IN THE SUPREME COURT OF NEW ZEALAND

SC 26/2017

BETWEEN **WELLINGTON INTERNATIONAL AIRPORT LIMITED**
Appellant

AND **NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED**
First Respondent

DIRECTOR OF CIVIL AVIATION
Second Respondent

SC 30/2017

BETWEEN **DIRECTOR OF CIVIL AVIATION**
Appellant

AND **NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED**
First Respondent

WELLINGTON INTERNATIONAL AIRPORT LIMITED
Second Respondent

Hearing:	24-25 August 2017
Coram:	Elias CJ William Young J Glazebrook J Ellen France J Arnold J
Appearances:	D J Goddard QC, V L Heine and S E Quilliam-Mayne for Wellington International Airport Limited
	H B Rennie QC and E M Geddis for New Zealand Air Line Pilots' Association Industrial Union of Workers Incorporated
	F M R Cooke QC, M S Smith and D R Johnson for the Director of Civil Aviation
	C J Curran and A A Arthur-Young for the NZ Airports Association as Intervener

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CIVIL APPEAL

MR COOKE QC:

May it please the Court, I appear with Matthew Smith and Diana Johnson for the Director of Civil Aviation.

MR GODDARD QC:

May it please the Court, I appear with my learned friends Ms Heine and Ms Quilliam-Mayne for the Wellington International Airport.

MR RENNIE QC:

If the Court pleases, I appear with Ms Geddis for the Air Line Pilots' Association.

MR CURRAN:

May it please the Court, counsel's name is Curran and together with Ms Arthur-Young we appear for the Intervener in this matter.

ELIAS CJ:
Thank you, Mr Curran.

Yes, so you're kicking off, are you?

MR COOKE QC:
Yes, so we've agreed that the order would be that I would start, my learned friend Mr Goddard would follow for the Airport, Mr Curran applied for and the Court has granted him leave – he would be next, and then Mr Rennie for the Air Line Pilots' Association.

ELIAS CJ:
Yes, well, we'll consider later whether we'll hear from you, Mr Curran, but yes that's fine, Mr Cooke.

I should say that we only have a day and a half for this matter, so it may be necessary to sit extended hours if we lose time, otherwise I might be pushing you along a little bit.

MR COOKE QC:
Thank you for the forewarning.

Hopefully Your Honours have a one-page, a road map to the Director's oral submissions. But before I turn to that I wondered if I could just introduce what I apprehend are the key issues in the appeal.

On the face of it the case is all about the meaning of one word, "practicable", but in reality it isn't. The word "practicable" involves consideration of relevant practical considerations, that's true by definition. But what the practical considerations are and their significance in any particular case depends on the circumstances in which the word is being used, and in this context what you are wanting to do, that is obtain safety advantages, and the difficulty in doing them, which is measured by the cost of that exercise, are both relevant, I submit, by definition, and what is really in issue in the case is the weight that is being given to those relevant considerations. So the answer to the issue in

this case – what is the length of the runway end safety area required at Wellington Airport – isn't found in the Oxford Dictionary, given that in the end what is in issue is the weight to be given to obviously relevant considerations. And of course given that, context is important, and what we are dealing with here are technical rules promulgated in a highly sophisticated technical environment which are intended to be implemented by technically certified operators in a range of different circumstances in a manner that a technically qualified official, the Director of Civil Aviation, must find acceptable, and that's in a sense the first numbered point I've made on the one-page outline I've provided and, as the High Court Judge held, here the Director properly considered Wellington Airport's proposals for an extension, given the relevant facts and circumstances that exist in Wellington Airport, including the difficulty involved in providing a longer RESA, which is reflected in the costs that would be involved in constructing it, relative to the safety advantages that could be obtained by a longer RESA, and he did so when considering whether a longer RESA was practicable or not, and the Director exercised the case-by-case judgement that we submit the rules contemplate. And the Court of Appeal, with respect, in a sense overturned that judgement by making three interrelated errors. The first was by saying that as a matter of definition costs can only have what the Court described as "subordinate relevance", and here in this context there is nothing to suggest that the degree of difficulty in providing a long RESA, of which cost is simply a measure, has only a subordinate relevance. To the contrary, in this context the difficulty in doing so, measured by cost, is one of the very things that is central to the consideration of the practical issues involved in the RESA.

GLAZEBROOK J:

Why do you say it's measured by cost? It's not necessarily measured by cost, is it, because there could be absolute practical difficulties?

MR COOKE QC:

No, absolutely.

GLAZEBROOK J:

Or you say just in this particular context are you, or…

MR COOKE QC:
I'm just saying that cost is a measurement…

GLAZEBROOK J:
It can be one, "a" measure, right.

MR COOKE QC:
Is a measure of difficulty.

GLAZEBROOK J:
Not "the" measure though.

MR COOKE QC:
No.

So that's the first proposition, the Court of Appeal advancing this judgment that cost was only subordinate.

The second was that following the –

ELIAS CJ:
If it is – I'm just wondering how unfair it is to characterise it as subordinate, if you're acknowledging it's only a measure, a means of assessing difficulty, then is it so wrong to say that it's subordinate to the overall inquiry?

MR COOKE QC:
I think what the Court was saying by calling it subordinate was as a relevant consideration it was subordinate, and I think what Your Honour's putting to me is that if cost is a means of measuring difficulty it has a sort of, it's only a measure, and I accept it's a, I don't think you'll call that subordinate, but it's just one disciplined way of assessing difficult –

ELIAS CJ:
Well, they might have latched on to a different description, but it doesn't seem to me to be so very astray. It isn't the function that has to be undertaken, assessing costs, it's a question of assessing practicability, in which you'd say

costs is a proxy for another measurement which might apply in different cases.

MR COOKE QC:
Yes. I'll come later in the submissions to where although cost is a means of measuring difficulty it also in the statutory regime is expressly mentioned.

ELIAS CJ:
Yes, I see.

MR COOKE QC:
So Your Honour Justice Glazebrook asked me whether it is "the" measure. In this context it not only is a very effective measure in a disciplined way to assess difficulty, but it's also what the statutory scheme seems to be identifying as one of the factors that the Director will definitely look at in assessing it. But I think the problem with the Court of Appeal's analysis is it has said as a consideration that its cost, or the difficulty measured by a cost, is only subordinate and that, with respect, is assigning a weight to be given to a factor by definition, that is it's incorrect.

The second key error in a sense that flows on from that, that following the 2004 amendments to the principal Act balancing cost and benefit had, in the words of the Court of Appeal, "no place in the statutory regime," and on that point not only is it clear that the 2004 changes extended relevant considerations but weren't intended to exclude cost and benefit as relevant considerations, but the sections under which these rules are made or were made, section 33(2) of the Act, require both the level of risk to civil aviation and the cost of implementing the measure to be weighed, they're not just mandatory relevant considerations, but the section requires them to be weighed, and it simply can't be right that these considerations have no place in the statutory regime, as the Court of Appeal held following the 2004 amendment.

And that flows on to the third proposition, the third error I say that was made, that those considerations are only relevant when the rule is promulgated by

the Minister and not relevant in the application of the rules when they're so promulgated, and with respect that can't be right either because the concept of practicability that is in the rules that were promulgated involves a balancing of the practical issues involved at the particular place, so what you're seeking to achieve, the difficulty in doing so, are relevant to practicability. So the section 33(2) considerations of significance on promulgation must be considerations relevant on implementation of the rules to be promulgated. And in a related point about that is in what we call the devolved system of civil aviation regulation – what has happened here in the promulgation of the rule is that the judgements that the Annex 14 international instruments contemplated have been devolved to the relevant operators of the aerodromes and that judgement is to be exercised by them and then the Director is to assess the acceptability of their judgement. But it's not the Minister that decides the length of runway end safety areas at each of the airports in New Zealand. Under the rules that judgement is devolved under our devolved system to the relevant parties. And in the end, as I say, the challenge really comes down to the weight given to relevant considerations when those rules are implemented by technically qualified parties.

ARNOLD J:

So just taking this argument, does the Director – I mean, the Director acts independently in the sense of assessing whether what the airport company proposes is acceptable to him.

MR COOKE QC:

Yes.

ARNOLD J:

But you say there's no role beyond that in the sense of looking at alternatives and saying, "but you've proposed 90 … 140 would be better"?

MR COOKE QC:

I think that would depend on the circumstances again, and again when the Director exercises the function of checking that what is being done is acceptable to him – whether alternatives needed to be progressed or

analysed in greater detail would become a matter of a judgement for the Director. So there's no hard and fast rules about that. That's the whole purpose of these devolved rules – the judgements are passed to the experts in the area and would include, would be within the scope of what the Director did to say, "Well, actually I'm a bit worried about 90 metres here. Have you considered … ?" or "I think you should consider these alternatives", so that would be within the legitimate role the Director would exercise.

GLAZEBROOK J:

So the argument, perhaps just to cut to the chase, is that these are non-reviewable decisions basically, well, if you're saying it's just weight and it's technical judgement and…

MR COOKE QC:

Well, there's no such thing as non-reviewable, that's a kind of a –

GLAZEBROOK J:

No, I understand, but you're trying to make it as non-reviewable as possible, is that the argument?

MR COOKE QC:

Well, I suppose…

ELIAS CJ:

Well, it would have to be unreasonable, substantively unreasonable.

MR COOKE QC:

Yes.

ELIAS CJ:

But the real argument here is not about, it seems to me, not about the word but about the approach.

MR COOKE QC:

Yes, although – yes…

ELIAS CJ:

Whether the right questions were addressed.

MR COOKE QC:

The relevant considerations, yes.

ELIAS CJ:

Yes.

MR COOKE QC:

Although that's not how this case has been pitched, the case has been pitched as turning on the meaning of the word “practicable”, and that's not how the Court of Appeal addressed it either.

ELIAS CJ:

Well, but that – well, yes, but – mmm, all right.

MR COOKE QC:

And whether that's a real difference is a question…

ELIAS CJ:

Well, I don’t think it is a real difference, I suppose I should flag, because how you approach the question of practicality, what questions you ask yourself about the task that you're undertaking, may be the real error.

MR COOKE QC:

Yes. Well, I’d have to know what the real error Your Honour’s raising before I can respond.

ELIAS CJ:

No, no, there may be an error.

MR COOKE QC:

Yes.

ELIAS CJ:

Yes, in that.

GLAZEBROOK J:

Or one possibility is a failure to look at alternatives, I suppose, just taking from what we were just discussing.

MR COOKE QC:

Okay, yes, I understand, and that's something I'll come to, albeit later in the submission. But, yes, I will address that.

GLAZEBROOK J:

While we have stopped, I'm not sure I quite understood the point you were making about devolution, in terms of the role of the Minister and link back to the distinction the Court of Appeal was making between promulgation and what … application of the rules, because –

ELIAS CJ:

Is that to the satisfaction of?

MR COOKE QC:

The point is that the international instrument has within it an exercise of judgement which is being contemplated in the word "practicable", and in our system of devolved responsibility that judgement is not exercised by the Minister. So the Minister doesn't decide, go round each of the airports and decide what their RESA should be. What has happened consistently with the devolved system of aviation safety that we have –

GLAZEBROOK J:

I suppose I should say to you that seemed to be more of an answer that might back up the Court of Appeal's approach rather than the one you're suggesting. To be honest, I don't think it's a distinction that particularly appeals to me, the one that the Court of Appeal made, it's just that your point might suggest there was a difference between promulgation and exercising the functions under the rules. That's why I just couldn't understand why you

said it backed up your side rather than backed up the Court of Appeal's approach.

MR COOKE QC:
I understand that might suggest there is a difference, but the difference is that it is, in the New Zealand system, the person who exercises the judgement is the aerodrome operator, checked by the Director. So the judgement contemplated in the international instrument is to be exercised under the rule.

GLAZEBROOK J:
And you say contemplated by the international instrument includes cost, was that the point of that?

MR COOKE QC:
Yes.

GLAZEBROOK J:
Okay, that's fine.

MR COOKE QC:
Well, difficult–

GLAZEBROOK J:
That's fine.

MR COOKE QC:
So just two other points by way of introduction. The first is that it's important to understand that whilst this issue has come up in the context of the proposed extension to Wellington Airport, if the Court of Appeal is right in its approach there are presently issues about Wellington Airport's existing RESA lengths, so it's not the actual airport extension that really is the key issue. It's whether it's practicable to expect Wellington Airport to have a longer RESA now, and that will be the case for other airports as well. So on the Court of Appeal's approach there will be a significant issue for airports such as Wellington and Queenstown now. Just how profound that will be would require proper analysis, but it is something that bites here and now. And it's

also I think important to stress by way of introduction that from the Director's perspective there is no safety issue at Wellington Airport or any other New Zealand airports, all of those airports meet international standards. It would be great if we could have longer RESA areas at all of those places, but we have to be realistic about the environment we have in those airports, including Wellington Airport. It doesn't mean that the airport is unsafe or that it doesn't comply with a New Zealand rule or that it doesn't comply with the international standards, because it does in all cases.

So that's all I wanted to say by way of introduction, though of course we've started some of the analysis.

What I propose beginning with is perhaps what is mentioned in the second numbered paragraph of the outline, and that's the background to the amendment of the rule in 2006, and that's important not only because the rule making power required a reasonably elaborate notice and consultation process with the participants, and that's a process that really went from 1999 through to 2006, but because the rules are technical in nature so that the engagement with the participants is relevant to understanding the scheme and purposes of the rule, what the participants understood would be required of them, what they were consulted on, are all relevant to understanding what this rule was intended to mean. And the background to the promulgation of the rule was the amendment to Annex 14 of the Chicago Convention in 1999, and it's probably significant to note that prior to that amendment of Annex 14 there was no prescribed standard for RESAs in Annex 14, they had only a recommended practice and the recommended practice was 90 metres and we have that, the old Annex 14, in the bundle of authorities. I don't need to take Your Honours to it but that's in the Director's bundle of authorities, the second volume at tab 8 at page 17 of the then version of Annex 14.

ELIAS CJ:

What do you take from that though?

MR COOKE QC:

What I take from that is that it was the change to Annex 14 creating a standard that was the trigger for changing this rule. So the recommended practices have not been triggers for the amendment to the rule because at the time that we had the recommended practice of 90 metres the New Zealand rules for aerodromes had no reference to RESAs in them. So it was the change to Annex 14 that introduced a new standard that was the trigger for considering the amendment of the New Zealand rules.

ELIAS CJ:

But presumably if there was a change to the recommendation that too would have triggered reconsideration?

MR COOKE QC:

It might have except, as I say, the New Zealand rule had no prescriptive rules in them about RESA lengths arising from the 90 metre recommended practice. So what happened was Annex 14 was amended, created a new standard, that triggered an extensive consideration for a number of years or how do we manage that new international standards in the New Zealand environment and that led to the New Zealand rule and, as I will come on to, that led to the need for places such Wellington and Queenstown to actually engage in extensions to their the airports to meet the 90 metre standard, which they did. The point I'm making is it was the new standard that bit and then followed into the New Zealand rules.

Now as the evidence indicates, the creation of that new international standard resulted in the establishment of a technical study group which was made up of industry participants, including an ALPA representative, and it was that group that commissioned the McGregor analysis on what or how the new standard should be reflected in the New Zealand rules. Now there are differences between ALPA and the Director in their submissions about the significance of the 2002 McGregor & Co report, and in paragraph 31 of ALPA's submissions the submission is made that it's disingenuous to rely on one consultant's report to identify what was intended by the rule. But the original McGregor & Co report had a much more significant significance in terms of the rule than

that, and the significance of that McGregor analysis is actually set out in the notice of the proposed rule, and if I can just take Your Honours to volume 4 of the case on appeal and going to page 471, this is the July 2004 notice of the proposed rule, and Your Honours will appreciate that there has already been a period of several years of engagement with the industry between 1999 and 2004 before the rule is produced. And if Your Honours go to page 491 you will see at the bottom of page 491 there's the reference, there's the heading "cost-benefit analysis" and you'll see what is recorded is "because of the significant cost implications of implementing RESA for some aerodromes it was necessary for a detailed analysis of the costs and benefits to a nation to be carried out." And then there's a reference to: "Due to loss of resource within the Civil Aviation Authority, McGregor & Company and retained to carry out a cost-benefit analysis to analyse and report on the costs and benefits to New Zealand of requiring RESA at airports with international regular air transport services." And then over the page there's the reference to the analysis being carried out, the scope it, and then the third paragraph on that page: "The inputs for the analysis were obtained directly from source with McGregor & Company visiting all airports concerned, holding direct extensive discussions with the airports, airlines, ALPA, airway provider and other sources of data." And then two paragraphs on, "In summary, the report indicates that RESA are supported at a national level if the ICAO recommended practice of 240 metres is considered where this is practicable," slightly ungainly language there, but it's supported, "Where this is practicable, with a 90 metre standard where it is not," and then in brackets, "(240 metre RESA were not supported at Wellington, Christchurch 11/29 and Queenstown.)"

WILLIAM YOUNG J:

What's "11/29" mean?

MR COOKE QC:

That's the landing strip that goes the other way.

WILLIAM YOUNG J:

Oh, I see, okay, sort of east/west sort of thing.

MR COOKE QC:

Yes. So it's a rarely used – and I think for that purposes we can probably discount looking at that –

ELIAS CJ:

So there are two airports that are principally affected?

MR COOKE QC:

Yes. So the important point here is that it's recognised that Wellington and Queenstown were not considered to be 240s, they were considered to be 90s for the purposes of assessing what our rule should be in New Zealand.

GLAZEBROOK J:

Is there not an intermediate number?

MR COOKE QC:

Well, I mean, it's possible there could be in some circumstances, but what this analysis, the McGregor & Co analysis, demonstrates is it was just so costly to engage in any extension for the purposes of RESA that it just wasn't considered practicable to do that.

ELIAS CJ:

Are you going to take us to some of that?

MR COOKE QC:

I will take you to the McGregor analysis shortly.

ARNOLD J:

Can I just interrupt here? In the report, that 2002 one that McGregor did, there was in their statement of conclusions, which is in volume 3 at 386, they say that the introduction of Annex 14 RESA standard was not based on a cost-benefit argument but rather an interest of safety and so argument.

MR COOKE QC:

Yes.

ARNOLD J:

And they then go on to the talk about a cost-benefit analysis. So what lies behind that?

MR COOKE QC:

So I'll come to the shortly but, to answer the question directly, either a 90 metre RESA at Wellington wasn't justified on a cost-benefit analysis.

ARNOLD J:

I see.

MR COOKE QC:

But it was the new international standard. So it was analysed and regarded as a cost to the nation of meeting the new international standard whilst it being observed that actually if you do a cost-benefit analysis it's not really, the safety advantages you get are not worth the cost of doing it.

ARNOLD J:

Right.

MR COOKE QC:

And just back on 492 of volume 4, you notice also there's the reference to Wellington Airport was found to be the controlling input with its costs being some 6.5 times the next nearest airport. So again when New Zealand was looking at what we do about this new international standard it was fixing its eyes plainly on the aerodromes in New Zealand that would be affected by the standard and Wellington and Queenstown were squarely concentrated on. And that, with respect, is inconsistent with another submission made by ALPA –

ELIAS CJ:

So what does mean, for me, was found to be the controlling input to what?

MR COOKE QC:

Well, the analysis, which I'll come to shortly, is engaging in a cost-benefit analysis to the nation of implementing the standard and, as I understand that

sentence, it's identifying that the heavy cost of the Wellington extension is in a sense the most significant identifiable cost of implementing the international standard –

ELIAS CJ:
Oh, because this was an assessment overall.

MR COOKE QC:
It was.

ELIAS CJ:
I see, yes.

GLAZEBROOK J:
If there is a standard is there a choice but to implement?

MR COOKE QC:
There isn't, and they noticed – that's what they say, that's where my answer to Justice Arnold's question, that McGregor & Co said, "Well, it's not justified on cost-benefit terms but it's a standard and so we have to implement it, and there'll be a cost to the nation of doing that," and that is actually, you go on at page 499 of this bundle, you'll see 498 is an assessment of the costs that arise from implementing the international standard, and at 499 you get a table of the costs and you'll see in the middle of that table for Wellington the last cost option is 1.67 million and the highest is 18.37 million, and I'll come on to that because what happens at Wellington is the $18.37 million cost – I think that's right – is implement, because that's the cost of meeting the 90 metre extension.

Now my learned friends for ALPA also submitted that this kind of material wasn't really relevant to identifying what was contemplated for Wellington because this was a national cost-benefit analysis, not an individual airport cost-benefit analysis, and they based that submission on what is said by CAA in response to submissions on page 523 of this document – sorry, 523 is the report of submissions and then at 538 there's a submission about accident

statistics, and what's recorded under that submission is the Civil Aviation Authority's response, and my learned friends have identified on page 539 at the top of the page, the last sentence of the CAA feedback: "It should be noted that the CBA," that's the cost-benefit analysis, "was aimed at assessing the safety benefits of RESA for New Zealand as a whole and was not assessing the benefits or otherwise for individual aerodromes," and my learned friends have identified that sentence and said, "Well, look, this material doesn't tell you what was contemplated at Wellington," but obviously what was going to happen at Wellington and Queenstown was one of the driving considerations in deciding what rule would be implemented in New Zealand. And I'll come on to this later, but as we know the section that is directed to the rules that the Minister promulgates requires consideration of the costs of implementing the measure and the safety benefits involved, and what is happening in this McGregor analysis and then referred to in this notice of proposed rule is then reflected in what then goes to the Minister for the purposes of deciding or for promulgating the rule, and that is in volume 4 beginning at 575, 7 July 2006, you get the advice to the then Minister about the amendment to the rules, and the reference to McGregor is on 577, the bottom of that page, second-to-last paragraph, "An external consultant was engaged to carry out the cost-benefit analysis on the proposal to require RESA at the seven aerodromes that would be directly affected," and then there's the next paragraph, the members of the TCG and the relevance of the input information, and then if you go to page 580 there's the heading in the middle of the page, (fa), and that's the cross-reference to the mandatory requirement and the rule making power, subsection (fa), costs of implementing measures, "Where RESA has not been included in aerodrome planning and where runway extensions have used the land that would be available for RESA, there are major capital costs associated with implementing the RESA requirements. An external consultant was engaged to carry out an analysis of the costs and benefits of implementing the proposed RESA rules. The costs and benefits analysis showed that it is in New Zealand's interest to implement the requirements for RESA."

So the McGregor & Co report is not just one view of a consultant, it's actually a key analysis performed for the purposes of the statutory requirements that

analysed exactly what cost and the benefits that were anticipated from the rule and directly addressed the position of Wellington. And if I then can take Your Honours to how it does that – that's obviously in a preceding volume, volume 3, because it's done before this material's sent to the Minister, beginning at page 252, so this is an analysis of all the airports and when you go through to page 295 you get the analysis of Wellington and you'll see immediately under the heading for Wellington that, "Wellington is a key airport within the domestic air transport system and provides a convenient trans-Tasman link with the main Australian cities but not Canberra," and it records that "in 2000 there were about 2500 international departures and about 15,500 commercial jet domestic departures". And then over the page at 296, after analysing Wellington in greater detail, in the full paragraph before the heading for Christchurch, "Wellington aerodrome is located on the Rongotai isthmus. The geographical and other physical features of the land surrounding Wellington aerodrome, particularly the land beyond the runway ends, prohibit the provision of RESAs without major civil engineering works. As noted above, there have been a number of studies since 1960s to determine the feasibility of extending Wellington airport. Suffice to say they all indicate that only very limited extensions are possible without multi-million dollar (nine figures) expenditure. A main arterial road immediately to the north and a busy secondary road immediately to the south complicate the question of runway extensions. In the context of Annex 14 RESA standards the term 'impossible' becomes a consideration." So there are two points, apart from Your Honour the Chief Justice and Justice Glazebrook were asking me about the connection between cost and difficulty, this is being identified in this paragraph that because of the physical restraints at Wellington and the cost involved in dealing with them you see multi-million dollar expenditure is required, and it's in the context and it's what, Justice Arnold's questions of me, given that context, you know, that you need to consider whether we should be advising the international authorities that we cannot, we regard it as impossible to comply with the standard.

ELIAS CJ:

So is this pre the amendment?

MR COOKE QC:

No, this is the process of considering what the amendment should be. So Annex 14's been amended.

ELIAS CJ:

Yes. Sorry what date is this?

MR COOKE QC:

This is 2002. So Annex 14's been amended, it creates a new standard, New Zealand can under the international instrument say, "We're not actually going to be able to comply with the standards if they give a notification of difference."

ELIAS CJ:

Yes.

MR COOKE QC:

So the McGregor report is saying, "This is such a major exercise it's a consideration whether we should actually say we can't do it because it's going to be so expensive.

ELLEN FRANCE J:

Having considered the costs as required against safety, nonetheless the rule is enacted in the form that we find it.

MR COOKE QC:

Yes.

ELLEN FRANCE J:

So might that not tell you something about what "practical" must then mean? I mean, we've moved past not doing it, not implementing the international standard, we have done that.

MR COOKE QC:

And I'll go through the report to demonstrate how that's analysed, but also the question of practicable. Because remember "practicable" is not in the 90, so…

GLAZEBROOK J:

It's not what, sorry?

MR COOKE QC:

The concept of practicable is not in the international instrument about the 90.

GLAZEBROOK J:

Okay.

MR COOKE QC:

So…

ELLEN FRANCE J:

No, I understand that, but nonetheless you go for the default being 90 and longer, 240, if practicable.

MR COOKE QC:

Yes.

ELLEN FRANCE J:

So despite all of…

MR COOKE QC:

Well, but it's not despite, it's what, this explains the content of the rule. So this report goes on to say, "We'll nevertheless do the 90 notwithstanding…"

ELLEN FRANCE J:

Yes, no, I…

MR COOKE QC:

But that 240s are not recommended, you know, this is not sensible for Wellington. And so that gives you a very good indication of what was intended when they promulgated the rule, it wasn't regarded as practicable for Wellington to have an extension, even to the point where the reports say, "Well, actually, we might even have to consider whether we can do the 90," but they decide, "We'll do the 90," but what is plain is when they went through the process of deciding what we should do in New Zealand and what rule we should have, is that they would only require 90 metre RESAs at Wellington.

ELIAS CJ:

But as was put to you earlier, I suppose at some stage you're going to say where the consideration was of more than 90 and less than 240?

MR COOKE QC:

Yes, I'll come on – because in the chronology of events you get through to them, the more recent times, so saddled with the extension, and you say, and there's another McGregor & Co report about is it practicable to expect more than 90, so the question is looked at – specifically Wellington, again.

GLAZEBROOK J:

I suppose my slight issue with this submission is saying, well, yes, they enacted the rule in the way that they did but it meant that that applied to every airport but Wellington, because they obviously recognised it couldn't happen in Wellington. It seems a slightly odd submission.

MR COOKE QC:

But that's not what happens. What happens is it's not just Wellington either, the airports that are affected by the rule are addressed individually and airports such as Wellington and Queenstown are recognised as only requiring the 90 metre RESA, but they will have to do quite extensive extensions.

GLAZEBROOK J:

Well, no, I understand that. But that seems to be a submission that says, "well, because they recognise that only 90 was possible there then it will

forever only be 90 no matter what you actually, and what aircraft you're having in, and that's an exception somehow to the rule, because it was recognised when it was brought in that it would have to be", rather than saying, "well, you actually can't do anything more than you already do in Wellington because it's marginal as it is", if you understand the…

MR COOKE QC:

I do understand what Your Honour's putting to me and that's not what I'm intending to say, although the significance of the analysis done at this time would suggest there would have to be a reasonably significant change in circumstances, some way in which you could do a RESA extension that was much less costly before you would say that –

GLAZEBROOK J:

Well, it might just say, "well, I'm sorry, you've just got to – we'll do the 90 and then you have to stick to the type of aircraft that can come in at the moment and you can't go any further than that."

MR COOKE QC:

But that's not what the record suggests. The record suggests that there was this engagement with the whole industry over a long period of time – all these airports were looked at – it was recognised that with places like Wellington and Queenstown all that could reasonably be expected would be a 90 metre RESA, and that was what the basis upon which the rule was promulgated. Now I accept completely that if there was some change in circumstances in the future the design of the rule has within it an ongoing flexible characteristic that would mean that if there are major changes to the analysis that suggests actually you can now be expected to do more than 90, that that would be required. But what we're looking –

GLAZEBROOK J:

But if the change to the rule is "we want to have different aircraft in here and can we still do 90?" I don't know that this helps you, does it?

MR COOKE QC:

Well, the change in the aircraft doesn't change the analysis of the cost involved in extending it or the difficulty involved in extending it, and I accept you would then properly look at any change to the safety advantages involved in –

GLAZEBROOK J:

Well, I suppose that's where McGregor was coming from to a degree.

MR COOKE QC:

Yes, and that's what the subsequent – well, actually, the subsequent cost-benefit analysis focuses mainly on that question: what are the likely overruns and undershoots involved in the intended aircraft traffic at Wellington Airport, given its geographic location, its meteorological circumstances – that's all gone into detail in the later points.

GLAZEBROOK J:

I'm not sure you then come back to the – that's why I can't understand why you come back to this then.

MR COOKE QC:

Well, I guess it comes back to the point that if the Court of Appeal are right the problem bit as soon as this rule was promulgated.

GLAZEBROOK J:

Oh, no, I quite understand that submission, that's not…

MR COOKE QC:

So then the only question is 'has there been a change in circumstances, in the factual circumstances, about the situation at Wellington that would mean now it is practicable to engage in a longer RESA?'. But, with respect, the Court of Appeal can't be right. I know you can only take the materials that were generated at the time the rule was promulgated so far in understanding the meaning of it, but especially with a technical rule it must be pretty profound when in an industry-wide, long consultation where it's said only 90

metres are contemplated at Wellington, that must help a considerable degree in understanding the meaning of what was promulgated at that time, and that's all I'm saying.

GLAZEBROOK J:
All right.

MR COOKE QC:
And I accept that you'd then have to ask later, as was done, 'is there something that materially changed factually the position?', but what's important about this is what was intended by the rule. And just carrying on I've got this reference –

ELIAS CJ:
Where do we find the rule by the way? I know it's cited in…

MR COOKE QC:
In volume 1 of the Director's bundle of authorities, the blue one, tab 2, at page 20. I'm going to come to this in a second…

ELIAS CJ:
Right, thank you, I'll just flag it because I haven't gone through to do that.

MR COOKE QC:
No, I'm going to come to the rule. Can I just finish the McGregor references first?

ELIAS CJ:
Yes.

MR COOKE QC:
Just note at page 297 there's also the reference to Queenstown, which has similar issues. At 318 of the McGregor analysis Wellington's options are assessed, paragraph 9.9 or heading 9.9: "There are significant physical restrictions at Wellington that severely limit the alternatives for establishing RESAs. As a consequence, only 90 metre RESAs are contemplated at

Wellington." And then you've got five options for how to get to 90 metres, because the existing Wellington Airport wasn't that involved, extensions north or south or both, or what's called "paint-on RESAs" which is in effect a reduction in the declared distance, and you can see that paint-on is cheaper of course in direct cost terms but your cost comes in other ways in terms of your inability to attract larger aircraft. And you'll see –

GLAZEBROOK J:
I just – we were discussing this just before we came in. So that's effectively if you have a paint-on it means the runway's shorter and therefore you can't land the same sort of planes, is that…

MR COOKE QC:
Yes.

GLAZEBROOK J:
Yes, we assumed that was the case but it's good to just confirm that.

MR COOKE QC:
So the solution to the RESA in one sense is magically available tomorrow because someone will take a tin of paint and go and paint on your RESAs.

GLAZEBROOK J:
But practically it's not really available?

MR COOKE QC:
But it would mean that you probably wouldn't have any tourism into Queenstown and…

ELIAS CJ:
And we'll be taking the train to Wellington.

MR COOKE QC:
Yes. Which must be a major consideration.

ELIAS CJ:

I don't know.

MR COOKE QC:

But anyway, just going back to how this is assessed. We're looking at these options and over the page at 319, after discussing it with the company – and I took Your Honours to the earlier reference to McGregor … going round … and you'll see at the top of the page – "we have been advised by the airport company that, of the five options, option 4 is the preferred option should RESAs be mandated" – and option 4 is the extension south and extension north assessed then at $12 million. And just by way of foreshadowing, that's what was done, and you may recall that there used to be the road at the end of the airport which is now covered over by the airport, so that extension over the road was a slight extension at the northern end as well.

Similarly, you'll see back down at 319 there's the reference to Queenstown and their options and, as I'll go to shortly, they had to go about extension works to get to 90 metres at Queenstown. Just other references that show how this is analysed, page 367, further analysis of Wellington, third to bottom paragraph there: "All alternatives for 90 metre add-on RESAs involve multi-million dollar cost. The paint-on options with a starter extension …" Just to say what a starter extension is – that's where you use the RESA at one end to start your takeoff from, so you can go on to the RESA. Because aircraft of different weights and payloads need different runways to be allowed to takeoff, so you get a little bit more declared distance for aeroplanes by using your RESA at the other end, it's not needed for takeoff as a starter extension. But just so you know, you can't land on a starter extension, so you can't land on a RESA, you have to land after the RESA on the beginning of the runway strip.

And then over at 368 there's the middle paragraph, the second-to-last paragraph before the heading "Christchurch": "Thus given the significant physical restrictions at Wellington that severely limits the alternatives for establishing RESAs, the overall costs of providing them are greater than the benefits. So on cost-benefit grounds RESAs are not supported.

Notwithstanding this, however, we note the net flight safety benefits arising from option 5A and 5B, the paint-on alternatives." That goes back again to the point we exchanged with Justice Arnold. And appendix 5 of the report that begins at 416 is the analysis of Wellington, and then also at 454 is the financial cost-benefit summary for Wellington – the table of the maths, if I can put it that way.

So the basis on which the rule was promulgated would be that work will be required at Wellington and other airports like Queenstown, that work would only be the work you needed to get to 90 metres, and that was the stance that everyone reached after the industry was engaged-with over a seven-year period following the 1999 change to Annex 14. And on the Court of Appeal basis that whole process was in a sense misconceived, but everyone misunderstood what the rule was requiring, but actually what the rule that was promulgated required was more than 90 metre RESAs for Wellington and other airports and up to 240 metres for them, and it was all misconceived and the cost to the nation assessed was wrong. And that is a striking submission, and it is also striking that nobody said at the time, "hold on, that's what you're saying you're doing by the rule but that's not what it actually does, and what you're doing here is implementing a rule that requires much more than 90 metre RESAs at Wellington". And had that been raised and had that been thought to be the position, there would have been in a sense very serious concern because of the significant financial costs that would be involved in providing such longer RESAs, and that would have had to have been addressed because someone would have had to have paid for these very expensive additional RESA lengths.

