 paper and the actual aeronautical operating expenditure for FY19 was available in the Airport Monitoring Report for 2018-19 published by the ACCC. When calculating the 10.83% adjustment, Mr West used the data for FY17 and FY19 that had been reported by PAPL to the ACCC and published in the Airport Monitoring Reports, rather than the FY17 data in the January 2018 paper.[282]

379   Qantas refer to evidence from PAPL's representative, Mr Teng, regarding marketing costs, including donations and sponsorship costs, and 'airline incentives', which Mr Teng describes as:[283]

> payments to airlines to assist with new route development or increased capacity, 100% aero.

380   Mr Teng accepted that new routes or flights operated at Perth Airport during the term of a PSA were of an immediate benefit to PAPL 'On an incremental basis' because they increased passenger numbers. He also accepted there was no positive impact for the other airlines during the term of a PSA and such benefit would only be in the next agreement period, by virtue of reducing prices, if the flights were sustained in that next agreement period.[284] Qantas submit that in fact, airline incentives are likely to cause harm to the airlines asked to fund

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[279] D0019, _0014 at [62] - [64].
[280] D0009, _0022 at [110(f)] and _0023 at [112(d)], D0019, _0008 at [31], _0011 to _0013 at [46], [48] and [50] - [51].
[281] C0004, _0142 at [660].
[282] C0004, _0143 at
[283] C0004, _0143 to _0144 at [665] - [668], D0025, _0010 at [29(f)].
[284] ts 569.

them, where they would likely increase competition from new flights (operated by other airlines).[285]

381   Qantas further submit the court should infer from the documents[286] that marketing costs are either unconnected to the provision of aeronautical services and facilities to airlines or are expenses not reasonably or fairly imposed on airlines or, both. Qantas also submit the court should accept the evidence of Mr West on the efficient aeronautical operating expenditure for Terminal 1 International, Terminal 3 and the airfield. Qantas contend that in light of the considerations raised by Mr West, the court cannot be satisfied that PAPL has discharged its burden of proving the operating costs claimed represent reasonable or efficient costs.[287]

PAPL's position

382   Given the spreadsheets provided to the experts were versions of PAPL's aeronautical pricing models for the 2017-2018 negotiation period, those spreadsheets (unadjusted) reflect PAPL's position as to the appropriate opening asset base and forecast operating expenditure for each model.

Opening asset base

383   PAPL's position is Qantas have failed to establish that the reductions they seek should be made to the opening asset bases for the relevant models.[288] Consequently, the opening asset base for the models should remain the values included by PAPL, namely $249.9m for the Terminal 1 International model and $457.2m for the airfield model.[289]

384   PAPL submits there is nothing in the PSA with Qantas that restricts what expenditure PAPL can include in its opening asset base when conducting a building block calculation of prices to apply for a later pricing period, after termination of the PSA. PAPL contends the provisions in the PSA regarding recovery of unplanned capital expenditure and cost variances are merely facilitative. That is, they give PAPL the right to recover such expenditure in the form of higher charges under the PSA during the currency of the agreement if certain steps, like consultation, occur. However, PAPL submits the PSA does

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[285] C0004, _0411 at [669].
[286] See for example, F1264, _0010 to _0028.
[287] C0004, _0145 at [671] - [672].
[288] C0003, _0149 at [478].
[289] C0003, _0151 at [485], F0406, F0517.

not prohibit these amounts from being recovered, instead, through prices charged in a later pricing period. PAPL observes that Mr West accepted this in cross-examination (as also acknowledged by Qantas).[290]

385   PAPL contends there is no evidence from which the court could conclude there were inadequate consultations with Qantas in 2011-2018. Further, that whether or not there was consultation does not, in any case, establish the unplanned capital expenditure or cost variance amounts represent unnecessary or inefficient expenditure, so as to warrant the court deducting those amounts from PAPL's opening asset base. PAPL submits that the suggestion Qantas might, if consulted, have been able to reduce or minimise the cost variances or avoid the capital expenditure is purely speculative.[291]

386   PAPL submits Mr West's view that the information he received from PAPL about the capital expenditure and cost variance amounts was inadequate, and Mr West's confessed inability to understand (and his unwillingness to accept) the appropriateness of the aeronautical asset reallocations, provides no basis for the court to make the adjustments sought by Qantas. PAPL contends none of this demonstrates that the relevant cost amounts are actually incorrect or wrong in some way. By way of example, PAPL suggests neither matter is logically probative of the proposition that the amounts of $18.4m and $21.05m represent inefficient or unnecessary costs that ought not to have been incurred, so as to demonstrate that they should not be taken into account. For these reasons, PAPL submits the court should reject Qantas' proposed reductions to the opening asset base for the Terminal 1 International and airfield models.[292]

Operating expenditure

387   As with the opening asset base reductions sought by Qantas, PAPL's position regarding operating expenditure is that Qantas have not established the reductions sought should be made to the forecast operating expenditure for the relevant pricing models.[293]

388   PAPL summarises Qantas' position regarding the removal of marketing costs from forecast operating expenditure as being based on Mr West's assumption that such costs are not aeronautical in nature,[294]

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[290] C0003, _0150 at [481].
[291] C0003, _0150 at [483].
[292] C0003, _0150 to _0155 at [484] - [485].
[293] C0003, _0152 at [488].
[294] D0019, _0007 to _0008 and _0013 to _0014 at [25] - [30] and [57].

and the suggestion that some of the expenditure under this heading does not benefit airlines.[295]   PAPL submits Mr West's assumption that marketing costs are not aeronautical is not evidence capable of demonstrating that matter and his assumption that the particular costs relate to 'the promoting and advertising of non-aeronautical services and facilities' such as 'car parks and retail shops' is incorrect.[296]

389   PAPL submits that as Mr Teng explained in oral evidence, 'marketing costs' is not necessarily the best label for the expenditure.[297] Further, that the costs under this category are those incurred by PAPL at a corporate level for the general purpose of operating PAPL's business, allocated in portions across different parts of PAPL's business (which include aeronautical, property, ground transport and retail).[298]

390   PAPL contends that although Mr Teng was challenged about how some of the cost items under the 'marketing costs' hearing could benefit airlines,[299] an absence of benefit was not established, and in any case the premise of the questions was flawed.   PAPL submits the consideration that drives aeronautical cost allocation is not airline benefit, it is the extent to which the expenditure is used in the delivery of aeronautical services and facilities.[300]   PAPL further submits this is consistent with the function and purpose of PAPL's pricing models, which is to calculate prices necessary to recover the efficient costs of providing aeronautical services and facilities.[301]

391   PAPL explains the cost items it groups as 'marketing costs' represent corporate or head office costs not exclusively attributable to any particular business activity and therefore a methodology must be applied to allocate those costs among PAPL's various business activities, including aeronautical services.   It submits PAPL's allocation methodology and its output is independently audited[302] and, according to Qantas' own expert, involves well-established concepts like distributing common costs across the units of output they facilitate.[303]

392   PAPL submits the contested marketing costs are the product of that methodology and that the cross-examination of Mr Teng did not

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[295] ts 566 - 568.
[296] C0003, _0152 to _0153 at [491], D0019, _0008 at [30].
[297] ts 565.
[298] ts 565 - 566, D0003, _0009 at [40].
[299] ts 566 - 571.
[300] F0407, _0003 and _0012, D0025, _0006 to _0007 and _0010 to _0011 at [20] and [29].
[301] D0003, _0033 at [144] and [147] - [148].
[302] F0407, _0003, F0375, _0008.
[303] C0003, _0153 at [494], E0013, 0055 at [279].

establish PAPL's methodology for allocating the marketing costs as aeronautical was wrongly constructed or misapplied. PAPL contends the cross-examination dealt only with the question of 'benefit' to airlines, which is not the relevant inquiry. PAPL's position is Qantas have not demonstrated that the marketing costs amounts are incorrect or wrong so as to justify excluding them from PAPL's forecast operating expenditure for the relevant pricing models.[304]

393   As to Qantas' proposed 10.83% reduction to PAPL's remaining forecast operating expenditure, PAPL submits the reduction stems from a calculation performed by Mr West, to the effect that PAPL's actual operating expenditure for FY19 was 10.83% less than its actual operating expenditure for FY17, as derived from ACCC monitoring reports.[305]

394   PAPL further submits that Mr West's justification for performing the calculation is a comment in PAPL's forecast operating expenses paper from 2017-2018 that it aimed to deliver[306]

> incremental cumulative efficiency savings in total operating costs of $15 million over three years from FY18 to FY20.

395   PAPL contends Mr West's approach does not offer a sound basis for reducing PAPL's forecast operating expenses in its aeronautical pricing models for the following reasons.

396   First, the method involves recourse to PAPL's *actual* operating expenses up to 30 June 2019 to calculate an adjustment to PAPL's *forecast* operating expenses as at 2018 for the purpose of valuing aeronautical services under a building block model. PAPL submits that in this way, the method is contrary to authority, which requires in a quantum meruit that the relevant services be valued as at the time they were provided.[307]

397   PAPL submits Mr West's method is also contrary to the nature of a building block model which is forward-looking. That is, at a particular moment in time, such a model calculates a required revenue stream over a future period, which is then used to derive a price for that period. PAPL therefore submits it is inapposite to seek to use facts and

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[304] C0003, _0153 to _0154 at [495].
[305] C0003, _0154 at [496], D0019, _0014 to _0015 at [62] - [63].
[306] D0019, _0014 at [60].
[307] C0003, _0154 at [499], H0063, *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 803D-E, H0003, *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221, 263 (H0005); *Angelopoulos v Sabatino* [1995] SASC 5230; (1995) 65 SASR 1, 14.

circumstances not knowable at the earlier time in order to inform the choice of inputs into the model. PAPL contends that is the effect of Mr West's approach and that Mr West accepted in cross-examination, given the forward-looking nature of a building block model, his proposed deduction was unorthodox.[308]

398   Secondly, PAPL submits the mere fact that its actual operating expenditure decreased by 10.83% between FY17 and FY19 does not demonstrate its forecast operating expenditure as at 2018 contains unnecessary or inefficient allowances for future costs to a corresponding extent, or to any extent. PAPL contends the 10.83% simply reflects a reduction in actual operating expenditure over two periods and that a business' actual operating expenditure might decrease (or increase) over time for any number of reasons, some of which are described by Mr Teng in his evidence in chief. Further, the mere fact of a decrease over time does not demonstrate that higher operating costs, incurred in earlier periods, were inefficient or unnecessary. PAPL submits that in order for a conclusion of inefficiency to be drawn, it is necessary to understand the reasons for the decrease.[309]

399   PAPL's position is that Mr West's approach does not involve any qualitative or other analysis of the reasons why PAPL's operating expenditure declined over the period he chose. PAPL submits Mr West accepted in cross-examination that he undertook no such analysis.[310] Further, Mr West's selection of the data points used in his calculation was unscientific. PAPL notes that Mr West explained his decision to use data from FY19 by reference to his desire to use the most recent information available, but it is unclear why he chose FY17 as the other data point in his calculation, and he accepted in cross-examination that he could have taken other data points and thus arrived at a different figure than 10.83%.[311]

400   PAPL submits that in this way, Mr West's methodology is arbitrary and does not provide a rational basis for concluding that PAPL's forecast operating expenditure as at 2018, as used in its pricing models, contains unnecessary or inefficient allowances for future costs.[312]

401   PAPL contends Qantas have not demonstrated that PAPL's forecast operating expenditure is incorrect or wrong either at all, or to

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[308] C0003, _0154 at [500]; ts 44.
[309] C0003, _0155 at [502], D0025, _0015 at [46].
[310] ts 46.
[311] C0003, _0155 at [503]; ts 45 - 46.
[312] C0003, _0155 at [504].

any extent. Further, the court should find that no adjustments should be made to PAPL's aeronautical pricing models on account of the proposed 10.83% reduction.[313]

Analysis

Opening asset base

402   I find PAPL's position in relation to the opening asset base issue more persuasive. I do not accept Qantas' contention that PAPL bears the burden of proving the costs in question were reasonably incurred and reasonable in amount, so as properly to be included in an efficient asset base.

403   Qantas appear to accept the PSA does not preclude PAPL from recovering unplanned capital expenditure incurred during the term of the PSA in the next pricing period.[314] I accept PAPL's submission that the PSA does not restrict what expenditure PAPL can include in its opening asset base for a later pricing period, after termination of the PSA. My view is that the PSA does not otherwise engender a burden of the nature that Qantas contend for.

404   Similarly, I do not consider that the reference to 'open and transparent' information exchange in the context of the commercial negotiations contemplated in the APP gives rise to an onus of the nature Qantas contend for.

405   I do not consider that there is an appropriate basis to make the reductions sought by Qantas to the opening asset base for the Terminal 1 International and airfield models. I find the opening asset base for the models should be the values included by PAPL, namely $249.9m for the Terminal 1 International model and $457.2m for the airfield model.

Operating expenditure

406   Again, I do not accept Qantas' contention that PAPL bears an onus to establish the forecast operating expenditure to be reasonable and efficient.

407   However, my view is that the 'marketing costs' should be removed from the forecast operating expenditure, as sought by Qantas. As set out above, marketing costs include (among other things):

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[313] C0003, _0155 at [505].
[314] C0004, _0137 at [634]; ts 38 - 39.

    (a)   donations to local schools, government and Telethon (a Western Australian childhood disease research institute);

    (b)   the AAA sponsorship (an organisation representing the interests of privately owned airports, which may make submissions to the Productivity Commission that are adverse to the interests of airlines); and

    (c)   'airline incentives', whereby PAPL makes payments to airlines (for example, to assist with new route development or increased capacity) that may have a detrimental impact on other airlines (for example, due to increased competition arising from competing airlines' new routes).

408   In those circumstances, it is difficult to see how marketing costs should be included in the aeronautical operating expenditure forecast for the terminals or the airfield, and as such, be borne in part by Qantas. I accept Qantas' submission that the marketing costs are unconnected to the provision of aeronautical services and facilities to airlines and are expenses not reasonably or fairly imposed on airlines. The marketing costs should be deducted from each of the models.

409   As set out above, Mr West refers to making a $1.9 million deduction for marketing costs. Mr West arrives at that deduction with reference to PAPL's operating expenses forecast for FY19, which forecast future aeronautical operating expenditure of $8,656,166 for 'General Administration'.[315] Mr Teng advised Mr West that 21.9% of the 'General Administration' expenditure was 'marketing costs'.[316] 21.9% of $8,656,166 is $1,895,700.35, which is how Mr West arrives at the figure of $1.9 million.[317] Mr West suggests pro-rating that deduction across assets based on their proportion of total forecast operating expenditure in FY17, which is as follows:

    (a)   Airfield: 47%;

    (b)   Terminal 1 International: 27%;

    (c)   Terminal 1 Domestic: 10%;

    (d)   Terminal 2: 8%; and

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[315] F0407.
[316] F0510; F0511.
[317] D0019, _0008 at [31].

(e)   Terminal 3: 8%.

410   Pro-rating 'marketing costs' on that basis results in reductions of the following amounts for FY19:[318]

(a) $511,839.09 for Terminal 1 International;

(b) $151,656.03 for Terminal 3; and

(c) $890,979.17 for the airfield.

411   PAPL's aeronautical pricing models employ a 'price smoothing' mechanism, which ensures the prices paid by airlines remain constant throughout the period the subject of the models (FY19 to FY25). This price smoothing mechanism means that prices in FY19 respond to changes in forecast operating expenditure, depreciation, and/or capital expenditure for subsequent years.[319] Accordingly, the marketing costs reductions should be made across the whole pricing period, FY19 to FY25. For the purpose of calculating the impact of those reductions, marketing costs should continue to be calculated based on 21.9% of 'General Administration' costs and pro-rated using the same percentage allocation across assets as set out above.

412   I consider the further 10.83% reduction sought by Qantas should not be made to the remaining forecast operating expenditure. Mr West considered the actual reduction in aeronautical operating expenditure actually achieved by PAPL since FY17, as reported to the ACCC and published in the annual airport monitoring report, to arrive at the figure of 10.83%. The adjustment sought is based on PAPL's stated commitment to delivering incremental cumulative efficiency savings in total operating cost from FY18 to FY20 in its operating expenses forecast.

413   My view is neither that stated commitment, nor PAPL's reported reduction in actual aeronautical operating expenditure, provide a sufficient basis to make the adjustment sought by Qantas. Qantas have not established an appropriate basis to make the 10.83% reduction sought.

414   I find the forecast operating expenditure for each model should be the values included by PAPL, with reductions made to remove marketing costs on the basis outlined above.

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[318] D0019, _0007 to _0009 and _0012 to _0014 at [25] - [31], [48] and [57] - [58].
[319] E0020.

Depreciation of Terminal 3

Introduction

415   The issue concerning the depreciation of Terminal 3 is relevant to the building block model calculation in respect of that terminal.

416   As for the opening asset base and forecast operating expenditure issues, the parties' respective experts on the value of the aeronautical services were both instructed to use aeronautical pricing models (building block models) originally prepared by PAPL.

417   The Terminal 3 model contains a number of inputs (as do the models for other assets) including as to depreciation, which has a significant impact on the resulting building block model calculations and prices.

Framework

PAPL's position

418   PAPL contends the depreciation issue must be approached by reference to the correct framework. It submits the depreciation treatment for an asset is a matter for the owner's judgement,[320] based on an assessment of the useful life of the asset. Further, the judgement necessarily has to be made at a particular point in time, based on the facts and circumstances known or ascertainable at that time.[321]

419   PAPL submits in this case, the relevant point in time is mid-2018, for at least two reasons. First, the depreciation question is relevant to the valuation of aeronautical services provided to Qantas at that time, and as a matter of principle such services are to be valued as at the time they are provided. Secondly, the depreciation question informs the inputs for a forward-looking building block model making a calculation of price as at mid-2018, and that necessarily requires only facts and circumstances known or knowable at that time can be used.[322]

420   Accordingly, PAPL submits the depreciation issue calls for a reasonable exercise of judgement in recognition of the building block context, made in light of the facts and circumstances as at mid-2018. It contends the question for the court is what useful life for the Terminal 3

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[320] ***AMP Henderson Global Investors Ltd v Valuer General*** [2004] NSWCA 264; (2004) 134 LGERA 426 [54] (H0086).
[321] C0003, _0156 at [506] - [507].
[322] C0003, _0156 at [508] - [509].

assets, and thus what depreciation treatment, is reasonable to adopt at that point in time, in a building block calculation of aeronautical prices based on the estimated costs of providing aeronautical services at Terminal 3.[323]

Qantas' position

421   Qantas submit the authority on which PAPL relies (*AMP Henderson*) deals with the approach to be adopted by an expert valuer when valuing land in the context of an assessment of land tax. In particular, the basis on which a court can reject expert evidence on what was said to involve the exercise of a matter of judgement. Qantas suggest that authority neither deals with the matters in issue in this proceeding, nor says depreciation of an asset 'is a matter for the owner's judgement'.[324]

422   Qantas contend the question in a quantum meruit case involves determining the supplier's reasonable costs of providing the services in issue. Where those costs are assessed by use of a building block model, this involves a determination of whether the inputs into that model, including useful life of an asset, are reasonable and reflect efficient outcomes.[325]

423   Qantas submit it is neither reasonable, nor efficient, to hold the owner of the asset has an unconstrained or unreviewable discretion on dictating the useful life. Qantas contend the court is to determine the inputs into the building block model and it must do so on all the evidence available to it and it is the court's 'judgement', not the owner's 'judgement', that is relevant.[326]

Useful life

PAPL's position

424   PAPL submits in the circumstances prevailing as at mid-2018, the most reasonable and appropriate assumption is a useful life of 2025 for the Terminal 3 assets (besides aprons, which are not in issue as the parties agree a useful life of 40 years should be applied).[327] A useful life of 7 years is PAPL's position in respect of all Terminal 3 assets

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[323] C0003, _0156 at [510].
[324] C0004, _0186 at [834].
[325] C0004, _0186 at [835].
[326] C0004, _0186 at [836].
[327] C0003, _0157 at [511].

