NZ AIRPORTS

SUBMISSION ON OPTIONS FOR IMPROVEMENTS TO INFORMATION DISCLOSURE REGULATION FOR SPECIFIED AIRPORT SERVICES

26 FEBRUARY 2016

Introduction

1. The NZ Airports Association (NZ Airports) makes this submission in response to the targeted consultation paper published by the Ministry of Business, Innovation and Employment (MBIE) in December 2015 on the options for improvements to information disclosure regulation for specified airport services.

2. The affected airports – Auckland International Airport Limited (AIAL), Wellington International Airport Limited (WIAL) and Christchurch International Airport Limited (CIAL) – have been involved in the preparation of this submission.

3. NZ Airports' contact for this submission is:

Kevin Ward
Chief Executive
PO Box 11 369
Manners Street
Wellington 6011

DDI: (04) 384 3127
Mobile: 021 384 524

Email: kevin.ward@nzairports.co.nz

Executive Summary

4. NZ Airports welcomes the opportunity to comment on MBIE's consultation paper. We set out below in detail our responses to the two issues identified by MBIE in its paper. Appended to this submission is a table that addresses the specific questions posed by MBIE.

5. In relation to issue one we say:

(a) The current legal framework provides a clear delineation of roles between the Commission and the Minister, assisted by MBIE. The Commission implements information disclosure regulation of specified airport services, including analysing and commenting on airport performance. The Minister has stewardship of the regulatory regime and overall responsibility for regulatory outcomes, including the policy decision on the form of regulation and supervision of the performance of the Commission. It is important that those roles are not blurred.

(b) Section 53B empowers the Commission to comment on the performance of airports, but it does not empower the Commission to comment on the performance of the regulatory regime (which is a joint product of the form of regulation and the performance of the Commission).

(c) The current scope of section 53B is appropriate. If this was amended such that the Commission was regularly consulting and commenting on the mode of regulation of specified airport services this would introduce considerable regulatory uncertainty.

(d) The operation of section 53B can however be usefully clarified. It could be made explicit that the Commission's assessment of airport performance will be more in-depth following a price setting event, and that the assessment of airport performance will address all limbs of the section 52A purpose and all facets of airport performance, including market context and performance over the longer term.

6. In relation to issue two we say:

(a) We agree the Act, as presently drafted, does not make it clear whether or not the inquiry process in subpart 2 of Part 4 is available in circumstances where regulation has already been imposed. We agree this could usefully be clarified.

(b) The Commission has proposed amending Part 4 to address this issue in relation to specified airport services. There are a number of aspects of MBIE's proposal that could be clarified and we have identified those in this submission.

(c) MBIE's proposal is to introduce a short form inquiry process, omitting competition analysis and cost benefit analysis. The reason suggested for omitting these steps would be because specified airport services are already regulated. We do not agree that this is a reason to omit competition analysis and cost benefit analysis when considering the form of regulation for specified airport services. Co-incidentally, the Commission has very recently published expert economic advice emphasising the importance of context and competition analysis when considering the regulation of specified airport services.

Issue one: Commission's ongoing power to assess information disclosed

7. NZ Airports agrees that, for information disclosure to work effectively, the Commission needs to have effective powers to examine and comment on the information disclosed. As MBIE notes, the Commission's analysis of the information disclosed by airports plays a critical role in supporting interested persons making an assessment of whether the section 52A purpose is being met.

The current legal framework

8. We agree with MBIE's characterisation of the respective scope of section 53B and section 56G.

9. Section 53B empowers the Commission to monitor and analyse all information disclosed, and separately directs the Commission to publish an analysis of that information for the "purpose of promoting greater understanding of the performance of individual regulated suppliers, their relative performance, and the changes in performance over time".

10. Section 56G, in contrast, was intended to function as a one-off statutory reporting requirement. It is described in the Act as a transitional provision. In contrast to section 53B, reports under section 56G were for the purpose of assessing how effectively information disclosure (the regime itself) is promoting the purpose in section 52A.

11. MBIE has suggested that the Commission's "current approach" to section 53B reports has been to include an analysis of whether information disclosure is achieving the 52A purpose, notwithstanding this is expressly part of section 56G but not section 53B. While MBIE is right to say that the Commission included an analysis of that question in its section 53B reports relating to Christchurch Airport and Wellington Airport, we think it is important to highlight the specific context in which that occurred.

