



**MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT**  
HĪKINA WHAKATUTUKI



# Options for improvements to information disclosure regulation for specified airport services

**Targeted consultation paper**

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December 2015

## Information for submitters

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Written submissions on this paper are invited from key stakeholders.

Submissions should be sent to:

Major Airports Review  
Ministry of Business, Innovation and Employment  
P.O Box 1473  
Wellington 6140  
New Zealand

Email: [majorairports@mbie.govt.nz](mailto:majorairports@mbie.govt.nz)

It would be useful if submissions sent in hard copy were also provided in electronic form (Adobe Acrobat, Microsoft Word or compatible format).

Any queries should be directed to Autumn Faulkner either at the above email address, or by telephone at 04 474 2945.

## Official Information Act and Privacy Act

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## Introduction

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The Ministry of Business, Innovation and Employment (**MBIE**) is undertaking a review of the regulation of major international airports under Part 4 of the Commerce Act 1986.

Following an initial round of public consultation and discussions with stakeholders, this paper seeks further feedback on options for strengthening the existing regulatory regime for major international airports.

The Minister of Commerce and Consumer Affairs has decided not to pursue changes to the type of regulation applying to specified airport services. This has been on the basis of advice that, following the publication of the Commerce Commission's 53B summary and analysis reports, the purposes of Part 4 appear to be largely being met. The performance of Part 4, including the information disclosure regime for specified airport services, will continue to be actively monitored by officials and the Commerce Commission.

The overall aim of the review of the regulation of airports is to ensure that airport regulation operates effectively both now and in the future. This includes ensuring that the Commission has adequate powers to review information disclosed by airports and make comments on how it aligns with the Part 4 purpose. Officials also want to ensure that there is a process for applying an additional type of regulation if required. To ensure this credibility it is important that legislation sets out an efficient process for imposing further regulation if necessary.

Officials have identified the following issues with the current regulatory environment:

- it is not explicitly clear that the Commission has the power to undertake analysis and reach conclusions as to whether information disclosure is effective at achieving the Part 4 purpose as part of its section 53B reports, and in any case they are not required to; and
- it is not clear that the legislation currently provides a process to alter the type of regulation that applies to an already regulated airport service, for example the imposition or removal of additional types of regulation.

This discussion paper therefore seeks further feedback on two areas for potential reform:

- ensuring that the Commission has adequate powers to review the information disclosed by airports as part of the information disclosure regime; and
- implementing a process for altering the type of regulation under the Commerce Act if required.

This paper includes some specific questions; however more general comments on the issues and options are welcomed. Officials will use the submissions in making recommendations to the Minister of Commerce and Consumer Affairs as to any required changes to the Commerce Act.

## Process to date

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### Commerce Commission process

After the three airports reset prices in 2012, section 56G of the Commerce Act required the Commerce Commission (the Commission) to report to Ministers on the effectiveness of information disclosure in promoting the purpose of Part 4 in respect of the specified airport services.

The Commission reported separately for each airport. The reports found mixed evidence on the effectiveness of information disclosure, and a number of areas where it was too early to draw a conclusion. The Commission found that WIAL was targeting excessive profits. It also found that CIAL was on track to make excessive profits over its 20 year pricing period and that there was a lack of transparency in its pricing model.

Following these reports WIAL reset its prices, and CIAL updated its information disclosures. The Commission then analysed the further information disclosed, and published its final summary and analysis (under section 53B of the Act) reports in mid-2015. These reports are available on the Commission's website at: <http://www.comcom.govt.nz/regulated-industries/airports/airports-information-disclosure/airports-information-disclosure-summary-and-analysis/>. No additional report has been produced for AIAL as there has not been significant additional-disclosure.

To broadly summarise, the Commission reached the following conclusions.

Airport	Conclusions
Wellington International Airport (WIAL)	WIAL is no longer targeting excessive profits and is now targeting returns that fall within the upper limit of the estimated range of acceptable returns.  Information disclosure has been effective at limiting WIAL's ability to target excessive profits.
Christchurch International Airport (CIAL)	The Commission welcomed CIAL's improvements in transparency in its revised disclosure.  There were some areas for improvement, including providing improved information on its 20-year pricing period.  The Commission did not change its conclusion that CIAL is targeting excessive profits over a 20-year pricing period from 2012 to 2032.