(besides aprons), which include the buildings, plant and equipment, and land. PAPL refers to the following matters in support of its position.

425   First, as at mid-2018, Qantas were the sole remaining users of Terminal 3.[328] It was PAPL's view and position there would be no further aeronautical or other use for the terminal after Qantas relocated to Airport Central,[329] and PAPL was able, as the owner and operator of the terminal, to make that assessment.[330]

426   Secondly, as at mid-2018, the relocation and consolidation of all Qantas RPT services from Terminal 3 (and 4) to Airport Central by 2025 was an agreed objective between PAPL and Qantas. PAPL submits this was reflected in contemporaneous communications between the parties,[331] and in commercial agreements that (as at mid-2018) had been concluded only the previous year.[332]

427   PAPL accepts that in 2018, it was not certain the relocation would occur by 2025, as commercial agreement and various other steps first had to be achieved. However, it submits the following matters made it reasonable to expect and plan on the basis that those various steps would occur, and the objective would be achieved by 2025. As at mid-2018:[333]

(a)   PAPL and Qantas had contractually agreed on the objective of relocation by 2025 only the previous year;

(b)   PAPL and Qantas had contractually agreed to use best endeavours to achieve that objective; and

(c)   there were efficiency and capacity imperatives that required or supported relocation by 2025.

428   PAPL submits the evidence of Mr Teng, Ms Boshard, Mr Pereira and Mr West, together with various documents,[334] suggest the objective of consolidation by 2025 remained achievable as at mid-2018, in 2019 and into early 2020, before being derailed by the COVID pandemic.[335]

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[328] D0001, _0012 at [32].
[329] D0003, _0035 to _0036 at [156]-[160]; D0014, _0010 to _0012 at [36] - [38] and [40]; D0001, _0012 to _0013 at [32] - [34] and [39] - [40]; D0016, _0006 to _0007 at [30(c)-(d)] and [31].
[330] C0003, _0157 at [512].
[331] F0567.
[332] C0003, _0157 at [513]; F0331, _0006 to _0007; F0351, _0014.
[333] C0003, _0157 to _0158 at [514].
[334] D0016, _0007 to _0009 at [31], [39] - [44], _0013 at [55(e)]; D0001, _0011 at [33] - [34]; D0014, _0010 to _0011 at [36]; ts 607 - 611; ts 9, 15 - 19; F0768, _0010, _0028, _0072; F0751; F0682, _0016 to _0022; F1404.

429   Thirdly, PAPL's 2014 Master Plan assumed Qantas would consolidate by the early 2020s.[336]   This was the last phase of consolidation, the other stages of which included construction of Terminal 2 and Terminal 1 Domestic, which were planned (and had been achieved) in accordance with this and with earlier master plans.[337] Significant infrastructure projects, such as construction of major roads and the Airport Central railway station, were also premised on consolidation of Qantas at Airport Central, and had been planned on the basis that this would occur by 2025.[338]

430   Fourthly, as at mid-2018, it could reasonably be expected that a capacity constraint may arise for Qantas at Terminals 3 and 4 by around 2025. PAPL acknowledges there are differences of opinion held by Mr McGregor (of Qantas) and Ms Boshard (of PAPL) as to the capacity of those terminals. However, PAPL maintains a capacity constraint could reasonably be expected to arise, based on the following matters as at mid-2018:[339]

    (a)   Qantas were forecasting a need for [redacted] in contact bays at Terminals 3 and 4 by 2025,[340] which would exceed the available capacity of the terminals.[341] Possible solutions included bussing passengers to and from remote aprons, or splitting Qantas domestic operations across precincts. However, PAPL submits as at mid-2018, Qantas had informed PAPL they did not want to resume the use of bussing,[342] and had indicated a preference not to split (or further split) their operations across precincts;[343]

    (b)   passenger throughput at Terminals 3 and 4 was forecast to reach 2013 levels by 2025.[344] In 2013, that had led to significant constraints and problems with landside capacity at those terminals;[345]

    (c)   due to international upgrades to Terminal 3, there was reason to anticipate problems with terminal processing (eg baggage

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[335] C0003, _0158 at [515]; F1420, _0002 and _0004 to _0005; ts 21 - 25; ts 707 - 708.
[336] F0357, _0019 and _0136.
[337] F0085, _0004 to _0005, _0056, _0059; F0357, _0012, _0016 to _0017; D0004, _0008 at [43] - [44]; D0001, _0011 to _0012 at [30]; D0016, _0005 to _0006 at [30(a)].
[338] C0003, _0158 at [516]; F0353 and F0161, _0034.
[339] C0003, _0158 to _0159 at [518] - [519].
[340] D0008, _0022 to _0023 at [102]; D0015, _0008 at [26].
[341] D0015, _0008 at [27].
[342] D0015, _0008 at [28]; F0263, _0003.
[343] D0001, _0012 at [34]; F1197; D0015, _0008 at [75(a)]; F0592, _0006.
[344] D0015, _0017 at [70]; F1404.
[345] D0024, _0004 at [13] - [15]; F0682, _0005; F1289, _0005.

handling, security screening) if passenger numbers at Terminals 3 and 4 continued to increase through to 2025;[346]

(d)   various Qantas documents anticipated the potential for capacity constraints at Terminals 3 and 4 before or by 2025.[347] PAPL contends Mr West accepted in cross-examination that this was a concern for Qantas at the time, if passenger numbers continued to increase.[348]

Qantas' position

431   Qantas submit the appropriate useful life for the terminal assets or buildings is the value found in PAPL's own internal contemporaneous evaluations - 20 years.[349] Qantas refer to the building block models created by PAPL for negotiations culminating in the PSA and Mr Teng's evidence that a 20 year useful life was used.[350] Qantas contend that means, even assuming no other capital expenditure was incurred during the course of the PSA to extends its life (which they say was not in fact the case), the useful life of the Terminal 3 buildings was in 2011 predicted to end in 2031, being 13 years after the end of the Relevant Period. Qantas therefore suggests the court would not use a number lower than 13 years.[351] Rather than treating all Terminal 3 assets (besides aprons) as having the same useful life in the way PAPL contends, Qantas' position is that a 20 year useful life should be applied to buildings, a 10 year useful life should be applied to plant and equipment, and an 88 year useful life should be applied to land.[352]

432   Qantas also refer to PAPL's calculations of the useful lives of various Terminal 3 assets in September 2017, four months after the execution of the Development Agreement. Qantas suggest those calculations gave PAPL's best assessment of the remaining weighted useful life of the Terminal 3 buildings as at that date, which support Qantas' position regarding an appropriate useful life of 20 years.[353]

433   Qantas contend PAPL, as plaintiff and the party asserting a contrary position, bears the onus of displacing the 20 year life, and justifying why a shorter, 7 year life should be adopted (to PAPL's

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[346] D0015, _0016 to _0017 at [61] - [67].
[347] F0682, _0008; F1404, _0002.
[348] ts 6, 20.
[349] C0004, _0145 at [673].
[350] C0004, _0147 at [680]; D0014, _0011 at [39]; D0019, _0004 at [14]; F0837, _0004 and _0022.
[351] C0004, _0147 at [681].
[352] D0019, _0006 at [23].
[353] F0452, _0001; ts 547; C0004, _0147 to _0148 at [682] - [683].

commercial advantage).[354] Qantas suggest PAPL's witnesses did not give any evidence as to their view of the useful life of the Terminal 3 assets absent accelerated depreciation. Qantas observe PAPL did not put on evidence of its asset register, or assert that it showed any shorter life, and there is nothing to suggest that the September 2017 estimate should have been shortened.[355]

434   Qantas further contend PAPL understood it was proposing an alteration to the true state of affairs, as at February 2017, which is when Qantas suggest the concept of 'accelerated depreciation' emerged within PAPL (but was not mentioned to Qantas until around March 2018).[356] Qantas also suggest using accelerated depreciation masks PAPL's desired shift away from long run average costs. That is, PAPL understood accelerated depreciation is the only way to make a building block model price for Terminal 3 of the same magnitude as the prices for Terminal 1 Domestic and Terminal 2, due to the different cost bases of the terminals.[357]

435   Additionally, Qantas submit that given the centrality of reasonableness in a quantum meruit, PAPL is required to demonstrate that a 7 year useful life is reasonable in all the circumstances.[358]

436   Qantas submit the court should reject the bases advanced by PAPL in support of a shorter useful life. Qantas contend those involve attempts to suggest Qantas could not use Terminals 3 and 4 after 2025, whether as a matter of law (including contract), or of fact. Qantas suggest that should be rejected for two reasons. First, the effect of contemporaneous documents and the evidence of PAPL witnesses who were called, is that PAPL (and Qantas) did not proceed on that basis during the Relevant Period. Qantas contend they are *ex post facto* justifications, created by PAPL for this litigation, that cannot be relied on and fail on the facts.[359]

437   A significant amount of evidence was adduced by the parties regarding whether, practically, Qantas are and were able to use Terminals 3 and 4 beyond 2025. Qantas submit that as at any point in the Relevant Period, it was apparent Qantas would be able to continue

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[354] C0004, _0145 at [673], citing *Mitchell v Canal Rocks Beach Resort* [2002] WASCA 331 [6] - [7], [76] - [84] (H0151, _0005 and _0027 to _0029).
[355] C0004, _0147 to _0148 at [683].
[356] C0004, _0149 at [687]; D0009, _0019 to _0020 at [93] and [102].
[357] ts 48; F0339, _0004; F1281, _0001; C0004, _0146 to _0148 at [678] - [679] and [686].
[358] C0004, _0145 at [674].
[359] C0004, _0190 at [857].

to use Terminals 3 and 4 for the foreseeable future if they wished, including well past 2025. Further, that PAPL did not engage with Qantas before or during the Relevant Period on the basis that 'capacity constraints' would require Qantas to move out of those terminals. Additionally, PAPL's own internal documents were premised on Qantas being able to use Terminals 3 and 4 past 2025.[360]

438   Qantas contend none of the speculative reasons advanced by PAPL to the contrary are made out, including an alleged lack of stand capacity, forecourt capacity or 'processing capacity'. Further, there was no reasonable basis in the Relevant Period to consider that accelerated depreciation was justified as a result of 'capacity constraints' and relatedly, to use a 7 year useful life in a building block model.[361] Qantas suggest there are three points that demonstrate 'capacity constraints' are an *ex post facto* construct. First, the actual history of Terminals 3 and 4. Secondly, PAPL's position in negotiations. Thirdly, there is no reference to these constraints as serious problems in contemporaneous documents and all references to accelerated depreciation are justified on the basis of Qantas 'agreeing' to vacate the terminals before 31 December 2025.[362]

439   Secondly, and alternatively, even if those reasons were subjectively held, it was not reasonable to hold such views in the Relevant Period. Qantas contend those views were demonstrably wrong and unjustified when viewed at the time, as confirmed by retrospectant evidence.[363]

440   Qantas highlight PAPL now accepts it cannot and will not be able to complete a new terminal at Airport Central, nor have the necessary new infrastructure and runway ready, in time for Qantas to use them by 2025.[364] Further, such material is relevant as retrospectant evidence, being evidence from a time later than a period in question from which inferences can be drawn about matters obtaining in that period.[365]

441   Qantas submit it is clear PAPL has, at some point, formed the view that 31 December 2025 became impossible and evidence that PAPL later had that view is relevant.[366] Similarly, evidence that it is

[360] C0004, _0156 to _0157 at [722].
[361] C0004, _0157 at [723] - [724].
[362] C0003, _0157 at [725].
[363] C0004, _0145 at [675].
[364] B0010, _0008 at [33] - [34].
[365] C0004, _0181 to _0182 at [812] - [813], citing *Astway Pty Ltd v Council of the City of the Gold Coast* [2008] QCA 73; (2008) 159 LGERA 335 [34] and [41] (H0150, _0002 and _0012 to _0013).
[366] *Cross on Evidence*, [1170] (G0019).

now impossible to build the necessary infrastructure by the relevant date is relevant and probative that that may have been the case earlier, during the Relevant Period.[367]

442   In the alternative, Qantas submit if there was some basis to use a shortened useful life for Terminal 3, it is neither fair nor reasonable for PAPL to rely on that shortened life so as to increase the price to be paid by Qantas for aeronautical services in the Relevant Period, either in whole or part.[368]

443   Qantas submit Mr Teng conceded that if Terminals 3 and 4 could be turned to income-earning activities (whether aeronautical or non-aeronautical), it would:[369]

(a)   be unreasonable for PAPL to depreciate its value to nil for the purposes of a building block pricing model;

(b)   be necessary to treat those assets as having a useful life after 2025; and

(c)   not be appropriate to charge an airline for that cost.

444   Qantas contend PAPL should not be permitted to evade that outcome by its own unilateral action. For example, it is unreasonable for PAPL to say that while it would have to account for use of the terminals for non-aeronautical purposes, it does not need to do so if it chooses to demolish them and therefore render them unavailable for any use. Further, in such a case it would only be fair to impose a shortened useful life on Qantas if they agreed to that course. It would not be fair or reasonable for PAPL unilaterally to force that on Qantas.[370]

445   Qantas conclude there is no basis for PAPL to use accelerated depreciation in a building block model, and the useful life of Terminal 3, when viewed in the Relevant Period, was 20 years.[371]

446   PAPL contends Qantas' preferred date of 2038 appears to depend on Mr West's testimony, which cannot be accepted as reliable evidence on which the court can make a finding that 2038 is the appropriate date for depreciation of Terminal 3. PAPL submits that while Mr West describes in his evidence a process by which he derived from the 2011

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[367] C0004, _0182 at [813].
[368] C0004, _0145 at [676].
[369] ts 15 - 17.
[370] C0004, _0182 to _0183 at [817] - [818].
[371] C0004, _0185 at [831].

pricing model a 20 year useful life beyond 2018,[372] he makes clear he followed this process in order to arrive at a figure to use in negotiations with PAPL.[373]

447   Accordingly, PAPL suggests there is nothing that demonstrates Mr West's methodology, or the result of it, provides a reliable basis on which the court should adopt it as the measure of useful life of Terminal 3, and it is an erroneous oversimplification. That is, if recourse is given to the building block model used ahead of the 2011 pricing period, the actual 'remaining life' must necessarily be something far less than 20 years.[374]

Qantas' response to PAPL's position

448   Qantas consider PAPL's submissions regarding the 'useful life' to be founded (at least, in part) on what PAPL claims it was 'reasonable' for it to 'expect'. Qantas submit this is in error, as the question is not limited to PAPL's expectation (ie its subjective belief), but all relevant circumstances. Qantas contend it would not be reasonable for the court to find that the useful life of Terminal 3 in the Relevant Period was only 7 years, rather than the 20 years that PAPL assessed it at internally.[375]

449   Qantas submit the court must make a finding of fact on the useful life. That it is not being asked (as PAPL suggests) to make a finding as to what the owner expected the useful life to be, whether reasonably or otherwise.[376] Further, in the inquiry as properly framed, the court is not limited to the views of the owner. It must take into account other evidence going to what the useful life is, including the intentions of the occupier of the land. Qantas contend that includes where that occupier has rights, such as the good faith entitlement arising under the Heads of Agreement and Development Agreement. That is, PAPL could not act unilaterally to remove from Qantas the ability to stay in Terminal 3 in circumstances where Qantas were under an obligation to negotiate and exercise best endeavours, but expressly had no obligation to vacate Terminal 3 by the end of 2025.[377] Further, the obligation to exercise best endeavours did not, against the actual facts, give any basis to

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[372] D0009, _0019 at [95]-[96].
[373] C0003, _0160 at [521(a)]; D0019, _0004 to _0005 at [14] - [15].
[374] C0003, _0160 at [521(b)].
[375] C0004, _0186 at [837].
[376] C0004, _0186 to _0187 at [838].
[377] C0004, _0151 to _0152 at [698] to [700] and _0187 at [839].

believe Qantas would cease using Terminals 3 and 4 and they had no useful life after 2025.[378]

450　　　　Qantas contend at all relevant times there has been no enforceable requirement on Qantas to move their operations by any particular date, including 31 December 2025.　Qantas submit it is unclear whether PAPL seriously contends that the Heads of Agreement requires Qantas to move by that date.　However, if it does, Qantas say it is apparent from the terms of the Development Agreement (which are confidential between the parties) that they are under no obligation under that agreement to vacate Terminals 3 or 4 by then.[379]　Further, that while the parties could agree to negotiate the commercial terms required for the relocation, they cannot enforceably 'agree to agree' on terms not set and not capable of being determined by some agreed mechanism.[380]

451　　　　Qantas were of the view, and contend they had made it known to PAPL on many occasions, the Development Agreement did not oblige Qantas to move if commercial agreement could not be reached.[381] Further, Qantas had not committed to cease using Terminals 3 and 4 by 31 December 2025 and had made this unambiguously clear to PAPL.[382] Therefore, there was no reasonable basis in the Relevant Period to consider that accelerated depreciation was justified as a result of any commitment by Qantas.[383]

452　　　　Qantas contend PAPL's Chief Financial Officer, Mr Pereira, accepted in cross-examination that Qantas had refused to give a direct and binding commitment to achieve consolidation by 31 December 2025, but instead had been prepared to make promises to use best endeavours, subject to the parties being able to agree on commercial terms.[384]

453　　　　Qantas submit there was no other avenue by which PAPL could have required Qantas to relocate.　That is, it was not open to PAPL to have sought to 'evict' Qantas, such that it could reasonably be