That also responds to a submission again made by my learned friends at paragraph 31 of their submissions that the record shows that it was assumed that Wellington Airport would not be extended and would not be used for long-distance international flights. Well, of course it was used for international flights and it was necessary for there to be an extension. In fact the way the rule was formulated took into account that there would need to be a period of time for places, and particularly at Wellington and Queenstown, to get to the 90 metres, and it's in that context that I want to go to the rule that her Honour

the Chief Justice asked about, and that's in volume 1 of the Director's bundle of authorities, the blue one, behind tab 2, and I want to go to, first, rule 139.51, which is on page 20 of the Civil Aviation Rules. And can I just by way of foreshadowing indicate there are two transitional-style provisions and one shouldn't be confused with the other? So if we deal with 139.51(b), the main rule: "An applicant for the grant of an aerodrome operator certificate must ensure that a runway end safety area that …" – so in substance what 139.51(b) is saying, you've got to comply with the physical characteristics prescribed by Appendix A.1, and just if you go to A.1, it's on page 70, just to look at that, and you'll see A.1(a): "A RESA must extend to a distance of at least 90 metres from the end of the…" –

GLAZEBROOK J:
Sorry…

MR COOKE QC:
Page 70 of the Rules.

GLAZEBROOK J:
Yes, I realise that, I just seem to have trouble finding the page.

MR COOKE QC:
This is behind tab 2…

ELIAS CJ:
It's just we're having to move them backwards and forwards to manipulate them because they've photocopied them in an odd way. So page 50 did you say?

MR COOKE QC:
70. I have to say, looking at what Your Honours are looking at…

ARNOLD J:
Actually this version of the Rules in the –

ELLEN FRANCE J:

That is easier.

ARNOLD J:

– Wellington Airport bundle is a bit – is that the same one?

ELLEN FRANCE J:

And I for myself have found it easier to follow.

ARNOLD J:

A bit easier to follow.

GLAZEBROOK J:

Yes.

MR COOKE QC:

Right, well, I'll show how flexible I am by…

MR GODDARD QC:

Tab 3, Your Honour, of volume 1 of my authorities.

MR COOKE QC:

They look to be identical, do they not?

GLAZEBROOK J:

So I was going to say I didn't think I even had a page 70 but I've not found it. On this one's fine.

MR COOKE QC:

I wonder if there might just be a glitch with some of these bundles because…

GLAZEBROOK J:

Yes, they're all upside down and sort of oddly – but it's all right.

MR COOKE QC:

Right, because on my version what I'm looking at is identical to what I was just taking you to.

GLAZEBROOK J:

Yes, I just couldn't find it for some reason.

MR COOKE QC:

I'm happy to use either but they do seem to be physically identical, if I could put it that way.

ELIAS CJ:

So now you want us at page 70 was it?

MR COOKE QC:

Yes, still page 70. So you see –

GLAZEBROOK J:

Once I've found it I'm sure that's right.

MR COOKE QC:

So Appendix A.1: "A RESA must extend to a distance of at least 90 metres from the end of the runway strip and, if practicable, to a distance of at least 240 metres from the end of the runway strip or to the greatest distance that is practicable between the two." So if you then go back to the rule itself, which I think was page 20, you'll see 139.51(b) says you have to comply with that if, and (1) is "the runway is used for regular air transport services operating to or from New Zealand". So both Wellington and Queenstown were caught by that, as were the other major airports in New Zealand. What then goes on in (2) and (3) is a kind of grandfathering provision for the regional airports, and that's really saying they're using a 30-seater trigger, and basically 30-seaters involves you to a … largest category of aircraft which involves in the Rules a different category of regulation, so that's why we've got 30-seaters here. So what (2) is talking about is you first get a certificate after 12 October 2006, that's when the law's come in effectively or, (3), the runway itself is first

commissioned after 12 October 2006, so your first certificate or first runway, and then (4), and this captures I suppose many regional airports, you do have aeroplanes configured for more than 30 seats that regularly use it, and you either have extended your regional airport or you upgrade to instrument flights. Then you have to comply. So that transitional provision is only really directed at the smaller regional airports, but there was another transitional provision that applied to places such as Queenstown and Wellington. Actually, because this transitional rule has been repealed – it's not actually in our bundle so I need to pass that up –

ELIAS CJ:

Is it repealed because the period of transition has passed?

MR COOKE QC:

Yes. What's interesting about that – 139.102 – transitional requirements for runway end safety areas, the holder of a certificate that's been used for regular air transport to and from New Zealand immediately before 12 October 2006 is not required to comply with the requirement prescribed until 12 July 2007 – and this is the irony – it's not practicable for the certificate holder to comply with the requirement by 12 July 2007. The certificate holder must comply with the requirement as soon as practicable, but no later than 12 October 2011, and that is what both Wellington and Queenstown took advantage of.

GLAZEBROOK J:

Well, "practicable" there must mean just practicable rather than cost-benefit, mustn't it? I don't think it's of any moment whatsoever, but it must mean that in that context.

ELIAS CJ:

It's always contextual.

MR COOKE QC:

Exactly.

GLAZEBROOK J:
As I say, I wasn't suggesting it had any wider meaning than that.

MR COOKE QC:
And I would agree and support the submission it just demonstrates how it always depends on context.

Just for the evidence that Queenstown and Wellington did the subsequent extensions, I don't need to take Your Honours to it but for Wellington it's Mr Hoskin's affidavit, paragraph 31, at case on appeal volume 2 tab 15 page 197, and for Queenstown, Mr Clay, paragraph 9, case on appeal volume 2 tab 16 at page 212.

So the significance of this, really, is that the transitional provision – bearing in mind I'm making a submission that all of the actual situations at places like Wellington were being focused on squarely in the making of the rule – the rules contemplated, well, Wellington needs to get to 90 and that was addressed in the transitional provisions. There was no contemplation that Wellington would need greater than 90-metre RESAs. So we have to ask the question, how did the Court of Appeal get to a position that was contrary to the whole basis upon which the rule was promulgated in the first place and the whole basis upon which the airports were then extended after the rule was promulgated to meet the rule. How do we get to that position? Really the most significant finding that the Court of Appeal made was that following the 2004 amendment, Parliament had repealed the balancing exercise between factors of safety and costs. As the Court of Appeal said in paragraph 54 and then at paragraph 70, that balancing had no place in the statutory regime.

Really there are two answers to that proposition. The first answer is the one that has been dealt with reasonably extensively in the written submissions, which is that the 2004 amendments didn't eliminate either the concept of balancing or the relevance of safety benefits or costs in that balancing exercise. All that it did was add to the considerations that were informed the kind of balancing that the act contemplated. It didn't eliminate balancing or

eliminate cost and benefits, but added to it to make it consistent with using transport strategy. So that was the point of that.

You can illustrate that – and I know going to Hansard is only indirectly relevant – and in a second I want to go to the statute itself, which is actually much more helpful – but it may be significant to go to at least one of the Hansard passages which is in volume 2 of the airport's authorities.

ELIAS CJ:
Sorry, you're going to Hansard for what?

MR COOKE QC:
The proposition that cost-benefit was still relevant.

ELIAS CJ:
Under the amendment.

MR COOKE QC:
Yes, in 2004.

WILLIAM YOUNG J:
After 2004.

MR COOKE QC:
After 2004. And just also bear in mind, this is an amendment that occurs midway through the rule amendment consultation, because it's not until 2006 the rule actually gets amended, but consultation starts in 2009. No one said in the middle of it, "goodness, the Act has been amended. We should no longer look at a cost-benefit analysis," and you would have expected that if that was the case.

But first just dealing with Hansard, it's one of the latter passages of Hansard at page 16897, what happens here is the Minister is responding to points that have been made by the opposition about the amendment, and he's responding at the bottom of page 16897 to the National Party spokesperson

and that person is making the point that we'll end up with safety at unreasonable cost because the words "safety at reasonable costs" are no longer there. The ACT spokesperson has a slightly different point over the top of the next page. Her point was that there's been a diminishment in the relevance of safety as a consequence of the re-establishing of these or reconfiguring of these guiding principles, and what the Minister says in response is they're both wrong and perhaps capturing it at page 16899, top of the page: "Now we have a more integrated approach that requires people to think differently. It requires people to take into account a range of factors and amalgamate them. It moves us away from the safety and efficiency history. It takes us away from fragmentation."

And then a little bit further on after the exchanges: "So let us integrate safety, which means we cannot have safety at reasonable cost alone. We have to have safety as a matter of balance against the other four objectives" – because they're adding to the objectives. "Let us have safety integrated into people's thinking because we have to come up with solutions that are somewhat more innovative than simply going down the list of schedule of BC ratios until we run out of money."

So it's not getting rid of balancing of safety and cost but it's adding to the safety and cost considerations as part of the general theme of the Act. Going to Hansard only tells you so much.

ELIAS CJ:
It doesn't help me a great deal.

WILLIAM YOUNG J:
It doesn't tell me very much at all, actually.

ELIAS CJ:
It sounds quite tub-thumping.

WILLIAM YOUNG J:
It's tendentious.

MR COOKE QC:

Yes, fair enough. What does help you more directly – this is probably always the case with Hansard, actually – is what the statute actually says and can I invite Your Honours to go to our bundle of authorities, volume 1, which is the blue one and ask Your Honours to look at the sections that regulate the making of these rules?

GLAZEBROOK J:

Is that in the airport's authorities as well? Unfortunately it's backwards.

MR COOKE QC:

It sounds to be like there's been a photocopying glitch, so again I will show considerable flexibility and go to tab 1, section 30. You'll see section 30 deals with the general rule making function and that includes 30(a)(ix) rules relating to aerodromes and aerodrome operators. It is notable, then, over the page, section 32, there is then the procedure for making the rules in the sense indirectly by describing the procedure that was followed for making these rules.

Section 33 – Matters to be taken into account in making rules. 33(1) is interesting first, the ordinary rules made and the emergency rules made shall not be inconsistent with the standards of ICAO. That's the difference between the standards and the recommended practices and New Zealand's international obligations. So the section identifies the difference between how they influence the New Zealand rules.

Then in 33(2) in making or recommending the making of a rule the Minister or the Director, as the case may be, shall have regard to and shall give such weight as he or she considers appropriate in each case to the following. So it's not just a mandatory consideration. It is a weighting exercise that is a balancing concept and you'll see 33(2)(a).

ELIAS CJ:

That's always the case when decision-makers are required to have regard to a range of factors.

MR COOKE QC:
That is true, except here the statute spells it out.

WILLIAM YOUNG J:
What's important is the weight that the Director gives to these factors as opposed to the weight the Court might later give to them.

ELIAS CJ:
That's always true, too, in the exercise of the supervisory jurisdiction.

GLAZEBROOK J:
This is making a rule as well.

MR COOKE QC:
Yes. All of those are little footnotes to the point that's nevertheless the main point – and it's still a pretty good one – that we're talking here about.

ELIAS CJ:
It's a belt-and-braces thing, a device because of suspicion.

MR COOKE QC:
What, perhaps, I should identify then is 33(2)(a), includes the recommended practices. So the recommended practices are at 33(1), you must be consistent with the standards. 33(2)(a) talks about taking into account the recommended practice. You'll see (b), the level of risk to existing aviation safety and each proposed activity or service, (e), the need to maintain and approve safety and security including the personal security, (f), the stuff that comes in from the transport strategy, so you've got the four factors, economic development, access and mobility, public health, environmental sustainability. And then (fa), the cost of implementing measures for which the rule is being proposed.

So it just cannot be right that the balancing of cost and benefit is not part of the statutory regime. It's there explicitly in the statutory regime and it's

significant to note that subparagraphs (e) to (fa) were replaced by the 2004 amendment, and you'll see that from the annotation at the bottom of the page.

ELIAS CJ:
They were introduced by it?

MR COOKE QC:
Yes.

GLAZEBROOK J:
Is that what the issue was in terms of the debate about safety? Right, that's fine.

MR COOKE QC:
The (fa), the one that looks as if it's the brand new one, really (f) is the new one and (e) and (fa) were slightly reworded from what was there previously. But what the statute has done is looked at how this 2004 amendment affects these rules and costs and safety benefits and balancing are still clearly part of it.

ARNOLD J:
The argument against you is that's true about rule formulation, but not about rule application.

MR COOKE QC:
Your Honour has captured the heading at my next page of my notes, which is that's the next issue. If the Court of Appeal is not right about "not part of the regime", are they nevertheless right about that it might be relevant at the promulgation stage but not the implementation stage?

Now, of course, the irony about that submission in the first place is that Wellington was considered at the promulgation stage and it was decided that it wasn't practicable to have more than 90-metre RESAs at Wellington Airport, so it is slightly unusual. The Court should make that point but they don't identify the fact that at the stage the rules were promulgated, according to the

cost-benefit analysis that goes up to the Minister or that is referred to the Minister that Wellington is not anticipated to have more than 90. But more directly, section 30 allowed rules that required the exercise of judgement by others, so it was perfectly permissible for rules to be promulgated that involved – that the relevant operators in the aviation sector and the Director exercising judgements. That's a perfectly permissible regulatory task.

ELIAS CJ:
Did you refer to section 90?

MR COOKE QC:
30 is the rule making power.

ARNOLD J:
Is that a general submission?

MR COOKE QC:
Yes. Well, if you look at section 30 you can make rules for the following purposes: the designation, classification, or certification of any of the following on the long list of them, must incorporate the idea that the Director would find something acceptable, or the aerodrome operator would engage in assessment of what was practical in the circumstances.

GLAZEBROOK J:
Where do you get the airport operator? I can understand the Director of Civil Aviation.

MR COOKE QC:
Well, bearing in mind –

GLAZEBROOK J:
I mean, obviously if you have a rule you've got to comply with it and the operator would have to work out whether they were complying with it, but I think you were saying something more.

MR COOKE QC:

Well, bearing in mind the kind of human activity we're dealing with here, how you engage in the operation of an airport and you're creating rules that regulate that. That would inevitably encompass the certified aerodrome operators, which is what they are under the system, engaging in judgments as to whether things were required in certain circumstances, and the Director finding that acceptable. So I just see that as being inherent in the very subject matter that we're dealing with.

GLAZEBROOK J:

Well, if all you say is the airport operator has to comply with the rules and work out whether they have complied with the rules and then be checked up on by the regulator, then that would just seem to be what one would expect. So you're not saying anything more than that?

MR COOKE QC:

Not particularly, no. But I'm going to say something next which engages the next point, which is Annex 14 contemplated the exercise of a judgement in the recommended practice, providing a RESA if it was practicable. In the devolved system of aviation system safety that we operate in New Zealand, what has happened in New Zealand is that that judgement is to be exercised by the certified aerodrome operator and that judgement is to be checked by the Director of Civil Aviation. That's permissible under the rules.

GLAZEBROOK J:

Is it permissible under the Act?

MR COOKE QC:

That's what I meant, yes. I do say it's – I mean, we're not arguing about whether it was or it wasn't, but that's what has happened. Rules have been promulgated that pass the judgement contemplated by Annex 14 to be exercised by the aerodrome operator.

ELIAS CJ:

Well, that's not been challenged, the validity of that approach.

GLAZEBROOK J:
You perhaps need to take us to the Rules in relation to that as well. Is it just that it's then found acceptable, is that the …

MR COOKE QC:
Let's go back to them.

ELIAS CJ:
Sorry, and can you just recap on the things that you're relying on for this submission? You said it's inherent in the nature of the subject being regulated.

MR COOKE QC:
Well, that was in response to a question about whether it would be within the framework of the rule making power to do this.

ELIAS CJ:
Oh, I see, right, okay. Which we don't really need to get to.

MR COOKE QC:
All I need to say is that it has been done. If we go back to the rule itself, which is in – we're using the airports volume 1, aren't we, behind tab …

GLAZEBROOK J:
3.

MR COOKE QC:
Thank you. Rule 139.51. The applicant for the grant of the aerodrome operator – so that's Wellington Airport – must ensure that the runway end safety area complies with the physical characteristics in Appendix A.1 – and Appendix A.1, which is on page 70, uses the practicable language.

Then if you go back to page 21, you see 139.51(c): "The aerodrome must be acceptable to the Director."

GLAZEBROOK J:

Yes. I suppose I'm looking at that in a slightly different way. The operator must comply with the rules and then the Director must check that's the case. But whether it's put in exactly the way that you put it where the primary role – it just, I suppose the concern might be that that really just says they look at the proposal and say whether it's acceptable in terms of the Director rather than a requirement to look at alternatives and that's probably the issue. So is 90 acceptable? Yes, it's acceptable. I mean, it might be acceptable but it may not be optimal in terms of the way that the rule is promulgated, i.e. in terms of saying it's acceptable but a 240 would be better and practicable. In my opinion as a Director, it should be done.

MR COOKE QC:

Yes. That comes to the facts and circumstances of the individual cases. All I am identifying here – particularly in the context of a devolved system of –

GLAZEBROOK J:

Well, no, because if a devolved system – if they come and say, "Is it acceptable?" the Director would say it's acceptable even if the Director was of the view that it was practicable, even though the operator wasn't to have, say, 95, 100, 140.

MR COOKE QC:

Yes, that's possible. That's the whole reason for the acceptability function of the Director.

GLAZEBROOK J:

All right. You're not arguing that the only thing they do is check bare acceptability.

MR COOKE QC:

No. They check acceptability against the test of practicability, I think.

ELIAS CJ:

Would you accept, though, that the thrust of the rule is that it has to be what is optimal measured against what is practicable?

MR COOKE QC:

I think it's dangerous to add to the language we're already had to struggle with.

ELIAS CJ:

Well, I will want you to come to that when you look at how that rule is expressed because it does seem to me that that is actually the thrust of it, that you are pushed to do whatever is practicable towards a 240 standard.

MR COOKE QC:

Well, except that way of describing it is the word "optimal" that I was – it's hard enough to argue.

ELIAS CJ:

Isn't that the same thing, though? If you have to go as far as you can, limited only by what is practicable, isn't that the optimal position?

MR COOKE QC:

Well, again, it's hard enough with these technical rules to argue about other words, let alone the word that's used, "practicable", and that's the one that everyone's familiar with.

GLAZEBROOK J:

All right. The real point is that "acceptable" is to the limits of what is practicable.

MR COOKE QC:

Yes, that's exactly right. It does encompass, I guess, a further degree of subjectivity against an objective standard, if I could put it that way.

WILLIAM YOUNG J:

Well, it's a check. Isn't it simply to say that the Director – that the matter isn't subject to the sole determination of the aerodrome operator.

MR COOKE QC:

Yes, and deliberately chose as acceptable, so there's a degree of leeway contemplated. But "practicable" is a flexible word by itself. But we're all talking about exercising judgement but within a particular band in which that judgement comes to be exercised.

WILLIAM YOUNG J:

So the decision in issue here was effectively the Director's notification that he would in due course find the RESA proposal acceptable.

MR COOKE QC:

Yes. It's a slightly unusual environment because it's a bit of a chicken and egg thing. Wellington didn't want to engage in this and then find the Director saying, "Well, where's your 240-metre RESA?"

WILLIAM YOUNG J:

Or, "You've just provided us with a 240-metre RESA whereas you previously had a 90-metre RESA."

MR COOKE QC:

Yes. So there had to be a circuit breaker to some extent. There was a little skirmish in the High Court about whether this was a reviewable decision, although we accepted that there was a proper role in the Court identifying what the correct legal test was to be applied by the Director. But we argue that strictly speaking it's not a statutory power of decision that's subject to review. That's no longer an issue. But you can understand why that emerges, because this is slightly relevant to my learned friend's point –

WILLIAM YOUNG J:

Well, in one sense it was a letter of comfort.

MR COOKE QC:
Yes.

WILLIAM YOUNG J:
On the other hand…

GLAZEBROOK J:
Yes, although –

ELIAS CJ:
It had consequences…

GLAZEBROOK J:
– that were later held to be illegal I suppose is the other issue.

MR COOKE QC:
Yes, it has to be subject to supervision of the Court in the sense that if the Director had got the law wrong better that that be found out at the beginning. So there was no issue that the Court had a role, this is a question about whether strictly speaking it was a statutory power of decision that can be set aside and relief in that sense. But I don't think it matters. But that was all that skirmish was about, if I can put it that way, and maybe I was being a bit pointy-headed about –

ELIAS CJ:
Yes.

MR COOKE QC:
Thanks. But going back to where we were, what is clear from these rules is that the judgement contemplated by Annex 14 recommend practice as being exercised by the protagonists on the ground, that is, the aerodrome operator and the Director, and it's also apparent that it does an exercise of judgement and that that exercise of judgement inevitably involved questions of difficulty which are reflected in costs and safety advantage. So it, with respect, cannot be right when the Court of Appeal says that the factors that were identified in section 33 of the Act as to costs and benefits are only relevant on the

promulgation stage. They are obviously relevant when it comes to exercising the judgement that the rules contemplate the Director and the aerodrome operator will exercise.

GLAZEBROOK J:
Which one's in 33? Because I'm not sure that practicable brings in most of those ones in (f) does it.

MR COOKE QC:
(fa)?

GLAZEBROOK J:
(fa) I could understand, but…

MR COOKE QC:
Yes, it would obviously only be in the relevant ones.

GLAZEBROOK J:
But, I mean, do you really say you go back to that to give you an idea of what you can look at, or you just look at it in terms of what that would mean generally?

MR COOKE QC:
In a sort of normal statutory interpretation exercise when you were trying to identify the permissible considerations in a judgement to exercise under a rule you would look into the rules –

GLAZEBROOK J:
Why you have the rule in the first place, that makes some sense, yes.

MR COOKE QC:
Yes. And bear in mind too that there will be some that aren't obviously relevant, which is why the rule says "and give such weight to as are relevant," whatever that formulation is, "the following considerations".

GLAZEBROOK J:

So you say you look to the reasons you had the rule to decide what you might…

MR COOKE QC:

Exactly.

GLAZEBROOK J:

Because if the reasons you have the rule are those then you might want to think that they, at least some of them, might be relevant considerations when exercising the functions under the rule.

MR COOKE QC:

Yes, that a mandatory consideration on promulgation is highly likely to be a relevant consideration on implementation.

GLAZEBROOK J:

Yes.

MR COOKE QC:

As a matter of interpretation. So it can't be right, the Court of Appeal, but they're only relevant to promulgation, they're not relevant to implementation at all. But as a normal exercise you would say they're obviously relevant to both, particularly with the word "practicable", which by definition in this context must be focusing on the difficulty of doing it and what you're seeking to achieve, they must be two of the key considerations in this that you're focusing on, and obviously weighting those sorts of considerations. That might be a convenient time, Your Honour.

ELIAS CJ:

Yes, thank you, we'll take the adjournment.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.46 AM

MR COOKE QC:

Just so the Court knows where I am on my road map, I have got through numbered paragraph 1 through to 6 in the one-pager, and we'll now turn to the next key proposition in numbered paragraph 7, which was the third really key proposition from the Court of Appeal that as a matter of definition of the word "practicable" it has a meaning of "excludes costs as a central consideration" and my submission in respect of that is that that is not so, that the resources are relevant; how relevant they are in any particular context depends on that context, not from a definition of the word "practicable", and even the authority that the Court of Appeal relied upon for that proposition, the *Union Steam Ship Co of New Zealand Ltd v Wenlock* [1959] NZLR 173 (CA), a decision of the Court of Appeal in the late 1950s, referred to a test of what was practicable in terms of what was able to be accomplished with "known means and resources", so within that decision's definition of "practicable", resources was relevant.

So you don't get the answer to this case by looking at different decisions in different contexts on the use of the word "practicable", and some of the other cases in which the word "practicable" was used have been referred in my learned friend Mr Curran's submissions for the Intervener. I noted with horror that this is in fact the second occasion on which I have appeared in this Court to argue what the word "practicable" means. Your Honours might recall the *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 case about the foreign pork imports. One of the questions in that case was whether the Director-General had acted as soon as reasonably practicable in receiving a report of a technical group and taking a year to make a decision on that matter, and there's isn't much to be gained by looking at particular passages but I did notice from the majority judgment on that part, Arnold J for the majority: "For our part, we consider that the phrase 'as soon as reasonably practicable' was deliberately chosen to reflect the fact that the amount of time that the Director-General will need to respond to a review panel's report will depend on its nature and, in particular, whether it contains recommendations … ." So again it just stands for the proposition that it all depends on circumstances but that all definitions, from dictionaries or otherwise, do

incorporate questions of difficulty, because, all the practicable considerations, and after all the word “practicable” is derived from the concept of “practical” so it’s a practical assessment based on the relevant circumstances in the particular case. And that is why in the end this case does not turn on the question of statutory interpretation about the meaning of “practicable”, it is really a challenge to the weight given to considerations in the exercise of judgements that the rules contemplate the protagonists will exercise.

ARNOLD J:

Well, that's something that’s worried or been niggling away at me a bit. You say in your submissions that it’s not your argument that a cost-benefit analysis is the be-all and end-all, but what else is there?

MR COOKE QC:

The cost-benefit analysis is just a means to get information together in a disciplined way. So the question, “What else is there?”…

ARNOLD J:

But say that that produces an answer which indicates that the costs do not outweigh the benefits?

MR COOKE QC:

Yes.

ARNOLD J:

So what does the Director do then? On your analysis it seems to be, well, you say it’s not the end of the story, but it does seem to have been the end of the story here.

MR COOKE QC:

It does, because the answer was so straightforward in a sense the cost-benefit analysis produced such an obvious result, the same kind of obviousness that was apparent at the time when the rule was promulgated it was never thought, because of the difficulty of thinking in Wellington sitting in

the physical environment, that it would have to engage in the exercise of building out into either northwards or southwards into the water.

ARNOLD J:
So what you're saying is that the cost-benefit analysis will give you the answer if it's strong enough, it's powerful enough, but in other circumstances where it's more marginal then other considerations may come into play, is that…

MR COOKE QC:
Yes, that's so, but I also say the cost-benefit analysis has within it information other than simply the cost-benefit analysis, if I can put it that way. So it's a convenient way to assemble quite important information. So irrespective of the cost-benefit weight-up, there's a lot of information in the report that I'll take the Court to about what the actual risk to safety is involved in the volume of traffic that's anticipated to be at Wellington Airport. So by itself that is important information.

ELIAS CJ:
Well, why is that not part of a cost-benefit analysis? Because the cost-benefit must obviously look to safety and cost and practicality.

MR COOKE QC:
Yes.

ELIAS CJ:
So you put them all in the mix, as you suggested…

MR COOKE QC:
It is, yes, I'm not saying it's not part of it, but I'm just saying that it has independent relevance as information, provided in a disciplined way, for the statutory test. So in other words you don't make an answer to this question based on whether you get slightly more than one on your cost-benefit analysis. But the cost-benefit analysis is a very appropriate or disciplined way to look at the exercise of judgement that the rules contemplate in a way that the protagonists are used, all protagonists in this industry are used to

cost-benefit analyses. So it's a mechanism by which the relevant evidence for the judgement are assembled in a disciplined way to enable the judgement to be formed, irrespective of the answer of the mathematical question at the end of it. So, yes, all that preceding information is necessary for –

ELIAS CJ:
Well, as you said, it's methodology, and it gives some confidence that the result reached wasn't arbitrary.

MR COOKE QC:
Yes, and provides the relevant information. And there will be more than just what's in the documents assembled, there will be the Director's experience and knowledge, and in some ways everyone in this room has experience and knowledge of Wellington Airport because we've been there so many times over our lives, and some of them quite interesting occasions. But the Director, obviously, and his team knows the airport well, so they assemble that – and it wasn't just this cost-benefit analysis either, there was then the Department's analysis of it, their advice to the Director, there was peer review of the cost-benefit analysis by other consultants, so it's not a be-all and end-all on a simple cost-benefit analysis. But as the High Court said, it's a really helpful disciplined way to bring it together in a helpful way.

I need also to respond to the Court of Appeal's proposition that there is a significant difference in the statutory wording between the rule saying that, uses the phrase "practicable" rather than "reasonably practicable", and my response to that proposition is that it's still a matter of weight. The phrase "reasonable" –

ELIAS CJ:
I must say I didn't follow that at all. Because one would have thought that any standard always has to be reasonably achieved, it just seems over-refining.

MR COOKE QC:

It is over-refining. I think Court of Appeal was saying the concept "reasonably practicable" encompasses a greater degree of latitude than simply "practicable".

WILLIAM YOUNG J:

Well, are they, I mean if you take –

ELIAS CJ:

Oh, as a qualifier, using it is a qualifier?

MR COOKE QC:

Yes.

ELIAS CJ:

Oh, I hadn't read – yes, I see.

WILLIAM YOUNG J:

If you take it to a sort of perhaps a silly, if logical, extension, the Court of Appeal would say, "Well, it's practicable, even though it's only so unreasonably."

MR COOKE QC:

We're kind of like dancing on the heads of pins a wee bit, it's like debates about *Wednesbury* unreasonableness. So I accept it's a kind of emphasiser, but what is obviously true is that the word "reasonably" put in front of "practicable" doesn't change what the relevant consideration are. So you don't diminish the relevance of cost because of the word "reasonably", it's still a relevant consideration to be balanced, it's still an exercise of judgement. So that deals with what I've said in numbered paragraph 7 in my outline.

Before I go to the actual assessment that was done in connection with Wellington's proposed extension and the further McGregor & Co report, I just want to deal with an argument advanced by my learned friends for ALPA, it was referred to in numbered paragraph 8, it doesn't really feature in the

Court of Appeal's judgment. But the argument is that the international material contemplates a reduction of declared distances to provide a full 240 RESA and, with respect, that is not what the international instruments actually say. And can I first go, and I hope it's all right to go to the Director's authorities volume 2, which is the green one, for Annex 14 itself, behind tab 7, you have Annex 14.

GLAZEBROOK J:
Yes, they're still upside down.

ELLEN FRANCE J:
I was going to say I'm sorry but I have marked up volume 1 tab 6.

MR COOKE QC:
Someone's done this devilish trick to make me to go to Mr Goddard's bundle.

GLAZEBROOK J:
It's every second page is upside so you've got to keep turning it round.

MR COOKE QC:
Right, I understand why that would be slightly irritating. So can someone tell me where else it is?

MR GODDARD QC:
Volume 1 tab 6 of mine.

MR COOKE QC:
Thank you very much. All I can –

ELIAS CJ:
Well, you can stick with yours if you're familiar with it, because it's the same.

MR COOKE QC:
Well, I can, but it would be good to use the colloquialism that we're all on the same page.

So it again is the same version. Actually while we're in that –

ELIAS CJ:

This is in Annex 14 you think?

MR COOKE QC:

Annex 14, which is the instrument that triggered the amendment of the New Zealand rule. Just while we're in Annex 14 it might be helpful just, the Annex itself describes the differences between standards and recommended practices. If Your Honours were to go to page (xiii) in the foreword of Annex 14, at the bottom of the page you'll see it describes standard: "Any specification for physical characteristics," et cetera, "the uniform application of which is recognised as necessary for the safety," et cetera, "which Contracting States will conform in accordance with the Convention," subject to the impossibility of compliance.

ELIAS CJ:

Sorry, which page?

MR COOKE QC:

We're now, I've moved from (xiii) to (xiv)…

ELIAS CJ:

I see, yes.

MR COOKE QC:

And then there's recommended practice: "A specification for physical characteristics, configuration," et cetera, "the uniform application of which is recognised as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to confirm in accordance with the Convention." And it might also be helpful to note that obviously encompasses a greater degree of flexibility for contracting states, but that flexibility is also reflected in the word itself. So the word "practicable" in Annex 14 is used in recommended practices but it's not used in standards. So this is describing the difference between them, but also the

language of the actual provisions of the Annex reflect the flexibility through the use of the term “practicable”.

ARNOLD J:

So if you're not going to accept the standard do you have to have to enter a reservation or something?

MR COOKE QC:

Yes. So if when they came to do this they thought, “well, we really can’t do it at Wellington, it’s going to cost $12 million and here’s no real benefit,” then they would have had to have notified a difference.

ARNOLD J:

Right.

MR COOKE QC:

And that's what happened in the case that my learned friend Mr Rennie argued for ALPA concerning Annex 13, which was the cockpit voice recorder case, *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* [1997] 3 NZLR 269 (CA). There was in that case a notified difference, so the difference of New Zealand from the international standards. But there are all sorts of complex layers in terms, particularly in this area, to how international material affects domestic environments, and there are degrees of flexibility in various points in the exercise.

ARNOLD J:

And what’s the test for entering a – what did you call it, a difference?

MR COOKE QC:

Yes, registration of a difference. I think actually, although this talks about “impossibility” here, it does talk about “impracticable” in the Annex, in article –

GLAZEBROOK J:

Yes, that's what I was just going to ask in terms of what does “impossible” mean, is it defined anywhere?

MR COOKE QC:
I don't think so, no.

GLAZEBROOK J:
Because it would look like, "Well, we just don't have any land left, we can't do it," or something, rather than…

MR COOKE QC:
You can read a lot of material about what is contemplated, you know, the international writings about the degree of flexibility that states actually have to depart from the standards, so it probably is not something we need…

GLAZEBROOK J:
Well, in any event 90 complies doesn't it?

MR COOKE QC:
Yes.

GLAZEBROOK J:
Is your argument?

MR COOKE QC:
Yes.

But I was then going on to the actual provision itself, that's at paragraph 3.5.3 of Annex 14 – actually 3.5.1 and following, it's on page 3-14 if that helps you. Just so you understand, there's the reference to code numbers in these provisions. Generally speaking code 3 or 4 is jets, it's referring to what length an aeroplane needs. Now generally you can say it's jets. I am instructed that we are recently just getting to a situation where propeller planes might come into code 3. But what this is regulating is code 3 or 4 activities.

So, 3.5.1: "A runway area shall be provided at each end," when you've got that, and then: "Dimensions of the runway end safety areas," is 3.5.3: "A runway end safety area shall extend from the end of a runway strip to a

distance of at least 90 metres where it is 3 or 4 and the code 1 or 2 is an instrument one." And then there's: "If an arresting system is installed it may be reduced," and then there's a note: "Guidance on arresting systems is given in attachment A," and before I go to that you then get the recommendation: "A runway end safety area should, as far as practicable, extend from the end of a runway strip to a distance of at least 240 metres when it is 3 or 4 or a reduced length of an arresting system 120 when it's 1 or 2 with instruments, and 30, 1 or 2, non-instruments."

And then the guidance note is something that my learned friends have relied upon – I might just go to my own version of this because I've got it marked up, if Your Honours just bear with me – and what I want to look at is page A-14, at the bottom of the page you'll see there's a letter and numbers, page A-14, there's a guidance note, and you'll remember the guidance note is in connection with the standard, runway end safety areas, and my learned friends have relied on paragraph 10.2: "Where the provision of a runway end safety area would be particularly prohibitive to implement, consideration would have to be given to reducing some of the declared distances of the runway for the provision of a runway end safety area and installation of an arresting system." Now my learned friends have relied on that guidance note to say that therefore when you can't get to the 240 metres this guidance note applies. But 10.2 doesn't talk about a full runway end safety area or the recommended distance runway area, it's talking about where the provision of "a" runway end safety area, that is the standard, would be particularly prohibitive to implement. Or put in another way, once you have got yourself a RESA, because you've got 90 metres, then this guidance note then becomes irrelevant. So it's not something you can rely on to say this guidance note is suggesting that with the recommended practice of 240 metres, if you can't get to that you should consider reducing your declared distances, it's not what the guidance note says. It's focusing on a situation where you can't provide a RESA at all will find that particularly prohibitive to implement.

ELIAS CJ:

Surely though it all has to be read in together, and does this do more than indicate that the option of looking to reduction of runway is something that has

to be considered? You're saying there's a prohibition effectively on requiring such consideration aren't you?