The Commission has also begun its review of input methodologies which set out the rules, requirements and processes for applying regulation under Part 4. In respect of airports some of the key areas that the Commission is reviewing include:

- airport profitability;
- land valuation; and
- weighted average cost of capital.

It is expected that the review will be concluded by the end of 2016 in time for price resets by airports.

## **MBIE process**

In August 2014 MBIE released a discussion document: *Effectiveness of Information Disclosure Regulation for Major International Airports*. Officials have reviewed the eight submissions received and the issues that were raised. These submissions are available on our website: <http://www.mbie.govt.nz/info-services/business/competition-policy/part-4-of-the-commerce-act/airport-regulation/effectiveness-information-disclosure-regulation>.

Following this, officials met with stakeholders to discuss some of the key issues raised in the submissions. This paper seeks to reflect the issues that were raised during these meetings.

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

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For information disclosure to work effectively, the Commission needs to have effective powers to examine and comment on the information disclosed following a price setting event.

Officials recognise that the Commission's assessment of the information disclosed and whether the airport's behaviour aligns with the desired outcomes of workably competitive markets plays a critical role in supporting an interested person to make an assessment of whether the purpose of Part 4 is being met.

### **The status quo**

Following an information disclosure event, the Commission must undertake a summary and analysis of the information disclosed. This is set out in section 53B of the Act which states that the Commission:

- may monitor and analyse all information disclosed in accordance with the information disclosure requirements; and
- must, as soon as practicable after any information is publicly disclosed, publish a summary and 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.

After the first price setting events under the new information disclosure regime, the Commission was also required to undertake a section 56G report to Ministers. The section 56G reports were a one-off statutory requirement and will not apply to any further information disclosure events. The section 53B reports differ from the section 56G reports in that the Commission is not directed specifically to consider whether or not information disclosure is promoting the Part 4 purpose and the reports are not addressed to Ministers.

### **Possible issues with the existing legislation**

We are of the view that, notwithstanding the different wording of sections 56G and 53B, the Commission's existing powers are sufficient. However we wish to test further whether these existing powers are appropriate to enable the Commission to be able undertake effective analysis, including the publishing of conclusions on the effectiveness of the information disclosure regime.

The Commission's current approach to section 53B reports has been to undertake and publish an analysis of whether airports' behaviour is aligning with the Part 4 purpose and whether information disclosure for airports is achieving the Part 4 purpose. For example the Commission published conclusions on whether information disclosure was effectively promoting the Part 4 purpose in the WIAL and CIAL section 53B reports and the AIAL section 56G report.

We have identified the following risks with the current approach:

- the Commission's ability to undertake analysis and reach conclusions as to whether information disclosure is effective at achieving the Part 4 purpose as part of its section 53B reports might be challenged in future, as it is not explicitly stated in the Commerce Act that they can publish this sort of analysis; and
- a legal challenge or some other change in the views of the Commission might lead it to cease its current approach to section 53B reports as it is not currently required to assess whether information disclosure has been effective at promoting the purpose of Part 4.

**Question 1.1: Do you agree with the identified risks with the Commission's existing powers?**

**Question 1.2: Are there additional risks to be addressed?**

## Options

We have identified two options to address the risks with the current approach.

### Option one

Amend section 53B so that it is clear that the Commission **can** undertake an analysis into how effective information disclosure had been at promoting the purpose of Part 4.

This would:

- clarify that the Commission can undertake analysis into whether information disclosure is achieving the Part 4 purpose; and
- provide flexibility so that the Commission can use its own judgement to determine when a more in-depth summary and analysis into the effectiveness of information disclosure is required.

### Option two

Introduce a requirement specific to airports that **requires** the Commission, upon information disclosure following a price setting event, to consider how effective information disclosure has been at promoting the Part 4 purpose.

This would:

- clarify that the Commission can undertake analysis into whether information disclosure is achieving the Part 4 purpose;
- be airport specific; and
- address any concern that the Commission might change its approach to summary and analysis reports in future for reasons unrelated to a legal challenge.