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[378] C0004, _0189 at [852]; F0331; F0351.
[379] C0004, _0149 at [690] - [691].
[380] C0004, _0149 at [692], citing ***Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*** [1982] HCA 53; (1982) 149 CLR 600, 604 (H0146, _0005); ***Expectation Pty Ltd v Pinnacle VRB Ltd*** [2004] WASCA 261 [66] (H0147, _0030); ***United Group Rail Services Ltd v Rail Corporation New South Wales*** [2009] NSWCA 177; (2009) 74 NSWLR 618 [56] (H0148, _0017).
[381] D0009, _0008 at [37]; F0489; F1230, _0014.
[382] C0004, _0155 to _0156 at [712] - [717]; D0009, _0008 to _0011 at [36] - [39] and [43] - [50]; D0019, _0026 to _0027 at [116] - [120]; F0489; F1265.
[383] C0004, _0156 at [718] - [721].
[384] C0004, _0151 at [697]; ts 686.

considered in the Relevant Period that Qantas would cease using Terminals 3 and 4 even if no commercial agreement was reached.[385] Further, the evidence from PAPL witnesses was that this proposition (a forced eviction of Qantas from Terminal 3) was not even on the table.[386] Qantas submit this is consistent with PAPL's expectation that agreement with Qantas to move by 2025 would be reached, in the sense that if agreement was to be reached the issue of forced eviction would not arise. However, Qantas submit that PAPL's expectation is not sufficient for it to justify accelerated depreciation and to do so, PAPL needed to be satisfied there was no prospect of the Terminal 3 assets having any useful life (aeronautical or non-aeronautical).[387]

454   Further, from a practical perspective, there was no terminal into which PAPL could move Qantas, if it 'evicted' them from Terminals 3 and 4 and no reasonable prospect that one would exist.[388] Qantas submit PAPL has not attempted to prove that it could have had in place facilities for Qantas to occupy (and the necessary upgraded taxiways and new runway) such that PAPL would have been able credibly to threaten to evict Qantas by 31 December 2025, let alone to be able to do so.[389]

455   Qantas also refer to the APP, which state decisions about the allocation of risk must be shared and consensual and are not to be imposed unilaterally by the asset owner onto others.[390]

456   In the alternative, Qantas submit that even if PAPL's attempt to limit the inquiry to its subjective belief or 'expectation' is correct, it is not reasonable for PAPL to expect that Terminal 3 had no useful life beyond 2025, on the following bases.[391]

457   First, PAPL's own assessment of the useful life of the Terminal 3 building was 20 years. PAPL must discharge an onus to show that the shorter 7 year period is reasonable, and the 20 year figure is not reasonable.[392]

458   Secondly, PAPL only informed Qantas that it considered accelerated depreciation should exist in around March 2018, shortly

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[385] C0004, _0151 at [699].
[386] C0004, _0152 at [704]; ts 687; ts 7.
[387] C0004, _0152 at [706]; ts 686 - 687.
[388] C0004, _0153 to _0154 at [707] - [709]; ts 545; ts 5 - 7.
[389] C0004, _0154 at [710].
[390] C0004, _0187 at [840]; F0066.
[391] C0004, _0187 at [841].
[392] C0004, _0187 at [842].

before the 30 June 2018 end date of the PSA. This was not some long-standing shared view, and was inconsistent with the basis on which prices for Terminal 3 were calculated in all ASAs before 2018, including the PSA.[393]

459   Thirdly, by agreement between the parties, Qantas had no binding commitment to move out of Terminals 3 and 4 by any particular date. Qantas committed to working to try to do so using best endeavours. However, as reflected in a PAPL document dated 15 May 2018, while PAPL had initially sought a binding commitment from Qantas that they must achieve consolidation no later than 31 December 2025, 'this was a deal-breaker for Qantas' and ultimately:[394]

> PAPL compromised and the parties agreed that each would use Best Endeavours to achieve Consolidation by 31 December 2025 and to agree new PSAs.

460   Qantas submit that document is the best contemporaneous documentary guide to how PAPL saw the obligations on Qantas during the Relevant Period.[395]

461   Fourthly, Qantas had made clear to PAPL in unambiguous terms, on many occasions, that Qantas' commercial agreement was required, and they would not move otherwise. Qantas submit that even if one (wrongly) looks only at PAPL's expectation, the evidence does not support the conclusion that it was reasonable for PAPL to expect that Qantas would move and in fact, the opposite is the case.[396]

462   By the Relevant Period, PAPL had already moved on from one terminal concept (STEP) and was at the time considering a second concept design, the International Terminal Upgrade (ITU), which was to be linked to a separate new domestic terminal (NDT).[397] Qantas refer to a PAPL document from October 2018, which shows ITU was expected to be completed in 2028 and PAPL was considering three scenarios. The second scenario was Qantas staying 'until 2028' and the third was Qantas staying 'until 2032'.[398] Qantas observe neither the second nor third scenario is said to be foreclosed as at 31 December 2025 by a lack of capacity.[399]

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[393] C0004, _0187 at [843].
[394] F1230, _0014.
[395] C0004, _0187 to _0188 at [844].
[396] C0004, _0188 at [845].
[397] D0016, _0010 at [47(a)].
[398] C0004, _0166 at [756] and _0188 at [846]; F1281, _0001.
[399] C0004, _0166 at [757].

463   Further, that document refers to a 'regular depreciation case', contrasted against an 'accelerated depreciation case'. For each scenario on the 'regular depreciation case', Terminals 3 and 4 are described as still having residual value. The document also contemplates development of Airport West once Qantas vacate Terminals 3 and 4.[400] Qantas therefore submit PAPL's development ambitions (turning Airport West into a commercial or other non-aeronautical property income stream after Qantas vacate it) should be considered when assessing accelerated depreciation.[401]

464   Therefore, on PAPL's own documents, toward the middle of the Relevant Period, PAPL was already working on the basis that the update to Terminal 1 International that would be required prior to Qantas' international operations moving to Airport Central, would not be available until 2028. Qantas contend PAPL could have had no reasonable expectation that Qantas would vacate Terminal 3 three years before the ITU would be completed.[402] Further, that this was supported by many other documents, including Qantas' statement on 2 August 2018 that:[403]

> QF had not yet committed to 2025 move so premature to accelerate the depreciation.

465   Fifthly, PAPL's own documents indicated it knew, and was working on the basis, that Qantas' agreement was necessary and would have to be obtained in commercial agreement based on a business case that was acceptable to Qantas.[404] Further, from when accelerated depreciation was first raised with Qantas, PAPL knew it had to 'confirm' the 'assumption' that Terminals 3 and 4 would be subject to accelerated depreciation, and it would seek 'contractual agreement' to that effect.[405] PAPL's approach was that accelerated depreciation was only justified if Qantas agreed to move, which included agreeing the design of a new terminal to move into.[406]

466   In circumstances where, by the end of the Relevant Period, the then-terminal concept design (ITU and NDT) had not been agreed, was not a final design, and even PAPL proceeded on the basis that the ITU would not be ready until 2028, PAPL could not have had a reasonable

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[400] C0004, _0167 at [760]; F1281, _0001.
[401] C0004, _0167 at [761].
[402] C0004, _0188 at [847].
[403] C0004, _0188 at [848]; F1265, _0002.
[404] F0489.
[405] F1128, _0014 and _0017.
[406] C0004, _0188 at [849].

belief that Qantas would cease using Terminals 3 and 4 by the end of 2025.[407]

Capacity constraints

467   Sixthly, none of PAPL's points concerning capacity change this conclusion. Qantas submit PAPL did not approach negotiations with Qantas in the Relevant Period on the basis Qantas would be capacity constrained, and point to the absence of evidence from PAPL witnesses to that effect.[408] Further, PAPL's own documents in the Relevant Period did not suggest Qantas would be capacity constrained.[409] Rather, PAPL expected Qantas would say they could continue to operate from Terminals 3 and 4, would be able to meet any issues if and when they arose, and it would likely be cheaper for Qantas to do this than move to Airport Central.[410]

468   Qantas contend on this basis, when PAPL did not actually consider any capacity issues would exist, and where it positively understood capacity issues would not be a problem, it is not open to PAPL to now argue it had a reasonable expectation that Qantas would have to move by 2025. Qantas submit the only finding open on the evidence is the parties knew and worked on the basis that Qantas could stay in Terminals 3 and 4 until at least 2032 if they wanted to, if no commercial agreement was reached.[411]

Stand capacity

469   Qantas contend Mr McGregor's unchallenged evidence should be accepted. That Qantas have sufficient stand capacity until at least 2030[412] and, while it would not be ideal, some or all of the measures he identified could be taken if and when needed. Particularly when factoring the costs of those measures against the significant cost of constructing and moving to a new terminal in Airport Central and the associated costs of replicating existing customer product offerings and operating from the new terminal.[413]

470   As to stand capacity, Qantas contend the court should make the following findings as at the Relevant Period:

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[407] C0004, _0188 to _0189 at [850].
[408] C0004, _0160 to _0162 at [735] - [745].
[409] See for example, F1281; F1219, _0007, _0010 and _0013 to _0016.
[410] C0004, _0189 at [854], _0165 to _0166 at [754] - [755] and _0169 at [767]; F1289.
[411] C0004, _0189 at [855]; F1281.
[412] ts 813 - 815.
[413] D0008, _0026 to _0027 at [118] and [125]; C0004, _0162 at [744].

(a)   the stand capacity of the Airport West precinct is 64 NBE;

(b)   an additional four NBE positions can be created if necessary;

(c)   PAPL's best estimate in the Relevant Period of Qantas' future stand requirements is found in the PAPL 2020 Master Plan;[414]

(d)   Qantas can manage their expected future demand by the means set out by Mr McGregor;[415]

(e)   there is and would be adequate stand capacity for Qantas into the indefinite future, and Qantas would not encounter capacity constraints by 2025 on the basis of aircraft stands; and

(f)   that was PAPL's view throughout the Relevant Period, and PAPL did not proceed on the basis that Qantas would have to relocate by 31 December 2025 on the basis of capacity constraints.[416]

471   Regarding the stand capacity of Airport West, Qantas submit the difference in the evidence was between Mr McGregor's figure of 64 NBE[417] and Ms Boshard's figure of 59 NBE.[418] In Mr McGregor's first statement, he said the stand capacity was 61 NBE,[419] but in his second statement said he had failed to include three positions (R1, R2 and R3) equivalent to 3 NBE and therefore the correct stand capacity was 64 NBE.[420]

472   Mr McGregor's evidence is to be preferred over Ms Boshard's on this issue. As was apparent from Ms Boshard's testimony, she lacked expertise on this topic and relied heavily on an airfield planner in her team in relation to this issue for the purposes of her statement.[421] That planner was not called to give evidence (nor anyone else with appropriate expertise), despite PAPL being given the opportunity to do so. I acknowledge Mr McGregor's evidence that the R bays were designed as 'overflow' positions and there are restrictions associated with use of those bays. However, I accept Mr McGregor's evidence

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[414] F0768, _0097.
[415] D0008, _0021 to _0024 at [98] - [109]; D0018, _0011 at [48] - [49].
[416] C0004, _0174 to _0175 at [783].
[417] D0018, _0002 at [5].
[418] C0004, _0175 to _0177 at [784] - [790]; D0015, _0004 at [14].
[419] D0008, _0017 at [80].
[420] D0018, _0002 at [5].
[421] ts 657.

that the R bays should be accounted as part of the overall capacity of Airport West.[422]

473   Further, I accept Qantas' submission that it appears from PAPL's evidence, it may be possible for an additional 4 NBE positions to be created in Airport West.[423]

474   I also accept Qantas' position as to PAPL's best estimate of Qantas' 2025 NBE requirements, being a total of 46 NBE, as reflected in PAPL's 2020 Master Plan, as derived from emails sent in November 2018.[424]

475   Additionally, I accept Qantas may be able to manage future demand by one or more of the means set out by Mr McGregor, including bussing, new contact bays and 'upgauging' aircraft (increasing aircraft size).[425]

476   As such, I find that Qantas would not encounter capacity constraints by 2025 on the basis of aircraft stands.

Split operations

477   Qantas observe the evidence of Ms Boshard, which PAPL relies on regarding Qantas' preference not to split operations, was premised on an assumption as to a lack of capacity. That is, a capacity constraint would force Qantas to relocate because they would not conduct split operations if it became necessary to do so. Qantas submit the documents Ms Boshard relies on in support of that proposition do not support her view.[426]

478   One of the documents is dated 24 October 2019 and Qantas submit by reason of its date, it would not directly be the foundation for a view formed by PAPL in the Relevant Period.[427] Further, the document does not support Ms Boshard's proposition, in that she accepted Qantas were already conducting operations split across terminals,[428] and the intention of the document was to emphasise any agreement to relocate to Airport Central would need to [redacted].[429]

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[422] ts 830 - 831.
[423] C0004, _0177; D0015, _0004 to _0005 at [17]; F0846.
[424] C0004, _0177 to _0178 at [792] - [794]; F0768, _0097; F1374; F1375; F1376.
[425] C0004, _0178 to _0180 at [795] - [803]; D0008, _0022 to _0023 at [100], [102] and [104].
[426] C0004, _0169 to _0170 at [769] - [770].
[427] F0721, _0001.
[428] ts 620.
[429] C0004, _0170 at [771].

479   The second document Ms Boshard relies on is titled 'Guiding Design Principles', which Qantas submit is clearly addressed at the process of agreeing a new terminal design in Airport Central and does not purport to be a statement about it being unacceptable to Qantas to conduct split operations in the event Terminals 3 and 4 became capacity constrained.[430]

480   In her second statement, Ms Boshard refers to meetings and documents in which representatives of Qantas had indicated Qantas do not regard it as acceptable, going forward, for their operations to be split across terminals.[431] However, Qantas observe that only two of the documents referred to by Ms Boshard were dated within the Relevant Period, and each deal with what Qantas wanted in a new terminal after relocation (not what Qantas might do if they became capacity constrained in Terminals 3 and 4).[432]

481   I accept Qantas' position in respect of the split operations issue and the associated evidence.

Forecourt capacity

482   Ms Boshard gave evidence that if Qantas were to remain in Terminals 3 and 4 beyond 2025, the 'landside forecourt' (the roads and kerbside drop off / pick up areas outside the terminal buildings), would need to be substantially modified to support the increased demand, especially during peak periods. Further, undertaking the necessary works would not be an attractive option from a planning perspective when consolidation is expected to occur in the relatively near future. That evidence was admitted as opinion evidence, based on a study commissioned in 2015.[433]

483   Mr McGregor gave evidence that in his role as Manager - Airport Infrastructure Strategy, he was responsible for working with PAPL on any potential redesign of the Terminal 3 and 4 forecourt for Qantas.[434] Mr McGregor states the 2015 study was not commissioned in response to any concerns Qantas had about landside forecourt capacity.[435] Further, at the time he had concerns about the accuracy of the modelled

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[430] C0004, _0170 to _0171 at [772].
[431] D0015, _0018 at [75].
[432] C0004, _0171 to _0172 at [773] - [774].
[433] D0015, _0017 to _0018 at [68] - [72].
[434] D0018, _0007 at [33].
[435] D0018, _0007 at [34].

passenger forecast for Qantas at Terminals 3 and 4 in 2024 in the study, in that he considered them to be significantly too high.[436]

484   Mr McGregor's evidence is that in 2018 and 2019, he did not consider there to be an existing or likely future problem with the capacity or crowding of the Terminal 3 and 4 forecourt. Further, at all times, Qantas had had a range of measures available to prevent forecourt capacity becoming a problem before 2024.

485   Again, I accept Mr McGregor's evidence over that of Ms Boshard, noting that the issue identified by Ms Boshard is premised on 'increased demand'. Further, it appears work *could* be undertaken to address increased demand if that was necessary. Ms Boshard has simply described such work as an unattractive option from a planning perspective.

486   PAPL submits that as at mid-2018, it was reasonable to expect and to plan on the basis that:

(a)   Qantas would relocate to Airport Central by 2025;

(b)   there would be no further aeronautical or other use for Terminal 3 after that point in time, and

as at mid-2018, it was reasonable to adopt a useful life for Terminal 3 of 2025 in a building block calculation of price.[437]

487   Qantas submit the issue is not what it was reasonable to 'plan' on the basis of, and that the court is being asked to determine whether by the end of the Relevant Period it was reasonable to find that Terminal 3 had no useful life past 2025. A finding Qantas contend is not open. Further, the assessed useful life of 20 years was not displaced, was reasonable, and should be used in a building block model.[438]

Depreciation in the building block model & APP

PAPL's position

488   PAPL submits it is a reasonable and appropriate exercise of judgement as at mid-2018 to depreciate the Terminal 3 assets by the end of 2025 in the building block calculation.[439]

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[436] D0018, _0007 at [35].
[437] C0003, _0161 at [522].
[438] C0004, _0191 at [859].
[439] C0003, _0162 at [523].

