IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2019-425-112

UNDER	the Judicial Review Procedure Act 2016
BETWEEN	**WĀNAKA STAKEHOLDERS GROUP INCORPORATED**
	Applicant
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL**
	First respondent
AND	**QUEENSTOWN AIRPORT CORPORATON LIMITED**
	Second respondent

SUBMISSIONS FOR THE SECOND RESPONDENT
DATED 17 SEPTEMBER 2020

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MAY IT PLEASE THE COURT:

1. SUMMARY OF QAC'S SUBMISSIONS

No transfer of control through the Lease

1.1 The applicant's ("**WSG**") claim, as advanced in its submissions, is that the March 2018 lease between Queenstown Lakes District Council ("**QLDC**") and Queenstown Airport Corporation Limited ("**QAC**") in respect of Wānaka Airport ("**Lease**") is unlawful because it transferred:

(a) control of Wānaka Airport, and of the nearby waste water treatment plant ("**Project Pure**"), to QAC; and / or

(b) ownership of Wānaka Airport to QAC.

1.2 WSG says that QLDC transferred control of these assets to QAC without complying with the pre-conditions of such a transfer stipulated by s 97 of the Local Government Act 2002 ("**LGA**").[1] It is central to these allegations that QAC has already made decisions to develop Wānaka Airport into a Code C jet-capable airport so as to introduce operations involving narrow-bodied commercial jet aircraft.[2]

1.3 The factual basis for WSG's proceeding is misconceived. QAC has not – at any point, whether prior to or after agreeing the Lease – made any decisions to develop or expand Wānaka Airport into a Code C jet-capable airport. QAC is instead in the very early stages of a planning process that would involve the following steps:

(a) An analysis stage, which is where QAC was prior to Covid-19, assessing the existing airport infrastructure, the demand for air services and the opportunities and constraints of the airport.

(b) Option development, which would lead to the preparation of a draft master plan for the airport. The draft master plan would set out feasible opportunities for the development of the airport.

(c) Community engagement would then occur on the draft master plan.

(d) A final option would then be selected and more detailed design work would begin.

1.4 As is accepted by WSG's witnesses, and in its submissions, Covid-19 will have a significant effect on the future of Wānaka Airport.[3] Mr Keel explains that QAC is at present unable to model future aviation demand, and that draft master plans for both Wānaka Airport and Queenstown Airport will not be completed in FY2021 (ie the year to June 2021). Thus, even options capable of being set

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1 Amended Statement of claim ("**ASOC**") at [64]–[68] **[CBD / 1 / 00100–00101]**.

2 ASOC at [66]–[68] **[CBD / 1 / 00100–00101]**.

3 Affidavit of Mark Graham Sinclair sworn 31 July 2020 at [72(f)] **[CBD / 2 / 00370–00374]**; Synopsis of submissions for applicant dated 3 September 2020 ("**WSG submissions**") at [150].

out in draft master plans will not be prepared until the second half of 2021 at the earliest.

1.5 The legal basis of the claim that the Lease transferred ownership or control of the airport or Project Pure to QAC is as flawed as the factual basis. This claim is pleaded against QLDC only, but it affects QAC as a party to the Lease. QAC submits that QLDC has retained control of Wānaka Airport (and Project Pure), and has merely devolved operations, management, planning and development processes to a council controlled trading organisation ("**CCTO**") with the appropriate expertise. QAC says that:

(a) QAC is a council-*controlled* trading organisation subject to the LGA's statement of intent ("**SOI**") process, by which QAC is required to set its objectives and key initiatives on an annual basis in consultation with QLDC. As a CCTO, QAC is required to comply with its SOI (s 60 of the LGA). QLDC retains the power to modify QAC's SOI – and therefore control QAC's actions – as it sees fit.

(b) The Lease is itself expressly subject to the SOI process. QAC can undertake no activity at the airport except as its operative SOI allows. That provides QLDC with precisely the sort of legal control envisaged by the LGA. The SOI is issued annually and QAC must have regard to comments made by shareholders on the draft SOI;[4] as a majority shareholder, QLDC can amend an operative SOI at any time after consultation with the QAC board.[5]

(c) In relation to Project Pure, the Lease does not give QAC any control over the facility. The Lease sensibly recognises that the two assets have the potential to come into conflict. QAC may require relocation of Project Pure, but must bear the cost of relocation. Relocation would only be an option where QAC had committed to a substantial redevelopment of the airport, and that is a decision that would require approval from QLDC through the SOI process.

(d) QLDC has, in fact, exercised control over QAC's decision-making in relation to Wānaka Airport, including by imposing a "pause" on the draft master plan process in August 2019, while additional QLDC planning processes were pursued.

(e) QLDC holds 75.01% of QAC's shares. That super-majority shareholding itself gives QLDC the power to pass special resolutions, unilaterally amend QAC's SOI, control major transactions, and amend QAC's constitution as it sees fit.

(f) The Lease does not transfer ownership of Wānaka Airport. It is a lease, and title remains with QLDC. While the improvements on the site were sold, the improvements are not strategic assets to which s 97 applies, and the sale simply recognises that their economic life would expire during the term of the Lease.

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4 Local Government Act 2002 ("**LGA**"), clauses 1–3 of Schedule 8.