MR COOKE QC:

No, I don't go that far. I'm just saying that this guidance note is particularly –

ELIAS CJ:

It's fragile, is really all you can say. But it must be relevant mustn't it, because…

MR COOKE QC:

The potential reduction of declared distances, as we saw with the rule promulgation stage where there was, you know, there's the possibility of paint-on, is always part of the fabric of understanding the circumstances of the airport and dealing with what you've got on the ground, yes, I accept that. But what I don't accept is the idea that the international materials contemplate that if you can't 240 metres you need to contemplate a reduction in your declared distances. And there's a similar proposition based on, there's another tier of documents that are generated and there's a manual that goes underneath the Annex, and again my learned friends relied on the aerodrome manual and the reference to these sort of possibilities, and I invite Your Honours to go to the ALPA's bundle of authorities, behind tab 6 there's extracts of the Aerodrome Design Manual and at page 60 in the bottom right-hand corner there's reliance on what begins at, under paragraph 3.4, "calculation of declared distances" and over the page my learned friends rely on 3.4.9: "Where the provision of a runway end safety area may involve encroachment in areas where it would be particularly prohibitive to implement and the appropriate authority considers a runway end safety area essential, consideration may have to be given to reducing some of the declared distances" – and again what's being talked about is "a" RESA, not the full 240-metre RESA but where provision of a RESA would be particularly prohibitive and the appropriate authority thinks, well, this is essential to have the 90-metre RESA, because that is a RESA, you'd have to consider reducing your declared distances. But that is not suggesting if you can't get up to 240 metres you should do that.

ELIAS CJ:

But if 240 metres is practicable, why not?

MR COOKE QC:

Well, I accept that. If it was practicable then that would open up that kind of consideration, but not necessarily of 3.4.9 but because of the practicability test.

Just while we're here though, if you go over the page you get reference to the purpose of a RESA, in 5.4.1, is to minimise the damage, so it's not absolute: "These areas known as Runway End Safety Areas should be capable of adequately supporting any aircraft that overruns or undershoots," then the length provision is addressed, and over the page again I just note 5.4.7: "A study of the ADREP data on runway overruns suggests that the standard distance of 90 metres would capture approximately 61 percent of overruns," et cetera, "therefore it is recognised that some overruns would exceed the 240-metre RESA distance. Accordingly, whatever length of RESA in excess of the standard is provided it is important to ensure that the likelihood of potential impacts arising from an overrun are minimised as far as reasonably practicable." So again that kind of assessment. But my point in going to this is that the international materials don't say you should contemplate reducing your size of declared distance if you can't get to the recommended practice. But I accept if it is practicable to go to longer than 90 the question will be different.

So that deals with paragraph 8 of my outline and now I want to deal with how the Director dealt with the situation presented to him by the airport in relation to the proposed extension for commercial reasons, in effect the judicial review challenges. And, as I've already said, what we say about the McGregor report that was presented was it was an appropriate disciplined way in which to present information to the Director when in effect what the airport was saying is "it's been accepted since this rule's been implemented that we only need to have 90 metres and we extended that because of the practical limitations of going further. Is that still the case if we do an extension?" and the Director required that this be subject to the kind of analysis that one follows in this area

through a cost-benefit analysis, and versions of the further McGregor report were created and I suppose one was done for the northern extension and then there was a further one for the proposed southern extension. I think written submissions may have quoted from the paragraphs of the northern unfortunately but I should rely on the southern one. And can I just go to that McGregor –

ELIAS CJ:
Where's the Director's – it's a letter isn't it, the decision?

MR COOKE QC:
If I go to, I think, the Director's file note, which may be helpful, is going to be in the same bundle as I've had to go for the McGregor report, so I can show you that and the McGregor –

ELIAS CJ:
So which volume are you…

MR COOKE QC:
Volume 5. So to answer the Chief Justice's question, in volume 5, if you go to page 847, you get a file note of the decision made by the Director, but if we go back to the McGregor report beginning at 7… this is the South report which begins at 788 I think, so you can see that's a report produced in November 2014. If you go to page 791, as we talked about in terms of chicken and egg, a particular extension for commercial reasons hadn't yet been determined, but if you look at 791 paragraph 2 in the executive summary: "The length of the runway extension is to be determined but at this early concept engineering stage three extensions are considered: 100, 200 and 300." So in other words what the Director has been presented with is a range of possible extensions for commercial reasons for the purposes of assessing whether it is practicable to require more than 90 metres, given the possible change in factual circumstances that mean more than 90 is now required. That's further recorded on page 792 in terms of the situation, over to 800, and if I can –

ELIAS CJ:

I suppose one of the things that I don't quite understand is why isn't it all considered together, what is practicable, in terms of the RESA? If it's practicable to consider these three different extensions … doesn't have to be considered in that context … why you just treat the RESA as totally distinct and with a presumption that the 90 metres meets the requirement.

MR COOKE QC:

I think the Director does –

ELIAS CJ:

They're disconnected though in the way it's presented, it seems to me.

MR COOKE QC:

But I don't think the Director did disconnect them way, because he assembles the information. But I think also it's important to understand that the extension at the airport for what might be called commercial reasons in some ways is not relevant to what the Director has to –

ELIAS CJ:

Well, that's what I'm questioning.

MR COOKE QC:

Well, I'll put it to you this way. Whether there is an extension of Wellington Airport because local Government, central Government, regard it as in the best, best for the region, Wellington regional economy, to have a larger airport is neither here nor there to what the Director must decide. So if –

ELIAS CJ:

No, but it's an indication that there is some practicality in the extension, and I of course accept that that is predicated on the revenue that's going to be obtained and so on. But I find it hard to believe that it doesn't also, that assessment doesn't also affect the RESA it is practicable to require, and in particular consideration of whether if you're doing this you might go a bit above your 90 metres.

MR COOKE QC:

I understand the point but –

ELIAS CJ:

Well, who addresses that directly?

MR COOKE QC:

Well, as I was going to say, whether public money will be invested into the airport because it's good for the economy to do so isn't something that would change the Director's assessment of what is practicable from a runway end safety area point of view. So, put another way round, if the Government didn't think it was worth putting public money into a RESA, the Director would say: "Well, that's irrelevant. You've got to comply with the rule irrespective of your regional economic advantages you see or don't see in association with the airport." So the fact there's going to be an extension for regional economy reasons in the end can't be relevant to whether what is required as matter of compliance with the –

ELIAS CJ:

But that does seem to come pretty close to saying that once you've decided in one context that a RESA of 90 metres is as much as is practicable that's good for all time.

MR COOKE QC:

Well, I accept that as a matter of fact that will have a heavy influence on that. Because at the time the rule was promulgated it was understood it could be done, it was always understood that there could be a further extension but that it would be very costly to do so. So the question that the Director must concentrate on is whether that is practicable, focusing on the difficulty in costs and the safety issues. The economic advantages one way or t'other really shouldn't influence the decision.

ARNOLD J:

But given that all of these changes were made to, as I understood it, give effect to the transport strategy which talked about integration and all this sort

of stuff, I mean the effect of your submission is that that sort of goes out the window, as far as the Director's concerned.

MR COOKE QC:

Well, from the Director's point of view the fact that public bodies might not be prepared to invest money to meet the RESA requirements wouldn't be relevant. So that's why in the end –

WILLIAM YOUNG J:

Sorry, would or wouldn't?

MR COOKE QC:

Wouldn't be relevant. I mean, that was the issue in really for them getting to the 90 metres, it was that a cost-benefit analysis didn't support it – "well, we just have to do it". And so what the Director needs to focus on is the safety issues of the RESA and the cost in balancing those. It has to be accepted that it's possible to build this, it always was known that it was possible to extend with monetary investment. But the fact that there is consideration about extending it for the regional economy reasons doesn't change that.

ELIAS CJ:

But if you're going to, if your modelling shows that you're actually going to have a bonanza from extending it, why wouldn't that affect the cost-benefit analysis you'd earlier undertaken about what's practicable?

MR COOKE QC:

What it does, what the increase in air traffic, the way that is relevant to the analysis, is to see what effect that has on the safety needs in association with that air traffic, and that's what the McGregor analysis does do.

ELIAS CJ:

So you don't re-look at the cost-benefit analysis if your costs and benefit change because the airport is reconfigured?

MR COOKE QC:

No, you do do that, and that's what McGregor does. It looks at what is – in fact let's go through what it does.

ELIAS CJ:

Yes, thank you.

MR COOKE QC:

So if you look at 793, 794, it talks about the future air traffic that's going to be generated in connection the proposed extension, so table 3 on page 794 is the air traffic growth rates that will flow as a consequence of the proposed airport extension, and that is put into a more detailed table in table 4 on page 795, and then what is put into the mix is the meteorological conditions at Wellington Airport, so you see at 795 to 796 you assess issues such as crosswind, cloud base, visibility, that affect the operations at that airport. 797 then gets into the risk assessment as a consequence of all those inputs, and then that is reflected at page 799 in terms of the probability of overruns and undershoots. And table 11 brings together the expected number of years between occurrences as a result and that, on table 11, you can see the different types of aircraft given the projected growth of travel by different categories of aircraft. And I think the written submissions highlight the heavy aircraft, which is the second group in table 11, because they're the ones that are particularly relevant to the extension proposal, and the number of years, and you see the number of years are assessed at 2013, 2023 and 2033 in terms of the number of years that one could expect between occurrences. And then paragraph 30 on the same page brings together the likelihoods of these events occurring, so the initials mean: LDOR is landing overrun, landing undershoots and takeoff overruns are the three categories of event. And then what you can achieve by different lengths of RESA are then assessed, and that's on page 800…

ELLEN FRANCE J:

Can I just check, reading paragraph 34, am I right that if you want to know the percentage of overruns that would be captured by the 240 RESA you just add 76 plus 9 plus 9 so you get to 94?

MR COOKE QC:

94, yes. It's slightly – so her Honour Justice France was referring to paragraph 34, which is summarising what is it table 12, and that is what proportion of these events do you capture by a longer runway end safety area. So you see in paragraph 34 a 90-metre RESA captures 76% of overruns on landing, 53% on takeoff and captures 73% of undershoots, and then it's assessing increasing the RESA to 140 to 240 metres and unfortunately they slightly do them round the wrong way if you know what I mean. But the landing overrun, if you assume 240 metres the landing overrun gets to 94%, takeoff overrun 79% and landing undershoot by 87%. So you never capture everything. And then what the assessment then does is go through an assessment of the implications of such events in terms of lives lost and damage to property and those sort of things to engage in a cost-benefit analysis which you find on page 806 and table 18, perhaps summarised in paragraph 56, the present value of incremental safety benefits of 140-metre over a 90-metre RESA is 7.65 million. We've compared the cost of extending the runway so this all has to be compared with the cost of doing it, not whether people are willing to invest to do it but what the actual cost of doing it is, compared with the cost of extending the runway to provide for 140 metres at each end, which is 93.33 million. Net benefit is negative of 85.68 million. Thus on the grounds of cost it will be imprudent and impracticable to provide 140-metre RESA at both ends of the runway and then the situation is worse for 240-metre RESAs. So these are quite significant differences and it's not finely balanced.

WILLIAM YOUNG J:

So is there, I suppose theoretically there might be a point around 93 or 94 metres where the cost-benefit might be one, the cost and –

MR COOKE QC:

It will still be the same disproportionate, because you won't capture –

WILLIAM YOUNG J:

I suppose you won't capture –

MR COOKE QC:

You won't capture anything with one metre.

WILLIAM YOUNG J:

No, okay.

MR COOKE QC:

So the point of this analysis, and I'm going back to Your Honour the Chief Justice's point, it doesn't matter what the Wellington City Council or Government say about putting money in to extend for commercial or regional benefit reasons, what matters is this, what's the safety advantage of doing this which has been analysed in considerable detail compared with how much it will cost to do it. and what this demonstrates it's completely disproportionate. You can do it, it's possible to extend the runway into the water for this additional safety margin, but in terms of spending public money it's a slightly mad proposition, there are limited resources in a country. You wouldn't spend that amount of money for events that occurred so infrequently, it just doesn't make any sense. Which is why at the very beginning when they promulgated the rule they made that very point. It's only 90 metres are considered at Wellington because the safety advantages of doing so are minimal and the cost is extreme. And that is why the investment decision, the cost-benefit analysis that central or Wellington City Council might make to whether say, well, should we do it? Let's do it, because we're going to attract more people to come to the city. That's an entirely different type of analysis and it shouldn't be relevant to this one. The directive should just focus on what's the safety implications of this and what's the cost of doing it and, you know, is it practicable to expect Wellington to go beyond 90, given that analysis. That then flows into the other, and I should just demonstrate how this follows through into the Director's decision.

If Your Honours go on to page 847, you'll see the Director's file note in relation to the decision and probably the meaty bit is at 849 under the heading, "Cost-benefit practicability of alternatives": "In addition to considering the level of safety risk involved in 90-metre RESA I've also turned my mind to cost-benefit considerations and whether Wellington Airport have appropriately

assessed the practicability of longer alternatives," and bear in mind this report was dealing with 100, 200 and 300, it wasn't just a fixed thing, it was trying to assess each extending RESAs in a more general sense: "These must be acknowledged as further mitigating the residual risk that the conclusions of the McGregor report I refer to above identity, ie, the remaining percentage of occurrences that could not be captured by a 90-metre RESA. In considering this question I have adopted the approach to considering practicability that was proposed in the memo provided to me by Mr Ford: practicability should be interpreted as incorporating elements of feasibility and reasonableness, some element of pragmatic limitation must be applied, 'practicable' does not equate to what is possible, the test of practicability involves balancing safety benefits to be achieved against the associated cost and difficulty. The fact that rule compliance may involve significant cost or the allocation of significant resources does not of itself mean that compliance is impracticable," that's the point I've been trying to make, "instead the cost and difficulty must be carefully weighed against the safety benefits to be achieved," so reference to an alternative view of practicability. "In the present case I accept the longer the RESA the lower the level of residual risk associated with undershoots or overruns at the aerodrome. Although I have concluded that a 90-metre RESA provides an acceptable level of safety, I have also considered whether the cost in extending past the 90 metres would achieve additional safety benefits that outweigh the cost. In light of the discussion above, I am of the view that safety benefits provided by the construction of a longer RESA are small when calculated with reference to the very low probability of an adverse event in the first place combined with the level of effectiveness of the 90 metre RESA", and then he goes over the page to say that's supported by the cost-benefit analysis performed by McGregor and independently peer reviewed by Castalia, and the same sort of conclusion at the end of the paragraph ("also noting that it accords with my own assessment that the additional safety benefits in an already very low risk environment do not justify the high cost"). And just to put that in context too, it all reflects a number of aeroplanes that land. The assessment at Heathrow Airport will be fundamentally different than the assessment of Wellington Airport in terms of the real aviation risk. So that's why this kind of analysis is important. And that analysis – and this is probably, the file note's the best place to see, I mean, the Director's also just

sworn an affidavit explaining that that's the approach he adopted, there's correspondence to the same effect. But in terms of the judicial review challenges it can't be right to say that the McGregor report was material that shouldn't have been relied upon to make the decision that the Director made. I would submit those are obviously relevant considerations for the Director to take into account.

The next judicial review error alleged is a kind of starting point criticism that the Director started at 90 metres rather than 240 metres. But it doesn't matter where you start, at 90 metres or 240 metres, what matters is whether it's practicable to have more than 90, and that's what the Director was considering. In a sense, there was no starting point one way or t'other. What the Director was considering was whether it was practicable to have more than 90 and up to 240. Where you start shouldn't and doesn't make any difference to the answer to the question.

And that's also in answer to the other criticism, and I think some of Your Honour's questions to me earlier in the day, that the Director didn't consider any intermediate distance greater than 90, less than 240. Once the Director had reached the view that it was impracticable to have more than 90 metres when the assessment of some other random distance further out makes no difference. He's made that decision after being presented with information about distances out from 90 metres and concluded, it's just not practicable to have more than 90. So to have some artificial consideration of the further distance out from 90 it just makes no sense. He's already made the critical decision.

WILLIAM YOUNG J:
With the figures there you can sort of roughly form a cost-benefit analysis of any extension, can't you?

MR COOKE QC:
And that's what in fact was done in a sense.

WILLIAM YOUNG J:

I mean you could say, "Well, what would the cost-benefit be of a 10-metre extension? Well, it's going to cost about $10 million."

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

And the benefit on the figures would be distinctly less than that.

MR COOKE QC:

Yes. So intermediate distance doesn't take you anywhere. That's what was all supposed to be brought together and considered in, actually in the way it was put to me earlier, in one place in the right assessment.

So then the final criticism in the judicial review challenges is a failure to consider EMAS, the engineering systems when the aircraft goes beyond the end and sinks into a material that absorbs the further progression of the aircraft to a point of no return, and there are several points to make about that.

The first is in a sense a practical one and that is because the existing runway end safety areas at Wellington Airport are used as starter extensions, that is the aeroplane goes on them to start its takeoff, any use of EMAS would require an extension or I guess a reduction in the clear distances. And the only reason I'm making that point is that considering EMAS is not an independent question from considering a longer RESA because you will need beyond 90 metres anyway if you're going to have EMAS so it only becomes relevant if beyond 90 is regarded as practicable. But apart from those, that practical point, there are two other points I want to emphasise and that is that EMAS was decided to be not formally part of the New Zealand rules on promulgation, and I can demonstrate that in bundle 4 at page 551. Apart from the fact this is not, there's no reference to EMAS in the rules, at page 551 –

GLAZEBROOK J:

Sorry, I've buried mine. So if you just…

MR COOKE QC:

We're on volume 4 on the case of appeal, page 551, and what we are in is the notice of proposed rule – no, so the consultation, the summary of consultation made on the proposed rule and the CAA feedback on it, and in 551 there's the heading "Engineering equivalents to RESA" and there's a reference to "ALPA submitted that the CAA did not consider engineering alternatives to RESA in the notice of proposed rule proposals" and then in CAA response: "The CAA considered engineering systems to achieve similar safety results during the development of the notice of proposed rule proposals and has current FAA and manufacturer's material on the subject. These systems were not included in the analysis for RESA as neither ICAO or any other regulatory authority considers engineering aircraft deceleration systems is equivalent to the ICAO specification for RESA. Also these engineering systems are not applicable to lowering risk during undershoot."

WILLIAM YOUNG J:

What does that mean? What happens if there's a mechanical arrest in the system and the plane undershoots and lands in it?

MR COOKE QC:

Well, it's not a good question to ask me, but as I understand it it doesn't help, you still land in advance of the runway proper in a way that will not be appropriate.

WILLIAM YOUNG J:

So are there airports around the world that use these systems?

MR COOKE QC:

There are.

WILLIAM YOUNG J:

Okay.

MR COOKE QC:

But the point is that on the rule development stage it was thought when, and they didn't include any provisions in relation to deceleration systems.

But the final point I just wanted to make about that is that it's not as if the, the Director or those advising him dismissed EMAS as a possible consideration, because it was identified as something that might be relevant but only if it was considered that more than 90 metres was practicable. So if we go back to bundle 5, page 771, this is the advice given to the Director from Mr Ford, the General Manager, Aviation Infrastructure and Personnel, and this is where, for example, you get a definition of practicable on pages 771 to 772, and then there's the reference in 772 to the safety benefit report, engagement with ALPA, independent review and cost-benefit analysis summary. And then at page 775 there's the reference to Mr Ford's advice: "I note the question of Engineering Material Arresting System solution as raised by ALPA. The question at hand requiring your attention is whether or not Wellington Airport's current proposal provides for Part 139 compliance. I would submit that any consideration of EMAS solutions would then only arise if you were to find that the current proposal did not meet Part 139 requirements and if the airport submitted a further proposal for your consideration then it was to include an EMAS element" – in other words, if it is practicable to go beyond 90 metres that's when you might need to take into account the possibility the EMAS as a potential approach. And then going back to the Director's file note on page 850 –

GLAZEBROOK J:

Although that could be saying if you find it acceptable rather than to the limits of acceptability. I don't find that particularly helpful, it just says, well, if it's okay you don't need to consider it.

MR COOKE QC:

If it complies, yes.

GLAZEBROOK J:

I mean, the slight concern I have is just that to the limits of practicality rather than just practical, I suppose. But you'd say in any event, I mean, the answer to that was that it wasn't practical even in that sense to go beyond the 90?

MR COOKE QC:

Yes, and it's not for the –

GLAZEBROOK J:

But I just don't take much comfort from what's said here in terms of saying that that was an understanding that it was to the limits of practicality. Because I don't quite see if it's practical to go beyond why do you then need to look at the EMAS solution, because if it's practical to go beyond 90 then you would go to 140, why would you then be looking at EMAS?

MR COOKE QC:

Well, what this advice is saying, if it is practicable to go over 90 you then need to work out how you're going to do it. Are you going to do it just by extending the RESA or might you have a lesser extension using EMAS?

GLAZEBROOK J:

I don't think that's what he's saying but I can understand the submission.

MR COOKE QC:

Yes, well, it seems to me that neither is that comment referring to the concept of acceptability, it's talking about whether 139 has been complied with. Then if you go onto 850, back to that file note of the Director-General under the heading "EMAS", this is his file note: "And following my current view I've not specifically considered whether the use of EMAS in constructing the RESA would provide additional safety benefits. EMAS does not form part of Wellington Airport's decision and I accordingly have no information to assess. I do not believe that I need to specifically consider the use of EMAS given my acceptance that the decision by the airport to provide a 90-metre RESA meets the Part 139 requirements."

GLAZEBROOK J:

See again that looks like just acceptable rather than to the limits of acceptability. Your point that says you'd have to go beyond 90 and it wasn't practical to go beyond 90 answers that but it doesn't – if that is actually the case. You couldn't have it just at 90 because you'd need to go beyond 90 to put it in at all?

MR COOKE QC:

Yes.

GLAZEBROOK J:

I mean, how much beyond 90 – do we have information on how much beyond 90 you have to go?

MR COOKE QC:

I don't know that but the point I make is use of starter extension. It would have to be something…

GLAZEBROOK J:

Past the…

MR COOKE QC:

Yes.

GLAZEBROOK J:

Yes.

MR COOKE QC:

I am assuming, this might not be right, but I'm assuming that almost a full 90 would be EMAS, would be the engineered deceleration materials.

GLAZEBROOK J:

All right, okay.

MR COOKE QC:

I mean, presumably you can put in smaller, you can put in, say, 10 metres of it which won't do much, but I don't know – this is one of the reasons why it's difficult when it's not actually in the rules how, unless you've got –

GLAZEBROOK J:

And also nobody considered it so you don't actually have, it's part of the proposal, as is said here, anyway.

MR COOKE QC:

That does take me to the end of paragraph 9 in my one pager, so I hope Your Honours had some questions as you went along.

WILLIAM YOUNG J:

Can I just ask you a question? Was there ever a cost-benefit analysis prepared in relation to the commercial benefits of the extension which the airport wanted to provide plus as against the cost of doing so but with full RESAs?

MR COOKE QC:

No, not in the record as I understand it, and that's for the reason that I answered earlier, that from the Director's perspective the willingness of public bodies to pay for stuff is not really relevant.

ELIAS CJ:

But it's not, I mean the question isn't just directed at that, is it, it's directed at the safety and cost analysis in the altered circumstances?

MR COOKE QC:

Yes.

ELIAS CJ:

And there isn't analysis of that?

MR COOKE QC:

There is an analysis that includes the economic projections associated with the benefits to the Wellington Region of the airport extension.

ELIAS CJ:

Why would it have to be that, though?

WILLIAM YOUNG J:

That's the question I asked.

ELIAS CJ:

Sorry.

WILLIAM YOUNG J:

I suppose it just depends on which way you look at it, whether that would be a viable way of looking at it because the Director could say, “Well that's great, you can extend the runway but you've got to provide a full RESA and you won't do this unless it's sensible, but if it is sensible there will be the money to do it.”

MR COOKE QC:

Yes, I don't think it really is the Director’s function to make business decisions.

WILLIAM YOUNG J:

Right.

GLAZEBROOK J:

But though are you making business decisions on that circumstance or just saying if you do make this business decision then you need to provide more than you do at the moment?

MR COOKE QC:

I think the rules must contemplate with Director as will be neutral in terms of whether this is a profitable exercise or, because if it was really that then we’d have the other side of the analysis too but you're allowed to have less RESAs if your airport is not as profitable.

GLAZEBROOK J:

Well you're not in 90.

MR COOKE QC:

Put 90 – once 90 is established.

GLAZEBROOK J:

90 is there so the question is whether you have to have more or some other engineering solution than 90.

MR COOKE QC:

As I say and I think that analysis requires you to assess the safety advantages of having more against the costs rather than trying to make some sort of assessment of profitability from future airline operations and where the public might be prepared to invest money for the regional public good reasons which are beyond the province, I would suggest, of what the Annex 14 and the regulations, the rules are required and the Director to assess who must focus on aviation safety.

GLAZEBROOK J:

I suppose the more money you have, the more practical it is to go out whether it's a cost-benefit analysis or not. I mean the safety, the fact that you've got a, where practical, to go over 240 must have assumed to take into account, I would have thought, whether you're a small island state where it just may not be because you've got three aircrafts, well whatever it is.

MR COOKE QC:

I think that's really where the international standards and recommendations were supposed to be uniform that it wouldn't –

GLAZEBROOK J:

No, to 90, yes, but where practical it's supposed to go, or to the extent to which it is practicable is to go further.

MR COOKE QC:

The economic wealth of a country in question. I would have thought that that the international standards and recommendations were supposed to be economy neutral in that sense.

GLAZEBROOK J:

Are they? Once you get past 90 I wouldn't – because if you can take cost into account they can't be because the whole idea is 90 is the minimum and the absolute standard you can't go below it, but where practicable, or to the extent to which it was practicable you go past it, why wouldn't that be more practicable for a very rich nation as against a small island state?

MR COOKE QC:

That would be counterintuitive in terms of what international –

GLAZEBROOK J:

Why would you say to the extent practicable you go further and say, well, it's exactly the same test if you're the US with a whole pile of aircraft coming in as against a small island state that doesn't have the money?

MR COOKE QC:

Well all I can do is repeat the submission I made on that, I really don't think the New Zealand rules are contemplating the Director going into the –

GLAZEBROOK J:

No, they may not be.

MR COOKE QC:

And I don't think the international materials are contemplating different countries having a different response to –

GLAZEBROOK J:

Well I would have thought that's odd because why would you say “where practicable”, and if you say you can take into account cost why, if you've got a very rich country then one million might seem peanuts, if you've got a small island state one million might seem like asking them to climb Everest.

MR COOKE QC:

Well, I mean I can't take the argument further than I have because I really don't think this bites in this situation especially at this stage we're dealing with here when, you know, at the moment we're just dealing with a proposal by Wellington Airport for an extension, it's still at the moment on paper and no doubt no idea where the airport has got to in terms of attracting international interest in coming here and interaction with the Government, local – central Government about that. I don't, with respect, think that's the Director's function to try and get into.

ELIAS CJ:

Do we have the letter that kicked all this off, that elicited this response, what they were asking for?

MR COOKE QC:

Yes we do. It starts with the, to describe it is the Director's affidavit described how this evolved in a chronology sense and that's in the case on appeal volume 2 beginning at tab 12, and I'm hoping that the Director's affidavit isn't alternatively upside down every second page. So what that affidavit describes beginning from – he describes the background in terms of the rules and then –

ELIAS CJ:

I'm just really wondering why it was necessary to get this indication on your argument that if they have a 90-metre RESA that's it.

MR COOKE QC:

But it's entirely appropriate for the airport to say to the Director, "We're planning an extension for regional economy reasons. We want to check with you in that context whether that makes any difference to the assessment."

ELIAS CJ:

Well, I thought, really, your argument was that it couldn't.

MR COOKE QC:

I'm not saying it couldn't. I'm saying it didn't.

ELIAS CJ:

It didn't, but it didn't because – just encapsulate it.

MR COOKE QC:

Because it was still impracticable to expect Wellington Airport to have more than 90 metres.

ELIAS CJ:

I thought your argument was once it was decided it was impracticable it was …

MR COOKE QC:

But it's appropriately thought out and before public bodies invest millions of dollars …

ELIAS CJ:

Yes, I understand it would be a prudent move but I'm just wondering what it was thought that the Director was to do.

ELLEN FRANCE J:

Well, presumably technology and so on and the risks and experience will change over time.

MR COOKE QC:

There might be ways in which to extend will be much cheaper than they were when the rule was promulgated.

ELLEN FRANCE J:

Or the aircraft change in terms of likelihood of overrun or undershooting and so on.

ARNOLD J:

Or landing systems, because wasn't there some evidence that if you have a certain type of landing system that reduces the rates of overshoots and so on.

MR COOKE QC:

All of those sorts of things could change, but what you're looking for, really, is whether there is any of that stuff that makes the original assessment on promulgation for Wellington different.

ELIAS CJ:

Yes. Yes.

WILLIAM YOUNG J:

Consistently with the Court of Appeal's judgment can the Director be … regard the current arrangements at Wellington Airport as acceptable?

MR COOKE QC:

I don't think so. Well, I have to be careful not to cause problems. Although I could imagine the eyes looking at the back of my gown and thinking, what's he saying? But even the Court of Appeal's analysis will require quite a disciplined, would require quite a disciplined reassessment and there is –

WILLIAM YOUNG J:

Would require the runway length to be, the declared runway length to be shortened wouldn't it?

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

To –

MR COOKE QC:

And it's not just Wellington. It's Queenstown, Paraparaumu, Hokitika, Whakatane. All who have only 90-metre RESAs where this judgment could cause pandemonium and the reality is we haven't, not having the argument but there is a rule that talks about ongoing compliance, whether that rule bites. There might be some ambiguity about it or whether people can wait until their next audit, but at the moment on the reality is on the Court of Appeal's analysis Wellington Airport is probably non-compliant. I say probably because

you would still need to go through a disciplined assessment and whether what counsel said during a hearing about costs during the hearing would be the same as if it was assessed by the Director, because you'll recall the Court of Appeal said cost was relevant but only up to a certain point so that will have to be looked at, but let's put it this way: there's a lot of potential problems.

WILLIAM YOUNG J:
Well, presumably you would have to shorten the declared runway distance by 300 metres.

MR COOKE QC:
Yes, and that – I can't tell you what the effect of that would be on Wellington Airport, but you might not be travelling to Auckland on a train. You could have your propeller aircraft across it, probably, but I don't know what they were doing. Queenstown might be different, but I don't know what this might do to tourist trade into Queenstown.

WILLIAM YOUNG J:
Well, I suppose Queenstown is similar because they've got the lake on one end and the Shotover River at the other.

MR COOKE QC:
Well, the analysis might be different and I shouldn't say that we have the evidence to deal with that, but they will be the same – if cost is the same it's quite a question of whether you can do it.

WILLIAM YOUNG J:
And you can always do it by shortening the runway.

MR COOKE QC:
You can. That's why cost has to be relevant. Either you can measure costs of the engineering or the cost is measured in opportunity cost, because you go out there with a bucket of paint and paint a new runway and say, "Well, the Australians will have to go via Auckland." The same with Wellington and I don't know the real ramifications of this, but this judgment has those

implications and that's why I stressed at the beginning of these submissions the importance of how we ever would be engaged between 1999 and 2006 about the meaning and effect of these rules at each airport and what the cost to the nation was going to be. If anyone thought this was going to happen, the reality is the rule would never have been promulgated. It would have had a disastrous effect on some of our significant international airports and no one said at the time, "Hold on, do you realise what you are doing is going to require Wellington to have a 240-metre RESA?"

WILLIAM YOUNG J:
So Wellington becomes a regional airport?

MR COOKE QC:
Yes.

ELIAS CJ:
Can I ask you how much longer you expect to be? Have you finished, effectively, Mr Cooke?

MR COOKE QC:
I expect to be another 10 seconds.

ELIAS CJ:
I will let you do that, then. I just wondered if counsel think we should resume at two.

MR COOKE QC:
Well, I've finished unless Your Honours have any further questions.

ELIAS CJ:
We'll resume at two, then. Carry on, Mr Cooke.

MR COOKE QC:
Well, all I need to say is unless Your Honour has any questions, which I estimated would take 10 seconds.

ELIAS CJ:

I will look quellingly at the Bench. No. Thank you, Mr Cooke. We'll take the adjournment.

COURT ADJOURNS **1.00 PM**

COURT RESUMES **2.00 PM**

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

Your Honour, I have my usual one-page roadmap and exceptionally a one-page runway map as well. I thought I might begin with the diagram and just pick up where the Court finished in its exchanges with my learned friend Mr Cooke.

What we have here is an aerial photograph of the airport as the runway is currently configured as it stood in 2011 – which is the date of the photograph – and as the runway currently is. Then underneath it a diagram which shows the various components making up the runway which is from point A to point B, either side of what I understand are called the piano keys painted on the runway, and then after each of those there is 60 metres of strip and then after each of those, as you can see on the diagram, the green boxes is 90 metres of RESA. They don't look different when we look at the actual photograph of the runway because, as my learned friend mentioned, that is painted in exactly the same way so that they can be used as part of the takeoff run as a starter extension.

We then have the various different declared distances shown on the diagram. If we look, for example, at runway 34 – in case it's of interest, runways are named after their bearing. Basically 34 means roughly 340 degrees. You're heading almost exactly north. So of course going the other way you've got runway 16, 180 degrees different. That's why it's 34 and 16, and the Christchurch one that Your Honour Justice Young was making anxious

enquiries about of my learned friend will have whatever orientation it had, 110 or 290 going the other way.

WILLIAM YOUNG J:
Or 111.

MR GODDARD QC:
So on runway 34 going to the north the takeoff distance available is shown to be 2300 metres. That includes the clearway, which is an obstacle – an area after the end of the runway that's clear of obstacles and perhaps the only advantage of water at each end is that it's relatively easy to provide space clear of obstacles after you get off the runway. No trees and no tall buildings. But more important for our purposes are the next two distances shown. The TORA, the takeoff run available, and the accelerate-stop distance available. These are both distances that apply to planes taking off. The takeoff run available is how far you can travel on the ground before you really need to be airborne or you have an overshoot. What the Court will see is that the takeoff run available and the accelerate-stop distance available start partway through the RESA. If you look back at the photograph, you can see the plane travels along the non-runway part of it, the taxiway, turns – and that turning circle means it ends up a little way into the RESA – and then it has taking off to the north a takeoff run available of 1921 metres. It can use part of the RESA and the whole 60 metres of strip because they're paved in the same way as a runway to takeoff.

Then what we have next is the landing distance available and when you're calculating what planes can safely land you don't proceed on the basis that you can land on a RESA, even if it's paved, or land on the strip, so where you can start your landing is at the beginning of the runway, point B if we're on runway 34, and you can then have – before you come to a stop – you work right through to the other end of the runway, which is 1815 metres. Then we see the opposite going the other way, and the numbers are slightly different because you can start your run a little bit further back on the RESA at the northern end. So you get slightly better by 20 metres or so TORA and ASDA figures there. So that's how the airport currently works.