489   The building block model aims to calculate prices sufficient to enable recovery of the costs of providing aeronautical services, including (through depreciation) the return of the capital investments associated with providing those services.[440] That means if, on an exercise of reasonable judgement, an asset's economic life is expected to end at a particular future point in time, it is necessary and consistent with the object of the calculation to depreciate the asset in full to that point in time in the pricing model. PAPL submits to do otherwise is to provide, implicitly, for the business not to recover part of the costs of providing the relevant services through its pricing, which is inconsistent with the premise and object of the model.[441]

490   PAPL contends the APP are consistent with this conclusion, which relevantly provide:

      (a)   that prices should:

            (i)   be set so as to generate expected revenue for a service or services that is at least sufficient to meet the efficient costs of providing the service or services; and

            (ii)   include a return on investment in tangible (non-current) aeronautical assets, commensurate with the regulatory and commercial risks involved and in accordance with these Pricing Principles;

      …

      (c)   that prices (including service level specifications and any associated terms and conditions of access to aeronautical services) should:

      …

            (ii)   reflect a reasonable sharing of risks and returns, as agreed between airports and their customers (including risks and returns relating to changes in passenger traffic or productivity improvements resulting in over or under recovery of agreed allowable aeronautical revenue).[442]

491   PAPL refers to principle 1(a) and submits that requires Terminal 3 prices be set to generate expected revenues at least sufficient to enable recovery of the cost of providing services from the terminal, including the capital cost of the terminal assets by means of depreciation.[443] That

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[440] E0003, _0013 to _0014 at [31] - [32]; E0004, _0019 at [47] - [48].
[441] C0003, _0162 at [524].
[442] F0066, _0001.

is, where Terminal 3 reasonably is not expected to be used after 2025 as an aeronautical and income-producing asset, principle 1(a) requires the terminal assets be depreciated in full to that point in time for the purposes of PAPL's aeronautical pricing. PAPL submits that is the manner in which it understood and approached the matter in its building block calculation for Terminal 3 in 2018.[444] PAPL further submits this approach is also consistent with authority concerning the way in which similarly worded pricing guidance to principle 1(a) has been understood, and the sorts of policy objectives that are involved.[445]

492   Qantas contend such submissions do not assist PAPL, as they cannot overcome the factual findings. Questions about the propriety of recovering costs across the useful life depend on the underlying question of the useful life itself, which Qantas submit was not 7 years during the Relevant Period.[446]

493   PAPL submits the balance of the APP do not support a different conclusion or make it unreasonable to depreciate Terminal 3 to 2025. In particular, principle 1(c)(ii), is no answer to PAPL's position. First, because that principle refers to a reasonable sharing of risks and returns 'as agreed'. Therefore, it has no application where there has been no agreement between PAPL and Qantas as to how any risks or returns associated with their commercial relationship should be shared.[447]

494   Further, reasonable sharing of risks and returns cannot be considered in a vacuum, solely by reference to the Terminal 3 depreciation issue. That is, the assessment required must be carried out by reference to all potential risks and returns associated with the commercial relationship between PAPL and Qantas, and how those risks and returns are (or might be) shared. In that context, PAPL submits it is unclear how requiring Qantas to bear a particular risk in connection with the full depreciation of Terminal 3 to 2025 could fairly be said to give rise to an unreasonable sharing of risks and returns.[448]

495   Additionally, given principle 1(a) contemplates PAPL should be entitled to recover the costs of its capital investment in Terminal 3 through the setting of aeronautical prices, it could not be unreasonable

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[443] C0003, _0162 at [525].
[444] D0003, _0017 at [73], _0033 at [148] and _0033 to _0036 at [156] - [160].
[445] C0003, _0162 to _0163 at [526]; H0060, _0030 to _0031 at [76] - [78]; E0007, _0085 to _0086 at [350] -[351]; F1200, _0024, _0370; H0016, _0019 at [74] and [76].
[446] C0004, _0192 at [860].
[447] C0003, _0163 at [528(a)].
[448] C0003, _0163 at [528(b)].

for PAPL to decline to share any risk in this respect with Qantas. The more general principle 1(c)(ii) would have to be read subject to the more specific principle 1(a).[449]

Qantas' position

496   Qantas submit a result where PAPL unilaterally forces accelerated depreciation onto Qantas is contrary to the APP.[450]

497   Qantas submit principle 1(a)(ii) assumes an airport would face commercial risks in relation to its investment in tangible assets, and one such risk was PAPL would decide the useful life of such an asset is shorter than it had previously thought, for whatever reason. Further, the imposition by PAPL of accelerated depreciation on Qantas without Qantas' agreement is contrary to the APP, and accordingly is unreasonable in the context of determining reasonable remuneration for PAPL in a quantum meruit.[451]

498   Thirdly, it was clear from PAPL's lay witnesses and documentary evidence that Qantas vacating Airport West would be to PAPL's benefit in two ways. First, earning non-aeronautical revenue from the Airport West precinct and secondly, lowering the 'Fair Market Value' PAPL would have to pay Qantas for Terminal 4 under the lease for that terminal.[452]

499   Qantas refer to the 2020 Master Plan, which identified PAPL's intention to 'transition' Airport West to substantial non-aeronautical commercial use,[453] and a PAPL document which identified traffic problems caused to non-aeronautical uses if Qantas remained in Terminals 3 and 4.[454] Additionally, a further PAPL document which identifies Qantas remaining in Terminals 3 and 4 would delay PAPL's Airport West development ambitions,[455] and Mr Teng's confirmation that as at October 2018, PAPL's intention was to develop property in Airport West.[456]

500   Qantas submit in circumstances where PAPL's own documents show that its non-aeronautical revenue and profit was greater than its

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[449] C0003, _0164 at [528(c)].
[450] C0004, _0183 at [819] - [820] and [822]; F0066, _0001.
[451] C0004, _0184 at [825].
[452] C0004, _0184 at [826]; F0010, _0064 to _0066; F0019; F0042; D0016, _0008 at [35]; F1231; ts 691, 696; F1219; ts 680.
[453] C0004, _0184 at [827]; F0768, _0069 and _0072.
[454] F1390, _0002 and F1490, _0003.
[455] F1281, _0001.
[456] C0004, _0184 to _0185 at [827]; ts 18.

aeronautical revenue and profit,[457] it would be unreasonable for PAPL to impose all the depreciation of Terminal 3 as an aeronautical asset onto Qantas in order to free up the asset for non-aeronautical use at PAPL's sole benefit.[458]

501 Further, PAPL's documents showed it believed the effect of accelerated depreciation would be to reduce the amount it had to pay Qantas under the 'Fair Market Value' provision for the value of the Terminal 4 building after the Terminal 4 lease expired.[459]

502 Qantas therefore submit it is unreasonable for PAPL to insist on accelerated depreciation, due to its belief that it would be better positioned to make three separate profits at Qantas' expense, based on PAPL's unilateral choice, taken against Qantas' wishes:

(a) the inflated fees for aeronautical services that Qantas have to pay;

(b) a perceived entitlement in the reduction in the 'Fair Market Value' payment that PAPL would have to make to Qantas for Terminal 4; and

(c) the ability for PAPL to capture all profits from use of Airport West for non-aeronautical purposes, given its 'dual till' system, where PAPL retains profits on non-aeronautical income, but has aeronautical costs paid for by airlines.[460]

503 PAPL submits the fact the site of Terminal 3 might be used for another purpose later is unsurprising, given PAPL is a commercial entity and might seek to make use of its available property. PAPL submits that is not relevant to the correct depreciation treatment for the current Terminal 3 assets and if in the future the site is redeveloped and used for non-aeronautical purposes, then under the 'dual-till' approach, neither the revenues nor costs associated with that will impact aeronautical prices. Therefore, the possible future (non-aeronautical) use of the site is immaterial, which PAPL says consistent with the APP and the regulatory scheme and involves no unfairness to Qantas.[461]

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[457] ts 678; F1255.
[458] C0004, _0185 at [828].
[459] C0004, _0185 at [829].
[460] C0004, _0185 at [830].
[461] C0003, _0164 to _0165 at [532].

504   Qantas contend that as principle 1(c)(ii) states, if this risk is to be shared, it should be reasonably shared by agreement. Absent further agreement, the risk remains on PAPL, or at least it remains on PAPL where there has been a previous agreement as to the asset's useful life, allowing for agreed subsequent capital expenditure. Therefore, the lack of agreement means that PAPL must bear the risk of an earlier ending of useful life than the PSA agreed life and subsequent improvements would imply. Qantas submit the clear intent of principle 1(c)(ii) is to prevent what PAPL is seeking to do - allowing one party to impose a risk, and burden, unilaterally on the other.[462]

Capital Expenditure

PAPL's position

505   PAPL submits that by 2018, the remaining useful life of the terminal assets in the 2011 model would be the sum of the remaining useful life of the opening asset base and the remaining useful life of new capital investment in the terminal, over the 2011 to 2018 period. By 2018, the opening asset base had a remaining useful life of two and a half years. New capital investment in Terminal 3 had a useful life of 20 years.[463]   Accordingly, the remaining useful life of that capital expenditure will depend on when the investment was made in the terminal. PAPL submits the model shows that in 2010, there was $5.80 million of capital expenditure invested in the terminal buildings and by 2018, this would have a remaining useful life of 12 years. In 2011, $21.79 million was to be invested in the terminal buildings and this would have a remaining useful life of 13 years by 2018.[464]

506   I observe that while PAPL's submissions highlight the remaining useful life of capital expenditure by 2018 was not 20 years, the submissions do appear to indicate the remaining useful life of capital expenditure by 2018 was 13 years. That is, a useful life through to 2031.

507   PAPL observes its 2018 aeronautical pricing model does not provide for additional forecast capital expenditure that would be required to keep Terminal 3 functioning adequately, and Qantas have not addressed what capital expenditure assumptions are appropriate if their preferred approach is adopted.[465]

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[462] C0004, _0192 at [862] - [864].
[463] F0106.
[464] C0003, _0160 at footnote 721.
[465] C0003, _0166 at [541].

508   PAPL submits that if Qantas' case on depreciation is adopted, the court must do the best it can on a quantum meruit to estimate an appropriate figure for the forecast capital expenditure over the period of the pricing model and take that into account when calculating a price for services at Terminal 3.[466]

509   Further, from the available evidence, there are two apparent options for estimating the forecast capital expenditure. First, the court could take an average of the forecast capital expenditure included in the 2017-18 pricing model for Terminal 3 for the 2019 and 2020 financial years ($3.662 million), and project it forward for each of the 2021-2025 financial years (being years where there is no significant allowance for forecast capital expenditure).[467]

510   Alternatively, the court could take the average of the forecast capital expenditure for the 2012-2018 financial years utilised in PAPL's 2011 domestic terminal pricing model ($2.040m), adjust for inflation up to 2021 (at 2.5%), and project the resulting figure ($2.618m) forward for each of the 2021-2025 financial years.[468] PAPL submits this alternative approach seems aligned with Qantas' use of the 2011 pricing model to arrive at their preferred depreciation treatment for the Terminal 3 assets and might be preferable for that reason.[469]

Qantas' position

511   While Qantas submit it is PAPL's onus to prove what inputs should be used,[470] Qantas accept in the alternative that the court has the power to try and determine a figure. If necessary, Qantas concede the court would be entitled to attempt to estimate a figure as PAPL suggests in its alternative approach, as set out in the preceding paragraph.[471]

Analysis

512   In the context of this proceeding, I do not accept PAPL's contention that the depreciation treatment for an asset is a matter for the owner's judgement. I accept Qantas' submission that in a quantum meruit case where costs may be assessed by use of a building block model, the court is to determine whether the inputs into that model are

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[466] C0003, _0167 at [542].
[467] C0003, _0167 at [543(a)]; F1121.
[468] C0003, _0167 at [543(b)]; F0106.
[469] C0003, _0167 at [544].
[470] C0004, _0193 at [871].
[471] C0004, _0194 at [873].

reasonable and reflect efficient outcomes. Further, the court must ultimately determine the inputs on all of the evidence available to it, in all of the relevant circumstances. It is the court's judgement, not the owner's judgement, that is relevant.

513   I find that during the Relevant Period, a 13 year useful life for the Terminal 3 buildings, through to the end of 2031, is reasonable in all of the circumstances.

514   In reaching this view, I consider the following matters to be most persuasive. First, the evidence that in the relevant building block model for the PSA, a 20 year useful life was used.[472] That is, the useful life of Terminal 3 was in 2011 predicted to end in 2031. This is reflected in PAPL's submissions on the capital expenditure issue.

515   Secondly, PAPL's calculations of the useful lives of Terminal 3 assets in September 2017 supporting the position that as at that date, the weighted useful life for the assets was (as to the majority of Terminal 3 assets, including the buildings) considered to be far longer than 7 years.[473] Further, having regard to all of the evidence, I am not persuaded that Terminal 3 had no useful life beyond 2025.

516   Thirdly, I do not accept PAPL's contentions that Qantas could not use Terminal 3 after 2025, either as a matter of law or fact, including:

(a)   under the Heads of Agreement or the Development Agreement: I accept Qantas' position those agreements did not oblige Qantas to move if commercial agreement could not be reached;

(b)   under the APP: I find PAPL's submissions in relation to the APP unpersuasive and accept Qantas' submissions regarding PAPL's unilateral imposition of accelerated depreciation of Terminal 3 on Qantas being contrary to principle 1(c)(ii);

(c)   alleged 'capacity constraints' including stand capacity, forecourt capacity and processing capacity: as set out above, I prefer Mr McGregor's evidence over Ms Boshard's on the issues of stand capacity, managing future demand (including as to bussing and split operations) and forecourt capacity. I also note PAPL's own documents forecast capacity constraints only arising in around 2032;[474] and

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[472] D0014, _0011 at [39]; D0019, _0004 at [14]; F0837, _0004 and _0022.
[473] F0452.
[474] F1281, _0001.

(d)   a lack of evidence as to what facilities Qantas could move their operations from Terminal 3 into, in the event it was necessary to move at the end of 2025. I note PAPL documentation suggests new facilities would not be complete until around 2028.[475]

517   Fourthly, it is unreasonable for PAPL to unilaterally impose a shortened useful life for Terminal 3 on Qantas.

518   I consider that the useful lives of the Terminal 3 assets should be treated independently, as contended by Qantas. Therefore, the useful life to be applied for the buildings is 13 years, the useful life to be applied for plant and equipment is 10 years, and the useful life to be applied for land is 88 years.

519   As to capital expenditure, I accept PAPL's 'alternative' position, as also conceded by Qantas. I find the average of the forecast capital expenditure for the 2012-2018 financial years utilised in PAPL's 2011 domestic terminal pricing model ($2.040m) should be adjusted for inflation up to 2021 (at 2.5%), and the resulting figure ($2.618m) projected forward for each of the 2021-2025 financial years. Having determined the useful lives of Terminal 3 assets should be treated independently, I consider this capital expenditure should be proportionally allocated between the 'buildings' and 'plant and equipment' asset classes based on their respective opening values, with their useful life to be calculated based on 13 years and 10 years respectively.

Value of the aeronautical services

Introduction

520   PAPL and Qantas advocate for different methodologies to be used to determine the market value or appropriate price for the aeronautical services provided by PAPL to Qantas at Perth Airport during the Relevant Period.

521   Mr Houston is PAPL's expert and Mr Siolis is Qantas' expert on the market value or price for the services PAPL provided to Qantas. The experts prepared individual reports, in which Mr Houston was asked for his opinion as to 'the market value' of the aeronautical services,[476] whereas Mr Siolis was asked for his opinion as to 'the desirable or appropriate method' for determining a price for

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[475] F1281, _0001.
[476] E0004, _0009 at [14].

aeronautical services.[477]   The experts also undertook calculations on instructions, and adopting particular assumptions, from the parties using aeronautical pricing models (building block models) originally prepared by PAPL.

522   The experts participated in two expert conclaves and produced a JER following each conclave. The first conclave was in relation to the value of aeronautical services provided by PAPL. The second conclave was in relation to the operation or output of the building block models, using inputs from the other expert conclaves on asset beta, gamma and WACC.

523   The experts use different methodologies to estimate market value or price. The experts agree that, in the context of this proceeding, there is no economic distinction to be drawn between the terms 'value' and 'price'.[478]

524   The experts also agree that 'efficiency' is a term of art in economics and relates generally to the idea that society's resources should be organised in a way that delivers as much utility of welfare as possible.[479]

525   The experts agree that competition in a market is effective (or workable) when no firm possesses substantial market power. It is that state in which competition is working as well as one might hope in a market economy.[480]   They agree the following definition of effective (or workable) competition given by the Federal Court captures the relevant considerations:[481]

> In a workably competitive market, some or even all participants may have some market power, in the sense that they all have some discretion over price, but no participant will have a substantial degree of market power. In such a workably competitive market, at any given time, prices might deviate from underlying costs and the deployed technologies might deviate from the most efficient ones currently available. Economic forces drive such a market towards efficient prices, outputs and costs, but not instantly.

526   The experts agree, in the context of the provision of aeronautical services by PAPL to Qantas, PAPL's minimum willingness to sell -

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[477] E0007, _0005 at [2(5)].
[478] E0013, _0007 at [13].
[479] E0013, _0016 at [53].
[480] E0013, _0016 at [54].
[481] E0013, _0016 at [57], citing ***Australian Competition and Consumer Commission v Metcash Trading Ltd*** [2011] FCA 967; (2011) 282 ALR 464 [163].

expressed in per passenger terms - can be derived by estimating the efficient long run average cost of providing such services.[482]

527   The experts also agree that the aeronautical pricing models initially prepared by PAPL, and which formed the basis of negotiations between PAPL and Qantas in relation to the pricing of aeronautical services from 1 July 2018:

(a)   are a valid representation of the building block methodology typically used to derive an estimate of the long run average cost of providing infrastructure services; and

(b)   can be taken as a representation of principle 1(a) of the Commonwealth government's APP, as set out below, but without any explicit allowance for the 'at least' component of the principle.[483]

    (a)   that prices should:

        (i)   be set so as to generate expected revenue for a service or services that is at least sufficient to meet the efficient cost of providing the service or services; and

        (ii)   include a return on investment in tangible (non-current) aeronautical assets, commensurate with the regulatory and commercial risks involved and in accordance with these Pricing Principles.[484]

528   The experts note that, although the above concepts are agreed, there is significant dispute between the parties as to the values to be adopted for various input parameters to the building block methodology, such that there are material differences in the prices so derived.[485]

529   Further, Mr Siolis agrees that the prices at which transactions take place in any market can be taken to represent 'market value' as defined by Mr Houston.[486]

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[482] E0013, _0017 at [59].
[483] E0013, _0017 at [60].
[484] F0067, _0005.
[485] E0013, _0017 at [61].
[486] E0013, _0010 at [25].

530   However, Mr Siolis does not consider a price to be appropriate for the purpose of this proceeding, simply because it could be a market price, unless the market in which the price was determined was subject to effective competition.   Mr Siolis' critical point of disagreement is principally with the usefulness of identifying a 'market value', which he considers is not a useful way of determining an appropriate price for the services provided by PAPL to Qantas.   Mr Siolis considers if the provision of services is not subject to effective competition, the market price may be higher than it would be if the market was subject to effective competition.[487]

Mr Houston's methodology

531   Mr Houston estimates the market value of the aeronautical services provided by PAPL to Qantas primarily by taking a weighted average of the prices agreed in comparable transactions with other airlines for similar services in similar circumstances.   He adjusts the price arising from those comparable transactions for differences in the non-price attributes of the terminal service, the level of risk associated with each transaction, and the value of any non-price benefits made available as part of each transaction.   Mr Houston considers whether the weighted average of the prices agreed in comparable transactions fall between a 'lower bound', which he considers an estimate of PAPL's willingness to accept, and an 'upper bound', which he considers estimates Qantas' willingness to pay.[488]

532   In relation to the adjustment for non-price attributes of the facilities provided by PAPL, Mr Houston undertook a qualitative comparison of the facilities provided by PAPL:[489]

(a)   at Terminal 1 International, Terminal 1 Domestic and Terminal 2, being the terminals predominately used by airlines other than Qantas; with

(b)   those provided by PAPL at Terminals 3 and 4, being the terminals predominately and exclusively used by Qantas, respectively.

533   This qualitative comparison was undertaken by reference to 18 distinct attributes, each of which was identified and evaluated by either PAPL or Qantas.[490]   Drawing on that comparison, Mr Houston

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[487] E0013, _0010 at [26] - [27].
[488] E0013, _0007 at [16].
[489] E0013, _0041 to _0042 at [195].

concluded the non-price attributes of the services provided at Terminals 3 and 4 to be at least comparable, if not better in some respects, than the services provided at Terminal 1 Domestic and Terminal 2. Accordingly, he found no basis on which to adjust the prices in those comparable transactions to reflect the non-price attributes of the terminal facilities used by Qantas.[491]

534   In Mr Siolis' opinion, not all of the services provided by PAPL to Qantas are comparable to the services it provides to other airlines, since the asset values and forecast passenger numbers for Terminal 3 are much lower than for the terminals used by other airlines. For example, Mr Siolis considers that because Terminal 3 has a lower associated asset value than the other domestic terminals, the revenue PAPL needs to recover from its charges for the use of Terminal 3 is also lower. Mr Siolis concludes the differences between Terminal 3 and other domestic terminals means that the prices agreed between PAPL and airlines other than Qantas (which use other domestic terminals), are unlikely to be reflective of the prices that would be agreed between PAPL and Qantas.[492]

535   In Mr Houston's opinion, differences in relative asset values and forecast number of passengers have no bearing on whether one terminal offers a better service than another, and do not establish an economic reason for prices to be different as between terminals.[493]

536   While I accept that services provided at different terminals may be similar, I am not persuaded by Mr Houston's position in relation to this issue. I accept Mr Siolis' view that not all of the services provided by PAPL to Qantas are comparable to services provided to other airlines. Further, given the differences between Terminal 3 and other domestic terminals, including in relation to asset values, the prices agreed between PAPL and airlines other than Qantas are unlikely to be reflective of the prices that would be agreed between PAPL and Qantas.