12. The section 53B reports that MBIE refers to followed decisions by CIAL and WIAL to respond to the Commission's section 56G reports following their price setting events. In those 56G reports, the Commission made several observations about the extent to which it considered information disclosure was achieving the 52A purpose. In response, WIAL initiated its third price setting event, which superseded PSE2. CIAL revisited its PSE2 disclosure methodology in order to address the Commission's concerns.

13. When the Commission assessed those disclosures under section 53B, it did so with reference to the criticisms it had identified in its recent 56G reports. All parties accepted that, given the actions that airports had taken in the interim, it was sensible for the Commission to express its view on the extent to which they had addressed its concerns. In a sense, those section 53B reports served as an addendum to the 56G reports, and the transitional exercise contemplated by the Act to ensure that Ministers had up to date information.

14. NZ Airports' view is that neither the airports nor the Commission considered that the approach taken in those section 53B reports would necessarily be carried forward into subsequent disclosure periods such that the transitional evaluation required by section 56G became perennial. NZ Airports understood that the approach taken by the Commission was intended to be exceptional, in light of the unique context.

15. The Commission explained in its section 53B Report on WIAL that the on-going operation of section 53B only, and a focus on the performance of airports, was in the Commission's view likely to be effective:[1]

> *Assessment of airport conduct will be continued as part of our summary and analysis of future price setting events in addition to summary and analysis of expected and actual performance under s 53B. This is likely to achieve similar outcomes as the s 56G review. The purpose of this summary and analysis is to promote greater understanding of the performance of individual regulated suppliers, their relative performance, and the changes in performance over time.*

16. Going forward, the current legal framework provides for section 53B reports that analyse and comment on the performance of airports, but not the merits of the regulatory regime itself.

The current allocation of roles

17. This legal framework reflects a clear allocation of roles as between the Commission and the Minister (supported by MBIE).

18. The Commission, as front line regulator, is responsible for implementing the regulation of specified airport services. It must determine the content of the information disclosure obligations, and analyse and comment on the performance of airports as revealed by the information disclosures.

[1] Summary and analysis of Wellington Airport's third price setting event (30 June 2015), page 16 paragraph A6.

19. The purpose of information disclosure regulation, as set out in section 53A of the Act, is to "ensure that sufficient information is readily available to interested persons to assess whether the purpose of this Part [i.e. the purpose set out in s52A] is being met". Airports are accordingly required to make annual disclosures, and disclosures following price setting events. The Commission in turn is required to report a summary of that information and an analysis of airport performance under section 53B. The role of the 53B report is to facilitate understanding of the airports' disclosures, for the purpose of "promoting greater understanding of the performance" of airports, in comparison to each other, and over time.

20. The Commission's role under section 53B, therefore, is to facilitate an assessment of the extent to which airports' performance is consistent with the section 52A purpose. Disclosures, and section 53B reports, are intended for a general audience of all "interested persons" including, particularly, commercial counterparties such as airlines. Over time the regular disclosures and section 53B reports will build up a picture of how airports' performance compares to the section 52A purpose and whether the long term interests of consumers are being served.

21. This construction of a record over time will also facilitate the separate role of the Minister, supported by MBIE. The Minister is responsible for the policy settings and, of particular relevance to the current context, whether information disclosure is the appropriate form of regulatory intervention.

22. The picture built up over time by airport disclosures and Commission section 53B reports will inform the Minister's on-going monitoring and stewardship of the regulatory framework. In doing so the Minister, supported by MBIE, will be making two inter-related assessments: is the regulatory framework appropriate and is the Commission implementing the chosen regulatory model well. Both are needed for there to be high quality regulatory outcomes. This is not an assessment that the Commission, as front line regulator, has the necessary distance or objectivity to make.

23. This is why the section 56G exercise was unique and so different to section 53B. The section 56G process was a one-off exercise to help the Minister check that the form of regulation of specified airport services specified in Part 4 was the correct one. The report was mandated by the Act and did not require the Commission to form a judgment as to whether stakeholders should be put through a process to test the policy settings.

Issues with the existing legislation raised by MBIE

24. It follows that we disagree with MBIE's characterisation of the issue. NZ Airports' view is that it was not intended that the Commission, under section 53B, should under normal circumstances carry out an assessment of whether information disclosure is achieving the purpose of Part 4.