Just looking at it and picking up the exchange that Your Honour Justice Young had with my learned friend immediately before lunch, perhaps the most obvious reason why the Court of Appeal's approach to what's practicable just can't be right is that of course on that approach it's eminently practicable to have 240-metre RESAs at each end of the airport as it currently stands. You don't need to extend anything or build anything. All you need to direction is move each of points A and B in by 150 metres, and then you'll be able to have more RESA at either end. My learned friend Mr Cooke said you would need to get out there with your paint pot. Yes, there's some paintwork and some lights to move and a few other bits of equipment to move but for a few hundred thousand dollars – using known means and resources, to use the language of the Court of Appeal – you could have 240-metre RESAs at each end of the airport without doing any significant civil engineering.

The problem, of course, is opportunity cost. It's the cost of doing that in the form of opportunity costs which means it's not practicable, in my submission. My instructions are that if one were to do that then no trans-Tasman flights could operate out of Wellington and for domestic operations there'd be a passenger penalty on jet operations of about 50 passengers. So you could carry about 50 fewer passengers than you could with a declared distances as they currently are, because you've knocked 300 metres off your declared distances. All of them drop by 300 metres, 150 at each end.

In particular, what that means is that your takeoff run available on runway 34 would go down from 1921 metres to 1621 metres, and when a plane takes off it's full of fuel and at its heaviest that you've got a significant constraint. If you shrink your takeoff run available by 300 metres, no more trans-Tasman flights out of Wellington and very limited domestic jet operations.

So that is why the correct approach to Part 139, in my submission, is that a change of that kind is not practicable and that's certainly the assumption on which the rule change was made.

WILLIAM YOUNG J:

Just pause there. Was there any extension following the rules, the 90-metre RESA requirement?

MR GODDARD QC:

Yes. There was a small extension.

GLAZEBROOK J:

That was the 12 million one?

MR GODDARD QC:

Yes. That's right. It was – option 4 in the original McGregor report of 2002, was basically implemented. It was a small extension.

WILLIAM YOUNG J:

That was done by 2011, was it?

MR GODDARD QC:

Yes, to comply with the transitional regime for airports offering international services.

So on the Court of Appeal's approach, when Wellington Airport's certificate is next due for renewal, and they can't be issued for more than five years and then they have to be renewed, and that's next due in February 2019, on the Court of Appeal's analysis in the lead-up to February 2019 the Director would have to look at a picture like this and say, "Well, it's within known means and resources to move each of Point A and B in by 150 metres. Cost is irrelevant. So it must be done." That, in my submission, could not be further from what was anticipated at the time that this rule was introduced. I'll come back to that. But it would mean, as my learned friend said, that the whole consultation process and the Ministerial decision-making process, all of which proceeded on the basis that the relevant cost range for Wellington Airport was a cost range associated with 90-metre RESAs, misfired, and it misfired because, inappropriately, cost was treated as being relevant to practicability.

So it's implicit in – indeed, a fundamental assumption underpinning the rule making process that more than 90 metres was not practicable at Wellington Airport at that time, and the reason it wasn't practicable was because of the opportunity cost of paint on or the very large financial cost of building out. So cost was assumed to be relevant, and we see that in the discussion at the time.

GLAZEBROOK J:
But they did have quite a big cost for just painting on them, didn't they? I didn't quite understand. It was 1.7 million or something.

MR GODDARD QC:
Yes, and –

GLAZEBROOK J:
Was that because there was still going to have to be some type of extension?

MR GODDARD QC:
And also there were built into that some penalties in terms of what cargo could be carried in and out and passengers, so there's some opportunity cost in there as well but not, in fact, the full opportunity cost that would be associated with going beyond 90 to 240. It's broken down in one of these pages. There's the painting and the lights and then there's the cargo penalty and passenger penalty. I haven't worked through the details but it's in there somewhere, and actually seen in that light those numbers seem rather low, if anything. They're very different from the consequences of another 30. It's partly because it's not exactly linear. When you get down below a certain level, suddenly a whole class of operation ceases to be possible.

So that's the world as it currently is. That's what the Court of Appeal's approach would require. What about in the context of an extension? This picks up a set of questions the Court asked my learned friend. If you're already extending how do you think about this? In my submission, the answer is that if a particular extension is proposed and if you're asking, well, in the context of – you can't deal with them in a separated-out way, to pick up Your

Honour the Chief Justice's question. Of course they're not wholly distinct inquiries. But what you've got to say is, for any given extension what are, then, the safety benefits and the costs of a longer RESA. So you assume you're doing an extension and the cost and benefits are what they are. The proper inquiry is what are the incremental gains and the incremental costs for an incremental RESA. So obviously if you are doing no extension otherwise, the whole of the cost of the extension and the whole of the benefits are just RESA-attributable. You'd have to do all those basic costs, including consenting costs and everything else, and the cost of lawyers and all those others costs which can be more significant.

But as soon as you're doing an extension Your Honour is quite right that you can't say, well, the whole of the cost of doing this is attributable to the cost of a bigger RESA. You've got to look at the incremental change and that's what was done in this cost-benefit analysis. A cost per incremental metre of extension was used and what was worked out was for any given extension, whether it's 100 metres or 200 metres or 300 metres, what are the incremental safety gains from more RESA over 90 and what are the incremental costs?

ELIAS CJ:

Now, I'm very bad at this sort of thing so you'll have to be patient. Why isn't it that once you've set your RESA it's just locked into position? I mean, why doesn't it cut both ways? If you say in deciding that the 90-metre RESA was appropriate, you look at things like you'll have to cut down 50 passengers or the planes and all of that sort of thing, why don't you have to do exactly that same exercise again when you're changing the parameters?

MR GODDARD QC:

You do, and that's what was done. What was done was to say, if we push it out 100 metres each way and we use that as starter extension and all of that, what additional traffic can we carry? So the traffic projections that my learned friend took the Court to are traffic projections that assume you've got the extra runway and therefore the extra services, so you look at that busy airport with more runway and you say in the light of that what are the safety gains and

what are the costs, and the safety gains depend on the assumptions you make about the quantity of traffic and the nature of the traffic. A reasonably sophisticated analysis was undertaken based on how much excess runway you've got for different types of plane. Again, at a crude level, the way I think about it is that if the runway gets longer, then even if the RESAs haven't changed for any given plane that I currently fly into Wellington on, I am safer because there's just more runway there now. So there's some safety benefits from a longer runway even without bigger RESAs, but of course you're also going to get heavier planes flying in and additional services flying in, so you've got to look at the risks associated with those and all that's wrapped up in the cost-benefit analysis.

So the incremental safety benefits from an extended RESA over and above any given runway extension are looked at and the incremental costs, and I think for the extension south it was about $930,000 per linear metre, a bit less than a million for north, and in fact the north one turned out to be low which is one of the reasons for doing it to the south. Those numbers were crunched and the cost-benefit analysis said, well, for any of those given extensions if we go to extend the RESA from 90 to 140 what will that cost? Answer: 50 metres more at each end, so a little under a 100 million. What are the safety benefits? That was worked through and it turned out that the safety benefits were less than a tenth of the cost of doing this. So it's not a good use of the scarce resources of New Zealand Inc.

Picking up on Justice Arnold's question about the relationship between cost and practicability, it's obviously not a crudely mathematical process in which if you're one dollar over by your cost estimate you say it can't be done. But that wasn't the approach the Director took. The Director talked about the costs greatly exceeding and the way I think of it, really, is a question of proportionality and in my submission it is if the costs are disproportionate to the benefits – as they were here – a factor of more than 10 going to 140 more than 16, I think, going to 240, then you can say it's just not practicable, and remember, if we don't take costs into account in that way and look at whether they're justified by the benefits, then the whole question of extension is irrelevant. In February 2019 we're going to be requiring Wellington to spend a

few hundred thousand dollars shrinking its runway and radically change the services.

WILLIAM YOUNG J:

Alternatively, I mean, I suppose your strongest argument is what I'm about to postulate wasn't contemplated when the rules changed, but alternatively Wellington Airport could say, well, it's going to cost us 300 million to provide RESAs that comply with the recommendation. The alternative to that is becoming a regional airport, so we're going to spend the 300 million.

MR GODDARD QC:

And at that point you'd still have to say is that 300 million expenditure practicable?

WILLIAM YOUNG J:

Well, obviously it all comes down to what is practicable. I don't know what the economics of Wellington Airport are, but I imagine that it is at least possible that if offered the choice between spending 300 million on longer RESAs or becoming a regional airport they would probably spend the 300 million. I don't know enough about it.

MR GODDARD QC:

Yes, that's perfectly possible. Of course, there would be a tricky period in between while one got the resource consents and built it. It's kind of embarrassing from 2019 out to whenever that could be put in place when you wouldn't be complying. So I'm not quite sure how you'd bridge that. There's no relevant transitional period now. So I think that's one problem, but again the fact remains that –

WILLIAM YOUNG J:

Your best argument is that that wasn't what was contemplated by those who were framing the regulations.

MR GODDARD QC:

Yes, exactly, so that dilemma, either you become a regional airport with the opportunity cost associated with it or you spend 300 million if that's cheaper and therefore more practicable.

WILLIAM YOUNG J:

So if you take into account the benefits of being able to keep on operating, if you treat the opportunity available from continuing to operate as a benefit then the costs subside in terms of significance on that. I mean, that's just one way of looking at it but if those are the factors.

MR GODDARD QC:

If building is cheaper than having your operational scope shrunk, then obviously the cost of achieving those RESA should be worked out in terms of the building cost, not the opportunity cost, because you look at achieving compliance in the most cost effective way, but it may still be the case that that's not practicable because the costs are not proportionate to the safety benefits and having to make that trade-off was not even remotely in contemplation. So, again, the public's been consulted on this basis on a completely misconceived understanding, and the Minister has been invited to make a decision and make the rule on the basis of completely inaccurate information in the mandatory cost-benefit analysis about what the costs are associated with this and that is a pretty surprising conclusion and it's not one that we're driven to. Rather, we can give "practicable" a contextual meaning that recognises that costs, whether financial or opportunity, are relevant.

GLAZEBROOK J:

I suppose if you did go down this route you could say, well, the decision was made at the levels you're operating, and what you were operating at the time we're prepared to accept 90, but as soon as you want to extend that in any way then you need to look at extending the RESAs.

MR GODDARD QC:

Well that would have been a possible basis on which to consult and of course it wasn't.

GLAZEBROOK J:
No, sorry, the need to consult on that because what you were consulting on was whether 90 was practicable for Wellington and those places at the time they were bringing it.

MR GODDARD QC:
No, I think what was being consulted on was the proposed rule which said you had to do 90 and beyond that if it was practicable and so in order to do the cost-benefit analysis of that rule you had to take a view on what, and Your Honour's right, assuming current and projected operations at the airport.

GLAZEBROOK J:
That's what I'm saying, is it projected operations or is it merely assuming current operation.

MR GODDARD QC:
When you look forward presumably to natural growth but –

GLAZEBROOK J:
Well I mean obviously with just natural growth rather than a growth with an extension, is what I'm suggesting?

MR GODDARD QC:
Exactly right, so that's what you do and that was the basis on which it was concluded that going beyond 90 on, you know, existing plus natural growth was no practicable and the basis for drawing the conclusion was cost, that's explicit, too expensive at Wellington to do more.

So the first point to note is that the base assumption was that cost was relevant to practicability, that was a fundamental plank of the basis of consultation and the Minister's decision making because otherwise you couldn't have reached that conclusion in relation to Wellington for the purpose of your cost-benefit analysis of a rule which turned on practicability. I mean that's quite an important point that the approach to cost and to the trade-off between costs and benefits that underpins the consultation process and the

Ministerial decision making process, it requires costs to be taken into account when accessing practicability.

And then you get the result for Wellington, and Your Honour is exactly right there, based on the world as it stood and looked at the time and the Court explored with my learned friend the fact that if you're going to do an extension you do need to do that analysis again. It's not just locked in place, that 90 metres for all time, because if you're going to have significantly increased traffic through and if technology has changed in a way that might reduce risk or that might reduce construction costs, of course you have to pause and look at the practicality of what's proposed here and now.

WILLIAM YOUNG J:
Well some of the construction costs are going to be lumpy, for instance, the resource consent is presumably going to cost the same amount whether it's for 100 metres or 300 metres?

MR GODDARD QC:
Yes, but again what was done in the course of this decision, the one's that challenged, was just to look at incremental metres so it assumed that that lump, that first hit had been taken.

GLAZEBROOK J:
Can you explain a bit more to us how the increased traffic is taken into account? I mean obviously it's going to have an effect on safety because you're going to have more coming in, you're going to have people coming in, presumably the frequency might have an issue to do with whether people are rushing in and overrunning and things, I mean I don't know.

MR GODDARD QC:
Nor do I.

GLAZEBROOK J:
Let's assume that but they did take that into account, and you were talking before about opportunity costs having been taken into account earlier.

To what extent are those figures taking into account the opportunity cost in terms of extra revenue?

MR GODDARD QC:

It wasn't done here because, I mean there is no opportunity cost. The RESAs here are analysed as incremental over and above any extension you did. There's – whatever extension you're going to do and remaining completely agnostic –

GLAZEBROOK J:

So the traffic didn't actual – because I suppose your submission earlier was well they did do all that analysis of traffic but really all you're saying is they did that in order to work out the incremental cost of the RESA is that – not in terms of a cost-benefit analysis –

MR GODDARD QC:

In terms of incremental safety –

GLAZEBROOK J:

– in terms of a benefit being increased revenue?

MR GODDARD QC:

Yes. No, in, yes. So they did it for the purpose of working out safety benefits.

GLAZEBROOK J:

That's fine. That's what I actually thought was the case and then I –

MR GODDARD QC:

I confused you, I'm sorry. No.

GLAZEBROOK J:

Well I thought I just better double check because –

ARNOLD J:

So, I mean the, if an extension is going to increase the operator's profitability by a considerable amount you'd say that doesn't come into any assessment about whether the, a longer RESA is practical?

MR GODDARD QC:

That's right. You'd say -

ARNOLD J:

I was going to say even though, like Justice Glazebrook it did seem to me that the notion of practicability as it's used in the international instruments does take account of the ability of particular national entities to absorb the costs of some of this.

MR GODDARD QC:

So, I'm glad Your Honour asked that because that's one point on which I think I do differ a little bit from my learned friend Mr Cooke. Obviously first of all, and this is a point my friend made, just volumes of traffic are going to have an impact on risk and therefore the safety benefit from having a longer RESA. So Your Honour's exactly right that the benefits of a longer RESA at Heathrow are going to look very different from that same RESA at Wellington and in turn up here. So the small island nation with less traffic faces whatever construction costs there may be and the construction costs may also be higher because you might not have all the materials and equipment there but you've got to work that out and – but the benefit's going to be much less, so it's relevant in that very direct way. It's also, I think, within the contemplation of the Chicago Convention and Article 38, which deals with departures/differences, that the word "practicable" is used there again but I think in a very different context and I think in that context it is reasonably clear that the burden on a developing country which has other priorities for expenditure which can deliver much greater safety benefits.

For example if your water's not currently drinkable probably putting the money into your water is going to be sensible first. That of course is still true of New Zealand. We have limited resources in New Zealand and we have to

make sensible decisions about how to use those resources and the question of practicability has to be in that sense, I think, where it contextually – say if we're going to get $1 or eight, sorry, if we're going to get eight cents of safety benefits for each dollar we spend on runway extensions, there are a lot of things we can do with that money in New Zealand that will give better social outcomes and that's part of the discipline of the inquiry and that in my submission is contemplated certainly in the New Zealand Transport Strategy objectives and in the broad objectives that the Minister and the Director have in there. It's one of the reasons. That reference to sustainability, concepts of economic development are all relevant there. So I think I've veered slightly off piste.

GLAZEBROOK J:
But I suppose the question really is, say the runway extension is going to give benefits of 500 million, let's just pick a figure, to the airport company and the cost of doing this even on a negative cost-benefit is minus 20.

MR GODDARD QC:
It's still not a sensible use of New Zealand's scarce resources.

GLAZEBROOK J:
Well is that right? Because, I mean it's directly related to the runway extension.

MR GODDARD QC:
So you've worked out that if you extend a particular amount then that's going to produce some gains to the airport and say the region of, that are $500 million greater than the cost of doing that extension. Then you say and what now about another 50 metres of RESA? And it remains the case that another 50 metres of RESA at each end will cost just under $100 million and deliver safety benefits of about $8 million so it's still not practicable, it's still disproportionately expensive.

GLAZEBROOK J:

Well is that what the test is when it says to the limits of practicality, because it says 90 and then to the limits of practicability. I think it does say that, to the limits of practicability up to 240 –

MR GODDARD QC:

No it doesn't use that language. It says so far as practicable.

GLAZEBROOK J:

No, I'm talking about the international, sorry.

MR GODDARD QC:

No, it's so far as practicable.

ARNOLD J:

I think under the 240, between 90 and 240 it talks about it, yes.

GLAZEBROOK J:

That's right, that's what –

MR GODDARD QC:

No, I don't think the actual Annex 14, if we just look at that.

GLAZEBROOK J:

Well that might be in the commentary, I'm not sure.

MR GODDARD QC:

The language, and I'm in volume 1 of my authorities, the orthodoxly photocopied one, under tab 6, I'm deriving disproportionate entertainment from that, and I'm looking at, so that's the Annex 14, the relevant provision is 3.5, runway end safety areas, which is on page 3-14 as it happens, and the recommendation is, "A runway end safety area should, as far as practicable…" so there is no reference to limits of practicality or anything, if that's somewhere it's in commentary, Your Honour, the language of the recommendation which is, you know, picked up in our rule basically. We're … sort of drafting tweaks that parliamentary counsel often use when they're

incorporating national instruments into domestic law is: “A runway end safety area should, as far as practicable…” That question doesn't depend on the current profitability of the airport. You wouldn't get a different answer to that inquiry at a very profitable airport as opposed to a marginal airport.

WILLIAM YOUNG J:

Can I just ask you, you've been asked about whether the practicability should be assessed by reference to the commercial benefits of increasing the length of the runway as against the costs of providing additional 300 metres of RESA, so that's what we've been talking about.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

And then earlier I said, well, one way of complying with this very simply is you just cut the runway, the declared length of runway down by 300 metres. Now is there any difference, economic difference between commercial benefits of increasing the length of runway against the costs of providing 300 metres of RESA as opposed to the commercial disbenefits of reducing the length of the declared runway by 300 metres as opposed to the costs of providing longer RESAs. I mean are they just other sides of the same coin?

MR GODDARD QC:

I think it's a question of making sure that you're holding the right things constant as you embark on each inquiry. So if you're looking, so you can say, you can combine by saying well suppose we extend but use some of that for RESA then what you'd have to work out in using some of it for RESA is how much traffic you can carry with that shrunken runway compared with what the runway –

WILLIAM YOUNG J:

You see, to my way of thinking the strong point in your argument is that the – I don't think it particularly credible to construe the regulation against its background as requiring Wellington Airport to built longer RESAs.

GLAZEBROOK J:

Do you mean current –

WILLIAM YOUNG J:

That in order to persist with its current mode of operation must provide 300 metres of additional space out into the Cook Strait. Now that may suggest that this exercise of practicability doesn't turn on commercial benefit/disbenefits as against costs of providing additional runway length. So it's probably in your favour to that extent but whether then there is, as it were, a difference that's material if you are talking about an extension.

MR GODDARD QC:

And the answer is no. The logical inquiry is the same because – except for the lumpy costs of starting the extension work – but otherwise it doesn't matter whether you conceptually think of yourself as building 100 metres more of runway and 100 metres more of RESA or of building 200 metres more of runway but then saying, oh, hang on, why don't we use some of that for RESA and clawing backwards? Now in each case the question about whether to build at all or how much to build is going to depend on the economic trade-off between the benefits of having that much longer a runway and the costs of having that much longer a runway, and it will either fly or it won't so to speak. And then you've got to say, "Okay, so if that flies, if that stacks up what about the RESAs? Is it practicable to have more RESA, because if it is you should have it." That's what the rule says.

ELIAS CJ:

Why are you saying "more RESA"? Why not "what's the appropriate RESA"?

MR GODDARD QC:

Because then you have to look at what the increased RESA for your given extension means for what your runway now is and what the economic - and you've got an opportunity cost and that's just a very clunky way of doing it. It's like assuming something's big and then clawing back from it and it's easier to build up and the answer should not be the same. The maths will be the same. That is I think very clear.

ELLEN FRANCE J:

Can I just check what you were saying about the Convention. One of – it's a purpose of the Convention, admittedly, where practicable, to the highest practical degree to ensure uniformity, and I had understood that the means then of allowing countries to differentiate depending on things like their economy and so on was via the difference. So if you didn't, if the country decided that wasn't something they could afford they would deal with that –

MR GODDARD QC:

So far as standards are concerned –

ELLEN FRANCE J:

Right.

MR GODDARD QC:

– yes. So Your Honour's right that there's an attempt to seek uniformity in relation to certain essential aspects of air, similarly in navigation, and so you have in Articles 37 and 38 of the Chicago Convention mechanisms for adopting standards and recommended practices and then a requirement in Article 38 that if you can't deliver against a standard you must notify that difference. Sometimes also called a "departure". The title and the text have different terms which is really unhelpful. But, and that's a practicability test and that deals with, you know, broad economic environment issues and also path dependency issues. You may just have a particular set up before a standard comes in which just may be practicable for a country or for a country in a particular place to comply with.

WILLIAM YOUNG J:

Do we know anything about international practice?

MR GODDARD QC:

We know that it's quite variable. That's discussed in the 2002 McGregor Report which talks about the extent to which different countries do and don't comply. In our analysis –

GLAZEBROOK J:
Is this being interpreted anywhere else that's of any benefit to us?

MR GODDARD QC:
No.

GLAZEBROOK J:
That's what I presumed, yes.

MR GODDARD QC:
Frustrating.

GLAZEBROOK J:
Or commentary or –

MR GODDARD QC:
The Court of Appeal of New Zealand in the context of the cockpit voice recorder case talked a little bit about the concept of practicability in Article 38 and referred to one of the, or the leading text at the time on the Convention which said really it's hard to think of the Convention as creating an obligation under international law such as the level of flexibility. My friends pushed back a little on that by reference to some more modern texts and I think you'd have to say that that's right, having regard to the Vienna Convention on treaties, obligations of good faith that states bring to that. It's not right to say there's no obligation at all but it's a flexible obligation that accommodates a wide range of different circumstances, even so far as standards are concerned. Then you get the point my learned friend Mr Cooke made that when it comes to recommended practices, (a) they're just recommended, so there's not the same obligation to comply and the same obligation to notify differences. It's encouraged that you do so but it's encouraged, not required. And (b) quite a few of those recommendations have flexibility built into them by the use of the word "practicable" again.

So I'm going to find a good way to answer Your Honour Justice Young's question. I guess the right – the thing is you don't get a different answer from

saying if we do an extension of 100 metres, should we do another 100 for RESAs and say, okay, we're doing an extension of 200 should 100 of that be used for RESAs. They're the same inquiry because when you assess costs in every case you're going to take the lesser of the fiscal cost of construction and the opportunity cost. So you don't get a different answer and that's a piece of basic –

GLAZEBROOK J:

I'm not sure that actually helps, though, as to whether you should take into account extra revenue you get from whatever you do. Because on your analysis, do you take account of the extra revenue you get from the 100 metres when you're assessing whether it's practicable to put the RESA of 100 metres in? Actually, 100 is an extension of RESA by 100. Sorry, we're getting confused again. That doesn't answer that question.

MR GODDARD QC:

No, and that is really what I was trying to answer by saying you don't – it doesn't matter whether you're asking this question at a very profitable airport which is generating large profits or one that's breaking even.

GLAZEBROOK J:

Yes, but why is that the case?

MR GODDARD QC:

Because that doesn't go to the practicability of a RESA of a particular length because what you're looking at, and it's a fairly elementary economic concept, at any rate, the question is does it translate into the law? What you look at is the incremental costs and benefits associated with a particular decision, so you take what's there as given and then you ask what are the incremental costs and incremental benefits from changing that decision. That was the point I was making earlier. It doesn't matter whether you think –

GLAZEBROOK J:

But your incremental benefits may be huge from the 100 extension.

MR GODDARD QC:

And if they extend –

GLAZEBROOK J:

So you don't take those into account because it might be you suddenly –

MR GODDARD QC:

You can have those without the longer RESA. That's the answer. If you can have those benefits without the longer RESA, then they are not benefits associated with the RESA. That's perhaps the best way of putting it.

GLAZEBROOK J:

Well, I'm not sure. I think that's just saying, "I can have those." Of course you can have those benefits without the longer RESA if I decide not to build it. It doesn't answer the question as to whether you should build the longer RESA.

MR GODDARD QC:

I think it does, Your Honour, because it says for each extra metre of RESA what changes, and those profits don't change but the costs of building change, go up, and the safety benefits go up, and you think about the balance between those. So the point is that the profitability of the runway extension is constant across the different choices you make about the length of RESA, and therefore if you're analysing the practicability of more rather than less RESA, you've got to focus in on the costs of the RESA and the benefits of the RESA.

GLAZEBROOK J:

Well, you could say if you can more easily afford it then it's more practical.

MR GODDARD QC:

Well, in my submission that is not the sense in which the term is used. There was no inquiry, for example, when rule 139 was adopted into the existing profitability or the existing capital base of Wellington Airport, and rightly so because that's strictly irrelevant to the inquiry. They're quite right

not to ask that question of any of the airports. They didn't say in relation to any of these airports can they afford the extra RESA that's required because –

WILLIAM YOUNG J:

Well, it can't depend, for instance, if the airport company has a catastrophic loss in 2016 as a result of some mismanaged investment. That can't really affect the length of the RESA it's got to provide.

MR GODDARD QC:

Exactly so. Whether or not your franchises for all your duty free shops and things like that are spectacularly profitable or marginal because you've made poor leasing decisions doesn't affect the practicability of more RESA, and that's just another way of putting what I was suggesting to Your Honour. The background wealth or otherwise capital endowment and the profitability from other activities of the airport is strictly irrelevant to the question of whether more RESA is practicable.

ELLEN FRANCE J:

The other side of the coin is if you had a particularly poor airport company, then what are you doing, trading that off against safety?

MR GODDARD QC:

You can't. That's exactly right. You can't say we've made all these catastrophic decisions where, you know, built a casino on some spare land and we're haemorrhaging money, so we're not going to have a RESA, that's irrelevant. So whether it's good commercial decisions, bad commercial decisions, large capital base, small capital base, none of it's relevant to practicability. Thank you, Your Honour, that's a really helpful way of looking at that the other way around.

So let me zip through, and I can very fast now I think, my roadmap. The first, and what I've done is list five key errors in the Court of Appeal judgment and then – that's where they take us. The first error my friend has dealt with is the suggestion of the Court that the 2004 amendments removed cost as a factor or eliminated cost-benefit analysis and that discussion we just pick up the

Court of Appeal's decision and turn, which is volume 1 of the case on appeal, tab 9, and we go to 17. This page is an important part of the Court's reasoning and it was driven off changes in 2004 to the functions of the Minister and the Authority, so that's 17, which is on page 96 of the case on appeal, the Court said: "A principal function of the Minister when the Act came into force was to 'promote safety in civil aviation at a reasonable cost'. However, by the Civil Aviation Amendment Act (No 2) 2004, both the Minister's and the Authority's objectives were amended; they are now to undertake their functions 'in a way that contributes to the aim of achieving an integrated, safe, responsive and sustainable transport system'. The 2004 amendments eliminated the earlier guiding reference to 'reasonable cost', discarding the existing two-factor analysis of balancing safety against cost."

Now it certainly treated – additional factors were brought into play, environmental impact, health and safety impacts, but it's in my submission wrong to suggest that cost, and the relationship between cost and other benefits, was discarded and there are sort of easy and more complicated paths to that conclusion. But perhaps the easiest one to note first is the point my learned friend made about the rule making process when the Minister undertakes it, and the fact that it's a mandatory relevant consideration to look at the costs. Now what that tells us is that costs must be relevant to the function at aiming at an integrated, safe, responsible and sustainable transport system. You wouldn't tell a Minister whose objective was this, that they had to pay attention to costs, unless costs were relevant to that objective, and it's exactly the same objective that applies to the Director, and cost logically must be relevant there as well. Mandatory consideration for the Minister when making rules, but it's certainly a permitted consideration and it's not surprising that that comes into the phrase of integrated, safe, responsive and sustainable transport system, because, and I deal with this in my submissions, the purpose of this change in objectives was identified in the explanatory note as aligning the objectives of the Minister and the Director with the objectives of the New Zealand Transport Strategy, and I provide references to the New Zealand Transport Strategy and it's in my bundle, but what is made very clear, pervasively through that strategy, is that cost is

relevant. It's a very important factor, and that the concept of sustainability is treated as embracing cost.

Perhaps let me just do that one point. So the Transport Strategy is in volume 2 of my authorities. It's under tab 11, and I don't think we need to go further than, it's not page numbered unhelpfully, but we've got the front cover, then a page with a lovely picture of –

GLAZEBROOK J:
Tab 11 of your authorities is it?

MR GODDARD QC:
My authorities, so volume 2, tab 11, there's a cover page, there's a letter from the Minister accompanied with a photo of a very young looking Mr Paul Swain. I suppose I don't look like I did in 2002 either. And then we've got an index page and then chapter 1, Vision and Principles, and the vision is of an affordable integrated, safe, responsive and sustainable transport system. Principles, sustainability, to ensure transport is underpinned by principles of sustainability and integration. Transport policy needs to focus on improving the transport system in ways that enhance economic social and environmental well being and promote resilience and flexibility … will also need to take account of the needs of further generations and be guided by medium and long-term costs and benefits." So the concept of sustainability has built into it thinking about the future sustainably pursing goals such as safety which requires us to pay attention to medium term costs and benefits just so.

So we have a description of objectives which is intended to be aligned with that. That includes in sustainability the relationship between the goals you're pursuing and their costs and the relevance of costs to the Minister's objectives is explicit in the Act. It seems odd to then suggest that it's not even capable of being taken into account by a director with exactly the same objectives. So that is essentially my item one and that is fundamental to the Court's reasoning as the Court will see in my 1.1. I point to some of the paragraphs where the Court of Appeal took this into account and ultimately if we go to paragraph 78 of the Court of Appeal judgment, the summary at the end.

In summary, “we're satisfied an acceptable RESA must comply.” About four lines down: “We’ve reviewed New Zealand’s international obligations in the interests of the purpose of the Act … the elimination of cost-benefit analysis by the 2004 amendments to the Act.” With respect, that’s just wrong. You've got an objective which is exactly the same for the Minister and the Director and the relevance of cost to the objective is explicitly recognised by the Act, it's also very obvious for the legislative history, so that runs right through.

Item 2, I think I've pretty much covered this. 2006 amendments to Part 139 were predicated on RESAs longer than 90 metres not being practicable at Wellington Airport. My learned friend took the Court to the passages in the notice to proposed rule making that I was going to go to in my 2.1. It's explicit that more than 90 metres was not seen as practicable at Wellington at that time because of the cost of doing more. So the whole of the consultation and ministerial decision making process were conducted on the basis that costs relevant to practicable and that when one pays attention to cost more than 90 metres was not practicable at Wellington as it then stood even though, according to known means and resources, paintbrushes and electricians, you could move A and B and incur some significant opportunity costs and have a longer RESA.

That links through to my point 3. There’s no reference to paint-on RESAs anywhere in the judgment of the Court of Appeal. The fact that one way you can achieve a longer RESA is just by reconfiguring your existing physical infrastructure just isn't addressed. It's a fundamental aspect of the context of this rule that that will always be possible. If you're talking about a category 3 or 4 airport it's always going to have a runway long enough that you can, that you have, you know, 150 metres at each end up your sleeve and still have some runway left. So in the domestic rule and also in the international regime it must in context be the case that cost is relevant to practicability otherwise the rule would do nothing because the answer is, is it practicable, yes, you can just paint on one, it's never going to be impossible if you don't take into account cost. As soon as you take into account cost then it may not be practicable because the opportunity cost of doing it, if you paint it on is too high and similarly, if you then look at how to offset that opportunity cost by

building more instead to get back to the whole or most of your existing operations you are paying attention to cost again, the cost of doing that, is it less. So that's central to the term practicable as it's used in this context and that's my point 4. That the Court of Appeal's approach to what's practicable would deprive the test of any meaningful effect. It would never be impracticable to have a 240-metre RESA.

WILLIAM YOUNG J:
Or it might be if you're right up hard against a mountain.

MR GODDARD QC:
But you can always paint it on.

WILLIAM YOUNG J:
Well you can always take the mountain down.

MR GODDARD QC:
No, but you can always –

WILLIAM YOUNG J:
I see what you mean.

MR GODDARD QC:
– paint on.

ELIAS CJ:
Shrink the runway.

MR GODDARD QC:
It's always practicable.

WILLIAM YOUNG J:
Yes, you may get to the point where you haven't got a runway left.

MR GODDARD QC:

But you get, is my point, about you're always going to have some runway left if you've got a category 3 or 4 airport because you're always going to have, you know, something north of 1000.

ARNOLD J:

Category 3 or 4 airport, that's based on jets, so shortening it may exclude jets or fully loaded jets or whatever.

MR GODDARD QC:

Yes, and that's your opportunity cost.

ARNOLD J:

Yes.

WILLIAM YOUNG J:

Okay, so you can always wind up with something?

MR GODDARD QC:

You can always wind up with something. You'll still have an airport, and you'll always be able to land something, it's just that the opportunity cost may be very substantial. But if cost is irrelevant, which is the Court of Appeal's approach, and in particular the trade-off between costs and benefits – so that's my point 4, and that really deals with the heart of –

GLAZEBROOK J:

How do you calculate the opportunity cost in those circumstances?

MR GODDARD QC:

You'd look at the –

GLAZEBROOK J:

I suppose my question is, if you can calculate the opportunity costs, why can't you calculate the opportunity benefit from having a longer runway.

MR GODDARD QC:

You can.

GLAZEBROOK J:

But you just say you don't.

MR GODDARD QC:

No, no –

GLAZEBROOK J:

Well you've just said it's irrelevant whether you earn a lot more money from having a longer runway than if you don't but the opportunity costs of having a shorter runway are taken into account.

MR GODDARD QC:

If the shortening is in order to have more RESA, so it's a question of what is the decision you're making, and you've got to look at the costs and benefits of that decision. So if you're saying, should we take 100 metres off the declared distances, in order to have 100 metres more RESAs, then that's the weighing that you do. If you are saying shall we build another 100 metres of physical, you know, what aerodrome, runway at each end, to have – you don't look at opportunity costs, you look at the building costs, and presumably the choice between which of those you do if you were going for another 100 metres of RESA, would depend on whether the cost of building was less than the opportunity cost of shrinking the scope of your operations. But for any given configuration of runway, it will have a particular cost, or have a particular profitability, you can then calculate the incremental costs and incremental benefits of each metre of RESA and that is, it may depend on where you're starting from. If it takes you near one of those discontinuities in the relationship, if it takes you, you know, one way or another over a threshold of some kind, but as long as you think – and again coming back to what we're doing here, that is what a McGregor cost-benefit analysis said it did. It said for any given extension, whether it's 100 metres or 200 metres or 300 metres, we're going to look then at the cost and benefits of a RESA of 140, 240 versus 90. What is the practicability of this, and that's the analysis it did. And Your

Honour Justice Young was right to say to my learned friend earlier that you can effectively interpolate between those points that were analysed by McGregor to say if you go part of the way from 90 to 140 what's it going to look like, and the answer is even if you only went, if you go half the way it's going to cost roughly half as much. Even if we assume the whole of the benefits it still doesn't stack up.