537   Secondly, Mr Houston applied an adjustment to account for the different commercial circumstances applying as between aeronautical services provided to other airlines and those applying to the services supplied by PAPL to Qantas. Of the five comparable transactions:[494]

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[490] E0013, _0042 at [196]; D0004, _0010 to _0012 at [53]-[58]; D0008, _0011 to _0015 at [55] - [71].
[491] E0013, _0042 at [197].
[492] E0013, _0047 at [230] - [234].
[493] E0013, _0044 at [209].
[494] E0013, _0042 at [198].

(a)   three (Virgin, Alliance and REX) involved the provision of services at prices agreed for a seven year term;

(b)   one (for airlines BARA) reflected prices that had been agreed over a seven year term, along with a one year extension applicable during the relevant period; and

(c)   one (CoU) reflected services taken on the same basis as Qantas – being in the absence of an aeronautical services agreement with PAPL.

538   PAPL states a fundamental reason for it entering into aeronautical service agreements with airlines is to secure increased certainty in relation to:[495]

(a)   the risk of not receiving sufficient revenue to cover the cost of providing aeronautical services; and

(b)   to provide it with a legal mechanism for enforcement of its terms, thereby encouraging performance by an airline and the resolution of disputes, should they occur.

539   In Mr Houston's opinion, these risk mitigation attributes are economically significant, and the circumstances of this proceeding can be taken as one example of the materialisation of the risk to PAPL of not having an aeronautical services agreement in place.[496] Consistent with its perception of the risk-mitigating benefits of having an aeronautical services agreement in place, PAPL applies a 10% uplift to determine its CoU price, being that applying in the absence of an agreement with PAPL.

540   Accordingly, since he considers the CoU price itself a comparable transaction, Mr Houston applies a 10% uplift to the prices agreed between PAPL and each of the four airlines, to align those prices with the circumstances in which aeronautical services were provided by PAPL to Qantas during the Relevant Period.[497]

541   Mr Siolis considers Mr Houston's 10% uplift to be unreasonable, as CoU prices are intended for use in circumstances entirely different to those of Qantas.[498] Mr Siolis contends PAPL's CoU prices are intended

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[495] E0013, _0042 at [199]; E0004, _0052 at [201].
[496] E0013, _0042 at [200].
[497] E0013, _0042 to _0043 at [201].
[498] E0013, _0048 at [236] - [237].

for airlines that engage in spot transactions with PAPL and use PAPL's aeronautical services on an 'as needs' basis. However, Qantas' use of PAPL's services is of a long-term nature and on a regular, frequent basis. As such, Mr Siolis considers PAPL's provision of services to Qantas reflects a much greater degree of certainty over volumes than the typical services charged for under PAPL's CoU pricing.[499]

542   Mr Siolis considers the risk to PAPL associated with the services used by Qantas is unlikely to be materially higher than the risk associated with providing the services used by the comparator airlines identified by Mr Houston. This is because, despite the lack of a formal contract, the volume of aeronautical services PAPL provides to Qantas reflects a high degree of certainty. The stability of Qantas' aeronautical services can be seen by comparing Qantas' passenger numbers at Perth Airport in the 12 months leading up to, and following, the expiry of the PSA. The lack of any material change in those numbers indicates that, despite the lack of a formal agreement, Qantas' use of PAPL's services reflects a high degree of certainty over volumes and therefore, it is inappropriate to adjust the prices applied in the comparable transactions by 10%.[500]

543   Mr Houston disagrees with Mr Siolis' characterisation of the distinction between the circumstances applying in relation to Qantas and those applying to airlines PAPL provides aeronautical services to on CoU terms. He reiterates the benefits as to revenue certainty and enforceability were not present in relation to the services provided by PAPL to Qantas during the Relevant Period. Further, that the absence of those benefits is not altered by the scale or frequency of the services provided to Qantas over that period.[501]

544   I do not agree with Mr Houston's contention that the CoU price is itself a comparable transaction. I accept Mr Siolis' contentions that CoU prices are intended for use in circumstances different to those of Qantas and I agree it is inappropriate to apply a 10% uplift to the comparable transaction prices.

545   Mr Siolis considers Mr Houston should have made a further downwards adjustment to the prices agreed between PAPL and other airlines, to reflect the greater scale of Qantas relative to other airlines operating at Perth Airport. This is because airlines' bargaining power is

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[499] E0013, _0048 at [238].
[500] E0013, _0048 to _0049 at [240] - [243].
[501] E0013, _0044 at [212] - [213].

likely to be greater in negotiations with airports for airlines of a larger scale.[502] With the highest market share of passengers through Perth Airport, the greater scale of Qantas relative to other airlines implies Qantas would likely have a greater (yet still limited) degree of bargaining power in negotiations with PAPL. Qantas would likely be able to use that bargaining power to negotiate a lower price for aeronautical services than the other airlines.[503]

546   In Mr Houston's opinion, an airline does not require a great deal of scale to be able to have a strong bargaining position relative to PAPL. In terms of considerations strengthening airlines' countervailing power, Mr Houston considers none are contingent on an airline achieving a particular scale. That is, an airline can exert its bargaining power by making marginal changes to aircraft type or schedules, thereby causing material financial detriment to PAPL.[504] In the absence of a full analysis of the relative degree of bargaining power held by each airline, in Mr Houston's opinion there is no basis for making any adjustment to the price struck in comparable transactions to account for the size of one airline relative to another.[505] Further, Mr Houston considers the weighting of each comparable transaction by reference to forecast passengers already accounts for any differential in the extent of countervailing power held by one airline relative to another.[506]

547   I am persuaded by Mr Siolis' opinions on this issue and accept an airline's bargaining power is likely to be greater in negotiations with airports for an airline of a larger scale. This is evident from the airlines that negotiated with PAPL and agreed prices for the Relevant Period, as the airline [redacted] with the highest number of passengers effectively agreed the lowest prices with PAPL.[507] I am not persuaded by Mr Houston's weighting of the comparable transactions by reference to forecast passengers. I consider Qantas have greater scale relative to the other airlines that negotiated with PAPL and agreed prices for the Relevant Period, particularly in terms of domestic passenger numbers, but also comparative to the individual airlines represented by BARA.[508] Accordingly, I consider the price for the services provided by PAPL to be Qantas should be no more than the prices PAPL agreed with Virgin (for domestic services), and BARA (for international services).[509] I do

[502] E0013, _0050 at [250].
[503] E0013, _0050 to _0051 at [250] - [254].
[504] E0012, _0029 at [121].
[505] E0013, _0045 at [217].
[506] E0013, _0045 at [218].
[507] J0011, _0001; J0010, _0002.
[508] J0013, _0001.

not consider the price agreed between PAPL and other airlines such as REX or Alliance to be 'comparable transactions' as suggested by Mr Houston.

548   As to the value of any non-price benefits, referred to as 'value pools',[510] in Mr Houston's opinion the final agreed price and the relevant value pool for each comparable transaction should be treated as a bundle. That is, absent the value pool, airlines would have likely demanded a lower price for aeronautical services. He therefore considers that to enable a like-for-like comparison the comparable transaction price should be adjusted downwards to reflect the discount implied by the associated value pool.[511]

549   To estimate the adjustments, Mr Houston calculated the present value of the financial benefits offered to each of the airlines receiving a value pool and compared this with the present value of the aeronautical services revenue expected to be received by PAPL under the relevant ASA. Mr Houston then applied the proportion of the present value of expected benefits arising from the value pool as an estimate of the price discount to be applied to the prices of each comparable transaction, to bring it onto a like-for-like basis to the circumstances applying to the provision of services to Qantas, for which Mr Houston assumed no value pools applied during the Relevant Period.[512]

550   In relation to the value pool adjustments, Mr Siolis considers that the discounts applied by Mr Houston are insufficient. This is because the prices were agreed in the context of PAPL's substantial degree of market power. That is, PAPL has the ability to sustainably set prices above competitive levels, and as such the prices agreed with other airlines are unlikely to be consistent with the efficient long run average costs of providing aeronautical services. Mr Siolis considers the value pools negotiated by the comparator airlines in this environment are likely to be smaller than if they were negotiated in a competitive market and will not reflect the value pools that would be taken into account in a charge for Qantas. Mr Siolis therefore suggests increasing the adjustments for the value pool discount by either 50% or 100%.[513] The resulting prices are lower than the prices estimated by Mr Houston. However, Mr Siolis does not consider that these are appropriate prices

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[509] J0010, _0002.
[510] E0013, _0043 at [202].
[511] E0013, _0043 at [203].
[512] E0013, _0043 at [204].
[513] E0013, _0049 at [246] - [247].

for the provision of aeronautical services by PAPL to Qantas in the Relevant Period. This is because the prices are still informed by the prices agreed in comparable transactions, an approach Mr Siolis deems unsuitable for determining appropriate prices in this market.[514]

551   Mr Houston considers both the basis for and extent of Mr Siolis' increased value pool discounts is flawed, primarily on the basis that Mr Houston disagrees PAPL has exercised any substantial market power. Further, Mr Houston considers the use of any market power does not itself affect the use of comparable transactions to derive an estimate of market power. Additionally, in Mr Houston's opinion, the increase proposed by Mr Siolis to the value pool discounts is arbitrary and bears no resemblance to the size or scope of those value pools.[515]

552   After adjusting the comparable transaction prices as contemplated above, Mr Houston derives an average of the adjusted prices, weighted by reference to the number of passengers expected to be carried by the airline (or airlines) in relation to each comparable transaction.[516] As set out above, I am not persuaded that a weighted average, or indeed any average, of the comparable transactions considered by Mr Houston provides useful guidance in determining the price for the services provided by PAPL to Qantas.

553   The resulting prices Mr Houston arrives at are as follows:[517]

(a) $17.350 per passenger for international terminal services, inclusive of airfield charges;

(b) $11.418 per passenger for domestic terminal services;

(c) $6.178 per passenger for airfield services; and

(d) $11.909 per tonne of MTOW for airfield services to non-passenger aircraft.

554   In assessing these prices by reference to whether they fall within his lower and upper bounds, Mr Houston concludes they are:[518]

(a)   'reasonably proximate' to, or above, PAPL's minimum willingness to accept and will not cause PAPL undue hardship

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[514] E0013, _0049 to _0050 at Table 5.1 and [248] - [249].
[515] E0013, _0045 at [215].
[516] E0013, _0008 at [17].
[517] E0004, _0067 at Table 4.12.
[518] E0004, _0010 at [15(f)-(g)].

such that it would not be in its economic interests to enter into an arrangement on those terms; and

(b)   substantially below Qantas' maximum willingness to pay and so will not cause them undue hardship such that it would not be in their economic interests to enter into an arrangement on those terms.

555   Mr Houston used PAPL's aeronautical pricing models as a means by which to establish estimates of the seller's minimum willingness to accept. In undertaking those calculations, Mr Houston:[519]

(a)   received instructions from PAPL as to the inputs to be adopted in his use of PAPL's aeronautical pricing models; and

(b)   formed an opinion that the approach adopted by Dr Hird in respect of asset beta and the WACC resulted in reasonable estimates of the WACC, while noting that there may also be other reasonable estimates of the WACC.

556   Mr Houston presents a summary of the comparable prices and PAPL's 'minimum willingness to accept' in the table below:[520]

Table 2.1: Mr Houston's estimates of market values and PAPL's minimum willingness to accept

Service	Charging basis	PAPL's minimum willingness to accept	Weighted average of adjusted comparable charges
International terminal and airfield service	$ per pax	$16.338	$17.350
Domestic terminal service	$ per pax	Between $11.533 and $11.591	$11.418
Airfield service	$ per pax	$5.998	$6.178
Airfield service to non-passenger aircraft	$ per tonne MTOW	$10.826	$11.909

Source: Houston report, tables 4.11 and 4.12.

557   While Mr Houston and Mr Siolis agree PAPL's minimum willingness to sell can be derived by estimating the efficient long run average cost of providing the relevant service, and PAPL's aeronautical pricing models may be used to do so, they also acknowledge there is significant dispute between the parties as to the various inputs to the building block methodology. Mr Houston and Mr Siolis received instructions and assumptions from PAPL and Qantas respectively as to

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[519] E0017, _0004 to _0005 at [12]; E0004, _0062 at [251] - [252].
[520] E0013, _0008 at Table 2.1.

those inputs and other adjustments to be made in calculating prices using the aeronautical pricing models.

558   Accordingly, while I accept the PAPL's aeronautical pricing models *may* be used to establish estimates of PAPL's minimum willingness to accept, that is subject to the inputs and any other adjustments to be made to the models. Considering the findings set out elsewhere in this judgment as to those various inputs and adjustments (including gamma, asset beta, WACC, opening asset base, operating expenditure and regarding the depreciation of Terminal 3 assets), I do not accept Mr Houston's lower bound in fact represents PAPL's minimum willingness to sell, given it is based on instructions and assumptions provided to Mr Houston which in my view have not been demonstrated as PAPL's 'minimum' position.

559   Mr Houston's estimates of Qantas' 'maximum willingness to pay' are expressed in per passenger terms and do not distinguish between either the terminal and airfield components of the service or use of the domestic as distinct from the international terminal. On that basis, Mr Houston's estimate of Qantas' maximum willingness to pay lies between [redacted] per passenger.[521]

560   In Mr Siolis' opinion, Mr Houston's willingness to pay 'upper bound' simply restates a factual proposition from economics. Namely, that no firm will be able to charge a fee for services to a customer than is higher than the customer's willingness to pay.[522] I accept Mr Siolis' opinion in this regard.

561   Further, in my view this 'upper bound' check employed by Mr Houston has no place in the context of a quantum meruit claim. The fair and reasonable remuneration for services provided and accepted is not to be determined with reference to the profit that the recipient of those services may or may not derive. For this reason, I do not consider Mr Houston's 'upper bound' a useful check or reference point.

562   Mr Siolis considers the fact that PAPL (and other airports) are subject to regulation indicates the operation of imperfect competition in the market cannot be relied on to deliver a price that will produce desirable economic outcomes. Using prices agreed by other airlines with PAPL (as a monopoly provider), which forms part of

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[521] E0013, _0008 to _0009 at [21].
[522] E0013, _0027 at [113].

Mr Houston's methodology, is subject to the same problem in that the market for aeronautical services is not subject to effective competition. Mr Siolis considers that if PAPL has a substantial degree of market power, then the outcome of any negotiations with other airlines in the same market (ie with PAPL as a monopoly supplier) cannot be relied on to produce an outcome consistent with an effectively competitive market.[523] In Mr Siolis' opinion, substantial market power is the ability to set prices sustainably above competitive levels.[524] He considers such a market is not subject to effective competition and economic forces cannot be relied on to drive such a market towards efficient prices and costs.[525]

563   In Mr Siolis' opinion, a finding that PAPL *possesses* a substantial degree of market power is sufficient to conclude that the relevant market is not subject to effective competition. Mr Siolis reached this conclusion after finding that PAPL is not effectively constrained by existing or potential competitors. He notes that the Productivity Commission has also found that after considering the range of competitive constraints, including airlines' countervailing power, in its assessment of which airports have market power, that Sydney, Melbourne, Brisbane and Perth airports have:[526]

> … significant market power in the provision of domestic aeronautical services, creating a prima facie case for regulatory intervention.

564   Mr Siolis considers a finding that PAPL *exercised* its market power would be relevant when considering the extent of any regulatory intervention. For example, the Productivity Commission has found that the existence (not the exercise) of substantial market power means that a 'light handed' regulatory regime should apply to major airports.[527] That regime is the price and quality of service monitoring that currently applies to major airports. A finding that PAPL has *exercised* its substantial market power would mean more intrusive regulation would be required.[528] In other words, the question of whether PAPL has exercised (rather than holds) substantial market power does not provide any additional insights into whether the relevant market is subject to effective competition.[529]

[523] E0013, _0010 at [28].
[524] E0013, _0033 at [145].
[525] E0013, _0034 at [151].
[526] E0013, _0037 at [163]; F0686.
[527] F0686.
[528] F0686.
[529] E0013, _0037 at [165].

565   Whether PAPL has exercised its market power is therefore irrelevant to Mr Siolis' approach to identifying the appropriate price for the services provided. However, to address that question, Mr Siolis found that PAPL will have exercised its substantial degree of market in its negotiations with airlines if the prices for aeronautical services agreed in those negotiations are inconsistent with a price that would be agreed in an effectively competitive market. A price that would be agreed in an effectively competitive market would be one that was closely related to the efficient costs of supplying the relevant services, but which enabled PAPL to recover all of the efficient costs associated with providing the services, including an appropriate cost of capital. PAPL will be prevented from exercising this substantial market power if its is effectively constrained by actual or potential competitors, customers or effective regulation.[530]

566   Mr Siolis considers PAPL has not been effectively constrained from exercising its substantial market power in negotiations with airlines for the reasons set out further below.[531] In Mr Siolis' opinion, this means there is a material risk that prices agreed in this market will be significantly greater than the efficient long run average costs of providing aeronautical services, leading to inefficiencies and the exploitation of consumers.[532] Mr Siolis considers that the existing regulatory regime's inability to constrain PAPL's behaviour means that prices agreed between PAPL and airlines other than Qantas for the period after 1 July 2018 are likely to be significantly higher than the long run average cost of providing aeronautical services. Therefore, setting charges for the services to be provided to Qantas based on those prices (ie prices in excess of the efficient long run average costs of providing those services) will lead to undesirable economic outcomes that are inconsistent with the objectives of regulation.[533]

567   The table below shows that for each of the aeronautical services provided by PAPL to Qantas, the prices proposed by PAPL are significantly higher than the efficient long run average costs of providing the services, as estimated by Mr Siolis:

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[530] E0013, _0037 to _0038 at [167].
[531] E0013, _0038 at [168].
[532] E0013, _0045 to _0046 at [220].
[533] E0013, _0046 at [225].