25. The question to be considered, then, is whether section 53B should be expanded now to expressly provide for such a function. NZ Airports view is that the current scope of section 53B represents sound regulatory policy and should not lightly be amended. There are a number of reasons for this.

26. First, were an assessment of the effectiveness of information disclosure to form a regular part of section 53B reports, the consequence is that the form of regulation for specified airport services would be up for debate either on an annual basis (on MBIE's first proposal) or with undue frequency (on MBIE's second proposal). This would not be a small change or a tweak to current arrangements. To regularly put the form of regulation up for discussion would introduce material regulatory uncertainty not seen in any other regulated sector. This degree of regulatory instability would undermine

investment incentives and long-term planning, and therefore would not serve the long-term interests of consumers.

27. The risks associated with regulatory instability are particularly acute given how recently the regulatory environment for specified airport services has been overhauled, and the pace at which the Commission's approach to information disclosure has evolved since the passage of the legislation. Against that background, it is sensible to give the regime a reasonable amount of time to settle before it is revisited. That will not only minimise the disruptive impact on airports in the short term, but also ensure that a critical body of information and experience is available at the point at which a further assessment is made of the effectiveness of information disclosure.

28. Second, including an assessment of the effectiveness of information disclosure with each section 53B report, or after each price setting event, risks the assessment being overly influenced by short term factors and individual airports' commercial decisions. An assessment that the information disclosure regime is not achieving the section 52A purpose should be able to demonstrate the systemic basis for that conclusion. Specific and isolated examples of airports' commercial decision-making may point to an underlying systemic issue. But in the absence of more evidence and examples it is difficult to conclude that a single instance reflects the failure of the regime. Accordingly, an approach that emphasised short term factors would undermine the rationale of information disclosure in the Act.

29. Third, the form of regulation for airports chosen by Parliament was information disclosure rather than price-quality regulation. Already, there are concerns that the Commission's approach to information disclosure constitutes de facto price control.

30. If an assessment of the effectiveness of information disclosure is made in relation to each disclosure, or each price setting event, the implication is that a short term departure from the Commission's building blocks, by any airport, constitutes a failure of information disclosure. That is tantamount to an assertion that the information disclosure regime requires airports to follow a regulated price path. We do not think that was what Parliament intended, nor is it a sensible use of information disclosure.

31. Moreover, it seems reasonable that, subject to the outcome of the 56G reports, Parliament intended its decision regarding the form of regulation for specified airport services to be enduring. It is difficult to accept that Parliament would have gone to the effort of promulgating subpart 11 if the expectation was that the Commission would revisit that decision annually.

32. Fourth, the contrast between section 56G and 53B suggests that Parliament intended to reserve to Ministers the decision as to whether or not information disclosure is effective. Were the Commission to make such an assessment in each section 53B report, that would suggest the Commission has an overlapping policy role that we do not think Parliament or officials intended. It would also overlook the fact that any assessment of regulatory outcomes must consider the combined effect of the form of regulation and the implementation by the Commission. The Productivity Commission has recently emphasised the importance of a clear and proper allocation of responsibility in the regulatory system, including monitoring of statutory entity regulations.[2]

33. Finally, we note that there is an interrelationship between this issue and MBIE's second issue relating to the process for imposing further regulation. If, as MBIE suggests, there is a need for clarification of the process by which the form of regulation is altered, then that process is the more appropriate forum in which to review the effectiveness of the current form of regulation, rather than through section 53B reports.

[2] Productivity Commission, Regulatory institutions and practice (June 2014) pp 353-365.

The operation of section 53B

34. If MBIE has concerns about the future analysis that may be undertaken by the Commission, it may be, however, that there are other improvements to the operation of section 53B that might be made to address these concerns.

35. First, the section could better reflect the current practical reality that the Commission engages in a detailed consideration of airport performance after a price setting event, and there is less of a role for additional commentary and analysis during a pricing period when annual disclosure statements are made. This in part reflects the importance of stakeholders understanding price setting events, and in part reflects the high quality of annual disclosures, which don't need a lot of additional commentary or analysis to communicate the performance of the relevant airport that year.