ELIAS CJ:
But you don't know about the costs because the costs were all –

WILLIAM YOUNG J:
Costs per linear metre.

MR GODDARD QC:
We've got a cost per linear metre.

ELIAS CJ:
Yes.

MR GODDARD QC:
We do.

ELIAS CJ:
Yes, yes. So we do. Okay, thank you.

MR GODDARD QC:
Bearing in mind that what was looked at was incremental costs. And so what – and that's why what we see in the Director's decision informed by this analysis, and my friend went to this but perhaps it is just worth going back to it again, so we're in, if we look at that file note, which is in volume 5 on, begins at page 847. What the Director says, and in my submission he's right, on page 848 under the heading, "Information on which my decision is based": " I accept the validity of the analysis provided by McGregor & Co concerning the probability of overruns and undershoots … Further I consider that the associated cost/benefit analysis identifies the costs and benefits of providing RESA in excess of 90m." And he's right. By taking a few snapshots and

looking at how that stacks up, you do get a picture of the costs and benefits of providing RESA in excess of 90 metres whatever the amount, and whatever the extension, because that was the backdrop to the analysis, and then what the Director goes on to say over on page 849 under the heading, "Cost/Benefit – Practicability of alternatives", is, in the very last paragraph on 849, "in light of the discussion above, I am of the view that the safety benefits provided by the construction of a longer RESA", so he's not limiting it to a RESA of 240 metres, which is another criticism of the decision that was, in my submission, wrongly accepted by the Court of Appeal. He has got a couple of points of analysis and he's concluding based on that, as one can with a bit of elementary, numerical ability, and it's one of the things that you hope the Director would have, what you can conclude, "that the safety benefits provided by the construction of a longer RESA are small, when calculated with reference to the very low probability of an adverse event in the first place, combined with the level of effectiveness of the 90m RESA". 90 metres catches so much, and provides so many safety benefits that the incremental gains could only be purchased by incurring disproportionate costs, and that's the point he goes on to make over on 850. "My view on this is supported by the cost-benefit analysis performed by McGregor, and independently peer reviewed by Castalia. That analysis concludes that the safety benefits associated with the extension of the RESA (to either 140m or 240m) are greatly exceeded by the cost of that exercise – which is around $1M/linear metre of RESA. I am persuaded by this analysis while also noting that it accords with my own assessment that the additional safety benefits, in an already very low-risk environment, do not justify the high cost."

So the next paragraph. "Thus, given the low probability of occurrences, and given the effectiveness of a 90m RESA, I accordingly am of the view that WIAL has appropriately applied the 'practicability test' embodied in CAR 139 in deciding the length of RESA that it will provide and that the additional safety benefits to be achieved in extending the RESA are significantly outweighed by the cost." And that's not limited to a binary 90 versus 240. It's just not a possible reading of it and it's not consistent with the analysis that was done by Castalia or how a technical expert in the space who is probably actually more numerate than literate because that's their level of expertise, unlike ours, can

take from an analysis of that kind. Again it comes back to what my learned friend says about these rules being addressed to experts in this field who are expected to bring to bear their knowledge, their experience, their judgment, their ability to draw sensible inferences from this sort of material, and form a view on practicability and acceptability of an approach in light of all that expertise. So really impossible to suggest that the cost-benefit analysis was irrelevant and should have been disregarded, which is what the Court of Appeal found, that clearly wrong in my submission, very relevant to the objective, and no basis for suggesting, having taken it into account, that the conclusion reached by the Director was based on any error of law.

ELLEN FRANCE J:

So if the Director decided, say in the current factual scenario, so you're got that cost-benefit analysis, but nonetheless it was just too terrible to contemplate this sort of accident that might occur, do you accept that's something that the Director could probably have weighed in the balance?

MR GODDARD QC:

As long as the Director's assessment wasn't unreasonable, yes. So the Director can take into account safety benefits, can take into account public concern about safety in aviation, can give a weighting to safety, although that's kind of built into the numbers that he used for the value of lives and the value of injuries, you can cut –

WILLIAM YOUNG J:

What was the value that was used here, for the value of lives?

MR GODDARD QC:

I'd have to go back to the –

WILLIAM YOUNG J:

It's in the McGregor report?

MR GODDARD QC:

It's in the McGregor report and –

WILLIAM YOUNG J:
Don't worry about it.

MR GODDARD QC:
It's in there Sir, I do remember seeing it, and it's based on the standard one used in the transport sector in New Zealand, so I don't think passengers lives are valued differently from drivers lives.

ARNOLD J:
I think it was 3.8 wasn't it?

MR GODDARD QC:
It was around that. So coming back to Your Honour Justice France's question, you can pick whatever reasonable number is appropriate for that, or you can use an orthodox – look at that and say, I'm still going to give more weight to safety as long as it's within the balance of reasonable expert judgement, and that's the way in which this should have been approached. It wasn't to say cost-benefit analyses are irrelevant, they're plainly relevant, and they're a useful way of disciplining analysis, as my learned friend said, and it wasn't to say practicable against the backdrop of this Act it means costs is irrelevant to the objectives of the Director, because that's plainly wrong. It's rather to say did the Director form a reasonable assessment that was open to him and the plaintiff respondent didn't actually take on the burden of showing that it was unreasonable, and just couldn't have in my submission. But we should avoid the temptation of being seduced into actually doing the analysis ourselves, much as I love to play with cost-benefit analysis on a Thursday afternoon, that's not the right question.

Then we get to my point 5 on my road map, the possible use of engineered materials, arresting systems, or some other arresting system. There are a couple of ways to come at this but again the question before the courts is, is there an error of law here, is this liable to be set aside for failure to consider EMAS, and even if it was – and the *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) approach, which says, well something's a mandatory relevant consideration only if it's expressly, or by necessary implication

required to be considered, is in my submission the right one, and that's simply not the case. There's no reference to EMAS in the Rules and it's not a matter of necessary implication, and the fact that since the rules were made, additional references to the possible relevance of EMAS have, or arresting system have come into the international instrument, means it's certainly open to the Director to consider it, but it doesn't mean that it's an error of law to fail to. So that's the legal answer. Then again there's also the point my learned friend made which again would have been obvious to an expert decision maker such as the Director. If we come back to my pretty picture of Wellington Airport, what the Court can see it's paved all the way to the outer edges, basically, of the isthmus (a hard word on a Thursday afternoon) and that if you're going to have 10 metres of arresting system, that's 10 metres more on top of the paved stuff. You can't use the EMAS as part of the starter extension, so whatever amount of land that's added to EMAS, is not land that's available for your TORA, your takeoff run available, and your ASDA, your accelerate-stop distance available. Just in case it's of interest, my instructions are that basically, in terms of stopping effectiveness, roughly two-thirds ratio is a reasonable rule of thumb for EMAS, so if you need 90 metres of paved runway to stop in, 60 metres of EMAS will give you the same sort of stopping, and my learned junior, Ms Heine is nodding, which is encouraging since she's the source of such knowledge as I have on this issue. But – and what that may mean, if one thinks about it, is that it may be practicable to have, say, a 240-metre RESA, but it may be cheaper to have 180 metres of EMAS, if you don't need to use any of it as a starter extension, and so it's open to an airport to say to the Director, well we've turned our minds to the practicability of a 240-metre RESA, and we actually don't think it's practicable because we can achieve the same safety benefits from 180 metres of arresting system, and that's cheaper and we'd like to do that, and the Director can accept that. But none of that works at Wellington where every metre needs to be used for starter extension, which means it can't be this crushable material, that you each time you drive on it then has to be replaced at vast expense. Each metre that you devote to EMAS to arresting systems at Wellington comes at the expense of usable runway and that matters.

So, (a) it's not a mandatory relevant consideration applying the orthodox legal text, but (b), there are reasons that would have been obvious to the Director about why that was not going to be to cost effective because it wasn't, again, think back to the cost-benefit analysis, it wasn't that the cost of the extension was a little bit more than the safety benefits, so if you could receive those safety benefits with two-thirds as much extension it would all be fine. We were out by factors of more than 10. So again for someone with the technical expertise of the Director that was a no brainer at that rough level.

Unless there's anything I can help the Court with I'm conscious that I'm really just following on from my learned friend Mr Cooke. I don't want to go through things I don't need to go through.

ELIAS CJ:

That's fine. Thank you Mr Goddard. I should say we think we'll take an adjournment at 3.30 and sit until 5.00, if that's convenient. Mr Curran, we don't need to hear you on the substantive submissions you've given us, but is there anything that, having heard the argument, is there any point you'd like to make?

MR CURRAN:

No thank you Ma'am. It was gratifying to hear some of the best points of the Intervener picked up and delivered to Your Honours by some of my learned friends.

ELIAS CJ:

I think that's rather worse than taking credit for the production of the volume. Thank you Mr Curran. Yes Mr Rennie.

MR RENNIE QC:

May it please the Court. If Your Honours please, the first respondent, the initiator of this initial proceeding, commenced it for the purpose of obtaining a general interpretation of the rule which has been debated already with you by my learned friends, and as we indicated in the Courts below that, which is a matter which has been in issue for quite some time, as to what the correct

interpretation is, and on which we have invited the Director to join with us in seeking a declaration, only to be told that it wasn't necessary because it was absolutely clear what it means, collided with the Wellington situation, and it's a matter of concern to me that a lot of the submissions that Your Honours have heard represent a deep dive into their perspectives of the situation in relation to the proposed extension at Wellington Airport, and yet the examination that was done in the Director's office identified that Wellington Airport had indicated it might extend by 100 metres, or by 200 metres, or by 300 metres, and in the Court of Appeal it emerged that in fact their current intention was to extend by 355 metres, which was not a figure that had ever been before the Director for decision, and so there is absolute imprecision about what it is that is contemplated, and I say that at the outset because the caution that I offer in this regard is that the Director, as I expect to show the Court in a moment, dived deeply into this in the way that my friends have done, came up with the proposition that the cost of the Wellington extension was so high that there was an end to it, that there need only be a 90-metre RESA continued as before, and didn't take the matter any further.

Now, and what my friends have put to the Court today, there are several major errors, and I want to identify those at the start and then go through the issues as briefly as I can. It's not my intention to advert to the written submissions that we've filed unless Your Honours have questions in relation to those.

My friends have both put it to Your Honours that there is some impending element in which we are going to see airports around the country, some were nominated by name, by one of counsel, forced to install 240-metre RESA when their certification next comes up. Well with respect that is not what the rule which was adopted and is in force says, and if you go at page 591 of the bundle, you will find the relevant part of the rule in the document which was –

GLAZEBROOK J:
Of which bundle sorry?

MR RENNIE QC:

I apologise, it's of the fourth bundle. This is, in fact, a copy, and I'll be coming back to it shortly, of the very rule which the then Minister, Mr Duynhoven, signed. You'll find the signature at 585 and at 591, 139.51(b), and this is the certification obligation.

GLAZEBROOK J:

I'm sorry, what page number was it sorry?

MR RENNIE QC:

I'm sorry Your Honour, 591. I'm travelling at a greater landing speed than possibly I should contemplate in the circumstances, 591(b), this is the certification requirement as imposed by the rule: "An applicant for the grant of an aerodrome operating certificate must ensure that a runway end safety area that complies with the physical characteristics prescribed in Appendix A.1 is provided at each end of a runway at the aerodrome if – (1) regular air transport services ... (2) operating certificate first issued after 12 October 2006 or commissioned after 12 October 2006 in relation to aircraft of that size, or", and this is coming over to the next and more important point, "(4)(i) either the land distance available or the length of the runway strip is extended to a distance or length that is more than 15 metres greater than the respective distance or length that was published for the runway immediately before 12 October; or (ii) the runway is upgraded to an instrument runway after 12 October 2006." So there is no airfield currently certified which will face the peril that my friends describe, unless that airfield is, in the manner I have just read out, extended or upgraded. That is the grandparenting provision which has been referred to in our submissions.

ELIAS CJ:

Sorry, you'll have to explain this a bit more to me. Why do you say it's grandfathered until extension?

MR RENNIE QC:

Your Honour, if you come back to paragraph (b) on 591.

ELIAS CJ:

Yes.

MR RENNIE QC:

This states the certification requirement for an applicant for an aerodrome operating licence.

GLAZEBROOK J:

So that includes the renewal, is that what you're –

MR RENNIE QC:

That's correct, five yearly renewals.

GLAZEBROOK J:

So when they come up for renewal they've got to apply again.

MR RENNIE QC:

Yes, yes, so every five years you're applying to have another certificate –

ELIAS CJ:

So there's nothing that's non-complying, is that what you say?

MR RENNIE QC:

What I'm saying is that every airfield that today has a certificate is able to continue with the terms of that certificate on renewal, unless it has extended its runway or converted to instrument operation.

WILLIAM YOUNG J:

So this depends –

ELLEN FRANCE J:

Yes, I don't understand, sorry.

WILLIAM YOUNG J:

So this depends on the view of the aerodrome operating certificate is first issued. Does that mean the current aerodrome operating certificate, which

suggests that this will stop in 2011, or does it mean that providing the airport was up and running before the 12th of October 2006 it's grandfathered?

MR RENNIE QC:

Well my friends are suggesting that (b)(1) has the effect of forcing an application not for a renewal but for the grant of an aerodrome operating certificate. This provision relates to the grant of an aerodrome operating certificate.

ELLEN FRANCE J:

They will have to get, at the end of the five year period, another aerodrome certificate and there won't be anything in this that stops that, stops the requirement to comply with the current law in relation to the length of the RESAs.

MR RENNIE QC:

Well that's not the way that it has been understood and operated since the rule came in in 2006.

WILLIAM YOUNG J:

But doesn't (1) apply anyway because it's used for international flights?

MR RENNIE QC:

Well there is a, well exactly. There are only five aerodromes in the country that are used for international flights. I was not addressing the international situation, which I'm coming to, but my friends have referred to Hokitika and Paraparaumu and places like that that have repeatedly had grants and renewals under this provision and suggested that in some way the Court of Appeal's decision is going to force them to have to have a 240-metre RESA. Now that may be a very good idea, as I shall come onto, but I disagree with my friends that this major problem which is postulated exists under the provision.

GLAZEBROOK J:

But you do accept that it exists for those who are flying internationally, at least in terms of that provision?

MR RENNIE QC:

Well except that there are only five such airfields and they all comply now.

GLAZEBROOK J:

Right.

WILLIAM YOUNG J:

Well they don't have 240 RESAs do they? I mean Wellington doesn't.

MR RENNIE QC:

Auckland does, Christchurch does.

WILLIAM YOUNG J:

But Wellington doesn't?

MR RENNIE QC:

Dunedin does. Queenstown and Wellington do not.

WILLIAM YOUNG J:

Yes, so they don't all comply.

MR RENNIE QC:

They comply with the historical requirement of the rule, and I'm just coming onto the second point, which may clarify this, Your Honours, because the second proposition that my friends put is that this is mandatory and unless you can achieve some flexibility under the word "practicable" then you're bound by it, but that is not strictly correct. Section 37 of the Act provides explicitly for an application to the Director for exemption. In fact Wellington Airport at the moment has an exemption. Its overall runway is half the width that is required by the Rules, and the Director has exempted that. The difficulty, no doubt, that Wellington has, and it is specific to Wellington wanting to extend, is that when you go to section 37, you'll have to find that it

has a safety provision written through, so that an applicant for an exemption has to demonstrate that granting an exemption under that section will not have a detrimental effect on safety, and that, Your Honours, seems to lie behind the detailed effort which is being put by both parties to the Court to suggest that somehow that exemption provision is to be ignored, notwithstanding Parliament's clear intention about what the terms would be for an exemption from the Rules, and that one is to wriggle through by looking at practicability.

ELLEN FRANCE J:

Well what, in terms of 37(2), they'd have to come within those provisions, wouldn't they?

MR RENNIE QC:

Yes, and my point is that my friends have suggested that there's no other place to go, but in reality the structure of the Act provides quite clearly that if you are bound by a rule which is creating a difficulty for you, you can go to the Director and seek an exemption for it. Wellington Airport would obviously have difficulties much greater than what we're discussing today if it were required to comply with the runway strip, that's the whole total strip not the sealed strip, the runway width which is half what the rules currently require. The Director has exempted that.

ELIAS CJ:

So this is in support of a submission that it's not necessary for practicability to be as loose as the appellants say because there are other mechanisms, is it?

MR RENNIE QC:

Well I'm saying two things Your Honour. I'm saying that Parliament has provided the means by which one gains an exemption from a rule and if Wellington can't bring itself inside section 37, then that's a matter between Wellington and the Director. My next submission is that the answer to that is not to try and achieve wriggle room inside practicability to get around that difficulty.

Now Your Honours the third point that I particularly wanted to emphasise, and which I can deal with just before the break that you intend to take, relates to a submission that was repeatedly put to Your Honours by counsel for the Director. He said more than once, Wellington was considered at the time it went up to the Minister. The Minister got the cost-benefit analysis. Wellington was not to be required to have more than 90 metres, and again when they promulgated the rule it's only 90 metres at Wellington. Now if Your Honours go in bundle 4 to page 575, Your Honours will find the papers which actually did go to the Minister, and emerged from the Minister.

ARNOLD J:

Sorry, I missed the reference?

MR RENNIE QC:

Bundle 4, Your Honour, at page 575. Now the first part of this set of documents, Your Honours, is the letter from the then Director of Civil Aviation, transmitting the proposed amended rule. Captain John Jones, very experienced pilot in his own right, and was head of Mt Cook for a long time, then the Director, nowhere in his letter is there any reference to either the transmission of a cost-benefit analysis, or to any special provision being made for Wellington. One then comes to the document that the Minister signed, with his signature at 585, adopting the rule.

ELIAS CJ:

Sorry, page?

MR RENNIE QC:

Page 585. And Your Honours, this rule is the Minister's rule. It's not the Director's rule. In fact it is the one matter in the Act that Parliament expressly reserves to the Minister, sections 22 and 28(9), the Minister may not delegate the making of the rule, and by necessary corollary, the Director can't amend the Minister's rule. That's the structure and scheme of the Act. The exemption that the Director can give under section 37 we have looked at.

Now the rule follows in the next following pages in the form that it was enacted, commencing with a narrative. Then at 591, 592, 593 and 594, the Rule and the appendix to the Rule specifying the physical characteristics for a RESA, and then what follows, and at 595 Your Honours will see that it's noted: "This statement does not form part of the rules contained … It provides details of the consultation undertaken in making of the rules" – is a summary which records the submissions received and in the successive pages the responses of the CIA to those submissions, being the position the Director had taken in respect of each of those matters, as part of the rule making process. There is, Your Honours, no reference in any of that material to what my friend put as being the Minister being told, the Minister knowing, the Minister doing. There is no reference to Wellington.

There is one other reference, which is of interest, and that's at 596 where this material issued in support of the rule noted that there had been a number of submissions on the use of the word "practicable", and it provides a comment in response: "The CAA considers that the word 'practicable' is an appropriate word to use in the rule. The word is also used in other legislation such as sections 26 and 84 of the Act." I'll come back to those. Then it goes on to recommend that: "Anyone contemplating developments to the physical characteristics of an aerodrome include dialogue with the CAA early in their plans as the interpretation of what is practicable for RESA will be on a case by case basis."

And Your Honours, sections 26 and 84, very briefly, but identified in that way by the Director in the material sent to the Minister indicative at least of what practicable was considered to mean. Section 26 is the obligation to notify all incidents and accidents. It's a requirement that that be done as soon as practicable. And a couple of other requirements – notify search and rescue operation as soon as practicable. And 86 – 84 I'm sorry, deals with where somebody is detained by a member of the security officers aviation security system, and that, as one might expect, requires that where a person is detained they must, as soon as practicable, be handed over to the police officers. Now in each of those sections identified in this material "practicable" clearly means "feasible". It doesn't mean you don't have to do any of those

things if it's a bit expensive to do it. It means it must be done, it must be done because the requirement is feasibility.

Now I have one further error for Your Honours but that may well be the appropriate time to break.

ELIAS CJ:
Thank you. We'll take 15 minutes.

COURT ADJOURNS: 3.33 PM
COURT RESUMES: 3.51 PM

MR RENNIE QC:
As I was saying to Your Honours when I started – sufficiently concerned about the Wellington detail that my friends have dragged the Court into as opposed to the interpretation issue that I wanted to make some key points, but ironically the fourth of those points does relate to the Wellington situation, and Your Honours will have available the aerial photograph which my friend for Wellington Airport handed up and he explained to Your Honours the process by which Wellington is operated, that is to say in short form that a RESA at one end is able to be used as what is called a starter area when the aircraft is taking off from that particular point. There's no technical or legal controversy about that, it is possible to do that. It does identify just how Wellington has stretched to obtain every available metre which it is able to describe as a declared distance.

In the matters that I'm about to come and deal with I just need to emphasise that the requirement in the rule for the RESA is a minimum requirement, and it doesn't alter, there's nothing in the rule which says that because the Auckland and Christchurch runways are twice as long, that they can have a smaller RESA. There's nothing in the rule that says that the frequency of use or the type of aircraft, or any of those considerations. Even the relative risk of operations through the airport. My friend for the Director said that the Director is satisfied that Wellington Airport is safe and currently compliant. It's not ALPA's argument that it's either unsafe or non-compliant. It is that it could be

and should be safer and more compliant. Having said that, the Director's confidence isn't internationally shared as it's only about three weeks since the *Daily Telegraph* in London declared Wellington to be the 13th scariest airport to land in in the world. So we are dealing with elements which relate to the public's safety, and the public's willingness to fly through an airfield.

Now in the diagram in front of Your Honours with the starter extensions, the effect that is achieved I have just described. Your Honours have been told a great deal about the cost-benefit analysis and you'll find the relevant part I'm about to deal with in the fourth bundle at page 643. And a figure which has been put to Your Honours today by counsel is that the incremental cost of a metre of runway at Wellington is $1 million. It's not, from what I've seen of the papers, clear where that figure comes from, although you can derive it in a very rough sense by taking the estimated cost of an extension, at 300 million, and the length of it at 300 metres, and you can get a million out of it.

WILLIAM YOUNG J:
Isn't it referred to in the Director's decision document?

MR RENNIE QC:
Yes, and it's referred to in the cost-benefit analysis as I'm about to show Your Honour, because if Your Honour looks at page 643 on the first part, table 1, you will see a table setting out the present value costs for 140 metre RESAs and 240 metre RESAs. Extension north and annual maintenance, 100, and then for 240, 300. The question, of course, is does that contemplate those extensions at both ends, and on the wording, to the extent that you can dissect it out, it appears that that is the case. So we don't have a comparison between how Wellington is now operated and an extended runway using the RESA at one end as a starter extension starting at each end, and that table is uncritically taken up and adopted by the Director's internal assessment at page –

GLAZEBROOK J:
I'm not sure I've quite understood that.

MR RENNIE QC:
If you want to achieve a 240-metre RESA at Wellington, and you are wanting to use the RESA as the starter extension, the extra distance you need is only 150 metres.

GLAZEBROOK J:
Okay, right.

WILLIAM YOUNG J:
What about for landing?

MR RENNIE QC:
What about for landing?

WILLIAM YOUNG J:
I mean, the declared, how does that work because you can't –

MR RENNIE QC:
It moves backwards and forwards depending on which direction you're coming from.

WILLIAM YOUNG J:
But that's taking off, isn't it?

MR RENNIE QC:
I'm sorry?

WILLIAM YOUNG J:
I mean you can use the RESA as part of the required runway length in taking off.

MR RENNIE QC:
Yes.

WILLIAM YOUNG J:
But you can't for landing?

MR RENNIE QC:

Well you can if you're using it as a starter extension because you have then constructed it and configured it as a runway, which we must assume you have done because those are the, it's the runway costs that are being applied to the costs per metre.

WILLIAM YOUNG J:

I may have misunderstood this but I didn't think – I mean I think if you look at perhaps by reference to this plan, when you've got a plane coming in on what I guess is runway 34, can it land on the RESA. Or is the distance calculated from the RESA…

MR RENNIE QC:

Well there are two answers to that. In terms of is the RESA an available declared distance, the answer is no. Is the RESA constructed to a runway standard –

WILLIAM YOUNG J:

If it's physically possible to land on the answer is yes.

MR RENNIE QC:

Yes, that it is serving its undershoot purpose as a RESA on your coming in, because you see when you come in, you are looking for both your undershoot at one end, and your overshoot at the other. The point I am making is not to solve it because it can't be solved from the information provided. The point I'm making is that the Director uncritically picked up both the stated costs and the table, which is carried through at 734, as if this somehow was an accurate statement of what is actually involved in providing the required RESA at this airport. And the justification –

WILLIAM YOUNG J:

What length, in what direction is the declared runway length most controlling. Is it more controlling for a landing aircraft or for a taking off aircraft?

MR RENNIE QC:

You mean in terms of the amount that they need?

WILLIAM YOUNG J:

So you're flying Airbuses.

MR RENNIE QC:

Typically you will, well, you will have a lighter aircraft coming in.

WILLIAM YOUNG J:

Yes, I understand that.

MR RENNIE QC:

And your aircraft coming in, and at the point it touches down, if it's an A320, which we're probably reasonably familiar with, will be doing somewhere around about 160 knots, or 300 kilometres an hour, and unless it is stopped, of course, in the next minute it will travel five kilometres and be well out to sea. So in that sense the importance of the distance on landing is the aircraft's ability to come to a stop in approximately the next 20 to 25 seconds. It has to go from 300 kilometres an hour to zero in roughly that period of time. The relevance of RESA is that if something goes wrong with that process on landing, for example, if you land too far down the runway –

WILLIAM YOUNG J:

I understand that. I'm just interested in as a regulatory matter, the runway, the declared runway length controls what planes are allowed to land.

MR RENNIE QC:

Yes and on takeoff, the reason I was drilling on that before going to takeoff is the considerations are different.

WILLIAM YOUNG J:

Well there's weight, obviously –

MR RENNIE QC:

Well yes because you plan for the condition that you know you have got at the time you are leaving as opposed to having had the plan for the condition you hope to get when you are arriving, because your planning has been done back in terms of fuel and weight load and things like that. And at Wellington Airport in its current situation the distances are sufficiently tight that there are a small number of circumstances in which an aircraft may have to offload passengers and freight baggage to meet the takeoff requirements. You could argue that therefore the distance for takeoff is the more critical distance, and that's where the extra RESA, which is in the case of an A320, is roughly about three and a half plane lengths further than is provided at the moment. That gives you flexibility in terms of your, the degree of confidence you can have when you're planning your flight. It's not just a safety thing, it gives you a wider degree of security in what you're doing, and all I'm really labouring all these points for to Your Honours is that what my friends would like to present to you about the situation is vastly more complicated and there are some serious issues in relation to the whole proposition as to the cost-benefit analysis.

In both Courts below I read out at the back of the very first McGregor report which is right back when the rule was being made, there is a fully expressed, I won't seek to read it out today, but there is a fully expressed caution from McGregor about the right and wrong uses for RESA and the – sorry, the right and wrong uses for cost-benefit analyses, and the fact that they don't capture all the factors. Now in this cost-benefit analysis, quite apart from the fact that it appears that what has been used involves stretching it out to the largest possible cost, presumably to get the largest possible concession, the proposition seems to be that if an airport company is impecunious, it is entitled to have a less safe airport –

WILLIAM YOUNG J:

I don't think that was the proposition.

MR RENNIE QC:

Well, the proposition, Your Honour, is that if the analysis comes out negative, then they should not have to provide the extra RESA.

WILLIAM YOUNG J:

Yes, but that's on the basis that the comparison is, the cost-benefit in terms of the cost of providing the RESA as against the benefit in terms of primarily avoiding accidents.

MR RENNIE QC:

But my friends, Your Honour, disavow any ability to bring into that the economic or social benefit to a community of an airport, and they disavow the notion that one has a look at the profitability, or unprofitability, of the company, but they still try to bring it on the basis that a negative result indicates that it is, meets a test of not being practicable. That is what is fundamentally wrong with the whole approach.

ELLEN FRANCE J:

Just in terms of the figures, you've referred us to the ones at 643, but in terms of those figures they, in fact, go down, or they change, don't they, in the final, in the November 2014 report. So, for example, that has the 100 figure and in fact what McGregor uses in the final report is 93.33.

MR RENNIE QC:

Well I was looking at the, yes, well that's true, but I was simply showing how the table translated through, yes, was picked up and translated through as a mechanism. I wasn't focusing on what the final figures were in the revised report because my point is that it's not apparent that the cost-benefit analysis adopts the operating system currently used at Wellington, and that's the point that I was after. I agree with you, I mean that –

ELLEN FRANCE J:

Well I'm a little bit lost, then, as to why using the figures that weren't actually the final figures helps us –

ARNOLD J:

This is the northern extension under Evans Bay.

MR RENNIE QC:

Yes.

ARNOLD J:

They're talking about the southern bit which is a bit cheaper.

MR RENNIE QC:

It's cheaper to build but it loses the bridge over Cobham Drive, which is a positive benefit in the northern extension, and that's a point I was going to come to, but I'll deal with it now. The Director had no information, the Director had found that it was feasible to bridge Cobham Drive. The Director, the second time around, had no information about what the cost of that would be or whether it would have been cost-benefit positive or negative to have retained that part of the northern extension when the airfield was to go south, and without getting into a lot of detail, and it's recorded that there was a meeting in November of 2014 where representatives of one of the international EMAS companies actually came and met in Wellington, and arising out of that the, our proposition is that it is feasible to actually achieve equivalent compliance to 240-metre, by going north, and by using EMAS, and by having relatively short distance RESA at each end, which is a matter that the Director brushes aside in their reports by saying we don't have to consider that because the company isn't proposing it. And yet in 2014 EMAS became a part of the ICAO standard and recommendations, and is spelt out. And so we've got this situation where Wellington seems to be able to persuade the Director that it can design its own proposal in the way that it wants to, say that it then can't afford it, and somehow then get what amounts to an exemption but it doesn't get it under section 37, and the whole point in this case was effectively to get an interpretation in general terms, that's what we were originally after, as I say we collided with the Wellington situation. At times it's said why wouldn't the pilots want a longer runway. The pilots would be happy to have a longer runway. The pilots have got no position on the economic benefit, non-benefit, they have a national and international perspective. But

what we do say in relation to the Director's decision is you do not have the material in front of you to make any valid decision. His decision addressed only a proposition that whatever length they built, they built to the south, that it would be cost-benefit negative, and yet that same proposal had as integral elements in it, one, that it was not commercially viable to the company without contribution from local and national Government. Now there's nothing to say whether local Government would be willing to fund something which had safety provisions below the statutory recommendations and standards. There's nothing to say that the Government which has not only signed up to the international convention but has actually put in place a rule requiring it, would fund something that conflicted with commitments the Government had already made. Those are key issues in Wellington which the challenge to the Director's decision has as elements in it.

ARNOLD J:
So just to follow up on that, are you saying then that the Director's decision needs to take account of these public funding issues in some way?

MR RENNIE QC:
The Director, the basic position is that the Director requires under the rule 240 metres or the nearest practicable distance below 240 metres.

ARNOLD J:
Right, so you say the starting point is 240 metres and you work back basically?

MR RENNIE QC:
Well that's what the rule says with respect Sir, so that's where it is, and you go down the scale. I don't suggest you go down – well actually, with a Monte Carlo type assessment of options, you might be able to do it metre by metre, but you go down the scale to discover at what point the outcome is one which the Director could not justify granting an exemption for under section 37, or could not reasonably regard as being impracticable under the rule, whichever it is that applies, and on any view of it since 2014 that must include consideration of EMAS and it may mean the Director having to be satisfied

that the project is capital limited by the scope of the applicant, which is where the other funding issues would come in. There is, for example, I talked about the bridging of the Cobham Drive – there is actually a whole safety benefit to State Highway 1 from that. So that might not even be a Wellington Airport cost at all, or indeed it might be a shared cost. It may well be that the Land Transport Authority would be concerned to remove the risk of up to 250 tonnes and 300 people in an aircraft landing in the middle of State Highway 1, and that risk, which is assessed to some extent in the cost-benefit analysis in terms of the possible damage to the trolley bus lines, the gas main, the vehicles, is not assessed in terms of a State Highway 1 disruption risk, or a Wellington City traffic disruption risk, and as I understand it the Director's position is that he doesn't have to consider those either because Wellington Airport hasn't put them forward. Our position is directly contrary to that, that the Director's obligation is to operate the rule, not to sit there and just see whether something that comes across he can tick the boxes on and say that it is all right, and our position on that is not confined to Wellington. It's relevant in respect of international airports. It is an international convention. You've heard that the New Zealand Government has a choice between complying or not complying with a standard. It's pretty much bound to, otherwise it's breach of the Convention. It has a choice between adopting or rejecting the recommendation by filing a difference, or adopting only part of the recommendation. It adopted the whole of the recommendation but it did actually do a couple of things in the domestic area, which it's permitted to do, because in the international Convention is what it must meet in its international obligations. In its domestic flying it was perfectly able to make provision for the grandfathering, or grandparenting. It was perfectly able, as indeed it did, to set a cut-off point where it didn't apply to airports where planes with less than 30 seats operated. Those were things that it was able to do, so it has that degree of flexibility, and round the country, in Queenstown, for example, which has been cited as the other international airport of relevance because there are five that currently operate, three compliant, two not. The practicability which converts to feasibility which translates to physical configuration at the end of that runway, we've acknowledged in each Court may, because until it's investigated we won't know, may mean that one cannot achieve 240-metre RESA, but at Wellington

the position is you can achieve it, it's feasible, but they don't want to do it. Now then they say in effect it's not all that likely that it will happen, but of course if it does happen, it's a catastrophe. Their own modelling shows 60 to 100% of people on the plane dying, especially if it comes over the northern end and down the bank. If the plane comes over the bank, just the hull loss on a 777, is greater in value than the cost of doing the RESA.

Now against that, around the world, roughly once a week, one of these things happen, and when you have RESA, as happened in October last year in the States as the Court may know, it works and America still has its Vice President Mr Pence, I don't offer any view on whether that was a positive or negative outcome in a cost-benefit analysis, but these things do happen.

So, Your Honours, moving from there, and I've covered quite a bit of what I had in my first set of notes, I was going to observe, Your Honours, that aviation is a young industry in which from the outset safety was an issue. In fact it's so young an industry that when my father started primary school the Wright Brothers had not yet flown. So incrementally year on year we have targeted zero tolerance for accidents, and zero accidents as an objective, and internationally it's come closer and closer and even though today the American National Institute of Mental Health reports that 6.5% of its population have a phobia of flying of such a level that they will never fly at all, and another 15% have a diagnostically ascertainable phobia but one which is thought to be treatable. Ronald Reagan famously said that when he flew he held the plane up by his own sheer willpower. So we are dealing with something which is more than just money, we're dealing with not only people and people's lives, but we're dealing with the creation of the confidence that will cause people to use aviation facilities. And that's one of the key issues which the original McGregor report, it's in that area of not able to be really financially costed, but which comes into the compliance issue. But as is confirmed, the reference in the case is at 334, I won't go to it, we've now reached the point where two-thirds of fatal and hull loss aviation accidents around the world occur in this landing threshold takeoff area.