Table 6.1: Comparison of per passenger prices for the aeronautical services provided to the Qantas Group at Perth Airport by PAPL to the efficient long-run average costs of providing those services (1 June 2018 to 17 December 2018)

Service	Efficient LRAC as estimated by Mr Siolis	Price in initial PAPL proposal		Price invoiced by PAPL (Jul-Sep 2018)	Price invoiced by PAPL (Oct-Dec 2018)
Domestic passenger services using Terminal 3	$6.21	$10.47	▓	$10.47	$12.07
Domestic and International passenger services using the airfield	$4.15	$5.94	▓	$5.95	$6.54
International passenger services using Terminal 1 or Terminal 3	$7.23	$16.48	▓	$11.89	$13.07

Source: ▓▓▓▓▓▓▓▓▓▓▓▓▓▓▓▓▓▓▓▓▓ *PAPL Internal Aeronautical Pricing*
Committee Meeting No 15 Slides (30 May 2018) [PAP.002.003.0063], slide 8.
Invoiced Prices - First statement of Mr Teng [PAP.999.991.0085], paragraphs 222 & 225.
Efficient LRAC as estimated by Mr Siolis – Siolis report, paragraph 35.
Notes: *i) The efficient LRAC as estimated by Mr Siolis assumes a value for imputation credits of 50%. The estimates of LRAC associated with this vale for imputation credits form the upper bound of Mr Siolis' LRAC estimates.*
ii) All figures are rounded to the nearest cent.
iii) International terminal figures are calculated by deducting the airfield figure from terminal + airfield totals where necessary.

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568   Mr Siolis considers the prices for 'comparable transactions' on which Mr Houston relies are likely to be distorted because they reflect PAPL's exercise of its substantial market power. Consequently, they cannot be relied on as outcomes consistent with an effectively competitive market.[534]

569   Further, in Mr Siolis' opinion, the question of whether PAPL has exercised its market power or not is not relevant to the question of whether the market for aeronautical services provided by PAPL is subject to effective competition. In Mr Siolis' opinion, the mere presence of substantial market power means that the market is not effectively competitive.[535] He observes that this is consistent with the finding of the Productivity Commission in its latest review of airports where it:[536]

> …has considered the range of competitive constraints, including airlines' countervailing power, in its assessment of which airports have market power. It found that Sydney, Melbourne, Brisbane and Perth Airports have significant market power in the provision of domestic aeronautical services, creating a prima facie case for regulatory intervention.

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[534] E0013, _0010 at [29].
[535] E0013, _0018 at [68].
[536] F0686.

570   Mr Siolis considers that in this case, PAPL not only has a substantial degree of market power in the relevant market but has exercised that power to the detriment of its airline customers.[537] As the ACCC has noted, the most observable manifestation of market power is the ability of the firm to profitably sustain prices above competitive levels.[538] In this case, the prices proposed by PAPL to Qantas are above the efficient long run average costs that Mr Siolis has estimated using the assumptions provided to him by the solicitors for Qantas. Mr Siolis considers this is direct evidence that PAPL has exercised its market power.[539]

571   For domestic passenger services using Terminal 3, the prices proposed by PAPL to Qantas are at least 53% higher than the efficient long run average costs estimated by Mr Siolis.[540] For domestic and international passenger services using the airfield, the prices proposed by PAPL to Qantas are at least 35% higher than the efficient long run average costs estimated by Mr Siolis.[541] For international passenger services using Terminal 1 or Terminal 3, the prices proposed by PAPL to Qantas are at least 32% higher than the efficient long run average costs estimated by Mr Siolis.[542]

572   Mr Houston disagrees this is 'direct evidence' of a substantial exercise of market power. He considers for a price cost analysis to be capable of informing the question of whether a firm is earning levels of profit that are consistent with the exercise of substantial market power, it must be undertaken:[543]

(a)   at the level of the firm's total revenue and so profits derived from the entire relevant service, rather than by reference to the estimated price-cost relationship for a single transaction;

(b)   over a period of several years, so as to assess the extent to which profits are above the competitive level, both materially and on a sustained basis; and

(c)   by reference to prices that are paid and so revenues earned, rather than proposals and counter-proposals arising in a process of inconclusive negotiation.

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[537] E0013, _0018 at [68].
[538] F1091.
[539] E0013, _0019 at [69].
[540] E0013, _0019 at [70].
[541] E0013, _0019 at [71].
[542] E0013, _0019 at [72].
[543] E0013, _0022 at [88].

573   Mr Siolis considers PAPL's conduct during its negotiations with airlines over the charges for aeronautical services also indicates it has exercised its substantial market power.   Mr Siolis considers the 'bargaining concessions' earned by airlines in negotiations with PAPL are insignificant.   That is, the difference between the aeronautical charges initially proposed by PAPL to airlines and the aeronautical charges agreed between PAPL and airlines, measured by comparing the implied WACC from the final agreed prices to the WACC proposed by PAPL in its initial pricing offer.[544]

574   In Mr Houston's opinion, the extent of the 'bargaining concessions' estimated by Mr Siolis is neither a relevant nor recognised consideration in forming an opinion as to whether any market power has been exercised, let alone its substantiality.   Mr Houston is not aware of, and he observes Mr Siolis does not cite, any academic economic literature that links the exercise of market power to 'negotiating tactics'.[545]

575   Secondly, Mr Siolis considers there is a lack of variation in prices charged to airlines, despite the significant variation in the size of each airline.   If the market for aeronautical services at Perth Airport were effectively competitive and if buyers genuinely had countervailing power, one would expect prices to vary according to the size and negotiating strength of each buyer, which Mr Siolis considers is not reflected in the prices charged by PAPL.[546]

576   Mr Houston considers Mr Siolis' contention as to the limited extent of price differentiation between different buyers of aeronautical services is also not an indicator capable of informing an opinion as to whether a market is either effectively competitive or any market power has been exercised.   In Mr Houston's opinion, the extent of price differentiation arising in a market may signify the existence of one or more potential economic effects, each of which has a different (or no) implication as to the potential existence of market power. These effects include:[547]

(a)   differentiation in the product or service supplied, for which no inference can be drawn in relation to the exercise of any market power;

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[544] E0013, _0019 at [73] - [75].
[545] E0013, _0022 at [89].
[546] E0013, _0019 at [76] - [78].
[547] E0013, _0022 to _0023 at [90].

(b)   the ability of a firm to discriminate by setting different terms - beyond the extent of any differences in the cost of supply - by which it supplies one customer relative to another, for which an inference may be drawn as to the presence of some market power, but with no basis by which to assess the extent to which it is being exercised (and so its substantiality); and

(c)   the ability of those customers with a degree of countervailing power to demand better terms (beyond the extent of any differences in the cost of supply), than those customers with less or no countervailing power, for which no inference can be drawn as to the exercise of any market power.

577   Thirdly, PAPL has been unwilling to consider the value that airlines generate for non-aeronautical services at Perth Airport in its negotiations with those airlines. Mr Siolis considers the revenue PAPL earns from non-aeronautical services is inextricably linked to aeronautical demand, and that, if the market for aeronautical services at Perth Airport were subject to effective competition, one would expect to see this two-sided nature of the market reflected in PAPL's negotiations with airlines. In Mr Siolis' opinion, PAPL's reluctance to recognise the inter-dependency between aeronautical and non-aeronautical services in its negotiations with airlines over charges for aeronautical services provides further evidence that PAPL has exercised its substantial market power in those negotiations.[548]

578   Mr Houston considers Mr Siolis' contention that PAPL's reluctance to recognise the inter-dependency between aeronautical and non-aeronautical services in its negotiations amounts to evidence that PAPL has exercised substantial market power is unsupported by any academic literature. Further, Mr Siolis' opinion is at odds with:[549]

(a)   the experts' agreed definition of the market that is relevant for the estimation of the market value and/or appropriate price for aeronautical services provided at Perth Airport, which is separate and distinct from any market involving transactions for non-aeronautical services;

(b)   Mr Siolis' preferred approach to determining the appropriate price, being to estimate the efficient long run average cost of the aeronautical services provided by PAPL; and

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[548] E0013, _0019 to _0029 at [79].
[549] E0013, _0023 at [93].

(c)   the APP that govern the economic regulatory framework applying to aeronautical services provided at Perth Airport.

579   Fourthly, PAPL's approach to adjusting the service life of Terminal 3 in its building block model represents an unreasonable sharing of risks. Mr Siolis considers PAPL's decision to recover all remaining costs associated with Terminal 3 from Qantas (the last remaining users of the terminal) by simply lowering the useful life of the Terminal 3 assets in the building block model is inconsistent with the behaviour that would be expected from an independent regulatory authority who would be attempting to mimic the outcome of an effectively competitive market (in terms of how risk would be shared). An independent regulatory authority would either establish the useful life or determine another way of recovering the costs of the Terminal 3 assets in a way that more appropriately reflects a sharing of the risks and benefits.[550]

580   Mr Houston considers Mr Siolis' observations as to the likely approach of an independent regulatory authority in relation to the service life assumptions for Terminal 3 are not capable of informing an opinion as to whether any market power has been exercised. While the treatment of an asset nearing the end of its useful life can give rise to complex considerations in the context of estimating the long run average cost of providing a service, Mr Houston considers the existence of differences of view in relation to the matters arising:[551]

(a)   offers no insight as to whether any market power may have been exercised, particularly in circumstances where PAPL has been unable to impose its preferred view; and

(b)   reinforces that the estimation of efficient long run average cost is an almost intractable task.

581   In Mr Houston's opinion, there is no evidence consistent with the usual considerations cited in academic literature that PAPL has *exercised* any substantial market power, or that the prices in the comparable transactions on which he relies were distorted in any way.[552] Mr Houston concludes that the net effect of a number of structural and institutional considerations (for example, countervailing power of airlines and PAPL being subject to a regulatory regime) was such that

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[550] E0013, _0020 at [80].
[551] E0013, _0023 at [94].
[552] E0013, _0011 at [31(a)].

PAPL's ability to exercise market power was constrained, so that it could not engage in the sustained exercise of market power.[553]

582   Further, Mr Houston considers that there is significant economic evidence that is consistent with PAPL being constrained from exercising any substantial market power. The evidence Mr Houston refers to includes:

(a)   PAPL's major airline customers having relatively strong countervailing power, particularly Qantas;

(b)   the strength of Qantas' countervailing power being demonstrated by their ability to determine the prices they paid for aeronautical services at Perth Airport in the Relevant Period, rather than to accept the prices proposed by PAPL in negotiations or to agree a compromise;

(c)   since the failure of the 2018 negotiations between PAPL and Qantas, Qantas have:

(i)   continued to use aeronautical services at Perth Airport without restriction; and

(ii)   received aeronautical services at Perth Airport that involved no deterioration and remained 'good' on average; and

(d)   more generally, analysis of the return on aeronautical assets at Perth Airport over the 16 year period to 31 December 2017 previously undertaken by Mr Houston shows that PAPL has not achieved levels of profit, and so cannot have set prices, that can be said to reflect any exercise of market power.[554]

583   Mr Houston considers the above observations, together with the other evidence on which he relies, as consistent with the findings of the Productivity Commission 2019 inquiry report. Namely, that the price monitored airports, including PAPL, had not systematically exercised their market power in commercial negotiations with airlines. In Mr Houston's view, his observations are also consistent with each of the Productivity Commission's inquiry reports that followed its two previous reviews of the form of economic regulation applying to airports, as published in 2007 and 2012.[555]

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[553] E0013, _0035 to _0036 at [157] - [158].
[554] E0013, _0021 at [85].

584   Mr Houston considers Mr Siolis' reasoning for not placing reliance on comparable transactions is deficient because it conflates the basis for introducing sector-specific economic regulation and the usual policy objective of sector-specific economic regulatory measures (being to modify outcomes so that, as far as possible, they reflect those that would apply in an effectively competitive market) with those market outcomes, once the regulator measures are in place.[556]

585   In any case, Mr Houston considers the prices at which transactions take place in any market are 'market prices' and so represent the 'market value' of the product or service, irrespective of the effectiveness of competition in that market.[557]

586   By way of example as to how 'market price' is indifferent to considerations as to the degree of competition in a market, Mr Houston refers to the market for crude oil. He explains prices in crude oil markets have often been found to be materially affected by coordination or limitations imposed on the output of decisions of large producers, organised by means of the Organisation of Petroleum Exporting Countries (OPEC). An arrangement that economists often refer to as a form of cartel. In Mr Houston's opinion, it would defy economic common sense to suggest that the hypothetical task of estimating the 'market price' of a barrel of oil should or could readily be undertaken by estimating the efficient long run average cost of oil production.[558]

Mr Siolis' methodology

587   In Mr Siolis' opinion, an appropriate price is one that would be determined in a market that was subject to effective competition. If a market is not subject to effective competition (because PAPL has a substantial degree of market power in the relevant market), then the price that would be realised if the market were subject to effective competition cannot be expected to emerge and will instead need to be estimated.[559]

588   Mr Siolis considers this price would be one that reflects the efficient costs of supplying aeronautical services to Qantas as this is the result that would be achieved if the process of competition operated in

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[555] E0013, _0022 at [86].
[556] E0013, _0011 at [31(b)].
[557] E0013, _0011 at [31(c)].
[558] E0013, _0011 to _0012 at [35].
[559] E0013, _0009 at [22].

the market. A methodology that can be applied to estimate efficient costs that is likely to achieve efficiency on the one hand, and which protects the interests of users of aeronautical services on the other hand, is long run average costs. In Mr Siolis' opinion such a benchmark can be implemented using PAPL's aeronautical pricing models (building block models), subject to assumptions being made about some of the inputs. Mr Siolis suggests this approach is also supported by statutory guidance as well as guidance (in the form of the APP) which set out that prices should reflect efficient costs, and the findings from the Productivity Commission which state that efficient long run average costs would represent an efficient price and would approximate the price that would be determined if the market was subject to effective competition.[560]

589 Adopting inputs for the pricing models that were provided to him by way instructed assumptions, Mr Siolis estimates the appropriate price for aeronautical services provided by PAPL to Qantas as follows:[561]

Table 2.2: Prices for the aeronautical services provided to the Qantas Group at Perth Airport by PAPL (1 July 2018 to 17 December 2018)

Service	Metric	Price assuming a value for imputation credits of 50 per cent ($)	Price assuming a value for imputation credits of 58.5 per cent ($)	Price assuming value for imputation credits of 96 per cent ($)
Domestic passenger services using Terminal 3	per passenger	6.21	6.17	6.02
Domestic and international passenger services using the airfield	per passenger	4.15	4.11	3.99
International passenger services using Terminal 1 or Terminal 3	per passenger	7.23	7.18	6.97

590 Mr Houston agrees that, as a conceptual benchmark, a price that is *at least sufficient* to recover the efficient long run average costs of aeronautical services would be consistent with market outcomes that can be taken to be efficient.[562]

591 However, Mr Houston disagrees with Mr Siolis in that he considers the economics discipline offers no particular insight as to how the 'appropriate price' should be derived. Further, if an

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[560] E0013, _0009 at [22].
[561] E0013, _0009 at [23] and Table 2.2.
[562] E0013, _00012 at [36].

'appropriate price' is taken to be that which gives rise to efficient market outcomes, then there are a wide range of prices that would qualify as being appropriate. In Mr Houston's view, these would be any price falling between the supplier's minimum willingness to sell and the buyer's maximum willingness to pay. Similarly, if an 'appropriate price' is taken to be that which gives rise to market outcomes that are consistent with effective competition, then there is no one price or conceptual benchmark that would qualify as being appropriate.[563] Mr Houston considers that if efficiency is to be assessed not only by reference to the market for the services provided by PAPL, but also by reference to the downstream market in which airlines compete to serve passengers and freight demand to and from Perth Airport, then *the* appropriate price is that most comparable to the prices that other airlines pay.[564]

592   Mr Siolis' approach to finding an appropriate price for aeronautical services does not require an estimate of an airline's willingness to pay, because Mr Siolis' approach first requires an assessment of whether the market is subject to effective competition. If it is, that could be expected to push prices down towards the level of efficient costs, including an appropriate cost of capital. The fact that prices could be set at a higher level than that, as high as the ceiling provided by the willingness to pay, does not affect the price that should prevail according to Mr Siolis' framework. Indeed, a price charged between the level of the efficient costs and that indicated by the willingness to pay would be evidence that PAPL was exercising its substantial market power.[565]

593   In Mr Houston's opinion, the practical difficulties arising in relation to the estimation of both the 'efficiency' of costs and their 'long run average' level (as required by Mr Siolis' method) cause the derivation of prices by reference to such a conceptual benchmark to be an almost intractable task that cannot readily give rise to the 'appropriate price'.[566]

594   In response, Mr Siolis considers that in circumstances where there is a monopoly pricing problem, economics provides the tools for policy makers (and courts) to strike a balance between the monopolist's interest in receiving a high price and the interests of customers in

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[563] E0013, _0012 at [37].
[564] E0013, _0014 at [50(b)].
[565] E0013, _0027 at [114].
[566] E0013, _0012 at [38].

paying a price which only reflects the efficient costs of providing the relevant services.[567]

595   In Mr Siolis' opinion, effectively competitive markets are more capable than regulatory solutions in delivering appropriate (price) outcomes. Where markets are not subject to effective competition, economics can help policy makers (and courts) assess when the benefits of intervening in a market outweigh the costs of intervention, and what price can achieve both economic efficiency and protection for users of the service.[568]

596   Mr Siolis observes that in this case, policy makers have provided clear guidance on how that balance should be struck. For example, the APP refer to the need to achieve prices that at least cover the efficient costs of aeronautical services, including a return on investment in tangible (non-current) aeronautical assets, commensurate with the regulatory and commercial risks involved.[569] He also observes the Productivity Commission has set out its preferred conceptual benchmark for assessing the efficient pricing of infrastructure services is long run average costs, as it reflects the cost (including opportunity costs) of the resources required to provide an infrastructure service.[570]

597   Mr Siolis considers that PAPL has aeronautical pricing models that can give practical effect to this conceptual benchmark. He explains he has relied on assumptions provided to him by Qantas' solicitors to adjust those models and produce a price that can be considered an 'appropriate price' which will deliver desirable economic outcomes. Further, that this price would reflect the price that would be expected in the relevant market if that market were subject to effective competition and, on that basis, would be a meaningful estimate of 'market value'.[571]

Analysis

598   For the reasons set out above, there are several difficulties with the methodology used by Mr Houston in estimating the value of the services provided by PAPL to Qantas and I am not persuaded his approach is appropriate in the circumstances of this case.

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[567] E0013, _0013 at [42].
[568] E0013, _0013 at [43].
[569] F0066.
[570] E0013, _0013 at [44]; F0686.
[571] E0013, _0013 at [45].

599   I consider Mr Houston's 'upper bound' is not an appropriate reference point and his 'lower bound' does not, in fact, represent PAPL's minimum willingness to accept. Further, I do not consider all of Mr Houston's 'comparable transactions' to be comparable, nor do I consider a weighted average by reference to forecast passengers to be the appropriate approach, having regard to the greater scale of Qantas relative to the other airlines.