**Question 1.3: What impact would each of these options have, and what approach would you prefer and why?**

**Question 1.4: If the Commission is to comment on whether information disclosure had been effective at promoting the Part 4 purpose, when would it be most useful for this inquiry to occur?**

## Issue two: process for further regulation

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It is important that there is a process for imposing further regulation if the purpose of information disclosure and Part 4 is not being met, for example if airports were found to be targeting excessive profits.

### The status quo

At present, the Commission may hold an inquiry on recommendation by the Minister of Commerce or on its own initiative into whether, and if so how, particular goods or services should be regulated (section 52I). It requires an extensive inquiry that involves:

- an assessment of whether the goods or services are supplied in a market where there is little or no competition, little or no likelihood of a substantial increase in competition and scope for the exercise of substantial market power;
- an assessment of whether the benefits of regulating the goods or services in meeting the Part 4 purpose materially exceed the costs of regulation;
- the development of the input methodologies that should apply; and
- an assessment of the costs and benefits of imposing the different types of regulation available under Part 4.

Following a recommendation by the Commerce Commission, the Minister may decide that the service should be regulated and which type of regulation should apply. The Minister then makes a recommendation to the Governor-General to make an Order in Council imposing regulation on the service.

### Problems with the existing legislation

There are two main issues with the above process:

- the inquiry process assumes that the goods and services being investigated are not currently regulated under Part 4; and
- there may be some legal risk if the Minister of Commerce and Consumer Affairs sought to impose an additional type of regulation on airports through the Order in Council process.

The inquiry process has been designed with unregulated goods and services in mind, and appears unduly onerous and inappropriate for specified airport services or another good or service that is already regulated (except where consideration is being given to removing regulation altogether). It would require the Commission to inquire into whether or not there is competition in the market in which the good or service is supplied. It also requires the Commission to assess whether the benefits of imposing any form of regulation on the good or service materially outweigh the costs. These aspects of the inquiry will tend to be unwarranted where it is already accepted that there is limited competition and that information disclosure under Part 4 (at least) is appropriate. They would likely add significant unnecessary time and cost to a future Part 4 inquiry into specified airport services.

The issue with the Order in Council process arises from the fact that secondary regulation could be seen to be overriding the type of regulation specified in the Commerce Act (primary legislation). This is problematic as secondary legislation cannot be used to amend or override primary legislation unless it was clearly Parliament's intent to enable it to do so. From our perspective the legislation does not



clearly allow additional types of regulation to be imposed on already regulated goods or services.

**Question 2.1: Do you agree with the problem definition? If not, why not?**

**Proposed process**

We have identified a proposed process for altering the types of regulation applying to airports. This is an airport-specific inquiry process. It is envisaged that this might be added to subpart 11 of Part 4 of the Commerce Act.

The process could be triggered by the Minister, or the Commission. It is likely to follow a section 53B, report and a preliminary investigation that highlights significant issues with an airport's conduct in light of the purpose of Part 4. If for example an airport is targeting excessive profits, this could be addressed by using the process to impose additional regulation.

Once a process was initiated, the Commission would investigate the costs and benefits of additional types of regulation (beyond information disclosure) for specified airport services, such as negotiate/arbitrate regulation or price-quality regulation. Following the investigation, the Commission would make a recommendation to the Minister, who could then recommend adding or removing types of regulation by Order in Council.

The proposal above is based on the existing inquiry process contained in Part 4 of the Commerce Act, but amended to ensure that it can impose or remove additional regulation on already regulated airport services.

**Step one: investigation is triggered**

The Commission:

- must hold an inquiry if required to do so by the Minister; and
- may hold an inquiry on its own initiative.

The inquiry may consider negotiate/arbitrate regulation or price-quality regulation, or may compare both.

**Question 2.2: Do you agree with the proposed triggers?**

**Question 2.3: Should anything else trigger an investigation?**

**Step two: the inquiry**

In conducting an inquiry into the regulation of a specified airport service the Commission must consider:

- if the benefits of imposing an additional type of regulation (beyond information disclosure) materially exceeds the costs of regulation.
- if so, how that type of regulation should apply.

As a part of an airports inquiry, the Commission:

- Must determine (and then apply) input methodologies. The new input methodologies are to impact the existing input methodologies in so far as the Commission identifies.
- Must, when carrying out the analysis, undertake a qualitative analysis of all material long-term efficiency and distributional considerations.