As Kenneth Keith observed in one of the Law Commission reports, the development of a consistent international regime of law has been an outstanding and probably the outstanding success in international legal co-operation, and that's where this comes out of ICAO – collective wisdom of about 180 countries.

If Your Honours turn to page 242 in volume 3, you will find a petition for rule change of the 15th of July 1999, and I draw Your Honours' attention to this because this was in fact the start of ALPA's initiative to have the ICAO convention implemented in New Zealand, and it sets out the reasons why, and the fact that it is a petition is of significance because under the statutory authorities by which rules are made, this is how you get a rule change. You actually file a formal petition under the Rules. It's the same petition that you would file under section 37 if you wanted an exemption. It's the same petition that any of the airports could file today if they wanted a modification to the current rule.

Then, as Your Honours have been made aware, so I'm not going to dwell on this part of it, a consultation process takes place, very wide ranging, investigation and submissions, and as I put a little while ago the rule becomes the Minister's rule, and indeed the Minister has a statutory duty on him under section 14(b) of the Act, which is to ensure that New Zealand's obligations under international civil aviation agreements are implemented. It would have been possible for the Minister at some stage to have taken an interest in these proceedings, because the Minister in this case is not the Director, and the Director is not the Minister. But that hasn't happened, and I don't know why.

The rule which was adopted in New Zealand allowing for the fact that the recommendation became mandatory, is essentially in the same form as in ICAO, so nothing hangs on that, and I've noted the domestic exemptions which the Minister made. I've also already noted that the Director has no power to make a rule or to amend a rule.

I've referred to the opportunities for exemption and I draw attention to the fact that the submission to the Minister said that adopting this was in the national

interest and the test which was applied clearly was a national test. I've talked to Your Honours about the way that the airports in this country are configured. The international ones, there are three others which have had international services – Hamilton, Rotorua and Palmerston North – and none of them are compliant as I understand it. Equally I don't think there's any real prospect of any of them again gaining national flights.

There are also three airports which have had regional jet services, or have them. That's to say – sorry, there are two further airports which have had, or currently have regional jet services, Hawkes Bay, which does comply, and Invercargill, which as I understand it does not. And then below that there are about another dozen domestic airports using turbo prop services, which come within the rule. So that's the scope of what is being addressed. And if one looks at that from the national prospective, any airport which does not have to comply with capital intensive projects like this potentially gains an economic advantage against an airport which does comply.

Now emphasis has been put on the proposition that in Wellington's case it was always considered that it wouldn't have to provide more than 90 metres but with respect there is no language saying that. There is language saying that at the time it did not have to provide more than 90 metres. In the pre-consultation, re-submission documents I've shown the Court that as the documents went forward no special position was set apart for Wellington. I respectfully suggest that no one would think that a rule made in the period between 2002 and 2006 was fossilised and would somehow ensure forever that the position would be as it was, and in fact, and this is a matter of course I argued, in the cockpit voice recorder case where the cockpit voice recorder requirements had not been carried over into New Zealand domestic law and to the contrary a difference had been registered. I argued unsuccessfully that the New Zealand domestic law should still be interpreted consistently with the Convention. It didn't do me a great deal of good at the time because the argument failed. The cockpit voice recorder was admitted in evidence and was of considerable assistance in ensuring the acquittal of the captain ironically, but the Government then actually altered the Convention. Now why do I mention that now? Because here in relation to EMAS the position is

different to what it was in the cockpit voice recorder case. In the case of EMAS the New Zealand government has not registered any difference to the 2014 inclusion of EMAS. In the cockpit voice recorder case the New Zealand Government had registered a difference. It is therefore open to Your Honours to conclude that a matter such as the introduction into the international convention of EMAS has at least sufficient effect in New Zealand law that it is a matter that the Director should be required to have regard to. And it is patently clear on the face of the papers that that did not happen. The argument in that regard parallels the argument –

ELIAS CJ:
Sorry. The argument being that it is in context, in the international context, a mandatory relevant consideration?

MR RENNIE QC:
It's an integral part of the recommendation and to that, in that sense it's a matter where the Minister is directed to ensure that the standards are followed, a matter which my submission is that the Director should have regard to the continuing development of that. The introduction of something like that should not depend upon further alteration of the rules when it's just simply a means of achieving compliance with a rule.

Similarly the Director's failure to commence at the 240 or not merely a failure to commence at the 240 metre but indeed a statement in his decision that he didn't have to is in my submission in conflict with the rule.

One of Your Honours asked a question of my friends about what the position is internationally and I just draw to the Court's attention that ALPA filed a detailed affidavit by Mr Greeves and a further reply affidavit by Mr Greeves. He describes the international situation. I'm not proposing to take Your Honours to the points in that affidavit beyond noting that he identifies active plans to introduce EMAS in such countries as United States and in China. There is a slightly amusing aspect to that, which is that the Chinese appeared to have invented it and the Americans appear to have invented it.

I don't think it really matters who invented it but no doubt we will shortly get a tweet telling us.

I've dealt at some length with the issues about cost-benefit analysis and I don't want to suggest that it is inappropriate to carry out such work, but in a prospective project such as this, with complete uncertainty as to such things as what distance might be approved, with a related complete uncertainty as to what project might be consented under the Resource Management Act, with uncertainty as to the available resources to support the project, with widely varying views on the commercial viability and the economic impact of such projects, my submission is that the Director expressing any view of it was more than premature. He did not have the basis upon which to form any informed and reasoned decision, and at the very least there should have been a range of tests to identify not whether a 240-metre RESA was cost-benefit negative or not, but under a variety of assumptions at what point a cost-benefit analysis might indicate positive or negative that it was practicable to do so.

We set out in detail in our submissions other elements of challenge, to the manner of the Director making his decision, and rely on those. Likewise while acknowledging the points that my friends make about the approach of the Court of Appeal, without attempting to do a they said/I say type exercise, it will be of no surprise to Your Honours that ALPA continues to support the outcome of that decision, which is grounded in multiple findings such that even were one part of it to be put aside, our submission is that the final outcome was correct.

ELIAS CJ:
Well that sounds as if you're distancing yourself a bit from the reasoning.

MR RENNIE QC:
There are a couple of elements in the reasoning which don't match what ALPA put forward, and that's why I'm, I don't myself see the utility of identifying those and discussing those and saying why they said this and we said that, because on the basis of this appeal is, of course, a de novo

examination of the issues, and also because we've gone in this appeal in some directions which weren't really covered in the Court of Appeal case at all. I'm content to put it on that basis. I'll just check with my junior.

ELIAS CJ:
Do we have the pleadings here, I haven't checked them –

MR RENNIE QC:
They're volume 1 Your Honour.

ELIAS CJ:
But do we have the statement of claim?

MR RENNIE QC:
I believe so. Tab 5 in volume 1 Your Honour. Tab 4 sorry. So subject to anything I can assist the Court on, in summary in relation to the correct interpretation of the rule, practicable means feasible and if an airport company facing that it is unable to bring itself within section 37 by petition, wishes to seek some concession, then it would really be driven back to having to petition for a rule change, not to attempt to say that its own self-assessment whether endorsed by the Director or not, of its financial situation, meant that it should receive a concession from the plain requirements of the rule.

In relation to the Director's decision, we respectfully say that it was premature. He did not ask the right questions. Indeed he did not even formulate correctly what it was that he was required to consider and decide.

ARNOLD J:
There's something that's slightly puzzling me about what you said, referring to the company's financial position. I mean we don't know what that is, and all the analysis is simply –

MR RENNIE QC:

I'm sorry Sir, I should perhaps have said its economic position or its place in the industry. I'm not suggesting that one conducts an investigation into the financial accounts or determines its capital adequacy or things like that.

ARNOLD J:

Right.

MR RENNIE QC:

My friend –

ARNOLD J:

I mean I had understood that the costs that were considered were the costs of doing an extension beyond the 90. You've raised a number of issues about that, and I understand I think what you're saying there, but that was the limit of the financial assessment of costs, wasn't it? That you simply worked out what was the cost difference between 90 and 140 or 90 and 240, whatever.

MR RENNIE QC:

I understood my friends to say, I think correctly, that an applicant can't come along and say this is going to cost me $100 million and I haven't got $100 million so please give me a concession. But I understood them to say that if they come along with a self-initiated self-described, self-designed, self-costed project, and the cost-benefit analysis is negative, they should then be able to say, it's not practicable. Now the Director, in my submission, should be saying to them, well that mightn't be but show me that nothing is.

ELIAS CJ:

Show me?

MR RENNIE QC:

That nothing is. There are ways, at least identifiable but – on which the Director has not looked at, where the rule could be either complied with or much more nearly complied with at Wellington, but because Wellington hasn't put them up the Director apparently does not feel under any duty, despite the

way the certification process works, does not appear to find any duty to actually require that proper performance.

ARNOLD J:
Well in terms of alternatives you've talked about EMAS but does the evidence deal with other options?

MR RENNIE QC:
I identify, for example, the Director found it's feasible to bridge Cobham Drive. In fact one of the benefits that he identified in his decision in the northerly direction was the removal of that safety hazard, and he's directed to consider safety and yet he has now ticked off on a southern extension, knowing that it's feasible to go north, and thereby preserving what is actually one of the largest safety hazards at Wellington Airport, that's what I'm talking about.

ARNOLD J:
Okay, I just wanted to make sure I understood what you were talking about.

MR RENNIE QC:
Yes.

ELIAS CJ:
I wondered whether you might tell us, you're seeking to have the appeal dismissed and the matter remitted in accordance with directions we are to give. What are the directions that you –

MR RENNIE QC:
We anticipated it would be the correct interpretation of the rule which essentially means what matters are or not able to be considered within the term practicable.

GLAZEBROOK J:
But say we're not with you on that and that we think cost has some relationship with it, what do you say then?

MR RENNIE QC:

Well at each Court level I've accepted that there is a point at which cost becomes relevant. I think the illustration I used from one of the Courts was it may be feasible to tunnel to the South Island but in fact in the national sense it is unaffordable. So in terms of cost there may be some point at which the applicant may call that in aid although personally I would expect that to be called in aid in a section 37 by an applicant rather than relying on practicability. If one has a look through the consultation document notes prior to the Director submitting material to the Minister, there are several references to the rights of submitters on the draft rules being able to, one in particular relates to EMAS. It is said that someone seeking exemption from the effect of the rule could possibly rely on EMAS in support of a petition under section 37. So it's a difficult call as to whether cost comes in under section 37 only or whether there is some ultimate point where cost is of such significance and relevance and cannot be avoided that one might have to consider that in relation to compliance with the rule, but the route out for someone who is in a cost problem is not trying to redefine practicability, the route out is to apply under section 37.

GLAZEBROOK J:

I was really asking if we don't accept that and we think cost has a wider view as the appellants say, what do you say then in terms of – because you do say there were things that weren't taken into account – I think so – is the northern/southern one of them, the EMAS is another, are there any others?

MR RENNIE QC:

The point I made as to the ability to continue to operate in the manner that they do now rather than loading it up with full extensions at each end.

GLAZEBROOK J:

And how is that taken into account because there's still the safety issue that arises. My understanding is that if anything for the way it's operated now with the type of aircraft in fact if it's extended it will be safer for them it just won't be safer for the bigger ones, well it will be similar in respect to – but I might be wrong on that as well.

MR RENNIE QC:

And that's where it gets complicated, Your Honour, and there's reference to this in the consultation documents because at the moment if you takeoff from Wellington under many conditions you are limited as to how much you can carry. So a longer runway for the bigger planes may lead to the smaller planes being loaded more heavily that's one of the many variables – which is why every single flight is individually planned. But I haven't quite answered your question about cost and you're saying if you're not with me on the basis that cost is irrelevant under the rule then how do I sit on that. Well the difficulty on that view of it is not so much whether cost is relevant or not relevant; it is that the rule contains no provision whatsoever to guide the Director as to how he is to evaluate concessions of that kind. It's not a rule which says you must do this or if you don't want to do it then you've got to show the Director A, B, C and D and he may give you a concession. It's just not structured that way.

GLAZEBROOK J:

Although it's not really a concession in the sense that 90 is the rule and above that it's to the extent practicable.

MR RENNIE QC:

Well, yes.

GLAZEBROOK J:

And it is an expectation that if it is practicable, well in fact it's probably a requirement, well I think it is a requirement, if it's practicable then you do go to 240.

MR RENNIE QC:

Well with respect the rule actually says it's 240 or such lesser distance but not less than –

GLAZEBROOK J:

Well exactly –

MR RENNIE QC:

– not less than 90 and this is -

GLAZEBROOK J:

I'm not sure it makes much difference –

MR RENNIE QC:

That was an ALPA-directed debate because we always seem to find that ALPA started at 240 and wanted to be bargained down and the Director said it was 90 and didn't need to be more, so that's, and that's why I still sit strongly on the submission that as the rule did not contain an exemption provision the exemption provision arises under the section with the requirements of that rather than under the rule.

ELLEN FRANCE J:

You talked about I think, I haven't got it down properly, this social and economic view of an airport. So that's something you submit should be taken into account?

MR RENNIE QC:

I put the submission on the basis of why it was that a cost-benefit analysis was not determinative –

ELLEN FRANCE J:

Right.

MR RENNIE QC:

– and I put that not just as a submission originating from me but because that is actually set out at length at the end of the first McGregor cost-benefit analysis which is found at page 392 of bundle 3.

ELIAS CJ:

I'm sorry, I missed the plan reference.

MR RENNIE QC:

392 of bundle 3.

ELIAS CJ:

Thank you.

MR RENNIE QC:

And if Your Honours look at the latter part of the second paragraph under 14.8, and then on from there it refers to society's evaluation of the costs and benefits that are not directly measurable in money terms. And, so the, and the, it's a very proper, professional comment and actually says in the final words in the top of 393: "A cost-benefit analysis is a means of making the best possible information available to government decision makers rather than a mathematical and economic formula for taking decisions." Put that in the context which is where I started about zero injury, zero tolerance of accidents and a point made in our submissions that you actually when you are an aircraft passenger give up significant civil rights for the duration of the trip on the aircraft of which being required to watch a safety video is one of the least.

I don't have anything more to add Your Honours.

ELIAS CJ:

Thank you Mr Rennie.

MR RENNIE QC:

Thank you Your Honour.

ELIAS CJ:

Well if we unwind. Mr Goddard, do you want to be heard in reply?

MR GODDARD QC:

I do briefly Your Honour. Do you want to do that now or tomorrow because -

ELIAS CJ:

How long do you expect to be Mr Goddard?

MR GODDARD QC:

There's a few factual corrections as it were need correcting and one or two other points. I'll be 10 to 15 minutes. But just a bit more than –

ELIAS CJ:

All right. We'll take the evening adjournment, thank you. Thank you counsel.

COURT ADJOURNS: 4.49 PM

COURT RESUMES ON FRIDAY 25 AUGUST AT 2017 AT 09.59 AM

ELIAS CJ:

Yes Mr Goddard, I will just ask Mr Rennie whether, because we pushed him on a bit yesterday, whether there was anything else he wanted to add.

MR RENNIE QC:

Thank you Your Honour. The only thing I was concerned that I might not have made absolutely clear was my position on the grandparenting where my friends were saying to me when I was some –

ELIAS CJ:

Yes. Come forward please.

MR RENNIE QC:

I'm sorry. Were saying to me when I was dealing with that that (1)(b) in the rule had an immediate bite and my point was that's not how it's been administered for 11 years and in fact the notes that went to the Minister said specifically that the extension requirements would only be triggered if and when an airport was either upgraded or extended and (1)(b) must mean with respect what I said it meant because that's not only how it's been administered but that's the purpose that the, was put to the Minister in the approval of the rule. That was the only point I was unsure whether I –

ELIAS CJ:

Is that material before us?

WILLIAM YOUNG J:

Yes. I noted it yesterday as you went through it.

MR RENNIE QC:

Yes. I just thought, it was the only thought I had overnight that I might not have made it sufficiently clear in the slight confusion between taking the objection and my friend suggesting that the rule contradicted it. That was all.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Dealing with that – but for Wellington they still have to comply because it's an international airport.

MR RENNIE QC:

That's correct. The five international airports that currently exist are in the international category and are caught specifically by the Convention. The Director and the Minister have greater freedom under the Convention about what they require in domestic-only airports. That's where the difference bites.

ELIAS CJ:

I had a further question relating to the, oh, what was it? You mentioned, and I think you said that there was in the materials reference to the fact that it had been your client's preference to get a declaratory judgment or something of that sort and then you said it was overtaken by the Wellington thing. I just want to get in my mind the relationship between that. Your contention is it that that the meaning of the rule has not been, or, is a matter of some contest which you wished to have resolved but that the proposal and then the Director's approval of it effectively is an interpretation which you are trying to challenge through these proceedings.

MR RENNIE QC:

Yes, we, in the papers and I could find the reference, there's actually an opinion that was tendered to the Director by ALPA. It's an opinion that Ms Geddis and I prepared and Sir Geoffrey Palmer peer reviewed, which is on the interpretation of the rule.

GLAZEBROOK J:

Have we got that somewhere?

MR RENNIE QC:

Yes, it's in the bundle. I'll find the reference or I'll find Ms Geddis to find the page reference. That was associated with an invitation to the Director to join in an application for a declaratory judgment as to what the rule meant. I regret to say that the opinion came back marked 0/10 by the Director. He simply said he didn't agree with it, without explaining why. The phrase I used yesterday was that that situation collided with the emergence of the Director's decision on the southern runway. So these proceedings were brought to review that decision, but equally to obtain an interpretation which would guide the Director and, for that matter, ALPA, as to how the rule is to be interpreted and applied.

ELIAS CJ:

Is it – because I hadn't really appreciated it – the case that your concern with the decision is that actually it is an indication of a general interpretation which will apply across the board?

MR RENNIE QC:

Exactly so, and that's why I used the word "collided" because ALPA's preference would have been to stay on the general issue but the situation was that what the Director's position on the rule, that is to say, one expressed confidence that he knew what the rule meant coupled with the Director applying it in the way that he said that it meant, meant that the proceedings had to challenge that as well as the general issue.

ELIAS CJ:

Yes, I understand, thank you.

MR RENNIE QC:

The reference, Your Honours, is to the letter to the Director proposing that joint application for a declaratory judgment is volume 5 page 809. The peer reviewed opinion which was sent to the Director is volume 5 page 835.

GLAZEBROOK J:

Can you just go through the – because there seemed to be two strands to your submissions yesterday. The first was the interpretation but the second strand, as I understood, was that more information was needed in any event to apply that interpretation. Can you just summarise that for us again? I have to confess that we had a long day yesterday and it would be useful, I think, before we hear the reply to just have that in our minds before we do hear the reply.

MR RENNIE QC:

Certainly. The submission I made was that the Director's decision – I'll just come back to why I pause on that word in a moment – was premature. He did not have the information upon which he could make a decision. He did not ask the right questions. He misconceived whose responsibility it was to identify the relevant factors. Those were some of the key points that I made.

GLAZEBROOK J:

Can you just go through those relevant factors and what he should have asked for, just summarised again, please?

MR RENNIE QC:

Well, first of all can I just start with why I paused on "decision"? In the High Court, the Director's position was that he had not yet made a decision, and the Director's decision was expressed in the sense of expressing a view with an attached caveat in his decision that this was dependent upon the information that had been presented to him and were that information to change materially, for example, in relation to construction costs, then he reserved the right to revisit it. We were actually in the position, the curious position, in the High Court that ALPA and Wellington Airport were arguing that there was a decision, but the Director had said that there wasn't. Now, what actually came out of that in the High Court was a finding that there was a decision and the whole case since then in the Court of Appeal and now here has proceeded on the basis that the Director has made a decision, although the decision does have certainly conditions and caveats in it and is expressed as a – I would say – preliminary view, the Director says as a view.

Now, the Director had before him a proposal which said that the southern extension might be 100 metres long, 200 metres long, or 300 metres long and as I mentioned yesterday in the Court of Appeal it emerged – I don't mean by that that it had not been disclosed before then but for the purpose of the case it emerged in submissions from my learned friends that the current proposal which has been submitted for a resource consent envisages a southern extension of 355 metres. The Court of Appeal asked counsel for Wellington Airport was it the position that if the ALPA proceedings succeeded the extension would not be built and counsel for Wellington disclaimed that, saying that there were various considerations and negotiations in commercial matters. In other words, it was a response, as I understood, that there might or not be built. So the question of the Director actually making a decision which I call an exemption decision in respect of something whose characteristics are so ill-defined as that is why I say it's premature. How can the Director satisfy himself as to what is practicable?

ELIAS CJ:

Do you mean that the company itself has not indicated unequivocally that it would not be able to proceed if required to comply with the 240 metre?

MR RENNIE QC:

It certainly disclaimed that in the Court of Appeal, Your Honour. I don't know what its position is today.

ELIAS CJ:

When you say it disclaimed it, it did not indicate?

MR RENNIE QC:

Justice Harrison asked counsel whether the position was that if the ALPA case meant that there had to be a further length raised, did that mean that the Wellington extension would not be built, and counsel disclaimed making that submission, saying that there were commercial matters and negotiations with airlines and so on.

ELIAS CJ:

It would have to be a commercial matter, yes.

MR RENNIE QC:

Without for a moment speaking for Wellington, but just speaking for ALPA, the number of airlines that might wish to use it and the extent to which they might use it and the type of aircraft that they might use on it may vary according to what safety provisions exist. There may be airlines who would fly to one with a longer RESA who would not fly to one with a shorter RESA. Or they may use aircraft types different from what they'd prefer to use, so it's an interactive situation.

There is a further issue which comes into practicability and that is that the whole project requires a resource consent and that application for resource consent was due to be heard in April or May of this year. When the Court of Appeal decision came in, various parties including ALPA said that the resource consent hearing should not proceed until the meaning of the rule was determined because there was an appeal to the Supreme Court which was pending and the Environment Court – I think I can fairly say a little grumpily – abandoned that intended hearing on the application of those parties. It was a common view.

ELIAS CJ:

Would the Director's decision as to safety – presumably doesn't get reassessed in the resource management context?

MR RENNIE QC:

Well, I'm not engaged in the resource management proceedings so I'm not personally with them. Just speaking –

ELIAS CJ:

No, I'm just wondering about the interrelationships of the two regimes and the extent to which what is determined here precludes further consideration of safety in the resource management hearing.

MR RENNIE QC:

I certainly – it's my understanding but it's really something which I'd leave Wellington's counsel to speak to, it's my understanding that one of the reasons for seeking the decision from the Director was to be able to inform the resource management hearing as to what was acceptable to the Director in terms of compliance in that area. There is a certain amount of chicken and egg about it because if for the sake of argument for whatever environmental or other reasons the resource consent was not on the scale which Wellington applies for then that might create some limitation on feasibility which would then no doubt be put to the Director in terms of what is practicability. In other words, for the sake of argument if the Environment Court were to say that the extension could be only 100 metres, then the difficulties of providing an additional 150 or more metres of RESA out of a 100 metre extension become apparent and the whole question of what the rule means comes into it, and it's not a cost argument at that stage. It's a feasibility argument. So there is an interaction there. As I said, I'm not familiar – I'm not even slightly familiar, I haven't read the papers for the resource consent hearing – but there would be a general argument under the Resource Management Act that something which was unsafe could not be permitted in terms of a resource consent.

ELIAS CJ:

Well, they do their own cost-benefit analysis, taking into account environmental things. So safety must, one would have thought, entered into that too.

MR RENNIE QC:

The other way that it enters into it – as I perceive it, but as I say I'm not familiar with that. My learned friend Mr Cooke, as I understand, is appearing as counsel for Wellington in the resource consent hearings although he's here for the Director so he's probably uniquely informed to tell Your Honour about that. But as I see it, you could have a situation where the Environment Court, on environmental grounds, would say that an extension should be only, say, 200 metres but on safety grounds, might have to recognise that that was the paramount consideration and authorise 355 metres. So safety can cut both ways in that Court. I think one common view, I believe, of all involved is that

those hearings will be assisted by knowing just exactly what it is that is required under the rule.

ELIAS CJ:

Would your purpose be met by quashing the letter? I'm not sure whether it can be or whether it's capable of that sort of thing. I'm just – it is procedurally quite difficult, this matter, it seems to me, and if what you're saying is that a determination that 90 RESA is satisfactory is premature that that would seem an available option if we were to agree with that.

MR RENNIE QC:

Yes, and indeed my perception on that has been that the Director always intended to reserve to himself the ability to make a fresh decision, although Wellington submitted in the lower Courts that he had lost that opportunity, which was a proposition I simply couldn't follow. I've always been of the view, as this case advanced and it became apparent, that what Wellington's proposal is not what Wellington submitted to the Director but that that was going to have to be done again and quashing the – setting aside the Director's decision, if it is a decision, does in my submission just dispose of that aspect and leave the slate clean for the Director to look at the matter in a correctly informed way, and by that I don't just mean legally informed. I mean informed as to what the proposal is.

ELIAS CJ:

That might be so even if the Director's interpretation of the rule is right, might it not?

MR RENNIE QC:

Yes.

GLAZEBROOK J:

Is that – those are the only, those are the factors you say he needed to be informed of. Do we now go on to a quick summary of the interpretation of the rule or are there other factors that you wanted to draw to our attention that

should have been taken into account by him in terms of the premature argument?

MR RENNIE QC:

Well, Your Honours heard yesterday from my learned friends the proposition that the devolution under the legislation is such that at the company level the company originates a proposal and presents it to the Director and the Director considers it, as I understand their position, on a pass/fail basis that he either approves it or he doesn't approve it. The issues that I was taken with that yesterday were that the Director would have to satisfy himself as to each of the components of the proposition and that he was going to the point of saying that in effect an exemption would be granted from this main requirement of the rule. He couldn't just take on face value those elements that were put together. The classic example here is that Wellington left EMAS out of the consideration altogether and the Director at both his analysis level on his staff and personnel level said as they haven't proposed it I don't have to consider it and there are in my submission – from 2014 that's been part of the international convention and I indicated yesterday that it is not only arguable but a proposition I uphold that as no difference was entered to that by New Zealand that that comes down to be effective. It doesn't require additional implementation in the New Zealand Rules to be relevant and the Director should have looked at it to say is there a way in which the safety objectives and requirements of the rule can be met by a proposal for extension which is different from what the company has put forward, and none of that was done.

It's understandable when one sees that the Director's view is that it's entirely a matter for the company as to what it originates, which is why I said yesterday that effectively the Director by doing that becomes a proponent for that proposal rather than a regulator on it. The proposal comes up and the Director merely has a look to see whether the figures appear to stand up. He looks at – in this case, its cost-benefit analysis and says the cost-benefit analysis is so negative that there's an end to it and doesn't look any further. That's a process error rather than just identifying matters that the Director should look at.

The discipline in terms of the rule as ALPA argues for it is that if the Director were acting in the way that we say the rule is to be applied by the Director then the company would have to put forward the proposal that it thinks is most likely to obtain the approval of the Director, not simply state the approval that it wants and say that the costs are so hopeless that the safety requirements should be set aside. That's true of not just Wellington, where the focus keeps coming back to, but round the country. There are airfields which, in time, will have to consider this if they carry out their announced intentions to extend and seek larger services. From ALPA's point of view, it's critical that what is then put forward is the best meaning, the safest proposal, not merely the proposal that is most convenient to the company. In the papers in relation to Dunedin and it would take me a moment to find the reference but it's an incidental point. Dunedin's submission in response was that they couldn't do 240 metres because they didn't own the land adjacent to the airfield and they saw that as being the end of feasibility and the Director at the time – a different director – the note simply went back, "Better explain to them that it isn't like that. You have to acquire the land and achieve the extension." Dunedin acquired the land and did the extension, whereas the argument my learned friend has put, as I understand it, Dunedin could have just simply said all the land that we have isn't capable of delivering 240 metres and therefore you have to have less, which cannot be consistent.

WILLIAM YOUNG J:
I don't really think that is their argument.

ELIAS CJ:
It's the effect, though, you say of the interpretation.

MR RENNIE QC:
Yes.

WILLIAM YOUNG J:

Well, I think they would say, well, what would be the cost of providing the land would be calculated by reference to a Public Works Act acquisition which presumably would –

MR RENNIE QC:

Yes, I accept I overstated it, yes. Thank you for the opportunity.

GLAZEBROOK J:

I just wondered if you wanted to say anything about the interpretation, because I don't think you did take us to the statute yesterday.

MR RENNIE QC:

To the rule?

GLAZEBROOK J:

Sorry, to the rule, yes.

MR RENNIE QC:

Well, with respect, yes I did because I talked about (1)(b) but I'm happy to do it.

GLAZEBROOK J:

Sorry, it was really more wanting to understand exactly where cost comes in because you did accept it was not just feasibility but I thought it was very much because you were saying that it was 240 and then you went down rather than it was 90 was acceptable which, in fact, is probably the international position which might be why we don't have much on it because it's 90 plus a recommendation only, which is slightly different wording from our rule. Our rule isn't a recommendation, put it that way.

MR RENNIE QC:

Well, we adopted the recommendation as the rule.

GLAZEBROOK J:

As the rule, yes.

MR RENNIE QC:

And therefore in that sense the difference is that here you start at 240 and you can't go below 90. There's an interesting point, the international standard actually allows or identifies the possibility of using EMAS within the 90 to enhance the value of the 90 and although my friend from the Bar yesterday gave an indication that roughly speaking the proposition was that EMAS meant you could have two-thirds of the distance you would have if you didn't have EMAS, the situation depends on which of the two American EMASs or the Chinese EMASs you're using which is part of the investigation which we say the Director should be making, but there are some circumstances in which, as much as double the value could be achieved by having the first 90 metres merely covered in EMAS and that's the kind of analysis that comes into the cost analysis because there is a point obviously where the cost of providing safety is greater than could conceivably be achieved, but the Director simply has taken a single shot scenario from the company saying it can't be done when in fact the ways of doing it are multiple and a number of them are materially better than is the situation here.

I think there's also the inherent difference between ALPA's position and the whole of the basis underlying the cost-benefit analysis, because the cost-benefit analysis identifies quite clearly in fact, as I said yesterday, the assumption is that if a large wide-bodied jet goes off the end of the runway between 60 and 100% of the people on board will die and the aircraft would be destroyed. Now ALPA's position is on the basis that everything possible to be done to ensure that never happens must be done whereas the cost-benefit analysis contemplates there is a point where the cost of doing that is such that one won't do that and the problem with all cost-benefit analyses in my submission is it all depends on the inputs and if you did a cost-benefit analysis on strengthening a building in Christchurch in 2009 you would get a different outcome to doing the same analysis in 2012 because the risk input of the earthquake would vary.

GLAZEBROOK J:

Although that's not the case here, or it's not suggested that's the case here. The risk input might change dependent upon the types of aircraft I take that point that you made earlier.

WILLIAM YOUNG J:

It might have been underdone, the risk assessments may have been underrated and that may be established when there is later an accident, there has been a misunderstanding of the dangers of wind shear or something of that sort.

MR RENNIE QC:

Well indeed, I mean Wellington has a series of metrological dangers which is part of the difficulty of doing the cost-benefit analysis. If I can just illustrate two of the problems with cost-benefit analysis evaluation. The same aircraft running the same distance at Wellington and being an overrun, at Christchurch doesn't even reach the RESA because the runway is twice as long. So when you go looking for statistics to see how often overruns occur in the number of airports it's nearly impossible for them to happen and Auckland and Christchurch the runways are, roughly, speaking, double the length of the Wellington runway. So when you're looking for across industry statistics as to overruns that you can feed into your cost-benefit analysis at that point in time the statistical basis that you have being an average across all airports is likely to understate the actual likelihood of a place like Wellington, that's the first problem that you have in doing that. The second problem that you have, you're dealing with an event which is rare but catastrophic although, on average, something like 40 to 45 of these accidents a year occur based on the international statistics quoted in the reports.

So the next thing is you have to work out which part of the world you take your statistic from because the overrun statistics in, for the sake of argument, Asia are significantly worse than the overrun statistics in New Zealand or Australia. But if you are going to extend the runway and bring in Asian planes do you then use Asian long distance statistics or do you use South Pacific long distance statistics? Do the overruns come from the pilots or do the overruns

come from the runway or do the overruns come from the air traffic control? And so the evaluation of all these multiple factors which in a systematic evaluation could be done by running multiple scenarios and seeing where the middle point arises. That's not the way that any of these cost-benefit analyses have been done.

ELIAS CJ:

In your submissions you make the point that the analysis effectively redoes the analysis that was done in coming to the 240 metres.

MR RENNIE QC:

Yes.

ELIAS CJ:

One thing that I certainly want to ask the appellants in reply is what weight comes in but the fact that that standard has been set? I mean, not using standard and recommendation but that 240 metres has been identified. Was there any further comment you wanted to make on that?

MR RENNIE QC:

The weight to be given?

ELIAS CJ:

Well, I just wondered on the approach they take it just seems to me it's being redone, and as we have discussed, if you did the cost-benefit analysis that they talk about in terms of the 90 metres it might not pass muster but they have to adopt that. So how do you factor in the fact that it is a standard that is looked to and you're not just doing it as a green fields exercise?

MR RENNIE QC:

Yes. Well, our first perspective on the rule making process, and I showed you the letter in which our petition to have the whole process start, our perspective was that there should be a 240-metre requirement at least all international airfields full stop. The McGregor report of 2002, which is the one that I read from with the cost-benefit cautioning yesterday, that arrived at a finding that at

individual international airports, of which there were slightly more because either there were or were anticipated to be international services from Hamilton, Rotorua, and Palmerston North at the time, so they were actually looking at eight, and they found that 240 metres could be justified in their cost-benefit analysis at all the airports except Wellington and Queenstown. So the decision that was then made at the national interest level was that 240 metres would be the standard for everybody but that at Queenstown and Wellington, they would be grandfathered at 90 metres and on both of those the cost-benefit analysis was negative. No dispute about that. Significantly negative. But the aggregation of the benefits nationally of having the national standard were held when the rule came in to justify having the 240 metre standard across those airports, the exception then being that the two that were grandfathered – or grandparented was the phrase that I preferred – those two provided that they were already instrument runways, so that provision for the system coming in wasn't caught, they were able to stay at 90 metres until such time – if ever – they extended their runways.

Now, there's a slight exception to that which is that in fact neither of them were at 90 metres at that point in time. In Wellington's case, Wellington achieved that by bridging the road at the southern end which previously was – well, the pilots called it a ditch. The danger was that you ended up in the ditch rather than on the runway. Well, that was bridged and that plus this method of using starter extensions at each end made Wellington compliant with 90 metres.

At Queenstown, similarly, some construction work was required to achieve 90 metres. In fact, there's been recent litigation over the tax deductibility of that, which was determined by, I think, Justice Brown, from memory, and I think may have gone on appeal, the issue being what the tax status was of the construction works which were required, and they both took some time to be done. That's where the overall position now sits. The position – you'll gather now arises in our reading of the rule is that with this proposed extension the RESA requirement must now be accommodated.

ELIAS CJ:

Yes, thank you, Mr Rennie.