600   However, as acknowledged by Mr Houston and Mr Siolis and apparent elsewhere in this judgment, there is a significant dispute between the parties as to the values to be adopted for the various input parameters to the building block methodology. Determining the inputs to be used in employing a building block method invariably requires numerous judgement calls to be made and has been described by Mr Houston as an almost intractable task. I appreciate that is a valid concern.

601   It does not appear to be in dispute that PAPL is a monopoly supplier in the relevant market, being in relation to its provision of aeronautical services to airlines at Perth Airport. I also consider that PAPL possesses, and has likely exercised, substantial market power. However, those findings are not solely determinative of my approach to estimating the fair and reasonable price for the services provided by PAPL to Qantas.

602   As set out above, in the context of a quantum meruit claim, reasonable remuneration is usually measured at the market value of the services rendered. That is, charges commonly made by others for like services. Where there is no market for the supply of like services, the court will usually assess reasonable remuneration to be the efficient cost of providing the services, including profit or return on capital. An estimate of the efficient long run average cost of PAPL providing the services in question to Qantas can be derived using the building block methodology.

603   However, my view is that one must consider the results of employing the building block methodology and the reasonableness of those results in light of all other relevant evidence. This includes having regard to what I consider to in fact be 'comparable transactions' with other airlines of analogous scale to Qantas. As set out above, I consider the price for the services provided by PAPL to be Qantas should be no more than the prices PAPL agreed with Virgin (for domestic services), and BARA (for international services).

604   As set out earlier in these reasons, I have determined that in the context of this case, the appropriate inputs to be used in the building block methodology are as set out below:

Parameter	Input
Risk free rate	3.3%
Leverage	20%
Cost of debt	5.7%
Asset beta	0.75
Equity beta	0.94
Market risk premium	7.7%
Cost of equity	10.5%
WACC	9.6%
Distribution rate	0.90
Utilisation rate	0.65
Gamma	0.585
Opening asset base	PAPL's position (no reductions)
Operating expenditure	PAPL's position, less marketing costs

605   As to Terminal 3 depreciation:

Asset category	Asset base	Useful life (years)
Buildings	$43,524,077	13
Plant and Equipment	$11,200,000	10
Land	$400,000	88
Aprons, Taxiways and Runways	$14,400,000	40

606   As to Terminal 3 capital expenditure:

Asset category	Measure	2019FY	2020FY	2021FY	2022FY	2023FY	2024FY	2025FY

Buildings	Capital expenditure	$2,819,929	$3,005,849	$2,082,192	$2,134,247	$2,187,603	$2,242,293	$2,298,350
	Useful life (years)	12	11	10	9	8	7	6
Plant and Equipment	Capital expenditure	$725,649	$773,492	$535,808	$549,203	$562,933	$577,007	$591,432
	Useful life (years)	10	10	10	10	10	10	10

607   The resulting prices for aeronautical services are as follows:

Aeronautical service	Price
Airfield (domestic and international)	5.383
International passenger services (T1 and T3)	9.336
Domestic passenger services (T3)	8.436

608   In determining how these prices relate to international and domestic services, I have considered:

(a)   how the parties have treated prices for international and domestic passenger services in the payments made by Qantas to PAPL to date for services provided during the Relevant Period;

(b)   that the parties agreed the court should deliver judgment stating the per passenger price for terminal services and airfield services, then the parties will calculate the amount due to PAPL (if any) for the Relevant Period; and

(c)   the categorisation of the prices put forward by the parties.

609   The prices paid by Qantas to PAPL appear to contemplate one price for international passenger services generally, and a separate price for domestic passenger services provided at T3. Qantas submit that after the joint expert process finished, they paid the difference between what they paid PAPL during the Relevant Period, and what they would have paid using the lowest price supported by their expert evidence, as calculated by Mr Siolis.[572] The prices calculated by Mr Siolis, to which Qantas refer in their submissions, clearly contemplate one price for

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[572] C0004, _0007 to _0008 at [18].

international passenger services using T1 and T3 ($6.97 per passenger), and a separate price for domestic passenger services using T3 ($6.02 per passenger).[573] Those are the prices on which the additional payment from Qantas to PAPL were based, again clearly contemplating one price for international passenger services using T1 and T3, and a separate price for domestic passenger services using T3.[574]

610   In the JER produced after the expert conclave on the output of the building block models, Mr Siolis presents revised estimates of aeronautical prices in light of information contained in other JERs.[575] The revised price estimates provide (among other things) a price for international passenger services using T1 or T3 ($7.05, assuming a value for imputation credits of 96%) and a separate price for domestic passenger services using T3 ($6.07, assuming a value for imputation credits of 96%).

611   Later in the JER, Mr Houston and Mr Siolis present a series of tables containing prices the experts have calculated to reflect various combinations of inputs to PAPL's aeronautical pricing models.[576] Based on a review of those tables it is apparent that the price Mr Siolis presents elsewhere as a price for international passenger services using T1 or T3, appears to be derived from PAPL's T1 international model. The resulting prices appear under columns titled 'T1I price, per passenger' in the series of tables presented by the experts.[577]

612   In Mr Houston's first report on the value of aeronautical services, he presents prices derived from the building block models in terms of (among other things) 'Terminal 1 International' and 'Terminal 3'.[578] However, the prices Mr Houston presents based on his comparable transaction methodology clearly contemplate one price for international terminal services and one price for domestic terminal services.[579]

613   In providing the prices produced by the PAPL building block models using the inputs determined by the court, Mr Houston and Mr Siolis presented those prices with reference to (among other things) 'Terminal 1 International' and 'Terminal 3'.

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[573] E0007, _0092 at [384] and Table 2.
[574] F1208, _0001.
[575] E0017, _0007 at Table 2.1.
[576] E0017, _0009 at [17] and __0011 to _0022.
[577] E0017, _0021.
[578] E0004, _0069 at [291] and Table 5.1.
[579] E0013, _0008 at [19] and Table 2.1.

614   For the reasons set out above, I consider it appropriate that the 'Terminal 1 International' price (that is, the price derived from the Terminal 1 International building block model) is the price for international passenger services using T1 and T3, and the 'Terminal 3' price (that is, the price derived from the Terminal 3 building block model) is the price for domestic passenger services using T3. This is reflected in the prices presented in the table at [607].

615   As set out above, I consider the price for services provided by PAPL to Qantas should be no more than the prices agreed between PAPL and Virgin (for domestic services) and BARA (for international services), given the greater scale of Qantas. While the prices agreed with Virgin and BARA are confidential, I confirm that is the case, with one exception. That exception relates to [redacted] and does not change my view regarding the inputs I have determined in respect of the aeronautical pricing models.

616   Accordingly, I consider the prices set out in the table in [607] above to be fair and reasonable remuneration for those aeronautical services provided by PAPL to Qantas during the Relevant Period.

617   As for freight and non-passenger services, PAPL's preferred position is $11.909 per tonne MTOW, on Mr Houston's comparable transaction methodology.[580] Using the building block methodology, PAPL's position appears to be a price of $10.826 per tonne MTOW.[581] Qantas submit that if their case is accepted in its entirety, PAPL will recover nothing in this action in that it has been paid what it ought to have been paid.[582] The additional payment Qantas made to PAPL on 2 September 2021 reflected a price of $10.83 per tonne MTOW for freight and non-passenger services. Qantas' preferred position regarding the price for freight and non-passenger services therefore appears to be $10.83 per tonne MTOW.

618   The price for freight and non-passenger services agreed between PAPL and [redacted] during the relevant period was $10.826.[583] On Mr Houston's comparable transaction methodology, he applies the CoU 10% uplift to that price to arrive at the price of $11.909 per tonne MTOW.

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[580] E0013, _0008 at [19] and Table 2.1.
[581] E0004, _0069 at [291] and Table 5.1.
[582] C0004, _0008 at [18].
[583] J0010, _0002 and E0007, _0052 at [203(d)] and Table 3.

619   Having accepted Mr Siolis' contentions that CoU prices are intended for use in circumstances different to those of Qantas and determined it is inappropriate to apply a 10% uplift to the comparable transaction prices, I also find that it is inappropriate to apply a 10% uplift to the price for freight and non-passenger services. I consider $10.826 per tonne MTOW (rounded to $10.83 as paid by Qantas to PAPL) to be fair and reasonable remuneration for freight and non-passenger services provided by PAPL to Qantas during the Relevant Period.

I certify that the preceding paragraphs comprise the reasons for decision of the Supreme Court of Western Australia.

CR
Associate to the Honourable Justice Le Miere

18 FEBRUARY 2022

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	:	PERTH AIRPORT PTY LTD -v- QANTAS AIRWAYS LTD [No 3] [2022] WASC 51 (S)
CORAM	:	LE MIERE J
HEARD	:	18 FEBRUARY 2022
DELIVERED	:	24 FEBRUARY 2022
FILE NO/S	:	CIV 3147 of 2018
BETWEEN	:	PERTH AIRPORT PTY LTD Plaintiff
		AND
		QANTAS AIRWAYS LTD First Defendant
		JETSTAR AIRWAYS PTY LTD Second Defendant
		AIRLINK PTY LTD Third Defendant
		NETWORK AVIATION PTY LTD Fourth Defendant
		EXPRESS FREIGHTERS AUSTRALIA PTY LTD Fifth Defendant

Catchwords:

Costs - Costs of issues - Who is the successful party - Whether issues discrete and severable

Costs - Special costs order - Whether prudent litigator would retain four counsel

Legislation:

Rules of the Supreme Court 1971 (WA)

Result:

Plaintiff awarded costs of action with the exception of four issues
Special costs order granted

Representation:

Counsel:

Plaintiff	:	Mr M Rush QC & Mr P Walker
First Defendant	:	Mr E Heenan
Second Defendant	:	Mr E Heenan
Third Defendant	:	Mr E Heenan
Fourth Defendant	:	Mr E Heenan
Fifth Defendant	:	Mr E Heenan

Solicitors:

Plaintiff	:	DLA Piper Australia - Melbourne
First Defendant	:	MinterEllison
Second Defendant	:	MinterEllison
Third Defendant	:	MinterEllison
Fourth Defendant	:	MinterEllison
Fifth Defendant	:	MinterEllison

Case(s) referred to in decision(s):

Perth Airport Pty Ltd v Qantas Airways Ltd [2019] WASC 460
Perth Airport Pty Ltd v Qantas Airways Ltd [No 3] [2022] WASC 51
Stanley v Philips [1966] HCA 24; (1966) 115 CLR 470

Strzelecki Holdings Pty Ltd v Jorgensen [2019] WASCA 96; (2019) 54 WAR
    388

LE MIERE J:

Summary

620   The primary relief claimed by the plaintiff, PAPL, is a claim for unpaid amounts for aeronautical services provided by PAPL to the defendants, Qantas, between 1 July and 17 December 2018 (the Relevant Period) calculated by reference to the fair and reasonable price for such services or, alternatively, restitution of the enrichment received by each defendant from its use of the aeronautical services provided by PAPL during the Relevant Period.

621   The parties agreed that the Court should deliver judgment stating the price for terminal services and airfield services that will provide fair and reasonable remuneration to PAPL.   On 18 February 2022, I published reasons for judgment (Principal Judgment) in which I stated the per passenger prices for terminal services and airfield services that will provide fair and reasonable remuneration to PAPL for the Relevant Period.

622   I subsequently made orders by consent that the defendants pay PAPL a total of $7.66 million together with interest of $1.86 million.

623   These reasons for judgment deal with what orders should be made in relation to the costs of the action. For the reasons which follow there should be orders:

1.   The defendants pay the plaintiff's costs of the action including reserved costs but excluding the costs of the following issues:

   (a)   the value of gamma;

   (b)   the benefit or profit earned by Qantas on flights to and from Perth;

   (c)   the fees or prices charged to Qantas by other Australian airports; and

   (d)   whether, practically, Qantas are and were able to use Terminals 3 and 4 beyond 2025 because of capacity constraints.

2.   The plaintiff pay the defendants' costs of the following issues:

   (a)   the value of gamma;

(b)　　the benefit or profit earned by Qantas on flights to and from Perth;

(c)　　the fees or prices charged to Qantas by other Australian airports; and

(d)　　whether, practically, Qantas are and were able to use Terminals 3 and 4 beyond 2025 because of capacity constraints.

3.　　Pursuant to s 280(2) of the *Legal Profession Act 2008* (WA), the costs payable to any party pursuant to the orders above are to be taxed:

(a)　　without reference to the limits provided for in Table B at cl 13 of the *Legal Practitioners (Supreme and District Courts) (Contentious Business) Determination 2020* (2020 Scale) or cl 14 of the *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2018* (2018 Scale);

(b)　　without reference to the hourly rates and the daily rates provided for solicitors (senior, junior and restricted), Clerks and Paralegals, Junior Counsel and Senior Counsel in Table A at cl 11 of the 2020 Scale or cl 12 of the 2018 Scale; and

(c)　　including reasonable allowances for work undertaken by Senior Counsel and Junior Counsel, and on the basis that the plaintiff is to be allowed the costs of four counsel, including two senior counsel.

Judgment sum and interest

624　　The fair and reasonable amount which Qantas should pay to PAPL for aeronautical services during the Relevant Period, applying the prices determined in the Principal Judgment, is $28.73 million. Qantas has paid PAPL $21.07 million.

625　　The parties agreed that, applying the prices determined in the Principal Judgment, Qantas must pay PAPL $7.66 million together with interest of $1.86 million. I made orders accordingly.

Costs

PAPL's proposed orders

626 PAPL proposes the following orders:

1. The defendants pay the plaintiff's costs of and incidental to the proceeding, including reserved costs, to be taxed if not agreed.

2. Pursuant to section 280(2) of the *Legal Profession Act 2008* (WA), the costs payable to the plaintiff pursuant to order 1 herein are to be taxed:

   (a) without reference to the limits provided for in Table B at cl 13 of the *Legal Practitioners (Supreme and District Courts) (Contentious Business) Determination 2020* (2020 Scale) or cl 14 of the *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2018* (2018 Scale)

   (b) without reference to the hourly rates and the daily rates provided for solicitors (senior, junior and restricted), Clerks and Paralegals, Junior Counsel and Senior Counsel in Table A at cl 11 of the 2020 Scale or cl 12 of the 2018 Scale; and

   (c) including reasonable allowances for work undertaken by Senior Counsel and Junior Counsel, and on the basis that the plaintiff is to be allowed the costs of four counsel, including two senior counsel.

627 Qantas proposes the following orders:

1. The plaintiff pay the defendants' costs of and incidental to the proceeding, including reserved costs, to be taxed if not agreed, save for the defendants' costs relating to the weighted average costs of capital.

2. The defendants pay the plaintiff's costs of and incidental to the proceeding, to be taxed if not agreed, relating to the weighted average costs of capital.

3. Pursuant to section 280(2) of the *Legal Profession Act 2008* (WA), the costs payable to any party pursuant to the orders above are to be taxed:

   (a) without reference to the limits provided for in Table B at cl 13 of the *Legal Practitioners (Supreme and District Courts) (Contentious Business) Determination 2020* (2020 Scale) or cl 14 of the *Legal Profession*

(Supreme and District Courts) (Contentious Business) Determination 2018 (2018 Scale)

(b)   without reference to the hourly rates and the daily rates provided for solicitors (senior, junior and restricted), Clerks and Paralegals, Junior Counsel and Senior Counsel in Table A at cl 11 of the 2020 Scale or cl 12 of the 2018 Scale; and

(c)   including reasonable allowances for work undertaken by Senior Counsel and Junior Counsel, and on the basis that the party is to be allowed the costs of 3 counsel, including only 1 senior counsel.

Courts discretion to award costs

628   The costs of proceedings are in the discretion of the court.[584] The discretion as to the award of costs must be exercised judicially but is otherwise unconfined. When making an order for costs, the court should generally look to the rules of court rather than to decided cases. All cases are different and fact specific.

629   Order 66 r 1 of the *Rules of the Supreme Court 1971* (WA) (RSC) introduces the general rule - the court will generally order that the successful party recover their costs. Nevertheless, a party who has enjoyed substantial success will not necessarily recover the entirety of their costs. The effect of RSC O 66 r 1(2) is that the court may depart from the general rule where a claim by a party for an unreasonably excessive amount has resulted in costs being unnecessarily or unreasonably incurred. Furthermore, RSC O 66 r 1(3) provides that the court may make separate orders which reflect the outcome of different issues.

630   Whilst these rules reflect the discretion of the court to depart from the general rule, it is convenient to start by considering which party was the successful party. PAPL and Qantas each submitted that they were the successful party.

Success and the general rule

631   What constitutes success in proceedings is to be determined by 'the reality of the circumstances involved in the case'.[585] Professor Dal Pont describes the successful party as the party 'who on the whole succeeds in the action'.[586]

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[584] *Supreme Court Act 1935* (WA) s 37.
[585] **Strzelecki Holdings Pty Ltd v Jorgensen** [2019] WASCA 96; (2019) 54 WAR 388 [50].

632   The starting point for the exercise of the court's discretion is that costs follow the event. To work out who is the successful party the court has to ask: 'who, as a matter of substance and reality, has won?' In a commercial case, it is important to identify which party is to pay money to the other.

633   Qantas submits that it was the successful party for a number of reasons. First, Qantas submits that PAPL failed to recover the amount demanded. Qantas argues as follows. The dispute arose because the parties were unable to agree prices for aeronautical services. PAPL invoiced Qantas at rates well above the reasonable value of the services.   The effect of the court's determination is that the remuneration demanded by PAPL was unreasonably high and that which Qantas had been willing to pay was too low. That the amount determined is higher than that for which Qantas contended has no more weight than the fact that it is lower than the sum for which PAPL contended. The making of an order for payment of a sum of money to PAPL does not mean that PAPL 'on the whole' succeeded in the action. On the contrary, and significantly, PAPL's case as to how the services should be valued was rejected and Qantas' was accepted.

634   Secondly, Qantas submits that it succeeded on a substantial majority of the issues and therefore should have its costs of and incidental to the proceeding save for the sole substantial issue one which PAPL was successful, that is the weighted average cost of capital (WACC).

635   I do not accept those arguments. In a commercial case where the plaintiff asserts that an amount is owing to it and the defendant denies that any amount is owing to the plaintiff, a plaintiff which ends up receiving payment should generally be characterised as the overall winner of the action. In commercial litigation the dispute is ultimately about money. In deciding who was the successful party, the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure.

636   Both parties turned out to have been overoptimistic in their claims as to what was fair and reasonable remuneration for the aeronautical services provided by PAPL to Qantas - PAPL's claim was too high, and Qantas' claim was too low. That is not uncommon in commercial litigation. In such a case the plaintiff should normally be regarded as the successful party within O 66 r 1(1). The plaintiff has been forced to

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586 Dal Pont G E, *Law of Costs* (5th ed, 2021) [8.2].

bring proceedings in order to recover the sum awarded. It has done so, and its claim has been vindicated to that extent.

