BARNZ CROSS-SUBMISSION ON MATTERS OF PROCESS RAISED BY THE AIRPORTS

20 July 2012

The submissions of the three Airports (Auckland, Wellington and Christchurch) and the NZ Airports Association (together the Airports) lodged on 28 June 2012 in response to the Commission's Process and Issues Paper raise substantially similar issues, and will therefore be responded to together by BARNZ in this cross-submission.

The key matters raised by the Airports with respect to the process proposed by the Commission for the section 56G Review are as follows:

1. The Review is happening too soon
2. All three Airports should be considered in the same Review process and report
3. The scope of the Review should only extend to whether sufficient information is being provided so as to enable interested persons to determine whether the purpose of Part 4 is being met
4. Only information disclosed by the Airports under Part 4 is relevant
5. The Commission is focussing disproportionately on section 52A(1)(d)

Each of these matters will be responded to in turn.

However, it is pertinent first to set out section 56G in full, because this is the source of the requirement on the Commission to undertake the Review, and is the basis for determining the legitimate scope and ambit of the Review.

> **56G Transitional provision requiring review after new prices set**
> (1) As soon as practicable after any new price for a specified airport service is set in or after 2012 by a supplier of the service, the Commission must—
> (a) review the information that has been disclosed by suppliers of specified airport services under subpart 4; and
> (b) consult (without necessarily holding an inquiry) with interested parties; and
> (c) report to the Ministers of Commerce and Transport as to how effectively information disclosure regulation under this Part is promoting the purpose in section 52A in respect of the specified airport services.

Is the Review is happening too early?

The Airports all assert that the Review is happening too early – that it is not yet 'reasonably practicable' to commence it now as the Commission is proposing to do. Rather, they assert that the Commission should hold the Review:

- After the Commission's analysis under section 53B has been completed
- After all three Airports have completed setting new charges

- After an (unspecified) period of time has passed when more annual disclosures and disclosure summaries are available
- After the merits review process has been finalised.

BARNZ disagrees.

Section 56G requires the Commission to undertake the Review *'as soon as practicable after any new price for a specified airport service is set in or after 2012 by a supplier of the service'.*

Wellington Airport set its new charges at the beginning of March this year. Those new charges came into force at the beginning of April. The Airport released its price setting disclosure in May. BARNZ is in complete accordance with the Commission's view that now is the appropriate time to commence the Review.

The trigger for the Review is the resetting of any new price for a specified airport service by a supplier – in the case of Wellington Airport this has occurred.

There is no requirement in section 56G that new prices have been set for specified airport services. The drafter deliberately used singular term 'specified airport service' rather than the plural term 'specified airport services' defined in section 56A which includes all three Airports. The requirement for the review is triggered individually, as each supplier resets its prices – just as each company supplying specified airport services has individually been made subject to regulation under Part 4 in section 56A(2).

Parliament has specifically and expressly directed in section 56G that there be a review early in the life of the new information disclosure regime. The Commission (as it is proposing to do) is required to undertake this Review in accordance with the timeframe directed by section 56G.

If Parliament had intended that the Review should not occur until all three Airports had reset their prices, then section 56G would have been worded differently, with the trigger being 'after new prices for specified airport services are set'. This is not the case. The trigger is 'after any new price for a specified airport service is set'.

If Parliament had intended that the Review not occur until more annual disclosures and disclosure summaries were available, then section 56G would have been worded differently, with the requirement to review being triggered by (say) three or four annual disclosures having been completed or a time being set, say 2015. This is not the case. The trigger is 'after any new price for a specified airport service is set in or after 2012'.

If Parliament had intended that the Review not occur until after the merits review process had been finalised, then section 56G would have been worded differently, with a proviso to this effect being included. This is not the case. There is no requirement for the review under section 56G to await the outcome of any merits review proceedings. Moreover, section 53 is very clear that the input methodologies determined by the Commission under Part 4 continue to apply until any appeal against the input methodology is finally

determined. The required timing in section 56G of 'as soon as practicable' remains the case, notwithstanding the on-going merits review proceedings.

Section 53B(2)(b) requires the Commission to publish a summary and analysis of any disclosed information as soon as practicable after the said disclosure, for the purpose of promoting greater understanding of the performance of individual regulated suppliers, their relative performance, and the changes in performance over time. The Airports allege this must occur prior to the section 56G Review. The Commission has indicated that it intends undertaking its analysis under sections 52B(2) and 56G at the same time so as to 'make the most efficient use of Commission resources and the levy budget'. BARNZ does not object to the Commission's proposal, and believes that undertaking both tasks together will meet the statutory requirement in both sections that the task be undertaken 'as soon as practicable'.

Should all three Airports should be considered together?

The Airports allege that the effectiveness of the information disclosure regime should be considered in relation to all three Airports at the same time, and in the same report, rather than the Commission's proposed process of undertaking separate Reviews and reports with respect to each airport.

BARNZ disagrees.

As discussed above in relation to the timing of the Review, section 56G has been deliberately drafted so that the requirement for the Review is triggered as each supplier resets the price of any specified airport service, not once all suppliers of specified airport services have reset their prices. If Parliament had intended that the Review should not occur until all three Airports had reset their prices, then section 56G would have been worded differently, with the trigger being 'after new prices for specified airport services are set'. This is not the case. The review relates to the specified airport service for which the supplier has just reset the price.

Section 56(1)(c) which creates the requirement to report to the Ministers of Commerce and Transport reflects the individual nature of the Review. It requires the Commission to report as to how effectively information disclosure regulation under Part 4 is promoting the purpose in section 52A in respect of <u>the</u> specified airport services. Section 56(1)(c) thus directly links the requirement to report back to the specified airport service which triggered the requirement to undertake the review. The requirement is not to report on how effectively information disclosure regulation under Part 4 is promoting the purpose in section 52A in respect of <u>all</u> specified airport services.