36. Second, section 53B could usefully specify that the analysis and commentary in a section 53B report should address all limbs of the section 52A purpose and all facets of airport performance relevant to those limbs, including market context and performance over the longer term. This has recently been emphasised in expert economic advice commissioned and published by the Commission.[3]

37. Making this explicit on the face of section 53B would ensure that stakeholders have the correct expectations as to the content and focus of section 53B reports. It would also provide the Commission with a framework to work to, and clearer direction that longer term trend analysis should take precedence over a more short term focus.

Issue two: process for further regulation

Problems with the existing legislation

38. NZ Airports agrees that the Act, as presently drafted, does not make it clear whether or not the inquiry process in subpart 2 of Part 4 is available in circumstances where regulation has already been imposed. Subpart 2 does not expressly rule out an inquiry where regulation has already been imposed, and we think that subpart 2 could be read as being available even under those circumstances. However, there is sufficient uncertainty in the legislation that it would be sensible to clarify the position.

39. MBIE also suggests a second and separate issue, being that because regulation has already been imposed, some of the steps in the inquiry process that would typically apply would be "unduly onerous and inappropriate". MBIE suggests that the requirements to inquire (i) into the state of competition in the market, and (ii) the costs and benefits of imposing regulation are unwarranted where regulation has already been imposed.

40. Our view is that these steps are still important, even where regulation has already been imposed. Accordingly, we disagree with the second suggested change. We elaborate further below on why we think these inquiry steps would be important.

Some clarifications

41. When considering the inquiry process and whether any changes are appropriate we want to clarify our understanding of a number of aspects of the MBIE proposal. If we have misunderstood any feature of the proposal we would appreciate an opportunity to comment on any clarified proposal.

42. First, an inquiry into the mode of regulation of specified airport services may proceed on an airport by airport basis or on a sector basis. The Minister triggering the inquiry

[3] George Yarrow, Responses to questions raised by the Commerce Commission concerning WACC estimates for disclosure purposes in the airports sector.

would have the choice, to be made by reference to the market facts and disclosure record at the time.

43. Second, the mechanism to be specified would be used to work through both a question as to whether to impose further regulation of specified airport services, and a question whether to reduce or remove regulation. In some places the consultation paper appears to suggest that the proposed amendment is intended just for imposing additional regulation of specified airport services.[4] Elsewhere, the paper appears to indicate that the process might result in the alteration or removal of regulation.[5]

44. NZ Airports' view is that, if MBIE is proposing to amend the Act to clarify that the form of regulation for specified airport services can be changed by Order in Council following an inquiry (notwithstanding sections 56B and 56C), then those amendments should also include the possibility of removing existing regulation. Allowing for both the imposition of further regulation and the removal of existing regulation would be consistent with the approach that applies where regulation is imposed de novo under subpart 2. Section 52O provides that, where regulation is imposed via an Order in Council, it may be revoked or varied only once the Commission has conducted a further inquiry. If regulation imposed after a subpart 2 inquiry can be revoked following a further inquiry, then the same position should apply with respect to airports.

45. One potential criticism of this approach is that Parliament has decided that specified airport services should be regulated and hence the Minister, following a recommendation from the Commission, should not be entitled to revisit that decision. However, MBIE's proposal already contemplates supervening the position laid down by Parliament, which is that specified airport services are subject to information disclosure regulation. If it is permissible to revisit Parliament's decision with respect to the form of regulation, then we think it should also be open to revisit the decision to declare specified airport services regulated.

46. Third, it is our understanding that MBIE's proposal is limited to specified airport services and not the other regulated services in other sectors that were also identified in Part 4 when it was introduced into the Commerce Act. We note in passing that those other sectors might have an interest in some of the issues in this consultation, including the threshold question as to whether the inquiry process in subpart 2 is available, and whether a short form inquiry process is appropriate (to the extent they perceive any decision in the specified airport services context might be precedent setting).

Proposed process

How an inquiry is triggered

47. MBIE proposes that an inquiry would be triggered either by the Minister or on the Commission's own initiative.

48. NZ Airports' view is that the Commission should not be empowered to commence an inquiry on its own initiative where goods and services are already subject to regulation and that regulation has been imposed by the Act rather than by an earlier Commission inquiry.

49. First, the decision to impose information disclosure on specified airport services was a decision of Parliament, enshrined in the Act. Accordingly, if that decision is to be

[4] See the opening paragraph of page 8, and also its penultimate paragraph, which appears to suggest that the competition and cost-benefit analyses are unwarranted because the desirability of regulation has already been settled. See also frequent references to "imposing an additional type of regulation" in the tables entitled "step two: the inquiry" and "step three: recommendations".
[5] See page 9 under the heading "proposed process".

reconsidered, we consider it appropriate that the Minister initiate the process rather than the Commission.