637   It is wrong to equate success on issues, even important issues which took up a great deal of time, with success in a more general sense. All of the facts and circumstances must be taken into account. The court needs to survey the whole battlefield. The application of the general rule requires consideration of the overall relative success of the parties in respect of the dispute that brought them to court, not which party has won on individual issues. Approached in that way I consider PAPL was the successful party.

Costs of issues

638   For organisational purposes the parties' submissions and the Principal Judgment were organised under a number of broad issues - quantum meruit legal principles, admissibility of public reports, gamma, asset beta, WACC, opening asset base and operating expenditure, depreciation of Terminal 3 and value of aeronautical services. These were discrete issues in the sense that each was considered separately, and different evidence and arguments were addressed to each. However, they were not discrete in that they were interrelated and all lead to the eventual outcome. The quantum meruit legal principles underpinned the approach to the calculation of fair and reasonable remuneration. The admissibility of public reports affected what evidence might be considered in relation to the other issues. Asset beta is an input into the WACC. Gamma, WACC, operating asset base and operating expenditure and depreciation of Terminal 3 are inputs into or relevant to the building block model calculation. The building block model calculation was fundamental to the court's assessment of fair and reasonable remuneration for the aeronautical services. In that sense each of the identified 'issues' are interdependent or related to each other and all inform the calculation of the fair and reasonable remuneration for the aeronautical services.

Affidavit of Ms Newbold

639   Qantas relies on an affidavit of Beverley Newbold affirmed on 21 February 2022. Ms Newbold is a partner in Minter Ellison and has the carriage of and is responsible for the conduct of the proceeding on behalf of Qantas. She has 23 years of experience in taxation and assessment of costs in complex litigious matters.

640   Ms Newbold describes the practice of time recording which she oversaw on this matter. She affirms that it will be possible for a costs consultant and taxing officer to discern in the vast majority of time narrations what activities and related costs were undertaken in relation to what issues

641   Ms Newbold affirms that between 17 December 2018 and 27 November 2020 it was necessary for Qantas to conduct its discovery and approach its defence of the proceedings on the basis that it might have to defend against any and all of the methodologies that PAPL had suggested might be applicable. At the first strategic conference on 20 March 2019, PAPL referred, amongst other methodologies, to 'the benefit that is derived in a profitability sense from Qantas' use of the services'. Qantas denied that that was a relevant methodology. The court found that it was not a relevant methodology.[587] PAPL's introduction of the Qantas profit or benefit occasioned substantial costs to Qantas for discovery, preparation and consideration of expert reports and lay witness statements, joint expert conclave on valuation methodology and JER 1 in preparation for and time at trial.

642   Ms Newbold affirms that PAPL required discovery of categories of documents including the Profit Categories and Other Airports Category. The other airports category refers to documents relating to the fees or prices charged to Qantas by other Australian airports. Qantas incurred substantial costs in giving discovery in relation to those issues. Specifically, Ms Newbold affirms:

> I am informed by Mr Aiolfi, and believe, that Mr Aiolfi reviewed and allocated the time entries to the Profit, Benefit and Other Airports Categories to confirm that narrations relating to review of those documents were distinguishable from other discovery categories. His estimate of the total discovery costs associated with the Profit, Benefit and Other Airports Categories is that those categories alone involved Qantas incurring legal costs of at least $1.1 million (ex-GST). This figure relates to costs incurred on discovery alone and does not include the preparation of evidence relevant to PAPL's methodological propositions or time spent on this issue during trial. Further, this estimate is an underestimation of the actual discovery costs associated with the Profit, Benefit and Other Airports Categories due to the occasional instances of a time entry being generic and not connected to one of the Profit, Benefit and Other Airports Categories (e.g. 'undertaking second level review of documents' or 'attending meeting with Minter Ellison review team to discuss updated discovery categories'), or relating to one of the Profit, Benefit and Other Airports

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[587] ***Perth Airport Pty Ltd v Qantas Airways Ltd [No 3]*** [2022] WASC 51 [112], [561].

Categories plus another unrelated category. Mr Aiolfi excluded those narrations from his calculations. It is also an underestimation as it does not include the costs of processing these documents, nor any time incurred by Counsel and Minter Ellison discussing how to approach difficult judgments about documents' relevance and confidentiality. I am satisfied that with time, in the course of preparation for taxation (if necessary), additional costs will be readily identified.

643   PAPL raised the issue of passing on of airport charges to customers. The court found the evidence did not establish that the charges were passed on to customers in any relevant sense. Qantas incurred costs of discovery in relation to this issue.

Qantas' analysis of the issues

644   Qantas submits that the primary and most significant issue between the parties was how the reasonable value of the services provided by PAPL should be determined and that the court rejected PAPL's case both as a matter of law and as inapt in the circumstances of the case. Qantas submits that PAPL's introduction of its 'comparable transaction' methodology and 'benefit' to Qantas created a discrete and separable issue on which PAPL wholly failed. Ms Newbold's affidavit affirmed 21 February 2022 sets out the cost burden to Qantas of this issue and Qantas' repeated reservations of rights with respect to such cost burden.

645   Qantas submits it was wholly successful and PAPL unsuccessful on the determination of gamma.

646   Qantas concedes that the estimation of asset beta 'was one of the two issues on which PAPL enjoyed some success' but that success was not unqualified nor was PAPL's ultimate figure adopted.

647   Qantas accepts that the determination of the other input parameters for PAPL's WACC - the market risk premium, risk-free rate, and cost of debt - was an issue on which PAPL had substantial success. Qantas says it is the only issue on which PAPL had substantial success.

648   Qantas submits that disputes about items of operating expenditure including marketing costs did not make any material contribution to the parties costs of the proceeding.

649   Qantas submits that the rate of depreciation to be applied to Terminal 3 was a significant issue to which substantial parts of lay evidence, cross-examination, and submissions was directed. Qantas

submits that it was determined 'having regard to the reality of the case' in Qantas' favour. Qantas submits that the court:

(a)   accepted Qantas' submissions and evidence that they would not encounter capacity constraints by 2025 on the basis of aircraft stands;

(b)   accepted Qantas' position on whether it could or would split operations across terminals;

(c)   accepted Qantas' evidence that forecourt capacity would not be constrained before 2024; and

(d)   rejected PAPL's contention that depreciation treatment was a matter for PAPL and accepted Qantas' submission that it was a matter for the Court to determine inputs to the model that were reasonable and reflected efficient outcomes.

650   PAPL argued for a depreciation based on a useful life of 7 years, Qantas argued for 20 years. The Court found that a 13-year useful life for the Terminal 3 assets was reasonable. In doing so, the court:

(a)   relied on the 20-year useful life used in the models underpinning the 2011 PSA;

(b)   observed that in PAPL's own calculations in September 2017 the useful life was considered to be far longer than 7 years;

(c)   was not persuaded, having regard to all of the evidence, that Terminal 3 had no useful life beyond 2025;

(d)   rejected PAPL's contention that Qantas could not use Terminal 3 after 2025, both as a matter of law and fact; and

(e)   found that it was 'unreasonable' for PAPL unilaterally to have imposed a shortened useful life for Terminal 3 on Qantas [517]. The court determined a useful life of 13 years. Qantas submits that PAPL introduced the 'accelerated' depreciation of Terminal 3 is an issue and was wholly unsuccessful.

651   Qantas submits that the only issue in dispute on which PAPL had unqualified success was the determination of the market risk premium, risk free rate, and cost of debt components of the WACC, the costs of which are readily identified in the costs referable to one set of expert evidence, the result on asset beta was equivocal and on all other issues,

Qantas was either the outright successful party or was substantially successful.

652   Qantas submits that if the court does not determine to leave the quantification of costs relating to WACC to the parties' agreement or taxation, then adopting an impressionistic assessment reflecting time taken at trial, it would be open to the court to award PAPL no more than 10% of its costs and Qantas 90% of its costs (or, netting them, that PAPL pay 80% of Qantas' costs). However, Qantas submits that in circumstances where costs relating to WACC are readily separable, and where significant costs were incurred prior to trial, Qantas submits that the more appropriate approach is to make orders in terms of its minute.

PAPL submissions on costs of issues

653   PAPL submits that an order for costs on an issues basis is not appropriate in this action. PAPL submits that the fundamental contest was whether Qantas had paid PAPL a fair and reasonable price for the aeronautical services and PAPL was wholly successful on as pleaded cause of action. PAPL submits that to embark upon an issue-by-issue analysis of the proceeding would be oppressive and an unjustified use of judicial resources, including on taxation.

654   PAPL submits the matter is not be approached by a detailed review of which party 'won' individual arguments or submissions or had particular pieces of conflicting evidence preferred by the court to that presented by the other. That approach is apt to descend into a re-run of the trial and add to the uncertainty and complexity of litigation, and the time and cost of costs arguments. Further, such an exercise is apt to overlook the significance of particular issues in contributing (or not) to the successful party making out its entitlement to relief, having regard to the pleaded issues, which must be a key consideration in any assessment of success.

655   PAPL submits that the complexity involved in addressing costs by reference to issues can be illustrated by the building block model and its various inputs. In relation to those inputs, there were many issues and sub issues involving questions of fact and expert opinion. Each of the issues had different degrees of significance in terms of its ultimate effect on the prices derived in the time taken in addressing it. An analysis of such matters in relation to the building block model alone would be very complex and require the court to form a view about such matters in respect of opening asset base, depreciation, forecast capital expenditure, operating expenditure, WACC (including cost of debt,

risk-free rate, asset beta, equity beta, market risk premium, cost of equity, and leveraged) and gamma. PAPL submits it enjoyed substantial success on many of these points while in some instances, such as depreciation and gamma, the court did not accept each party's position.

656   PAPL concedes 'the court did not embrace PAPL's submission that comparative transactions with other airlines should be the primary point of reference for determining a fair and reasonable price' but says the court did not accept Qantas' submission that prices agreed with other airlines were irrelevant or that Harbours Board stood for the principle that in a market with a single supplier, reasonable remuneration can only be accessed by reference to the efficient costs of the plaintiff.

657   PAPL submits that where, as here, the factual context is novel, the matter is important, and the court is engaged in an evaluative task that involves determining what weight to afford to various factors or circumstances, it would be contrary to justice toward costs of issues against the successful party unless the justification were very clear.

658   PAPL submits that if the court considers that Qantas should be awarded costs of issues on which it succeeded then the appropriate course would be to award PAPL a reduced amount of costs by a percentage reduction in the amount to which PAPL would otherwise be entitled. PAPL submits that any reduction should be very modest and the court should take into account complications which it considers will arise in the taxation of costs.

Costs of issues – decision

659   PAPL though generally successful, has, by the introduction of some issues on which it failed or did not pursue, increased the costs. The court may order PAPL to pay the costs of such issues. For the reasons stated by the Court of Appeal in *Strzelecki*, the power to apportion costs in this way should only be exercised where there are discrete and severable issues on which PAPL failed, and which added to the cost of the proceedings in a significant and readily discernible way.

660   There are a number of issues on which PAPL failed, or which it did not pursue, which are sufficiently discrete and severable, and which added to the cost of the proceedings in a significant way which is sufficiently discernible to warrant an order that PAPL pay the costs of those issues. The issues are as follows.

661   The first issue is the value of gamma. The court rejected Mr Houston's opinion that the distribution rate should be based on ATO tax data and rejected his reliance on dividend drop-off studies for the utilisation rate. The court rejected Mr Houston's suggestion that data from all companies should be used to determine the distribution rate and accepted Dr Lally's opinion that only data from listed companies should be used. The value the court determined for the distribution rate was one of the estimates propounded by Dr Lally and for the utilisation rated was the estimate given by Dr Hern, which was also one of the estimates given by Dr Lally. PAPL was wholly unsuccessful on the issue of the value of gamma. The issue added significantly to the costs of the proceeding and is a sufficiently discrete and severable issue.

662   The second issue is the benefit or profit earned by Qantas on flights to and from Perth Airport. PAPL argued that the per passenger economic profit and by Qantas on flights to and from Perth Airport materially exceeded the per passenger prices claimed by PAPL for the Relevant. And that was a factor supporting the charges it claimed should be paid by Qantas.[588] The court found that the profit per passenger earned by Qantas on routes to and from Perth Airport is not a comparable price. The court held that reasonable remuneration is the value of the services provided, not any profit gained by the recipient of the services in undertakings which use those services.[589] In effect, the court held that the profit per passenger earned by Qantas on routes to and from Perth Airport was not a relevant consideration. Ms Newbold affirmed that the costs of discovery in relation to that matter were substantial. The issue added significantly to the costs of the proceeding and is a sufficiently discrete and severable issue.

663   The third issue is the fees or prices charged to Qantas by other Australian airports. PAPL did not advance that argument at trial. However, PAPL required Qantas to give discovery of documents relating to that issue. Indeed, PAPL applied for and obtained an order that Qantas give discovery of documents relating to the fees or prices charged to Qantas by other Australian airports.[590] Ms Newbold affirmed that the costs of discovery in relation to that matter were substantial. The issue added significantly to the costs of the proceeding and is a sufficiently discrete and severable issue.

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[588] *Perth Airport Pty Ltd v Qantas Airways Ltd [No 3]* [2022] WASC 51 [8].
[589] *Perth Airport Pty Ltd v Qantas Airways Ltd [No 3]* [2022] WASC 51 [112], [561].
[590] See *Perth Airport Pty Ltd v Qantas Airways Ltd* [2019] WASC 460 [2] - [7].

664   The fourth issue is whether Qantas were able to use Terminal 3 beyond 2025. PAPL contended that Terminal 3 did not have a useful life beyond 2025 because, amongst other things, capacity constraints practically prevented its use by Qantas beyond 2025.

665   A significant amount of evidence was adduced by the parties regarding whether, practically, Qantas are and were able to use Terminals 3 and 4 beyond 2025. The court essentially accepted Qantas' contentions and rejected PAPL's contentions concerning capacity constraints at Terminal 3 beyond 2025. As I have said a significant amount of evidence was directed to that issue. The issue added significantly to the costs of the proceeding and is a sufficiently discrete and severable issue.

666   I am not satisfied that there are any other issues on which PAPL failed and Qantas succeeded which added significantly to the costs and which are sufficiently discrete and severable issues. Mr Houston's comparable transaction methodology is not a discrete and severable issue on which PAPL failed, and which added to the cost of the proceedings in a significant and readily discernible way for two reasons. First, the court did not find that the comparable transactions, that is prices PAPL agreed with other airlines, irrelevant. The court had regard to the reasonableness of the results of the building block method in the light of all other relevant evidence, which included the comparable transactions.[591]   Secondly, the issue concerns expert evidence of Mr Houston and Mr Siolis. That evidence and the experts' consideration of the underlying transactions, their comparability and their context are intertwined with their consideration of and evidence concerning other aspects of what is a market price or appropriate price for aeronautical services.

667   In the context of a long and complex commercial trial, the issue of Qantas passing on airport charges to customers did not add sufficiently to the costs of the to make appropriate to make an order requiring a separate assessment of costs of the issue.

Exercise of discretion as to costs

668   PAPL should have the costs of the action except for the costs of the four issues I have identified. For the assistance of the taxing officer, the costs of the action include the common costs, that is items of work that serve as much the purpose of the other issues as those of

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[591] ***Perth Airport Pty Ltd v Qantas Airways Ltd [No 3]*** [2022] WASC 51 [603], [615].

which Qantas has been awarded the costs. Qantas should have the costs of the four issues I have identified. The costs of those issues are the costs of work referable to those issues alone.

669   I have decided to award Qantas the costs of the issues I have identified rather than deduct a proportion of the costs awarded to PAPL because I am unable to form any proper estimate of the costs incurred in relation to those issues relative to the costs incurred in the action as a whole.

Special costs order

670   In my opinion, the amount of costs allowable in respect of this matter under the relevant costs determinations is inadequate because of the unusual difficulty and complexity and importance of the matter and it is appropriate to make a special cost order pursuant to *Legal Profession Act 2008* (WA) s 280(2). The parties agree that the special costs order should be as I have set out earlier in these reasons except for one matter. PAPL submits that the order should include reasonable allowances for work undertaken by senior counsel and junior counsel and on the basis that the plaintiff is to be allowed the costs of four counsel, including two senior counsel. Qantas submits that the cost payable by Qantas to PAPL should not be taxed on the basis that PAPL should be allowed the costs of a second senior counsel. Qantas submits that the resources Qantas deployed at the trial, and the result, demonstrate that one was sufficient.

671   The test in determining whether a successful litigant should be allowed the costs of multiple counsel is whether a reasonable and prudent person acting with ordinary prudence would have ventured into the court without that many counsel. Professor Dal Pont refers to judicial observations to the effect that it is unusual to allow a successful party the cost of three counsel. The matter should be approached objectively. In **Stanley v Philips**,[592] the issue was whether a successful plaintiff in a personal injuries case should be allowed the cost of two counsel. In an often-quoted passage Barwick CJ said:

> This Court in **Kroehn v. Kroehn** expressed a test for deciding whether the fees for two counsel should be allowed in a party and party taxation. The question propounded by Griffith CJ when he says: 'Would a prudent person not compelled by poverty come into Court in such a ease without two counsel?' must be understood in relation to the basic matter in issue, which is the presentation of the case to ensure a just

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[592] **Stanley v Philips** [1966] HCA 24; (1966) 115 CLR 470, 478 - 479.

adjudication. The question is not whether a man in seeking his own maximum advantage would be imprudent not to engage counsel of a particular level of experience or skill. The question is whether the services of more than one counsel are reasonably necessary for the adequate presentation of the case.

672   The same test applies to the deployment of four counsel. The question is not whether PAPL in seeking its own maximum advantage would be imprudent not to engage four counsel, including two senior counsel, the question is whether the services of four counsel including two senior counsel are reasonably necessary for the adequate presentation of its case.

673   Relativity is relevant. Qantas deployed three counsel, including one senior counsel, for the presentation of its case. PAPL deployed four counsel including two senior counsel. However, this is not a case where all counsel deployed were attending court at the same time or attending to the same tasks so as to give rise to multiple fees being charged to carry out work that could reasonably have been done by one senior and one junior counsel. PAPL submits that both senior counsel were not performing the same tasks. The trial was not conducted in that manner. It was reasonable for two senior counsel to be engaged to perform largely separate and discrete roles during the trial. Mr Young QC and Mr M Rush QC each addressed different aspects of PAPL's case and took different witnesses. I am satisfied that the deployment of two senior counsel and two junior counsel was reasonably necessary for the adequate presentation of PAPL's case. For the assistance of the taxing officer, I note that whilst PAPL's costs are to be assessed including reasonable allowances for work undertaken by Senior Counsel and Junior Counsel, and on the basis that the party is to be allowed the costs of four counsel, including two senior counsel, the taxing officer should not allow costs for senior counsel carrying out the same tasks. The same observation applies to the two junior counsel deployed by each party.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CR
Associate to the Honourable Justice Le Miere

24 FEBRUARY 2022