

BARNZ RESPONSES TO COMMERCE COMMISSION QUESTIONS RELATING TO PROCESS

28 June 2012

The Commerce Commission has released a Process Paper outlining its proposed process and issues for section 56G Reports for Airport Services required to be undertaken by the Commission under Part 4 of the Commerce Act.

Section 56G reads as follows:

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.

The Commission has specifically sought feedback on:

- The proposed timing of the review
- Its intention to separately review each Airport
- Its proposed process and timetable
- The scope of the review
- Relevant information it should consider

This paper provides feedback by BARNZ.

Proposed Timing

The Commission has proposed starting the review process now, given that WIAL (and now also Auckland Airport) have reset charges and Christchurch Airport is consulting on resetting its charges and it has received the price setting disclosures of WIAL.

BARNZ supports the Commission's intention to commence the section 56G reviews now. This accords with the intention of Parliament which directed in the wording of section 56G that the review should occur 'as soon as practicable after any new price is set in ...2012'.

BARNZ also supports the Commission's view that it should not wait for the outcome of the merits review process. Section 53(2) is very clear that input methodologies should continue to be applied irrespective of any pending merits review proceedings. If the Commission was to wait until completion of the merits review proceedings, this would likely prevent the section 56G review from occurring for some three years or more while all appeal processes are completed.

Wellington Airport has set charges which will result in the revenue it earns from these charges increasing by approximately 9% per annum during the next five year pricing period. All told, WIAL's revenue earned from its common use terminal and airfield assets will increase from \$55.7m in FY12 to \$85.9m by FY17. This represents a 54% increase in required revenue over the 5 year pricing period.

The increases to domestic jet and turbo-prop aircraft movements are extraordinary, with charges per passengers on turbo-prop aircraft more than doubling and charges for passengers on domestic jet aircraft increasing by 40%. The percentage increases during the peak and shoulder periods are even higher.

Approximate Charge per Passenger Using Wellington Airport

Passenger type	FY12 charge	Approximate FY 17 off-peak charge	Approximate FY 17 peak charge	Approximate % change FY12 to FY17 off-peak	Approximate % change FY12 to FY17 peak
International	\$22.29	\$18.55	\$20.60	-17%	-8%
Domestic Jet	\$10.82	\$15.20	\$17.10	40%	58%
Domestic large turbo-prop	\$6.12	\$11.80	\$14.60	93%	139%
Domestic small turbo-prop	\$6.12	\$12.70	\$19.20	107%	214%

The analysis by BARNZ is that far from increasing, charges should be decreasing over the new pricing period, with reductions of between 4% and 20% required in year one,¹ with constant charges thereafter, in order to produce an NPV = 0 outcome over the five years.

Any delay in the Commerce Commission undertaking its review of the effectiveness of information disclosure regulation under Part 4 of the Commerce Act in relation to Wellington Airport, just represents further time during which WIAL is extracting monopoly returns from airlines and the travelling public. The longer the review takes to be completed, the higher WIAL's charges will be when the Ministers come to consider the Commission's conclusions, and the greater the level of over-recovery by Wellington Airport and its shareholders.

Separate Reviews for Each Airport

The Commission has proposed preparing a separate report for each of the three airports. BARNZ supports this proposal. Otherwise, the reviews would necessarily need to wait until at least two months after the final airport reset its prices, which would be inconsistent with the statutory 'as soon as practicable' direction contained in section 56G.

¹ The range reflects the Commerce Commission range of WACC estimates from 6.08% to 8.04%.

BARNZ also agrees with the Commission's analysis contained in footnote 6 that the wording of section 56G requires reviews to be undertaken in relation to each regulated supplier after it sets a new price.

BARNZ considers that the information disclosed by each regulated supplier under Part 4 needs to be reviewed on its own merits, as does each pricing decision made by each regulated supplier, in order to assess how effectively information disclosure regulation has promoted the purpose of section 52A in respect of the specified airport services provided by that regulated supplier. The decisions made by each airport and the information disclosed by each airport need to be considered individually by the Commission.

Proposed Process and Timetable

BARNZ is comfortable with the proposed process and indicative timeframes for the review in the case of Wellington Airport.

However, BARNZ asks that the Commission take into account the greater number of airlines operating at Auckland Airport when it sets the indicative timeframe for the review of Auckland Airport, and allows more time for the preparation of submissions and cross-submissions. From BARNZ's perspective, this will be necessary so as to provide sufficient time for BARNZ to obtain the views of its members, which often requires input from Airline head offices located overseas.