50. Second, the Commission is tasked with the day-to-day administration of the information disclosure regime, and is responsible for determining the input methodologies and reporting on information disclosed by airports. As a consequence, there is a risk that the Commission is too invested in the regime to be able to stand back and appraise it with complete impartiality. At the least, we consider that the Commission should have to convince someone other than itself before an inquiry is initiated. It therefore makes sense that the decision to initiate an inquiry reside with the Minister.

51. Third, as noted above in relation to Issue One, anyone contemplating triggering an inquiry process will be making two inter-related assessments: is the regulatory framework appropriate and is the Commission implementing the chosen regulatory model well. Both are needed for there to be high quality regulatory outcomes. This is not an assessment that the Commission, as front line regulator, has the necessary distance or objectivity to make.

The inquiry

52. MBIE's proposed short form process omits several steps that would be required for a de novo inquiry under subpart 2:

(a) assess whether the goods or services are supplied in a market where there is both little or no competition, and little or no likelihood of a substantial increase in competition;[6]

(b) assess whether there is scope for the exercise of substantial market power in relation to the goods or services, taking into account the effectiveness of existing regulation or arrangements;[7]

(c) assess whether the benefits of regulation materially exceed the costs of regulation;[8]

(d) if those tests are satisfied, whether the goods or services should be regulated;[9]

(e) if so, how the goods or services should be regulated, and particularly which type or types of regulation should be imposed;[10] and

(f) assess the costs and benefits of different types of regulation, and consider what would be the most cost-effective type of regulation in the circumstances.[11]

53. MBIE appears to consider that those steps are not warranted given that specified airport services are already subject to regulation. We understand MBIE to be suggesting that:

(a) the competition and cost-benefit analyses under sections 52G(1)(a), (b) and (c) are redundant as Parliament has already decided that airports face limited competition in specified airport services, and that the benefits of regulation outweigh the costs;

---

[6] Section 52G(1)(a) and 52I(1)(a).
[7] Section 52G(1)(b) and 52I(1)(a).
[8] Section 52G(1)(c) and 52I(1)(a).
[9] Section 52I(1)(b).
[10] Section 52I(1)(c)(ii). Note that subparagraph (iii) is included in MBIE's proposals.
[11] Section 52I(4).

(b) that, in deciding whether to alter the regulation of specified airport services, there are no other factors that could relevantly be considered under section 52I(1)(b);

(c) that it is unnecessary to consider how specified airport services should be regulated, and particularly what type of regulation should be imposed, as otherwise required by section 52I(1)(c)(ii); and

(d) there is no need to undertake a comparative assessment of different types of regulation, and identify the most cost-effective type of regulation, as would otherwise be required by section 52I(4).

54. We disagree that the steps that MBIE proposes to omit are redundant where regulation has already been imposed. Specifically:

(a) the competition analysis under section sections 52G(1)(a) and (b) serves a problem definition role that informs the choice of regulation. The extent to which, and the reasons why, competition is limited are important questions when considering the appropriate type of regulation and the details of its implementation. Those are factors that also evolve over time, and hence it is sensible to periodically revisit the competition analysis in order to understand whether the current regulatory framework is optimal. In the case of specified airport services, a competition analysis would be particularly important for any decision to alter the form of regulation because, as a result of Government's decision to regulate specified airport services via the Act, that work has not yet been done. Accordingly, it is difficult to see how the Commission could carry out a sensible analysis of the type of regulation that is needed, and the costs and benefits of that regulation, without first defining the parameters of the competition problem to be addressed by that regulation;

(b) both the competition analysis and the cost-benefit analysis are key elements of any decision to roll back, or remove entirely, existing regulation. As explained above, NZ Airports thinks that MBIE's proposals should at least acknowledge the possibility that Ministers in future might conclude that the current form of regulation for specified airport services is unnecessary given the evolution of the market, or is no longer justified given its costs and benefits. The inquiries under sections 52G(1)(a), (b) and (c) are essential to that question;

(c) the cost-benefit analysis is also necessary, we think, to construct a baseline against which the costs and benefits of incremental regulation should be assessed;

(d) sections 52I(1)(b) and (c) require the Commission, having considered the issues above, to recommend whether regulation should be imposed, and in what form. In carrying out that exercise, the Commission is required by section 52I(4) to compare the costs and benefits of imposing different types of regulation, and consider what would be the most cost-effective type of regulation. This is clearly a critical element of the assessment, as it makes clear that the choice of regulation must be driven by the assessment of the competition issues and the costs and benefits of regulation. Again, it is not clear why MBIE thinks this element should be omitted.