MR RENNIE QC:

I appreciate the opportunity to clarify those matters, thank you, Your Honours.

ELIAS CJ:

Thank you. Yes, Mr Goddard.

MR GODDARD QC:

I think the Court has probably already got some reply notes from me that I handed up, as it turns out, prematurely, although I'll shortly be making a submission that that's the only thing that happened prematurely in this context.

Let me start with item 1. Ten minutes ago I was going to say that this confusion had been cleared up, but I think it's just come back. It's important to understand the structure of the rule and the timeframes for compliance, so if I could ask the Court to look at Part 139, which is in my authorities under tab 3, and to go to first of all, perhaps, 139.11 which is on page 14 of the rule.

The Director grants a certificate under 139.9 and 139.11 says the Director may not specify an expiry date that's later than five years after the date on which the certificate is granted, so the maximum duration of a certificate is five years.

Then what 139.13 says is that the holder of a current certificate that wishes to continue to exercise the privileges of the certificate i.e. wants to continue to operate as an aerodrome must apply for a new certificate under 139.7. So you're put back into the same process as if you started completely from scratch and then in the course of doing that the various design requirements will be considered by reference – among other things – to 139.51 which is over on 20.

ELIAS CJ:

Mr Goddard, sorry, you probably explained this and I've just forgotten, but the certificate, what's the certificate for?

MR GODDARD QC:

In order to operate an aerodrome you have to have a certificate and the Act makes provision for the grant of certificates to various participants in the system.

ELIAS CJ:

Yes, but we are not dealing with –

WILLIAM YOUNG J:

We are. It comes into the argument.

GLAZEBROOK J:

Basically you're saying you have to make a new application and if you are an international carrier you have to comply with (a) and there's no grandfathering at all. If it had to be 240, then it has to be 240 on renewal.

WILLIAM YOUNG J:

There are two issues, though. One that there was never any grandfathering for international flights.

MR GODDARD QC:

There was through to 2011. The Court may remember there was that piece of that rule that my learned friend handed up. It wasn't grandfathering because as my learned friend Mr Rennie acknowledged it wasn't as if Wellington or Queenstown were at 90 metres, but they were given some leeway through to 2011 to get to 90. But it was always the backdrop to this rule that as international airports they would have to comply every five years with the requirements in 139.51 and in particular the requirements in relation to the length of RESA.

WILLIAM YOUNG J:

There's a more awkward issue in relation to this 139.51 because on one reading that – I'd read it that it meant as soon as you renewed your operator's certificate you needed to comply.

MR GODDARD QC:

And fortunately we don't need to resolve that now because this is about Wellington and Wellington is under (1).

WILLIAM YOUNG J:

There was the point that Mr Rennie made that in fact his argument as to that was supported by a note in the material.

GLAZEBROOK J:

Whereabouts were you, 51(b)(2)?

WILLIAM YOUNG J:

This is page 20, 139.51(b)(2).

MR GODDARD QC:

(b)(2) and again Your Honour is exactly right. The way this has been approached is to say that if you're not under (1) because there's no doubt but that (1) applies regardless of when your certificate was first issued. These are orders so if you're caught by any of them you have to comply. The way that (2) has been administered is not to say that it bites on every renewal which one might read it as given the renewal structure but to say if you have a certificate dating back to 2002 it doesn't matter that it gets renewed in '07. We don't need to deal with that now because what is quite clear for international airports like Wellington and Queenstown which are the ones that have an immediate practical problem with going beyond 90 is that (1) catches them and so there's no grandparenting and that was never suggested. And the reason that's important, of course, is that it sheds light on the understanding of the rule at the time it was consulted on and at the time it was adopted. I will come back – no let me deal with that now.

So I've dealt with item 1 of my roadmap and now I'm just going to jump over 2 and 3 for the moment and come back to them and deal with 4 – so what was proposed in 2006 and in the extended period leading up to it. What was proposed as an adoption of the rule in essentially the form we now see which was minimum of 90 and up to 240 so, you know, as far as practical, up to 240. The cost-benefit analysis that was carried out proceeded on the basis that a rule of that kind would be satisfied at Wellington and Queenstown by 90 metre RESAs because the cost of going beyond that was so great that it was not practicable to have a longer RESA and having proceeded on that basis the range of costs assessed for each of those airports and fed into the national assessment was the cost range for 90 metres done in various ways, paint-on or small extensions or big extensions and then the consultation in the notice of proposed rule making was all predicated on the costs associated with going to 90 at Wellington, let's focus on Wellington. So the question that was being asked of the public was should we make a rule that requires 90 and up to 240 if practicable, and the way that the cost of adopting that rule for New Zealand Inc was assessed was by adding up the costs at each airport with 240 metre costs at the international airports except Wellington and Queenstown and 90 metres at Wellington and Queenstown.

So the assumption was that the cost of adopting a rule in this form which requires you to go beyond 90 if practicable was the cost associated of going to 90 at Wellington on existing traffic, you know, and natural growth predictions and then existing understandings of construction costs risks, all those things, sure.

So the world, New Zealand, was consulted on the basis of the assumption that that's how the practicable test would work and that those were the costs associated with adopting it and I think I went to those and my learned friend Mr Cooke went to those yesterday. What I said yesterday was not that the cost-benefit analysis was given to the Minister, at least I don't think I said that. What I said in my roadmap, and hopefully in my oral submissions, was that the ministerial decision making was predicated on that analysis, and the reason I said that is, I don't know what the Minister had in front of him. My learned friend Mr Rennie is right that there is no reference to attaching the

cost-benefit analysis in the letter to the Minister, and we don't know what the Minister might have called for, what it might have discussed with officials along the way because that's not what's been, you know, challenged here, but what is very clear is that in the information that went to the Minister the assurance that the mandatory cost-benefit analysis, the mandatory analysis of costs, sorry, had been carried out and that it supported adopting the rule at the national level was based on this cost-benefit analysis, and we see that in volume 4 of the case on appeal. The letter to the Minister that my learned friend took the Court to is at page 575.

ELIAS CJ:
In what volume?

MR GODDARD QC:
Sorry, Your Honour, volume 4, 575. And the Minister is stepped through the proposed amendments, their objective, the Minister's rule making powers. Over on 577 in the course of setting out the statutory procedures and consultation that's occurred, second to last paragraph: "An external consultant was also engaged to carry out a comprehensive cost-benefit analysis on the proposal to require RESA at the seven aerodromes that would be directly affected by the rule to determine that the application of RESA would meet the criteria of the Act for safety at reasonable cost", which was the criterion at the time the process began although it had broadened out by the time the rule was actually made in '06.

And then if we turn over to 580, sorry, perhaps beginning at 579 there's a heading, "Matters to be taken into account". The matters required to be taken into account by 33(1) are dealt with in the first paragraph and then fourth paragraph: "Section 33(2) of the Act requires that in making an ordinary rule the Minister must have regard to, and give such weight, as the Minister considers appropriate in each case, to the following matters", so the Minister is reminded of the matters that he must have regard to. And when we turn over the page to 580 the Minister is reminded that one of the things that he's required to have regard to by the new (fa) or at least is the costs of implementing measures for which the rule is being proposed. It explains that

where RESA have not been included in aerodrome planning, major capital costs: "An external consultant was engaged to carry out an analysis of the costs and benefits of implementing the proposed RESA rules at aerodromes serving international operations. The costs and benefits analysis showed that it is in New Zealand's interest to implement the requirements for RESA." That's a reference to an analysis of what the rule would require predicated on only 90 metres being practicable at Wellington. And the answer reached which was obviously an important factor in the Minister's decision making, that when you aggregate all of this at a national level it is in New Zealand's interest to implement the requirements assumes that what these requirements actually require at Wellington is 90. That when you say 90 plus up to 240 if practicable what is required at Wellington is 90 and if you use those numbers then, yes, it is in New Zealand's interests but you would actually have had to give different advice to the Minister if you'd used 240.

So the whole of this process is predicated on an expectation of a particular outcome in relation to Wellington which on my friend's argument is wrong, on his interpretation argument. It's much more sensible for all the reasons I ran through yesterday but including but not limited to this legislative history point, to read practicable as taking into account cost, that's how it was done in the lead up to the rule and if you don't do it then because you can always paint on a RESA and move a few lights if you adopt my learned friend's preferred interpretation, the one suggested in the opinion and adopted by the Court of Appeal, known means and resources, you will always be able to do a longer RESA.

ARNOLD J:

There is an oddity in this though that, I mean this analysis shows that from the point of view of New Zealand Inc it was worth requiring a RESA of 90 metres even though in respect of two of the airports the cost-benefit analysis would not justify it that nevertheless the rule was adopted. Now when you come to look at an individual airport such as Wellington and you say, well, it's decided to extend its runway and the purpose of that is to generate more activity at the airport for it, and for the benefit of the region as a whole, so if you look not at New Zealand Inc, but Wellington and Associated Region Inc, there's going to

be a beneficial outcome of this enterprise. Why would it be irrational for the Director in those circumstances to say, well, given that we're extending it for that purpose, and there is going to be a benefit to New Zealand Inc, although particularly focused perhaps on the Wellington region, I think we – would it be irrational for him to say I think we should achieve a little more in the way of safety. We should have an incremental addition, which is the exactly the language used in this document.

MR GODDARD QC:

There are two, maybe three questions in there. First of all, the reason for a national aggregate approach in relation to the 90 metres is because the 90 metres is the standard, and one of the goals of the adoption of standards under the Chicago Convention is to promote uniformity, my friend's point, and New Zealand is obviously reluctant to exercise the ability it has under Article 38 to notify a difference, or departure, which it would have to do if even one airport failed to meet the 90. So it makes sense at the national level to say well we're going to strive in good faith nationally to achieve that base level, and to do that aggregate analysis.

GLAZEBROOK J:

But you can then put the rule in that said, we do 90, you didn't have to have the extension.

MR GODDARD QC:

So then we've gone further and said, and we'll do more, you must do more if that's practicable, and the question then, there are two questions, so there were three in there. The next is, what does it mean to say we'll do more if practicable, and the Court's essentially been offered two ways of reading that. One is to say that the assessment of practicability can take into account the cost and benefits associated with going further. Not must, I think that's quite a good argument, we don't need to get there today, because the challenge is to the Director having taken it into account, so it's all that's required is that can be taken into account, and so the option is that it can be taken into account and that it's open to the Director to conclude that if costs greatly exceed, his language, are disproportionate to mine – I spend too much time reading public

law articles – benefits, then it is open to the Director to say, well I don't think it's practicable because of this disproportion and I'm going to accept the 90-metre RESA. Now it's perfectly consistent with that for the Director to give a range of weights to safety as compared with costs, and I answered some questions about that yesterday I think, and to have regard to the overall context in which that decision is being made, including the context of an extension, and I'll come to how you do that in just a second. So again the interpretation that I'm contending for, that Mr Cooke for the Director is contending for, is that in assessing what is practicable, one of the things that the Director is able to take into account is the relationship between costs and benefits and it would be surprising if he couldn't. It would have, inconsistent with the legislative history, inconsistent with context, because otherwise there'd only be one answer, and kind of inconsistent with common sense, really, you know, don't have so many resources that we, you know, throw things at them, and inconsistent with the legislative history of the primary legislation, I should a well, which was never intended to delete the importance of pursuing safety balanced against cost and other objectives so – and the alternative interpretation in the Courts being offered is one which says cost-benefit analysis should not be taken into account, that's what the Court of Appeal said, and that except in some residual way, which has never really been explained, cost is irrelevant and if that was right that would produce the very surprising consequence I suggested. So on the interpretation issue the clear choice before the Court, in my submission –

ARNOLD J:

I understand that.

MR GODDARD QC:

Then there's your third part.

ARNOLD J:

Yes, which was really the point of the question. Would it be irrational for the Director to factor into his consideration the fact that substantial benefits are expected to flow from the extended airport to the region, and that justifies requiring an incremental increase in the safety net?

MR GODDARD QC:

First, that's not the issue before the Court. There's no challenge to that and I don't have to take a position on that because that's not what's happened.

GLAZEBROOK J:

Well I don't really accept that.

WILLIAM YOUNG J:

It's the way it's put actually. I mean the proposition really has to be, is it irrational for the Director not to take that approach.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

Yes, so that's the issue, and it's a very different question.

GLAZEBROOK J:

Or is it a relevant consideration that he should be taking into account, so you can actually put it positively as well.

MR GODDARD QC:

Is it a mandatory relevant consideration.

GLAZEBROOK J:

Yes, which then comes into should he have been considering those alternatives like, the other sort of alternatives, either a shorter or longer or intermediate and balancing it against the benefits.

MR GODDARD QC:

Yes, I'll come back to that other options thing in a moment, but – I mean this issue is raised squarely by my friend's submissions and by Your Honour's question, and I deal with it on the second page of my page of my reply, items 8 and 9 are directed exactly at this.

So I think the first point to make is that the source of funds for the extension is a red herring. The issue for the Director is the practicability of a longer RESA so what I say in my 8.1 is the issue is costs and benefits to New Zealand attributable to a longer RESA. What changes, if you have a longer RESA, and what are the pros and cons of that. It's not affordability for the airport company, and her Honour Justice France asked some questions about that yesterday which captured that nicely. You can't say, oh we've had a terrible year so no RESA, or we've had a great year so it's, you know, it just is strictly irrelevant. So that's something that can't be taken into account in my submission. That would be an irrelevant consideration. Either way you can't plead poverty. You don't have to build more because you happened to have done well. So it's strictly irrelevant –

GLAZEBROOK J:
I don't think that's the argument that's being made – well, you're probably coming onto that.

MR GODDARD QC:
I am.

GLAZEBROOK J:
But the issue is really when you're looking at New Zealand Inc, if you have a whole pile of benefits from an airport extension, can you or should you take those into account in the New Zealand Inc sense, not the particular benefits to the particular company, because that will obviously depend on how it's funded, and a whole pile of other things that, one, I'm sure the company doesn't want to hand over for a start, and also would be hopeless, but it's a New Zealand Inc argument, or as Justice Arnold put it, it would have to be more of a regional argument possibly in a…

MR GODDARD QC:
I think Wellington is still part of New Zealand so, you know, what benefits –

GLAZEBROOK J:

No, but it's going to be looking more because I mean Auckland might say well you don't need it because we'll just have them all coming into Auckland is what I'm saying.

MR GODDARD QC:

And that we certainly wouldn't accept was a proper analysis.

GLAZEBROOK J:

No, exactly.

MR GODDARD QC:

A shocking suggestion. So I think that means my 8.1 is uncontroversial. So you don't look at affordability of the airport company, which means the underlying financial performance of the airport company is irrelevant. It means the financial merits of the runway extension are irrelevant. It doesn't matter if it gets off the ground commercially, so to speak, or whether it has to be funded by some public body or not. The sources of funding, all irrelevant, all red herrings. But what about the fact that there's presumably some good reason for doing it, and this is where I think I ended a little bit at cross-purposes with Your Honour Justice Young yesterday because I think Your Honour was asking me one question and I was answering a different one, and that's never good. So what I've tried to do is split out the analysis in a way which responds directly to the questions that Your Honours are now asking me.

So the first point is just to clarify how to think about opportunity costs and benefits in relation to a longer RESA and what might be relevant to considering its practicability. First, and I just wanted to be clear about what I was saying on this, if there's no airport extension, if we've just got the airport in the picture that I showed the Court, and RESAs are extended at 150 metres at each end by painting on lines 150 metres in, the landing distance available reduces by 300 metres, two lots of 150, but, and this is part of the point that Your Honour was making, the takeoff run available and accelerate-stop distance available reduced by 150 metres because when you're starting you

can still drive right out to the end of that RESA at one end and takeoff from it, but you still have to stop, you know, you're not trying to finish that process before you get to the other one, and that means there are going to be significant opportunity costs. My understanding is actually that is primarily driven by the landing distance available and the distance required to land a jet, especially when it's wet. But the point is anyway there are significant opportunity costs.

Now, and this I think engages directly with the questions, suppose the airports, and I use that language, that general language, airport deliberately or aerodrome, extended by 300 metres of which 200 metres is going to be used as runway extension and 100 metres for extended RESAs, and another way of looking at this is to say, suppose the airport comes to you saying I'm going to do 300 and I want it all to be runway, and the Director will say, hang on, what about taking some of it, Your Honour Justice Glazebrook, 100 metres of it say for extending the RESAs a bit from 90 to 140 at each end, not the full 240 but some. How do you think about that? Well it helps I think to break it down into its two components. The runway extension of 200 metres, obviously increases the landing distance available and the takeoff run available by 200 metres, and then the additional RESA lengths, the extra 50 metres of RESA at each end, don't affect the landing distance available, but you do get an extra 50 metres of takeoff run available because you can use the RESA at one end as a starter extension. Then you think separately about those in the context of considering practicability. The increase in declared distances in 9.3, the 200 provides operational benefits, but those aren't relevant to the RESA cost-benefit analysis because they don't result from the additional RESA length. There's no logical connection between having more RESA and achieving those benefits. You can do that without more RESA. On the other hand, 9.6, if there's an operational benefit, this is a question Your Honour Justice Young was asking me and I was answering by reference to a different question, sorry about that, if there's an operational benefit from the 50 metre increase in the TORA/ASDA in 9.4, in other words because you've got 100 metres more of RESA, those takeoff distances go up by 50, then Your Honour is exactly right, that that is a benefit from having that extra

RESA which, if it existed, would be relevant to the RESA cost-benefit analysis. But –

WILLIAM YOUNG J:

I think you've actually made it a more complicated question really. The proposition that you're facing is that the exercise that the Director should engage in in relation to any airport is whether the cost of providing the RESA recommended for a particular length of declared runway, should be balanced against the benefit of being able to operate an aerodrome with that declared length of runway. You're dealing with subsets of it, but that's the simple –

GLAZEBROOK J:

And your answer is that it's economically irrelevant, which is an answer but not necessarily one that, well – no, sorry, it's not an answer. It is true but not necessarily something that I think would necessarily in the context of this leg and in the context of looking at safety, international reputation, because having some plane go off the end of the runway and killing everybody on board in Wellington, is not going to be of particularly good significance to New Zealand Inc, even if you factor in the sort of costs that you do when you're looking at cost-benefit analysis.

MR GODDARD QC:

And that, I think, takes me back to my submission that there are a range of ways in which the Director can properly approach this, including giving weightings to things like confidence and international reputation and all those other matters, but it's not irrelevant, which is what ALPA contending for, to look at the balance between costs and benefits

GLAZEBROOK J:

To be honest I'm with you on that, but I mean I can now say, because we now have, well subject to looking more closely at the papers, but this is a different question that I'm asking you now. So assume I'm with you on cost and benefit, and that it was perfectly rational to take that into account, but is that the end of the matter and actually did they take into account international reputation and confidence in the cost-benefit analysis?

MR GODDARD QC:

Well it doesn't necessarily have to be incorporated into the cost-benefit analysis –

GLAZEBROOK J:

Well it does if that's all that's being looked at.

MR GODDARD QC:

No, that's not how the Director talked about it. The Director carried out his own assessment. He said significantly influenced and informed by the cost-benefit analysis, but he –

GLAZEBROOK J:

Well does he say, and I also think about the international reputation and the right to life that's contained in the Bill of Rights that's in the – when I was deciding whether the cost-benefit analysis should be accepted.

MR GODDARD QC:

And if there had been a complaint that he hadn't done that, then he would doubtless have filed evidence explaining whether or not he did, but I think we have to come back –

GLAZEBROOK J:

Well aren't you just stuck with what you've got.

MR GODDARD QC:

Well I don't think so Your Honour and this is another point I want to come back to is that my learned friend's criticism of the Director's decision has ranged widely, yesterday and today, and a whole raft of criticisms that were not advanced in the pleading, and that were not canvassed at first instance, have now been put forward, and really, with respect, it's not the way judicial review works. That you on a second appeal, even first appeal, ideally not even at first instance, suddenly come up with all these other things that you say are not satisfactory in relation to the decision. What we don't know is what the Director would have said about what he did or did not consider in

what he makes clear in his file note is a broader assessment, and what we don't know is whether it is, there would be any expert support, for example, for the proposition that if you turned your mind to those things you would necessarily reach a different decision. So we don't know that he didn't consider it, and that complaint was never made. The only complaint at that time related to arresting systems, and that's been dealt with.

GLAZEBROOK J:
Well it's not going to be very helpful to you if comments are in the well this wasn't pleaded so we can't look at it, that we haven't actually a clue whether it's going to be okay or not.

MR GODDARD QC:
Well there's, it is helpful in relation to these decisions because it's common ground. I think even the Director has got it, eventually that they create a legitimate expectation on the part of Wellington Airport.

ELIAS CJ:
Is that why you didn't maintain after the High Court that this wasn't –

GLAZEBROOK J:
That was the Director.

ELIAS CJ:
Sorry, I'm getting confused as to, yes.

MR GODDARD QC:
We've always said, and my learned friend Mr Rennie made this point, that we have been in complete agreement that there was –

ELIAS CJ:
Yes, well of course, because as you say a legitimate expectation in this connection is extremely valuable.

MR GODDARD QC:

It is extremely valuable, and it's also important for the whole of the rest of the process to make any sense, including as my learned friend Mr Rennie said, the resource management process. Sure, there is the potential for some sort of feedback but basically going into that you need to know what, for any given extension, will be extra runway that will influence additional traffic, and what will be RESA, which will have safety implications, because otherwise you can't do the analysis required under the Resource Management Act, which looks at all the implications for the people including, you know, what, more flights there will be, which depends on how you break up anything you build, what the associated benefits and detriments are. So this was a sensible way to do it. It was a practical way to do it. And that is something again which I think we have been in agreement on. The Director went through a fairly extended process, made inquiries, didn't just take whatever was first given to him, went back with further questions, commissioned his own economist to do a review of the McGregor report, and the review done by Covec for NZALPA, so the Director had before him three analyses by economists, had before him comments from NZALPA in relation to the original proposal identifying particular concerns, so there was a whole process designed to flush out issues that should be considered. Now sure you can challenge a process, you can challenge a decision maker's decision on the basis that reasonable inquiries haven't been made, but that's not the challenge here. There's nothing of that kind pleaded. So it just hasn't been dealt with in the evidence. There's no proper basis for it in my submission.

Second, you can say there's a mandatory relevant consideration which hasn't been considered, but the only one of those that was pleaded, and that's been properly argued and considered, is the EMAS issue. Although the language was broader it hasn't considered all construction options, in particular EMAS, no other construction option was actually pleaded, or the subject of evidence, so the Cobham Drive bridging point that my friend developed yesterday afternoon is not a point that was raised in the pleadings. I'm pretty confident that there would be good answers to why that wouldn't change the calculus, but they're not before the Court because it wasn't in issue. And really, and this loops to my sort of point 5 on the first page of my note, these

miscellaneous criticisms aren't pleaded, apart from EMAS, they're not relevant to the issues before the Court. Of course it's open to the Director to consider additional factors, or to make further inquiries, all of the things that Your Honour Justice Glazebrook and Your Honour Justice Arnold have put to me are things that might be relevant, could be relevant. They may well have been taken into account. He can do so either on his own motion or in response to issues raised by the consultation process. But refraining from doing so is not a reviewable error unless the factor is a mandatory relevant consideration or the Director acted unreasonably including failing to make appropriate inquiries. That's not alleged here, and there's no proper basis for such an allegation. So this is a bit of a red herring.

The other problem with my learned friend's prematurity argument is that matters were not as –

GLAZEBROOK J:
Can I just check whether you agree that was pleaded or not, I'm sorry, I haven't gone back to the pleadings.

ELIAS CJ:
I'm just trying to go through the pleadings at the moment.

MR GODDARD QC:
EMAS was pleaded.

GLAZEBROOK J:
No I understand that. Was the premature issue pleaded?

MR GODDARD QC:
No it wasn't pleaded, not at all.

GLAZEBROOK J:
Sorry, I'm just making sure.

MR GODDARD QC:

Yes, sorry, so I'm saying very firmly the whole prematurity thing was not pleaded.

GLAZEBROOK J:

Yes, I'm just double checking.

MR GODDARD QC:

But nor are the, some of the issues that my learned friend suggests were not pinned down, should have been written down –

ELIAS CJ:

I think, to be fair, they weren't made as matters of complaint. They were background so that we could understand the interpretation argument.

MR RENNIE QC:

Yes, if Your Honour pleases, there is another aspect that my friend may not be aware of which is that there was a third cause of action in the High Court, in which we contended that we had been denied our opportunity to consult and that is not a matter that has been appealed. But the affidavit evidence that we filed set out the very matters my friend has referred to, such as the Cobham Drive bridge and other matters, as being matters that we would have wished to be consulted on and Justice Clark held against us on that and said that there was not a further requirement to consult, but that was the shape of the case. It is, with respect, not correct to say we didn't raise them.

ELIAS CJ:

Nevertheless they're not pursued Mr Rennie so I suppose –

MR RENNIE QC:

No, no, they're exactly background, as Your Honour says, but to suggest that I thought them all up yesterday is, with respect, not a fair reflection of the history of the case.

MR GODDARD QC:

I'm grateful to my learned friend but I do, he's certainly right that there was a consultation process complaint no longer pursued, and these were suggestions of things that might have been the subject of more consultation and more interaction, but the point is they do not feature as part of the challenge made here, and they were not addressed in that way, they were responded to from a process perspective.

The matters that my learned friend suggested were uncertain, or they turned up at a late stage, are just wrong on the facts –

ELIAS CJ:

I just really wonder whether you're right to say that prematurity isn't flagged in the pleadings because the issue of –

MR GODDARD QC:

So tab 4, volume 1, the focus is very much on the, it was, the factual background was pleaded –

ELIAS CJ:

The point is raised that the proposal has changed and that it's the interpretation.

MR GODDARD QC:

Well the interpretation issue – so the grounds for relief that are set out in paragraphs 30 and following, firstly 30 to 32 deal with the interpretation issue, which as my learned friend quite rightly says has always been at the forefront of ALPA's complaint. What does it mean. So it's not prematurity, it's just what does it mean. Then mistake of law. So then we get a focus on asking the wrong question mistakes of law, 33(a). the interpretation issue, wrong test practicable, same point. Erroneous relied on the safety case, that's because you shouldn't be looking at costs, so that's the same argument again. (d), the Director in considering what is 'practicable' failed to consider all construction options in current airport use, including the use of … (EMAS), and therefore

erred in reaching his conclusion that it would not be 'practicable'." So that's a mandatory relevant consideration.

ELIAS CJ:

It's not just EMAS, is it, as pleaded, it's all the options.

MR GODDARD QC:

But no other options were identified.

GLAZEBROOK J:

Well I suppose the other option is the 140 or the 240, which the Director did actually consider, at least a 140. Was it 140, it was 140?

MR GODDARD QC:

Yes it was 140. The CBA considered at least a 140 and in my submission the Director actually considered the whole range because –

GLAZEBROOK J:

Well I understand because –

MR GODDARD QC:

You can interpret, in a sensible way –

GLAZEBROOK J:

You obviously are not going to go through every metre, one would have thought.

MR GODDARD QC:

It would be a good money spinner for cost-benefit analysis authors but not helpful to anyone else. And then an issue, then a question of law. So there's absolutely no –

ELIAS CJ:

Well the breach of natural justice point is now gone.

MR GODDARD QC:
That's gone.

ELIAS CJ:
Yes.

MR GODDARD QC:
So the complaints in there about the process are no longer live, and I do just want to emphasise that things were not as up in the air as my learned friend suggests. So the colour of –

ELIAS CJ:
Sorry, but I suppose this is just in response to the submission you made, perhaps I didn't record it correctly, but I thought you had said there was nothing in the pleadings?

MR GODDARD QC:
About prematurity, that was not argued –

ELIAS CJ:
No, I thought about failure to consult or is that –

MR GODDARD QC:
No, no, there was to, failure to consult –

ELIAS CJ:
I'm sorry. It was just, yes, you were talking about the prematurity.

MR GODDARD QC:
I'm talking about prematurity, and there is no pleading, should not have agreed to make a decision at that time because, you know –

GLAZEBROOK J:
I suppose there's a slight difficulty because really these pleadings are predicated on ALPA's interpretation of the provision. Now if we take an interpretation of the provision that's somewhat in between the view of ALPA

and the appellants, and I'm not making a comment on that, but obviously some of the questions you're being asked now do have an intermediate interpretation, probably possibly, but certainly not accepting the interpretation of ALPA in any event, then it's difficult to – really what I was putting to your friend right at the beginning, Mr Cooke, in the sense that is it all a matter of weight in terms of all of these considerations and therefore it's not reviewable, and that seems to be the view that's being put forward.

MR GODDARD QC:

And that is what I'm saying in response to Your Honour is that I don't think an approach which identified the relevance of some of these other factors, you know, reputation, confidence, would be a middle approach. It's what certainly the airport has always understood the position to be, that there's a wide range of factors the Director can properly take into account.

ELIAS CJ:

What about the factor that 240 metres is identified in the international commitment and in the Rules as what you're aiming for, if it's practicable.

MR GODDARD QC:

Is recommended if practicable, and I would say that's the key thing.

ELIAS CJ:

So how does it come into the weight in your cost-benefit analysis because it's really redoing what's been set by the rule. If that's desirable how do you factor that in?

MR GODDARD QC:

It's only desirable where it's practicable at a particular airport. So the whole structure of that rule assumes that you have to carry out an airport-specific inquiry.

ELIAS CJ:

So it all comes down to the interpretation of the rule.

MR GODDARD QC:

Yes.

ELIAS CJ:

Whether it does start with 240 metres, or whether it's…

MR GODDARD QC:

I don't think so. I'd have thought the order in which you asked the question was a complete red herring as long as you ask yourself the right questions, and that's point 6. It's not beginning at 240 metres. Sure you have to say is 240 metres practicable, and that was done.

WILLIAM YOUNG J:

You wouldn't ask that question if it wasn't in the Rules.

MR GODDARD QC:

Exactly. So the reason that was asked was because the rule requires it to be posed and you have to do it unless it's not practicable. So that is the weight that the rule gives to 240 metres, is that it requires you to do it unless it's not practicable, so it forces you to confront that question and the Director did confront exactly that question. Your Honour is also right to say, and in a sense my learned friend's right to say, that you must then get as close to that as is practicable, and that's why it's necessary to consider intermediate points, but coming back to Your Honour Justice Glazebrook's point, you don't do 239 then 238, unless you're trying to get to sleep, you know, you're counting backwards. Apparently counting backwards from 300 in threes is supposed to be very good, rather than just counting upwards I'm told. I tried it the other night, didn't work. But you could do it with RESAs. Counting RESAs, it's a new opportunity. So you don't do every interval at one or three. You take some sensible intermediate points and ask, well, does it change, and if it flips then obviously you're going to have to work out where in between it flips, and then stand back and put all the other softer, non-mathematical factors in to the analysis as well, absolutely accept they're in there, cost-benefit analysis is not the be all and end all of this. But there's absolutely no basis or suggestion here that wasn't done.

ELIAS CJ:

Sorry, no basis for thinking it wasn't done?

MR GODDARD QC:

Yes.

ELIAS CJ:

Right.

MR GODDARD QC:

And every basis for thinking it was actually, I can go further than that –

ELIAS CJ:

Well, if you are simply looking at the letter, what are you relying on in the letter to show that it's done.

MR GODDARD QC:

So in the file note?

ELIAS CJ:

Yes.

MR GODDARD QC:

I'm looking at the fact that the Director said he was significantly influenced by the cost-benefit analysis, which looks at intermediate points, and if you get the same result at 240 and 140, there's no reason to think you're going to get something different in between because of the nature of the –

GLAZEBROOK J:

Sorry, the Minister says that, because I thought he hadn't seen that.

MR GODDARD QC:

No, no, not the Minister, I'm talking about the Director.

ELIAS CJ:

The Director.

GLAZEBROOK J:
Sorry, the Director. I 'm sorry, I meant the Director.

MR GODDARD QC:
No, so it's the cost-benefit analysis does the 140, and what the Director, so let's go to the Director's file note rather than me making submissions about it in an abstract sort of way. So we're in volume 5.

GLAZEBROOK J:
We're so used to Ministers making decisions.

MR GODDARD QC:
It's usually what the Court is asking me pressing questions about. But for a change we've got a Director in, for a change I'm for an interested party. I also have to keep remembering what I'm doing here today. So page 847. So volume 5, page 847 is the file note by the Director of the decision that he made, and what we see on page 848 under the heading "Information on which my decision is based" is, "I accept the validity of the analysis provided by McGregor & Co concerning the probability of overruns and undershoots." So that's what are the risks we're managing, that's fine. "Further I consider that the associated cost/benefit analysis identifies the costs and benefits of providing RESA in excess of 90." So he's not saying it just does 240, he's saying it provides the costs and benefits of providing RESA in excess of 90, because it gives you that intermediate point and you can as a, you know, reasonable numerate and logical person, interpolate in between those, and he goes on to say he's read the critiques, he's conducted his own peer review and having gone through that process he says, at the foot of that section, about two-thirds of the way down the page, "I have relied significantly on the McGregor report in forming my conclusions about the acceptability of WIAL's decision." Then he goes on to his view.

So first of all he's not saying I just rubber stamped the McGregor report, he's saying he's comfortable that it gets the risks right, and that it works as a cost-benefit analysis and he looks at the critiques of it and the peer reviews and says he's relied significantly on it. Then he goes on to his view and the

primary basis for his view is that he's persuaded by the information he's read that a 90-metre RESA, and that includes, you know, ALPA submissions, Mr Rennie's opinion, all that material, "that a 90-metre RESA provides an acceptable level of safety at the airport, in light of the nature of operations, their frequency, the type of aircraft using the aerodrome, and the consequent risk attendant upon these operations". It looks at the operations that are at greatest risk, looks at the probabilities of the various types of error, so he's thought through all of that.

At the top of page 849: "This demonstrates that there is a very low risk of overrun or undershoot occurrences," and a 90-metre RESA will capture 76% of those, of landing overruns, 73% of undershoots, 53% of takeoff overruns." So he says well that's an acceptable level of safety appropriate in light of Wellington's status as an international airport and key domestic hub. But he goes on to look at the cost-benefit practicability. "Cost/Benefit – Practicability of alternatives." They are related. Then he's gone on to turn his mind to cost-benefit considerations. Whether WIAL has appropriately assessed the practicability of longer alternatives. These further mitigate the residual risk. "In considering this question, I have adopted the approach to considering 'practicability' that was proposed in the memo provided to me by Mr Ford." And gets down to the last paragraph on 849: "In light of the discussion above, I am of the view that the safety benefits provided by the construction of a longer RESA are small, when calculated with reference to the very low probability of an adverse event in the first place, combined with the level of effectiveness of the 90m RESA."'

Over the page: "My view on this is supported by the cost-benefit analysis performed by McGregor, and independently peer reviewed by Castalia. That analysis concludes that the safety benefits associated with the extension of the RESA (to either 140m or 240m)." Your Honour was asking about whether the Director had considered intermediate. This is an explicit reference to the intermediate approach.

GLAZEBROOK J:
I think I was accepting he had.

MR GODDARD QC:

Yes, sorry, I thought – greatly exceeded by the cost.

GLAZEBROOK J:

But not each metre.

MR GODDARD QC:

Not each, or three backwards, yes, the sleep inducing one.