As part of that qualitative analysis, the Commission must, as far as practicable:

- quantify material effects on allocative, productive, and dynamic efficiency; and
- quantify material distributional and welfare consequences on suppliers and consumers;
- assess the direct and indirect costs and risks of any type of regulation considered, including administrative and compliance costs, transaction costs, and spill-over effects.

During an inquiry, the Commission may have regard to any other matters it considers necessary or desirable for the purpose of the inquiry.

The Commerce Commission must undertake the same process to start an inquiry as contained in section 52J of the Commerce Act. This includes:

- gazetting the intention to undertake the inquiry and the terms of reference;
- indicating time frames and key steps;
- publishing papers, undertaking consultation and holding conferences; and
- publishing its proposed recommendation for consultation.

**Question 2.4: Do you agree with the proposed considerations?**

**Question 2.5: Is there anything else that the Commission should consider?**

**Question 2.6: Do you agree with the steps proposed for the inquiry process?**

**Question 2.7: Should any other steps be proposed?**

### Step three: recommendations

- At the end of an inquiry the Commission must make a recommendation to the Minister on whether, in its opinion, the regulated airport should be subject to an additional type of regulation (beyond information disclosure).
- If the recommendation is that a particular airport should be subject to such additional regulation, the recommendation must state the following:
  - what specified airport services should be subject to the additional regulation;
  - which type or types of regulation should apply to the services;
  - what input methodologies apply; and
  - if negotiate/arbitrate regulation is recommended, the material provisions of the negotiation process and arbitration process.
- The Minister must publish the Commission's recommendation, and may do so in whatever way he or she considers appropriate.

The Minister must consider any recommendation of the Commission.

- If the Minister proposes, contrary to the recommendation of the Commission, that the goods or services should be regulated, or that they should be subject to a type of regulation not recommended by the Commission, the Minister must ask the Commission for written advice on what that regulation would include.
- If the Commission receives a request under subsection it may, at its discretion,—
  - consult with interested parties; or
  - reopen its inquiry, in which case the process rules apply with all necessary modifications.

**Question 2.8: Do you have any issues with the process for making and considering a recommendation?**

**Question 2.9: Should anything else be considered when making a recommendation?**

**Step four: Minister's decision and recommendation**

- Having considered the Commission's recommendation the Minister must:
  - decide whether, in the opinion of the Minister, the regulated airport services should be subject to a different form of regulation; if the goods or services are to be regulated, decide which type or types of regulation are to apply; and
  - make a recommendation to that effect, if the specified airport service is to be subject to a different form of regulation.
- The Minister's decision may be the same as, or different from, the Commission's recommendation.
- If the Minister's decision is different from the Commission's recommendation, the Minister must set out the reasons for the decision and make the decision, with the reasons, publicly available.

**Question 2.10: Do you agree with the proposed process for the Minister making a recommendation?**

**Step five: Order in Council altering regulation**

Following a recommendation by the Commerce Commission, the Minister can (by recommendation to the Governor-General through an Order in Council) add or remove types of regulation for specified airports services.

**Question 2.11: Do you have any concerns with an Order in Council being used to alter regulation?**

## Summary of questions

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- Question 1.1: do you agree with the identified risks with the Commission's existing powers?
- Question 1.2: Are there additional risks to be addressed?
- Question 1.3: What impact would each of these options have, and what approach would you prefer and why?
- Question 1.4: If the Commission is to comment on whether information disclosure had been effective at promoting the Part 4 purpose, when would it be most useful for this inquiry to occur?
- Question 2.1: Do you agree with the problem definition? If not, why not?
- Question 2.2: Do you agree with the proposed triggers?
- Question 2.3: Should anything else trigger an investigation?
- Question 2.4: Do you agree with the proposed considerations?
- Question 2.5: Is there anything else that the Commission should consider?
- Question 2.6: Do you agree with the steps proposed for the inquiry process?
- Question 2.7: Should any other steps be proposed?
- Question 2.8: Do you have any issues with the process for making and considering a recommendation?
- Question 2.9: Should anything else be considered when making a recommendation?
- Question 2.10: Do you agree with the proposed process for the Minister making a recommendation?
- Question 2.11: Do you have any concerns with an Order in Council being used to impose additional regulation?