55. The importance of a competition analysis when considering specified airport services has very recently been emphasised in expert economic advice commissioned and published by the Commission. When advising on the current regulation of specified airport services, Dr Yarrow stated:[12]

[12] George Yarrow, Responses to questions raised by the Commerce Commission concerning WACC estimates for disclosure purposes in the airports sector, page 13.

The first, most obvious point to note here is that the airports are not necessarily naturally monopolistic in the way that, say, an electricity transmission or distribution system might be. For example, we tend to observe more significant demand-side substitution among airports by both airlines and passengers than, say, between electricity systems, although the quantitative significance of the difference depends upon factors such as population concentrations and the distances between those concentrations.[13]

Airlines have a degree of choice as to which airports they serve and the frequencies of their services. Thus, an airline might choose to establish a service between Australia and New Zealand via Auckland airport, relying on local connecting services for passengers wanting to travel to, say Wellington, or it might establish a direct service to Wellington. Passengers may choose the indirect route rather than a direct connection operated by a competing airline if the timings are more convenient or if the fare is lower. The establishment of a new direct route would then substitute, for some passengers at least, for the indirect connection, and Auckland airport could expect to lose some passenger traffic volume.

Similarly direct international routes to alternative NZ airports can, to a least some degree, be regarded as substitutes for overseas tourists and for airlines competing for tourists business. In this case the inter-airport competition is more direct, although again it is appropriate to note that the magnitudes of the relevant substitutabilities are contingent on geography.

Of course, not all passengers can easily substitute between the alternatives, but the numbers involved may be significant enough and their price sensitivity may be high enough for the potential switches to have material effects on airport pricing. In any market segment it is the sensitivity of such 'marginal traffic' to price changes that bears most heavily on price determination decisions.

The differences between airports and, say, electricity and gas transport systems (pipes and wires) is closely linked to the differences in the economic structure of the relevant networks. In an air transport system, airports are the 'nodes' of the network and air transport has the particular feature that the nodal facilities are owned and operated by different businesses. In contrast, in an electricity transmission system all the nodes (where there are connections to generating sets or to distribution networks) across a wide part of the system tend to owned and operated by a single business. There is therefore no inter-nodal competition as such, at least within the geographic area covered by common ownership.

56. As a general proposition, when considering changes to the way that specified airport services are regulated we think there should be compelling reasons to depart from the inquiry process and relevant considerations that inform the decision to impose regulation on a de novo basis, or to revisit the form of regulation under section 52O. The approach to the regulatory inquiry under subpart 2 is intended to ensure that all relevant information is available to decision-makers. We do not think that MBIE has provided a sufficient justification for a truncated version of that process, and the proposal to skip a competition analysis is contrary to the expert advice recently published by the Commission.

Recommendations and decisions

[13] It might be expected, for example, that the levels of demand-side substitution for NZ's three major airports are somewhat lower than for, say, some of the major (deregulated) airports in the UK, e.g. Birmingham and Manchester.

57. MBIE proposes that, at the conclusion of its inquiry, the Commission must recommend to the Minister whether the specified airport services should be subject to an additional type of regulation. As discussed above, NZ Airports' view is that the Commission should also be able to recommend to the Minister that regulation be rolled back or revoked, and the Minister should be empowered to roll back or revoke regulation (either on the Commission's recommendation or in disagreement with that recommendation).

58. We also note that MBIE's description of the requirements for the Commission's recommendation differ in some respects from that set out in sections 52K to 52M. In particular the description in the consultation paper seems to anticipate that if a recommendation was to be made it would be recommending negotiate / arbitrate regulation. It is not clear to us whether MBIE intends that there should be any variance from the existing provisions.

