

SECTION 56G REVIEW OF AUCKLAND AIRPORT: CROSS-SUBMISSION ON COMMERCE COMMISSION DRAFT REPORT

14 June 2013

INTRODUCTION

1. The Commerce Commission ("**Commission**") published its Draft Report on the effectiveness of information disclosure ("**ID**") regulation at Auckland Airport on 30 April 2013, under section 56G of the Commerce Act 1986 ("**Auckland Draft Report**"). The New Zealand Airports Association ("**NZ Airports**") makes this cross-submission in response to the Auckland Draft Report on behalf of Auckland International Airport Limited, Wellington International Airport Limited, and Christchurch International Airport Limited (together, "**Airports**").
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OVERVIEW

3. The submissions from BARNZ and Air New Zealand on the Auckland Draft Report focus almost exclusively on the Commission's conclusion that ID regulation is effectively limiting Auckland Airport's ability to extract excess profits.
4. The airlines have not responded to the Auckland Draft Report in a way that looks to constructively engage with the Commission's draft conclusions or the development of an effective ID regime. The airlines continue to assert that ID regulation can never be effective and, aside from demonstrating a strong resistance to the ID regime in and of itself, the airline submissions on the Auckland Draft Report say very little.
5. In essence, the airlines argue that:
 - (a) The Commission's conclusions are not supported by the evidence. However, the airlines' submissions put forward speculation, not evidence, which the Commission has appropriately recognised is not relevant to assessing current behaviour and the effectiveness of the ID regime.
 - (b) Changes are required to the Commission's assessment model. However, the airlines' submissions are attempting to convince the Commission to make changes to its ex post modelling which shed no light on the impact of ID regulation at the time airports set prices.
6. We discuss these points briefly in this submission.

AN EVIDENCE-BASED APPROACH TO THE CURRENT EFFECTIVENESS OF ID REGULATION

7. NZ Airports has consistently argued for an evidence based approach to assessing the effectiveness of ID regulation.
8. As discussed previously, NZ Airports considers that current behaviour provides the best (and, at this stage, only) evidence of the effectiveness of ID regulation. In this way, the effectiveness of the regime at its current stage should be judged on the basis of the decisions that were made by airports at the time of pricing (assessed against the understanding that existed at that time about how performance would be measured under the ID framework). As previously submitted, this also requires an acceptance that the regime is in its infancy and incentives are likely to grow stronger as the regime beds in.
9. The Commission has correctly acknowledged that, for PSE2:¹

Auckland Airport targeted returns within an appropriate range, based on a reasonable assessment of how, at that time, it could have considered the Commission might assess its performance.
10. The airlines have not engaged with this position or presented any evidence that would justify the Commission departing from its valid conclusion. Airlines are instead:
 - (a) attempting to get the Commission to change its method of assessment in a way that could not have been anticipated by the airports when they set prices (including pushing for changes to the timing of WACC estimates for assessment purposes);
 - (b) seeking to discredit the assurances given by airports regarding future conduct; and
 - (c) speculating without foundation about possible future approaches.
11. The correct approach is to find that the airline speculation about the future does not change the *evidence* that Auckland Airport's current behaviour is appropriate and that the ID regime has been effective in promoting that appropriate behaviour. The airlines should be discouraged from attempting to introduce a variety of "forecast misinformation" in an effort to convince the Commission to rely on that speculation to make key findings.
12. The section 56G review clearly directs the Commission to review the information which has been disclosed in accordance with the ID requirements as the main basis for the Commission's conclusions. When forecast information is used as part of an assessment of the effectiveness of ID regulation, that information should be limited to *disclosed* forecast information in the context of assessing *current* behaviour and performance. In other words, the correct approach is to consider what disclosed forecast information tells interested parties (including the Commission) about the actual decisions that have been made by airports.
13. What must clearly be avoided is seeking to predict future decisions in an effort to draw conclusions about actual performance over time. This amounts to speculation and assumption, and provides interested parties with no information about current airport performance or about the effectiveness of the regulatory regime.

¹ Commerce Commission *Auckland Draft Report to the Ministers of Commerce and Transport on how effectively information disclosure regulation is promoting the purpose of Part 4 for Auckland Airport: Section 56G of the Commerce Act 1986*, 30 April 2013 at paragraph 3.3.

CHANGES TO THE COMMISSION'S ASSESSMENT MODEL

14. As noted above, the airlines have suggested that the Commission use an updated WACC estimate after the date of the Commission's published April 2012 estimate in assessing Auckland Airport's profitability. The airlines have also suggested other changes to the Commission's modelling approach (such as the use of mid-year cashflows).
15. In NZ Airports' view, the airlines' claims in these areas demonstrate that measuring returns is a contentious exercise that will never be a precise science. As such, the best evidence of the effectiveness of ID regulation continues to involve examining (as recognised by the Commission in the Auckland Draft Report) whether airports were acting appropriately at the time of pricing based on the understanding of how performance would be assessed at that time.
16. For example, where the evidence demonstrates that the Commission's published WACC estimates were a part of the fact set used by airports and their airline customers in evaluating charges, that estimate is the appropriate reference point (applied in its correct context) for assessing the impact of ID regulation on airport behaviour and performance.
17. From the submissions on the Auckland Draft Report, it appears that BARNZ and Air New Zealand are suggesting ways in which the Commission should adjust its ex post modelling in a way that was not contemplated by airports at the time of pricing, in an attempt to obtain a finding that excess returns may be earned in the future (and that ID regulation is therefore ineffective). However, the changes proposed by the airlines do not in fact provide any information about the effectiveness of ID regulation at the time prices were set, which is the relevant time point for the Commission's analysis under the section 56G review.

CONCLUSION

18. In summary, the airlines put forward a variety of "evidence" in support of their argument that the Commission is wrong in its conclusion that ID regulation is effectively limiting Auckland Airport's ability to extract excess profits. NZ Airports considers the airlines' views to be deeply misguided. In our view, the airlines' submissions simply reinforce the importance of a robust evidence-based approach to assessing current behaviour, decisions and performance. In particular, it is clear that the airlines' submissions simply:
 - (a) reinforce the fact that measuring returns is not a precise science;
 - (b) acknowledge the Commission's analysis of future returns is necessarily heavily based on assumptions; and
 - (c) demonstrate the dangers in inviting speculation about future pricing decisions.
19. In light of these factors, NZ Airports encourages the Commission to retain its focus on:
 - (a) considering the best available evidence in support of its conclusions; and
 - (b) assessing the impact of ID regulation in light of the way the ID regime operated at the time airports set prices.