GLAZEBROOK J:

I do find it hard to read into this that he's thought about anything other than cost-benefit.

WILLIAM YOUNG J:

Well he must have thought about what was in the Covec report because he's dismissed it.

MR GODDARD QC:

He's thought about the Covec report, he's thought about the Castalia peer review. He's had before him all the material that was forwarded to him and the memo to him and all the stuff attached is at 829. So 829 is the decision paper that was put up to him and that talks about the background of all of this. It deals with construction and what's practicable. If we look over at 830 there's a reference to WIAL safety benefit report and McGregor & Co, but what you also see, for example, references to, over the page at 831, to the report attached, third paragraph, from Manager Aeronautical Services Unit which contains other material as well, that's in there. The independent review by, it says Castalian, but I think it's Castalia. Communication with NZALPA and all the relevant correspondence with NZALPA is under tab 4, hopefully all photocopied the right way up. Summary, "I am of the view that there is sufficient information available to you at this point to support your informed consideration of this matter." Then we've got a list of attachments over on 832. An internal report from the manager of Aeronautical Services, correspondence from WIAL and reports. All the correspondence with WIAL basically in the various reports original and subsequent from McGregor & Co,

and the Covec, and the Castalia review tab 3, NZALPA legal opinion, and more correspondence. So there's quite a lot of material before him. He says he's taken it into account and he said that he's been significantly, what was his language, relied significantly, on the McGregor report, but it's quite clear he's considered a range of other sources of information.

WILLIAM YOUNG J:

Just pausing there. The Covec report refers to the possible ongoing demand: "A reduction in demand for air travel to and from Wellington following an accident due to increased passenger perception of risk, and corresponding economic losses for airlines, the airport and other businesses in Wellington." Now McGregor must have come back and responded to that?

MR GODDARD QC:

Yes, so you've got the Covec review which just for the other members of the Court is at volume 4, 629 and following.

WILLIAM YOUNG J:

The bit I've read from is page 630.

MR GODDARD QC:

Yes, and the one of the criticisms is that some costs of accidents are omitted, and that's the thing Your Honour has just mentioned, and then McGregor responded –

GLAZEBROOK J:

Can you just pause a moment.

MR GODDARD QC:

Sorry Your Honour. So this is the Covec review commissioned by the Air Line Pilots' Association. So they've gone to Covec and said here are some, presumably, here are some things we think have been left out, do you think they matter, and Covec's presumably been given some questions itself, and so what we get are a range of things that are said to have been left out and one of them, as Your Honour Justice Young pointed out, is on page 630: "2.1

Some costs of accidents are omitted." And then 2.3, this kind of picks up one of Your Honour Justice Arnold's points, "2.2 The analysis assumes a risk-neutral decision-maker." And what they're saying here is maybe you should be risk-averse. Issues are raised about the period of analysis and the discount rate and the amount of sensitivity testing that's undertaken. Probabilities under section 3 and conclusions that are summarised, and two things happened after that. First is that McGregor responded to that and that response is in volume 5 under tab 721, and all those are worked through. The issue about consequential and intangible accident costs is dealt with on page 722, paragraph 9, and the point is made that those are factored in. Consequential and intangible accident costs and they're used as proxy, numbers used for proxy.

Then the issue about risk neutrality, it's explained where the numbers come from. The Ministry of Transport's estimates of road crashes based on a willingness-to-pay technique, which is what the national authority normally uses, may be some airline passengers who have a higher willingness to pay. They're not really saying well you're paying with other people's money. At the time, in 2002, this was discussed, and for the sake of consistency the road values were used, to do otherwise would have necessitated some heroic assumptions to alter values. "Anyway, in the current circumstances and various parameter values, aviation passengers' willingness-to-pay would need to be significantly (more than 10 times) higher to make any significant difference." And that's the point, so the point's been made yes, maybe there is room for waiting, but look at how much it would have to be before you'd get to a different answer.

So all of this is dealt with in here and then very sensibly the Director, having received such conflicting information, I'm sorry, I just noticed the time.

ELIAS CJ:

Yes, carry on.

MR GODDARD QC:

Went to get his own peer review, and that's at page 761 and following, from Castalia. And concludes, after going through a range of the issues that have been raised, that the cost-benefit analysis provides a sound basis for reaching that conclusion. So all of that and more was before the Director when he made his decision. I've got just a couple more points to make but perhaps we should …

ELIAS CJ:

Yes, we'll take the break now, thank you.

COURT ADJOURNS: 11.33 AM
COURT RESUMES: 11.46 AM

MR GODDARD QC:

Your Honour, the end is, as they say, nigh. I do just want to deal with a couple of the respects in which my learned friend suggested that matters were up in the air and changing significantly at a late stage, and that this was somehow a problem with the Director's decision. Now my primary submission on that is just that's not pleaded, hasn't been a feature of the case, and we shouldn't be going there. But the examples that my learned friend gave are actually also factually wrong. So first of all my point 2. The suggestion that the 355-metre proposal was introduced in the Court of Appeal for the first time, which is how my friend began. I asked the Court to look at the affidavit from the Chief Executive of Wellington International Airport, Mr Sanderson, which is in volume 2 under tab 13. He explains the background to the decision making on lengths, refers at paragraph 10 to a report received in November 2013 suggesting an extension of approximately 350 metres. So that was in the evidence filed before the High Court hearing, and then goes on at 17, over the page on 181, to say: "The current proposal is that WIAL will extend its runway 355 m south towards Cook Strait at an approximate cost of NZD$330m."

So this is not something that emerged out of nowhere in the Court of Appeal. There's been a careful planning process and in the evidence that was before

the High Court the exact 355 number was in play. So me and my learned friend seem to suggest that the cost figures for extending the runway, and therefore the cost figures for each metre of RESA, were approximate and inaccurate, but of course the Court pointed this out to my learned friend, the report he went to was actually the old one in relation to extending north, not the current one in relation to extending south. So item 3 in my road map, if we go to the relevant McGregor report, which is in volume 5 at page 788, the basis of what was assumed is actually in the box on page 789, first the estimated cost per metre of between .933 to 1.167 and says they've used the lower estimate, which of course is conservative in the sense that it favours spending, building the RESA rather than running against it, and where that's come from is explained at 792. If we look at paragraph 8 it's said, and this is the case at the time that: "The precise length of the runway extension is to be determined but at this early concept engineering stage three extensions are considered: 100m, 200m, and 300m. Each of these extensions would be accompanied by a 60m strip end plus a 90m RESA. The concept costs are estimated to be in the order of NZD 0.933 to NZD 1.167." And it's noted in footnote 3 that "typically at the pre-feasibility stage … accuracy of cost estimates are plus or minus 30%." Depends on the nature of the works. The lower cost has been used.

So this is based on engineering work at pre-feasibility stage. It's been done, the uncertainties around the parameters are noted and that's been fed into it, and the way that uncertainty at this time, because of course this is being written before a final decision has been made on what an appropriate extension is, is to be pick three different possible extensions and see whether it matters, and the answer is that it doesn't.

It's also, I think, important to note that the Director knew what he didn't know, and was conscious that he was making a preliminary decision before some of these things had landed. So if we keep volume 5 out, if we go back to that decision of the Director at page 847 of volume 5, and we just look at the foot of page 850. The Director carefully noted that his view has been informed by the information provided to him by Wellington Airport about "among other things, the cost of extending the RESA, and the nature of their proposed

operations at the airport. If these things were to change materially, or there were to a significant change in the regulatory requirements, I would need to revisit my view." So he knew what he did or didn't know. These were known unknowns, or at least known uncertainties, and he's caveated what he's decided by reference to the need to revisit if there are material changes. So again the fact that this decision was made before these things have been finally pinned down, an approach that everyone I think agrees is sensible, is not one that in any way goes to the validity of the approach adopted at this time, or to its reasonableness.

That's my items 2 and 3 in my reply notes. Item 7, I don't think need to spend too much time on this. The existence of a section 37 exemption power in the Act, that my friend spent a little bit of time on yesterday, isn't a reason to narrow or read down the concept of what's practicable, as that term is used in the RESA rules. The concept of practicability in that rule comes from the international instrument. Under that, and under the rule, the first question, of course, must be what is required to comply with it. It's only if you can't comply that you need to seek an exemption under section 37. So you've still got to answer the question, well what is required in order to comply with this obligation to go up to 240 if practicable, or close as practicable, and for all the reasons I've gone through, if the practicable limitation is to do any work, it must reflect cost, so the trade-off between costs and safety, otherwise you'd always have to have the 240-metre RESA, because it can always be done with known means and resources – painters and electricians.

So really the, where all those reply points take me, and particularly the exchange I had with the Court about what the Director can and can't do, is captured in 10, at the very end of my reply note. The Director reached a view supported but not based only on the cost-benefit analysis and the various critiques of it, that regardless of length of runway extension additional RESA length was not practicable because costs were disproportionate to benefits, and those were mostly safety benefits. He asked the right question, which is, is it practicable, having regard to all relevant factors that have been drawn to my attention, in particular the cost of doing it, and in particular safety benefits. He reached a view that it was open to him to reach. There is no challenge left

on foot to the process he followed, the extent of the inquiry, but there's no basis on which it could be faulted in any event, and thus no basis on which this could be set aside.

Unless there's anything I can assist with?

ELIAS CJ:
No, thank you Mr Goddard. Yes Mr Cooke.

MR COOKE QC:
Thank you Your Honours. I'm first grateful to my learned friend for in some ways covering some of the territory that is appropriately dealt with by way of reply, particularly in terms of material such as taking identifying with more precision the kind of materials that were taken into account by the Director in providing the view that he did to Wellington Airport.

What I would like to do by way of reply, given what my learned friend has covered, is really address two questions. The big question that's been raised by my learned friend Mr Goddard this morning about the relevance of the benefits of the airport extension, in terms of maybe profitability for the airport or the regional benefit, and then I want to deal with some other issues of correction, with respect, in respect of my learned friend Mr Rennie's submissions.

Dealing first with that big question, the one that was raised this morning with my learned friend, there's a degree of irony about it because as I understand it what's been said is, well, bearing in mind the potential economic benefit of the runway extension for the Wellington region and possibly nationally for the economy, is that could not some of the benefit flowing from that extension be used for a bit more RESA, and shouldn't that really have been taken into account by the Director in conducting an assessment of what he found acceptable under the Rules. The irony about that is what this case was about was the suggestion by ALPA that the Director's analysis should have been much narrower. That the Director should have focused purely on whether it was possible or feasible to conduct an extension for the purpose of the RESA,

or to take into account costs as a significant factor in making that assessment was inconsistent with the proper interpretation of the meaning of "practicable" in the Rules, and we've really come almost full circle to say, actually it's the other way round. The Director's approach was much too narrow, and that what the Director should have been doing was taking into account the economic and other advantages flowing from Wellington Airport's proposed extension and then made an assessment in light of those broader economic and social advantages, what could be expected by way of practicability for the RESA at Wellington Airport. So –

ELIAS CJ:
Well isn't that though – if feasibility is not the standard, and if you are adopting some sort of cost-benefit analysis, that it is necessary to –

MR COOKE QC:
To bring in those wider things.

ELIAS CJ:
Yes, yes.

MR COOKE QC:
Yes, I understand the point.

ELIAS CJ:
They are linked, they're not inconsistent.

MR COOKE QC:
And I'm not suggesting they're inconsistent but I'm just saying we're suddenly flicked over to a very, a fundamentally different proposition from the Director's analysis should have been that much narrower, to a much broader analysis of, wider economic and social benefits, and I know my learned friend Mr Goddard has spent some time on this, I want to sort of address that point by focusing on two responses I think to that proposition, the Director should be engaged in that kind of activity. The first is to say, as a matter of interpretation of these

rules, that that is not what you would be expecting the Director to do, and I'll come onto that in a moment.

GLAZEBROOK J:

Although you do expect him to take into account opportunity costs or don't you subscribe to that view?

MR COOKE QC:

Well opportunity costs wasn't the focus of the position but I do accept opportunity costs are taken into account, are addressed in the incremental way in terms of looking at the cost that is involved in either an extension, it will either be the physical cost of extension or the cost of losing runway and then therefore air traffic activity. But one way, and the focus of the analysis has been to look at the actual cost of extending, but one way of focusing on what happens here is that the Director took into account the cost that would be involved of an extension to Wellington Airport. In doing that, you know, taking into account that cost, realising it was substantial, it was assumed that the cost of that would be met if it was required. Whether that arose from greater profitability of Wellington Airport because of the extended airport generated more income for it, or whether it was thought that for the purposes of the regional economy, or the national economy, that the governments believed it was good for the region and therefore public resource was properly allocated to it, the Director didn't address his mind to those wider economic considerations. You can say he assumed that wherever the money was going to come from, it would be available to attend to a necessary extension if that was required as a matter of practicability at Wellington Airport. He didn't address whether it was going to be beneficial for the regional economy and if so to what extent. He assumed that whatever was necessary, practicable for the purposes of the RESA, would be met from whatever source. So in a way –

ELIAS CJ:

So you say he's able to assume that?

MR COOKE QC:

Well he did assume that. For him it was irrelevant where the money was coming from. If it was required for safety purposes to have it, it will come.

GLAZEBROOK J:

Well if required for safety purposes, it's just not practicable.

MR COOKE QC:

Yes.

GLAZEBROOK J:

Because 240 is required unless –

MR COOKE QC:

I'm using required, in fact, I wasn't focusing on the word. If it was practicable for the purpose of the –

GLAZEBROOK J:

But it's a circular argument because if practicability is just looked at in terms of the cost-benefit analysis then it doesn't matter where the money comes from, if practicability actually takes into account opportunity costs and on the other side benefits then it does – well it doesn't matter where the money's coming from, because it doesn't matter whether the airport company could pay for it or not, we've agreed with Mr Goddard on that, but it does, but if you do take benefits into account on the other side then practicability takes a different view.

MR COOKE QC:

And it's not just –

GLAZEBROOK J:

If the benefits are 500, and you do take it into account, and the cost is 20, i.e. on a cost-benefit analysis, well then it might not be unreasonable to expect it to be done if you do take into account the 500, rather than merely the incremental cost.

MR COOKE QC:

But it's not, but the Director's approach doesn't just assume whether or not the airport is profitable. It's whether or not there was going to be the public investment of funds into what is regarded as in the national or regional economy. The Director just has to assume that the money will be available.

GLAZEBROOK J:

I'm agreeing with you that's totally irrelevant, but that's not an answer to the question as to whether benefits come in. How it's funded it irrelevant. Whether it's commercially viable is irrelevant.

MR COOKE QC:

But also whether it is socially beneficial or economically beneficial to the region or the nation is also not something that you would expect the Director to be looking at.

ARNOLD J:

Well, I mean, it is explicitly a factor in section 33 in terms of the making of the rules whether the proposed rule assists economic development and so on.

MR COOKE QC:

I guess as we exchanged in the primary submissions about when those factors became relevant or not, we identified that as being the cost factor being there as to demonstrate that that must have been a relevant consideration. But the fact that it's in the list doesn't mean it will bite in terms of …

ELIAS CJ:

In that way.

MR COOKE QC:

In that way, yes.

ELIAS CJ:

So you say it's an indication that costs are relevant to the subsequent application, but not to …

MR COOKE QC:

Yes, and that goes to my other point, which is really the function of the Director. The Director's role is to focus on aviation safety and standards in that context. These are rules formulated by boffins to be implemented by boffins, if I can put it that way. The Director is one of the boffins. He's focusing on safety issues. You wouldn't expect him to be analysing national or region economic policy questions and deciding in the context of a rule that is promulgated in a very technical area of aviation safety to work out what is practicable. You would be expecting him to look at exactly what he did look at, and what he did look at involved extensive material, that is, what is the safety advantage of having 240 or some distance between 90 and 240 and what are the costs of implementing that safety advantage. That by itself engages an extensive potential area of inquiry. But it doesn't change whether or not an airport extension will be accurately predicted as providing regional or economic benefit or not. The inquiry that the rule has contemplated of the Director of Civil Aviation is much more prescriptive in terms of what is contemplated. Within the context of what the Director contemplates, there is still quite a wealth of information that can be relevant and that's the materials that my learned friend Mr Goddard took the Court through.

ELIAS CJ:

So you say it's the safety and cost dimensions of the RESA?

MR COOKE QC:

Yes.

GLAZEBROOK J:

I'm not sure why we sort of pick out a couple, then, because it says 240 unless practicable. If you're only going to pick out a couple of the things in section 33, why not go to the ALPA interpretation, which says it means feasible. So it's not just a – because you could say that the Director doesn't

actually really know all that much about costs, either. Certainly nothing about costs of construction. I mean, obviously you have to take advice on that.

MR COOKE QC:

I don't think that's really correct in terms of the regulatory role of the Director would be – he would be expected to know things about the cost of constructing airports because his role is to certify airports, certify the attributes or the things they have at their airports for the safety functions. So you would expect that that falls within –

GLAZEBROOK J:

Well you'd expect he'd be able to do that but not have detailed knowledge of the cost of construction I wouldn't have thought.

MR COOKE QC:

Well, obviously you need to be provided with information about that but it's, what I'm saying it's well and truly within the Director's province. This whole area of certification of aerodromes and various standards of infrastructure that you are obliged to have at aerodromes for certain categories of operation inherently involved bringing into the kind of things that were in the cost-benefit analysis. You look at the cost of doing this, and you look at the implications of doing it in terms of the flights in and out of the aerodrome. So that is the scope of the analysis you would expect the Director to engage in, and what you would expect in these kind of technical rules in a technical area where the Director has to assess what is practicable. It's not the Director's function to engage in an economic analysis of the regional benefits to the economy, and it should be neutral whether or not it does do that, and there'll be a degree of speculation about whether it does or not, is in the end for the Director not going to be material to decide on the question is it practicable to expect this work to be done by extension work at Wellington Airport, to make it in accordance with the rule requiring a 240 metre RESA if that was practicable.

And that, in a sense, also addresses Your Honour the Chief Justice's question, where do you get the assessment of 240 metres, because the –

ELIAS CJ:

How does it come in, yes.

MR COOKE QC:

Yes. And it comes in, we're only ever doing this whole exercise –

ELIAS CJ:

Yes, I understand that.

MR COOKE QC:

Because the Director has to look in a disciplined way, from a safety regulator's perspective, is this something that we can practicably expect of Wellington Airport, and bear in mind the key information really in the McGregor report is just how low the safety risk is, and how you don't really achieve much, say additional safety advantage by engaging in this very expensive exercise of going further into Cook Strait with your extension. So, and that is what you would expect the Director to be looking at and focusing on in terms of the, what the Rules require of him, and although my learned friend identified most of the reports, and the information that went to the Director for that purpose.

There's just one other I should mention which is the CAA's own analysis of those various reports, the Covec report and the Castalia review. There's also the CAA itself engaged in an analysis of that material and that's in volume 5 at page 730. So that's the Aeronautical Services Unit assessment commenting on this other material and that, in terms of giving the information to the Director to all, of what's been put forward, that also includes as appendix 4 on page 747, that's an ironic page to use, but 747, appendix 4 is providing detailed information on what ALPA's concerns about the proposals are, and does that over a three page appendix. So we not only have McGregor 1 for north, McGregor 2 for south, we have the Covec report form ALPA, that's reviewed by Castalia, it's commented on by McGregor as well. We get the Aeronautical Services Unit going in as material, then you get McGregor south. So there's no shortage of very detailed assessment of the practicability of requiring this extension at Wellington Airport. It's not an economic analysis of

the regional benefits to the Wellington economy. It is focusing on the Director's function, which is to assess what is practicable for the operations of Wellington Airport and its environment.

So that's my response to the main point that seems to have troubled the Court. I do then want to move on to a series of other issues. One of the things I wanted to also build on in response to some of the submissions of my learned friend Mr Rennie about the impact of the Court of Appeal's decision on other aerodromes, is just to get this clear. You remember there was a kind of a dispute between us about what the impact of, perhaps I can invite Your Honours just to go back to the rule and if we go on the case on appeal is best, volume 4 at page 591, and Your Honours will recall the exchanges all counsel have made about the so-called grandfathering in rule 139.51(b). The first page I've what – I've handed up to the Court is, is advice to the Court about which aerodromes are affected by the Court of Appeal decision. So if you go to my diagram, my table, the first column is the one that's affected by rule 139.51(b)(1), that's the international operations, and you see that's Wellington and Queenstown, both of which have 90-metre RESAs, but 90 by 90 is length then width, and just so you also know, the words, the numbers in bracket next to each of the airports is the date of certification. You'll see the next column is 139.51(b)(2), that is –

WILLIAM YOUNG J:
So that's when they're certified to, or when they were first certified?

MR COOKE QC:
When the next certification comes around. I'll come in a moment to whether that matters, but the next one, 139.51(b)(2), that's the aerodrome certification first issued after 12 October and the runway is used for 30 seats or more, that captures Paraparaumu and Hokitika and those two airports you see have 90 and 91 RESAs. Whakatane is in a little bit of a different position. Whakatane is presently, there is a proposal for a 30 seat operation to fly from Whakatane's airport. That hasn't yet happened, but of course you can understand what will happen as a consequence. If it does start at Whakatane, the Court of Appeal's judgment bites, what do you need to do about the

existing 90-metre RESA at Whakatane. So you should footnote Whakatane because at the moment it's not –

ELIAS CJ:

That arises when its certification runs out, does it?

MR COOKE QC:

Well actually can I just, I'll come to that point in a moment.

ELIAS CJ:

Yes, that's fine.

MR COOKE QC:

Because there's another little wrinkle with that, but all I need to say about Whakatane, I put it in red in this table, but it's only in red because at that moment that issue is arising because there is a proposal for a 30 seat operation to start there.

ELIAS CJ:

I see, yes.

MR COOKE QC:

It's not yet happened but that's, it's a red situation because they've got a Court of Appeal issue –

GLAZEBROOK J:

Does it really matter? I mean if the Court of Appeal's interpretation is right, then it's just a bit too bad that these are affected. If it's not right, well it doesn't matter anyway because they're not affected.

MR COOKE QC:

I understand that point. I'm only correcting the factual record.

ELIAS CJ:

And they're not non-complying at the moment because they have certification.

MR COOKE QC:
Well I will come to that in a second.

ELIAS CJ:
Okay.

GLAZEBROOK J:
But even that, I mean we're not going to be basing a decision as to what the rule means on whether unfortunately some might or might not be compliant with it.

MR COOKE QC:
And I'm not developing an argument that you should, I'm just trying to correct the factual record.

GLAZEBROOK J:
I doubt we're even going to put it into the judgment because it's not going to be in the least bit relevant.

MR COOKE QC:
Fine.

WILLIAM YOUNG J:
Isn't it easy enough – okay.

GLAZEBROOK J:
I mean it might be relevant for Wellington.

ELLEN FRANCE J:
I think it's useful just to be clear about what the factual position is, for myself.

MR COOKE QC:
Yes, that's the point, and I will get to the next bit I'm going to get to. This is the only other airport that's affected, is Rotorua, and Rotorua is affected because it engaged in an extension, and it has, you'll see 220, and 110-metre RESAs. But the other implication of this, we're talking about this all arising on

recertification. Can I just invite Your Honours to go back to page 591 of bundle 4, and turn over the page to 592, and look at rule 139.101(4): "A holder of an aerodrome operating certificate must, except as provided in rule 191.102, continue to meet the standards and comply with the requirements of Subpart B prescribed for aerodrome certification under this Part."

So there is an ongoing, and you might recall this in my principal submissions, I said there was, when I referred to people looking at the back of my gown, worrying about what I was going to say, there is a provision that requires on time compliance. So whether it just is an issue that is part to certification, is at least has got to be subject to what 139.101(4) says, and you see there the exception in 139.101(4) is, except as provided in 139.102, and 139.102 was the provision I handed up thinking that Your Honours didn't already have it, which gave Wellington and Queenstown as the current international operations until, the end, 12 October 2011 to get up to 90 metres, and as I say, as I've covered, both Wellington and Queenstown –

ELIAS CJ:
So that's spent?

MR COOKE QC:
That's spent , it's now repealed.

ELIAS CJ:
Yes, so there is no cut-out under 139.101(4) left.

MR COOKE QC:
Yes. So whether it does fall on recertification I really don't think that's correct, but it is true that before this, the effect of the Court of Appeal decision would suddenly cause pandemonium, the reality is that you would require a disciplined reassessment at each of the aerodromes and the Director hasn't done anything following the Court of Appeal decision to say, well actually Wellington you're not compliant, the decision is under appeal, and there would need to be a disciplined assessment of, even following the Court of Appeal's approach, but it is true that in a sense the Court of Appeal's judgment has

kind of put the position of aerodromes in a kind of holding pattern, because the Director doesn't really know what the test is, and if you think about the situation in Whakatane where there is an operator who wants to operate a 30 seat aircraft at that airport, what do they need to do. So actually the Court of Appeal judgment is causing an immediate difficulty in terms of how you go about the task of aerodrome certification.

That's all I needed to say about that. the next point I wanted to address relates to the next document, it's all stapled together, but the next document I've got in the bundle I've handed up, which is a response to my learned friend Mr Rennie's argument that actually from 2014 Annex 14 had been amended to make EMAS mandatory and that the implementation or the interpretation of New Zealand Rules need to be undertaken in a way that is consistent with New Zealand's now international obligations.

GLAZEBROOK J:
I wasn't actually sure that it said it was, he said it was mandatory, that it had been recognised, wasn't it? I hadn't understood this argument.

MR RENNIE:
No I didn't say it was mandatory, Your Honours, I simply said that it was recognised as the international standard and flowed down, that was all.

GLAZEBROOK J:
That would be my understanding of the argument.

MR COOKE QC:
Well the only thing, what I'm responding to is the submission based on the Annex 13 case, the cockpit voice recorder case where my learned friend said well this is different from that case because we don't have a registered difference from the international obligations and we've now got from 2014 EMAS in the international obligation and we need to interpret the New Zealand rule in that context so that's the submission I'm responding to, and it's just to note that there has been a change to Annex 14 and I have put in the version of this that shows how it has been changed but in terms of the

actual obligation, if you go – I've just provided Your Honours with excerpts, it is what is page 14 of the document under paragraph 3.5, runway end safety areas. You'll see at the bottom of the page is the international standard that we're considering when I mean safety area –

GLAZEBROOK J:
I think I've lost you again. I don't have a page, I see it's at the top, I've found it.

MR COOKE QC:
Yes, I'm sorry. So if you go down to the bottom of what is page 14, what is now becoming 3.5.3 and you've got the 90-metre distance for codes 3 and 4 and 1 and 2 in the instrument ones. Then you get the new phrase over the page: "If an arresting system is installed the above length may be reduced based on the design specification of the system subject to acceptance by the state." So what the change is is that you can now go beneath 90 under the standard if you've got EMAS but that doesn't materially affect the interpretation of the New Zealand Rules. That would, in terms of the standards say that you can actually have less than 90 if you've got an EMAS and that doesn't have any material impact on how you interpret the New Zealand Rules. In a similar way the recommendation says for 240 but the recommendation includes a reduction of the recommended distance as EMAS as well but with respect –

ELIAS CJ:
Yes you can't go below the 90 metres because of the terms of the New Zealand Rules.

MR COOKE QC:
Yes.

ELIAS CJ:
But the argument, as I understood it, was that when setting the what is the appropriate RESA this is one of the ways in which, or things that you'd take into account?

MR COOKE QC:

Well certainly in the international material is a permissible consideration.

ELIAS CJ:

Yes.

MR COOKE QC:

But that doesn't mean that becomes mandatory under the New Zealand rule to consider EMAS.

ELIAS CJ:

No, but it's an indication of the sort of considerations if you say it's impracticable to go to 240 metres, the sort of thing that you would expect the Director to be considering, shorter distances, other combinations, it's no more than that really.

MR COOKE QC:

I think 10. – anyway, there is no doubt that EMAS is generally relevant to the question of RESA but what the Director, and that was the advice in a sense to the Director but the Director formed the view that only 90 metres was practicable at Wellington Airport and they were providing the full 90. So once that analysis had been done whether or not there was EMAS in the further distances that the Director thought were impracticable becomes a material is a way of responding to that. So the Director hasn't treated EMAS as not something that would be looked at, the Director has just decided in the facts of this case EMAS doesn't take the analysis any further.

The only other thing, unless Your Honours had any other questions really was –

WILLIAM YOUNG J:

The last page of that document is quite interesting.

MR COOKE QC:

There's a repetition I think of the – are you talking about the diagram, Your Honour?

WILLIAM YOUNG J:

No, I'm talking about where it says it was nine, it becomes 10 runway end safety areas, that page there.

MR COOKE QC:

Yes, well that's –

ELIAS CJ:

Page 61?

MR COOKE QC:

That's the guidance note that's referred to earlier on. It's similar to the form of a guidance note earlier that had been in the earlier version and we looked at earlier but with additional bits and crossings out.

GLAZEBROOK J:

Well it's really just adding the arresting system material in to what was already there, isn't it?

MR COOKE QC:

Although there was reference to arresting system in –

GLAZEBROOK J:

And so it's a change.

MR COOKE QC:

It's expanding on it a little bit. But I just thought it does deal with the problems of natural obstacles in 10.1.

MR COOKE QC:

And if you wanted to spend time reading, like the aerodrome manual that we've had reference to, if you spent your time reading that –

WILLIAM YOUNG J:
So there's good reading in it.

MR COOKE QC:
– you'll find quite a lot of sort of peripherally helpful material that suggests the kind of analysis you're expecting to engage in and we're not again talking about regional economic benefits –

WILLIAM YOUNG J:
No, I'm just interested that initially it said basically the first natural obstacle was as far as the RESA had to extend, then the amendment says well you take that into consideration and then the next clause says, well, if you can't extend the RESA you've got to have regard to the possibility of reducing the declared runway length.

MR COOKE QC:
And again as I said before, it's a RESA so that's focusing primarily on the 90 metres rather than the recommended practice.

WILLIAM YOUNG J:
Okay.

MR COOKE QC:
And the other relevance of the, to go back to the annex 13 case, the *New Zealand Air Line Pilots' Assoc Inc v Attorney-General* case. The importance of that case in a sense is that it generally addresses the concept that there is flexibility in the Chicago Convention obligations and that flexibility does give individual states the room to manoeuvre given their individual circumstances around a certain set of parameters and that flexibility was regarded as significant in the cockpit voice recorder challenge on the basis that New Zealand was able to exercise it with a degree of latitude contemplated by those instruments.

In the same way we have the same flexibility here. The 240 metres is a recommended practice and it's the idea is that states will meet the standard,

even that they can notify that they can't meet the standard and then they aspire to the 240 metres and how they will deal with that depends on their individual circumstances. So that's the degree of flexibility in the international obligation which is reflected in the use of the word “practicable”. As I said, the word practicable is used in Annex 14 when it describes the recommended practices, not the standards, and that flexibility is being exercised in the New Zealand system by the certified aerodrome operators and the Director. So that's the way it works and that's the big rare flexibility that the international principles recognise.

Now the only other thing just to mention briefly is as I've already alluded to it from the Director’s perspective, the Environment Court proceedings are now on hold pending the outcome of this appeal and from the Director’s perspective there is this –

ELIAS CJ:
There’s some urgency.

MR COOKE QC:
As I've described, it is a bit of a holding pattern about how should one interpret the Rules actively on a day by day basis including for operators who now want to fly out of Whakatane, for example, so there is a degree of desirability of resolving the issue from the Director’s perspective, if I can put it in as neutral –

GLAZEBROOK J:
You want us to get on with it in other words.

WILLIAM YOUNG J:
Or you don't want us to duck it.

MR COOKE QC:
I beg your pardon Sir?

WILLIAM YOUNG J:
You'd like us not to duck it?

MR COOKE QC:
Yes, that is true. Whether – there's this awkward issue. This proceeding, as my learned friend Mr Rennie did say, frankly, it was really there a kind of declaratory judgment proceeding that became a judicial review because of what happened at Wellington and there is also – again, one of the ironies of this case about whether it's a narrow or broad interpretation of where you go. The other irony, of course, was the Civil Aviation Authority argued in the High Court that the letter that the Director had issued with all the provisos at the end about it all depending on the circumstances, the Director said, "Well, it's actually not technically a judicial review decision, although we agree that of course the Court can declare what the meaning of the law is so that we know how to apply it in the future." We've got this slightly strange situation that a letter has been set aside. We didn't argue that it's not judicially reviewable in the Court of Appeal or here because it just seems to be slightly pointy-headed to do that.

ELIAS CJ:
Well, it does have consequences, though, doesn't it?

MR COOKE QC:
Yes, it does and it's intended to have consequences. But the consequences it was intended to have are understandable in the sense you've got to give some certainty. You can't just wait for it to build up and say: "Well, that's not good enough." The Director has to, if he's going to exercise his functions reasonably, has to respond, especially when, as I said, these Rules require ongoing compliance as to, as you would expect, the Director to give an indication of what he thought, given the information available. But apart from, I would have thought, the appeal being allowed and the Court of Appeal's decision to quash the letter to be overturned there is then this difficult question about what you do about declarations, especially if the Court is thinking well, we don't agree with what ALPA said is the meaning of the rule and the difficulty always with a declaratory judgment proceedings is you do need

some context in which you – to make a declaration as to what the correct meaning of a rule is. So I'm not quite sure how the Court should deal with this situation about having a slightly different perspective on what the Rules require apart from saying so in the judgment. It doesn't seem to me that a declaration is an appropriate way in this kind of environment.

GLAZEBROOK J:
Unless it's a negative declaration that says this wasn't allowable. But that's probably not particularly helpful, either, as you say.

MR COOKE QC:
No, it doesn't get anyone anywhere. From the Director's perspective, to be perfectly frank about it, all he wants to know is what he's supposed to do.

ELIAS CJ:
It is possible that when we have had a chance to consider it we may need to float with you questions of relief but we can give that thought further down the track. You're just saying don't be too sweeping.

GLAZEBROOK J:
And do it quickly.

MR COOKE QC:
Well, I am just about to say, do this as quickly as possible. Don't do very much.

ELIAS CJ:
Well, that sounds something that we should be very happy to do.

MR COOKE QC:
I guess all I'm doing, because I'm not really saying anything concrete, is that this is an issue with the Director's ongoing compliance but there are all these other things in the background that everybody is sort of waiting anxiously to know how this is going to unfold so it's really important. The other thing about this, there's always a prospect of rule changes flowing from – if an

interpretation is taken that is different from what everyone thought is the rule in the first place, you know, they would obviously thought for a rule change but the first rule change took between 1999 and 2007 so it's not an immediate fix from a policy perspective if this all did misfire and for example it was expected that the Director of Civil Aviation would actually address the national advantages of – to the economy of an extension. The Director would probably want to say to the powers that be: "Well, I don't feel that it's my function to do that." But rule changes take their time in this particular context because of the inevitable interaction with the community about what the rule should be. It would be accelerated, of course. But these are all practical considerations, I think, with respect, that the Court might have to bear in mind when it comes to the judgment.

ELIAS CJ:

All right. That concludes your submissions?

MR COOKE QC:

It does, Your Honour.

ELIAS CJ:

Thank you. Well, thank you, counsel, for your helpful submissions. We will take time to consider our decision, thank you.

HEARING CONCLUDES