Responses to MBIE's questions

	Question	Response
	Issue one	
1.1	Do you agree with the identified risks with the Commission's existing powers?	We disagree with MBIE's characterisation of the status quo. We do not think it was intended that the Commission, under section 53B, should assess the effectiveness of information disclosure regulation (as opposed to assessing airport performance). Our view is that the recent section 53B reports reflected a pragmatic compromise in unique circumstances to complete the transitional section 56G exercise. The Commission explained in its section 53B Report on WIAL that the on-going operation of section 53B only, and a focus on the performance of airports, was in the Commission's view likely to be effective.
1.2	Are there additional risks to be addressed?	Our view is that, if there is a need for clarification, the Act should be clarified to make it clear that the Commission is not expected to assess the effectiveness of information disclosure under section 53B.
1.3	What impact would each of these options have, and what approach would you prefer and why?	Assessing the effectiveness of information disclosure through section 53B reports, either annually or following each quinquennial price setting event, would create material regulatory instability that is not in the long-term interests of consumers. There is also a risk that the perception of the regime's effectiveness will be unduly influenced by short term factors, or commercial decisions by individual airports. Revisiting the type of regulation on such a frequent basis also risks making information disclosure de facto price control (which is already a risk with the current framework). The Act reserves the primary responsibility for deciding the form of regulation for airports to Ministers. In doing so the Minister, supported by MBIE, will be making two inter-related assessments: is the regulatory framework appropriate and is the Commission implementing the chosen regulatory model well. Both are needed for there to be high quality regulatory outcomes. This is not an assessment that the Commission, as front line regulator, has the necessary distance or objectivity to make..
1.4	If the Commission is to comment on whether information disclosure had been effective at promoting the Part 4	Our view is that, outside of the context of section 56G, the Act does not permit the Commission to expressly opine on this question.

	purpose, when would it be most useful for this inquiry to occur?	There is an interrelationship between this issue and MBIE's second issue relating to the process for imposing further regulation. If, as MBIE suggests, there is a need for clarification of the mechanism by which the form of regulation is altered, then that process is the appropriate forum in which to revisit the form of regulation, rather than through section 53B reports.
	Issue two	
2.1	Do you agree with the problem definition? If not, why not?	NZ Airports agrees that the Act, as presently drafted, does not make clear how the inquiry mechanism in subpart 2 of Part 4 is supposed to function in circumstances where: (i) services are already regulated, or (ii) that regulation has been imposed legislatively rather than as a consequence of an earlier inquiry. But we disagree that a number of the steps that would ordinarily apply under subpart 2 are redundant in circumstances where services are already regulated. Separately, we think the mechanism should also expressly provide for regulation to be rolled back or revoked.
2.2	Do you agree with the proposed triggers?	We disagree that the Commission should be able to trigger an inquiry on its own initiative. As noted above, anyone considering a change in the mode of regulation of specified airport services will be making two inter-related assessments: is the regulatory framework appropriate and is the Commission implementing the chosen regulatory model well. Both are needed for there to be high quality regulatory outcomes. This is not an assessment that the Commission, as front line regulator, has the necessary distance or objectivity to make. At the least, we consider that the Commission should have to convince someone other than itself before an inquiry is initiated. It therefore makes sense that the decision to initiate an inquiry reside with the Minister.
2.3	Should anything else trigger an investigation?	No.
2.4 2.5 2.6 2.7	Do you agree with the proposed considerations? Is there anything else that the Commission should consider? Do you agree with the steps proposed for the inquiry process? Should any other steps be proposed?	We do not think MBIE has sufficiently justified omitting steps that would otherwise be part of the process for imposing regulation on a de novo basis. We think those omitted steps are important, even in circumstances where services are already regulated. For example, the importance of a competition analysis when considering specified airport services has very recently been emphasised in expert economic advice commissioned and published by the Commission. In general, we think there would have to be compelling reasons to adopt a different or truncated process for airports than would otherwise apply in other sectors.

2.8 2.9 2.10	Do you have any issues with the process for making and considering a recommendation? Should anything else be considered when making a recommendation Do you agree with the proposed process for the Minister making a recommendation?	The Commission and Minister should be able to recommend that regulation of specified airport services be rolled back or revoked. To the extent MBIE's proposal differs from that set out in sections 52K to 52M, we think that variance must be justified with reasons.
2.11	Do you have any concerns with an Order in Council being used to alter regulation?	No, as long as the process issues discussed in this submission are addressed.