Scope of the Review

The Commerce Commission has indicated that it will assess:

- The airport's performance (historical and projected) under s52A(1) to identify whether the objectives in (a) to (d) are occurring
- The extent to which ID regulation under Part 4 has had an impact on the airport's performance and conduct

But it will not be:

- Assessing how effectively ID is promoting the purpose of Part 4 relative to other types of regulation provided for under Part 4, or relative to no regulation
- Recommending what, if any, alternative type of regulation should apply.

Section 56G requires the Commission to '*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*'.

The key matters for consideration by the Commission under the section 56G Review are information disclosure regulation under Part 4 for Specified Airports and whether the purpose in section 52A is being effectively promoted by that regulation. To adopt administrative law phraseology, these matters form mandatory considerations for the Commission.

Section 56G does not place any express constraints upon the Commission in relation to what other matters it can (permissible considerations) or cannot (impermissible considerations) take into account in considering how effectively information disclosure regulation is promoting the purpose in section 52A. The section is drafted very broadly.

Nevertheless the Commission is proposing to place a constraint upon itself through its proposed intention to only compare the current situation of information disclosure regulation under Part 4 with the previous situation of information disclosure under the Airport Authorities Act. BARNZ considers that the Commission is improperly constraining itself through its intention to not compare the status quo with how effectively other types of regulation could operate.

If it is valid for the Commission to consider matters outside of information disclosure regulation under Part 4, (which is the expressly stated ambit of the Review) then the Commission needs to take a balanced and symmetrical approach to what matters it considers. If the Commission is prepared to compare the effectiveness of the current information disclosure regulation as against the previous information disclosure regulation under the Airport Authorities Act, and consultations over charges which occurred before Part 4 came into force, then it also needs to be prepared to compare the effectiveness of the current information disclosure regulation under Part 4 as against other forms of regulation contained in Part 4.

Merely comparing the status quo as against the status quo ante is to only look at half the equation – the ‘what was’ side of the coin, as opposed to the ‘what could be’ side. The Commission’s proposed scope of review will limit it to a backwards looking consideration of the effectiveness of Part 4 Information Disclosure as compared to information disclosure under the Airport Authorities Act, rather than a forwards looking review of the effectiveness of Part 4 Information Disclosure in promoting the purpose in section 52A in the context of all regulatory tools available under Part 4.

BARNZ therefore submits that if the Commission is going to consider matters outside of information disclosure regulation under Part 4, then consideration of how effectively ID has promoted the purpose of Part 4 relative to other types of regulation under Part 4 is also required.

In addition, BARNZ considers that the scope of the Commission’s review should also include whether information disclosure regulation needs to be extended to other services provided by specified airports. Section 56A(1)(d) and (4) specifically recognise that the Commission has a role in relation to this issue, with the Minister not able to extend information disclosure to any other airport services without the Commission having first made a recommendation to this effect. The Commission has already previously identified that the

issue of the boundary of regulated activities is one that may well need to be considered at an appropriate time.² BARNZ considers that the section 56G review provides the appropriate time to consider this question.

BARNZ therefore believes that the scope of the Commission's review under section 56G needs to examine:

- Whether any other services should be made a specified airport service under section 56A for the purpose of Part 4.

BARNZ acknowledges that there is no express statutory requirement in section 56G for the Commission to recommend whether alternative types of regulation should be applied to specified airport services. However, BARNZ notes that this question is one which the Ministers of Commerce and Transport may well have to directly face, depending upon the Commission's conclusions with respect to the effectiveness of information disclosure regulation. Those Ministers will necessarily be interested in any observations or recommendations by the Commission.

BARNZ's view of the scope of the section 56G review is that the Commerce Commission should assess:

- The airport's performance (historical and projected) under s52A(1) to identify whether the objectives in (a) to (d) are occurring
- The extent to which ID regulation under Part 4 has had an impact on the airport's performance and conduct
- How effectively ID is promoting the purpose of Part 4 relative to other types of regulation provided for under Part 4
- Whether any other services should be made a specified airport service under section 56A for the purpose of Part 4.

Relevant Information

The Commission has listed information which it considers it may have regard to in assessing the effectiveness of information disclosure regulation (refer para 23 of the Process Paper). BARNZ agrees that all of these types of information may be validly referred to.

For the avoidance of doubt, BARNZ specifically records its expectation that 'consultation material from price-setting events' includes both material provided by the regulated airport to its customers as well as material provided to the regulated airport by its airline customers during consultation.

² Transcript – Input Methodologies Airport Workshop, 18 February 2010, per Commission Duignan at page 32, lines 11 to 24.