This is entirely appropriate, as how effectively information disclosure regulation under Part 4 has promoted the purpose of section 52A will differ from airport to airport, depending upon:

- the degree to which innovation and investment has occurred at each airport
- the degree to which an airport is (or is becoming) efficient

- whether specified airport services at that airport are provided at a quality reflecting consumer demands
- whether a supplier has shared the benefits of efficiency gains with its consumers, including through lower prices; and
- whether a supplier is limited in its ability to extract excessive profits.

Each airport therefore needs to be considered separately in answering the question of how effectively information disclosure regulation under Part 4 is promoting the purpose in section 52A in respect of the specified airport services for which a new price has been set.

Looking at all three airports at the same time would create a serious risk of the Commission not focusing on each supplier and the specified airport services provided by that supplier which have just been subject to a price reset.

Is the scope of the review limited to the effectiveness of the information disclosed?

The Airports allege that the scope of the review must be limited to whether the purpose of information disclosure is being met – namely whether sufficient information has been provided by the Airports so as to enable interested persons to assess whether the purpose of Part 4 is being met.

BARNZ disagrees.

Section 56G requires the Commission to report to the Ministers as to how effectively information disclosure regulation under Part 4 is promoting the purpose in section 52A in respect of the specified airport services. The purpose in section 52A is to promote the long term benefit of consumers by promoting outcomes consistent with outcomes produced in competitive markets such that suppliers of regulated goods or services:

(a) have incentives to innovate or invest
(b) have incentives to improve efficiency and provide services at a quality that reflects consumer demands
(c) share with consumers the benefits of efficiency gains, including through lower prices
(d) are limited in their ability to extract excessive profits.

The Airports are endeavouring to limit the scope of the review to how effectively information disclosure regulation under Part 4 is promoting the purpose in section 53A in respect of the specified airport services. Section 53A articulates the purpose of information disclosure regulation as being 'to ensure that sufficient information is readily available to interested persons to assess whether the purpose of [Part 4] is being met'.

If the purpose of the review and report in section 56G was intended to be confined to whether sufficient information has been provided by the Airports so as to enable interested persons to assess whether the purpose of Part 4 is being met, as is alleged by the Airports, then the drafters would have directed the Commission to focus on 'how effectively

information disclosure regulation … is promoting the purpose in section 53A in respect of the specified airport services'. The section is however not drafted in this manner. The very clear direction from the statute is for the Commission to review how effectively the purpose in section 52A is being promoted. In other words, whether information disclosure is effectively promoting the long term benefit of consumers by promoting outcomes consistent with outcomes produced in competitive markets such that the outcomes specified in paragraphs (a) to (d) of section 52A are being achieved.

That this must be the case is clearly shown by considering the consequence of the Airports' assertion. If it was the case that the Review was simply to consider whether or not interested persons had sufficient information to assess whether the purpose of section 52A is being promoted, then a conclusion that interested persons received sufficient information to determine that the purpose of section 52A was not being met (say for example because excessive profits were being extracted, or efficiencies were not being shared with consumers), would result in a report that the purpose of information disclosure is met – despite the fact the purpose of section 52A is not being met.

The reason the Government directed that a Review occur so soon after the introduction of the new regime, was to test whether or not information disclosure was in fact capable of promoting the purpose in section 52A in an effective manner. The Airports' arguments to read down the scope of the Review are a blatant attempt to emasculate the effectiveness of the Review under section 56G and render it meaningless.

Is relevant information limited to that disclosed under Part 4?

The Airports allege that the only relevant information is that disclosed by the Airports as part of their information disclosure obligations under Part 4, with this information being sufficient to enable the Commission to report to the Ministers.

BARNZ disagrees.

Clearly, information disclosed by the Airports under Part 4 is a mandatory consideration for the Commission and must be reviewed. However, the information disclosed by the Airports is not the only information that the Commission may consider.

The approach advocated by the Airports would remove the ability of interested persons to question the appropriateness of the matters disclosed by the Airport, and of the Commission to look behind the information disclosed by the Airports, and assess whether matters such as the underlying asset and cost allocations, asset valuations, forecast costs, capital expenditure and demand are appropriate. The Airports' approach would confine the Commission to making a report on the basis of the Airports' views and disclosures of the relevant factors.

This is entirely contrary to the structure of Part 4 which provides the Commission with the ability to seek additional information in both section 53B(1) in relation to monitoring

compliance with information disclosure requirements, and section 53ZD which provides the Commission with very wide information gathering powers for the purpose of carrying out its functions and exercising its powers under Part 4.

Moreover, it is also inconsistent with the Commission's task of assessing whether information disclosure regulation has been able to effectively promote the long term benefit of consumers by promoting outcomes that are consistent with outcomes produced in competitive markets.

Is the Commission focussing disproportionately on section 52A(1)(d)?

The Airports have alleged that the Commission is focussing disproportionately on section 52A(1)(d), which lists the final outcome expected from a competitive market – that suppliers are limited in their ability to extract excessive profits. The Airports consider that the Commission has not given sufficient weight to the other outcomes expected to be produced in competitive markets as listed in paragraphs (a) to (c) of section 52A(1).

BARNZ disagrees.

The Commission's questions set out in its Issues Paper for Wellington Airport have clearly considered the full scope of section 52A(1). The order in which the Commission has posed its questions does not, to BARNZ, indicate any particular level of focus or weight.