5 LGA, clause 6 of Schedule 8.

1.6 The claims under s 97 should be dismissed. However, even if the Court were to find technical non-compliance in this regard, relief should be withheld in the Court's remedial discretion on account of:

(a) prejudice arising to QAC and to third parties (including prejudice arising from commercial arrangements concluded during WSG's almost 20 month delay in filing and serving proceedings challenging the Lease);

(b) the inappropriateness of a blanket order prohibiting development of a council asset (which even on WSG's view would be lawful if included in QLDC's Long Term Plan); and

(c) the futility of granting relief, in light of the Covid-19 impact on QAC's business and the aviation sector generally.

No claim now advanced against QAC

1.7 WSG originally pleaded that QAC had acted inconsistently with its SOI. Those claims against QAC have effectively been abandoned. WSG simply says:[6]

> WSG's entitlement to such relief is not dependent on establishing any breaches of the LGA by QAC, although related breaches by QAC also arise on the facts and are pleaded. Those matters **may be relevant to the Court's discretion** being exercised in favour of granting the relief which WSG seeks **and will be addressed in reply as required**.

1.8 No ground of judicial review is thus positively advanced against QAC. QAC assumes that this effective concession results from WSG's realisation that:

(a) QAC has acted at all times consistently with its applicable SOI, including when it entered into the Lease[7] – a matter that was expressly provided for in the operative SOI.[8]

(b) Section 64(10) of the LGA provides a complete answer to the relief WSG sought, namely to have the Lease set aside for alleged inconsistency with the SOI.

(c) The allegations pleaded against QAC were predicated on a decision to expand and develop Wānaka Airport into a Code C jet-capable airport that, as explained above, was never in fact taken.

(d) In addition, the alleged unlawfulness of land acquisitions by QAC near Wānaka Airport is moot, since WSG never sought any relief in respect of those transactions,[9] and there was never any basis for the allegations that QAC had breached s 59 of the LGA in entering into the Lease.

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6 WSG submissions at [326].

7 ASOC at [96] **[CBD / 1 / 00112]**.

8 Queenstown Airport Corporation Ltd *Statement of Intent: 2018–2020* (9 June 2017) ("**SOI 2018–2020**") at 9 **[CBD / 4B / 02237]**; see paragraph 3.30 below.

9 ASOC at [97] **[CBD / 1 / 00112–00113]**.

Procedural matters

1.9 Two procedural matters arise, which are addressed in an annex to these submissions. The first issue relates to the admissibility of aspects of WSG's evidence in this proceeding. The second relates to the vague insinuation in WSG's submissions that QAC may have breached the "duty of candour". QAC has met its disclosure obligations, but this issue is also briefly addressed, given the seriousness of such an unfounded allegation.

2. THERE HAS BEEN NO DECISION TO DEVELOP CODE C FACILITIES AT WĀNAKA

Summary

2.1 WSG's proceeding rests on its erroneous belief that QAC has decided that Wānaka Airport will be developed and operated as a Code C jet-capable facility. That misconception is shot through the central allegations on which this proceeding is founded. Thus:

(a) WSG's allegation that QLDC failed to consult adequately before granting the Lease assumes the public needed to be informed about an alleged decision to develop Wānaka Airport to introduce Code C jet aircraft operations.[10]

(b) The alleged failure by QLDC to consider relevant considerations before making its Lease decision,[11] now pursued only faintly in WSG's submissions,[12] involves alleged negative impacts (eg environmental and overtourism concerns) resulting from the alleged decision to introduce Code C jet aircraft operations at Wānaka Airport.

(c) WSG's claim under s 97(1)(a) LGA also assumes there has been a decision to "alter significantly the intended level of service provision" at Wānaka Airport by introducing Code C jet aircraft.[13]

(d) Finally, WSG originally pleaded (but does not now advance in its submissions) review grounds against QAC predicated on QAC's alleged "decisions" to develop, expand and operate Wānaka Airport as a Code C jet-capable airport, related land purchases, and failure to fully inform QLDC of its "plans and intentions" in this regard.[14]

2.2 It is important to note that WSG does not oppose development of the airport or the return of scheduled services. It supports the return of scheduled services. Its challenge is limited to the alleged decision to introduce narrow-bodied jet aircraft.

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10 WSG submissions at [291], [294] and [310].

11 ASOC at [81]–[94] **[CBD / 1 / 00106–00110]**.

12 WSG submissions at [57]–[59].

13 WSG submissions at [283]–[285].

14 ASOC at [96]–[98] **[CBD / 1 / 00112–00113]**; WSG submissions at [46]. In WSG's pleading, references to Wānaka Airport's development and expansion into a "dual airport" encompass the introduction of Code C jet aircraft operations: see for example ASOC at [26], [31], [60], and [61(a)] **[CBD / 1 / 0083, 00084, 00095]**.

2.3 The evidence of Mr Keel, and of QLDC's officers, is clear that no decision has been made to develop Code C jet facilities and that substantial planning work would still be required before any such decision could be made.[15] WSG does not point to a single document that evidences any decision, and the contemporaneous documentation is entirely consistent with QAC's position.

2.4 At times in its submission, WSG backs away from the position that a decision has been made, and refers instead to "intentions" or "plans" or "investigation options".[16] But that is not the basis of its application, and supposed intentions that have not led to a decision are not decisions susceptible to judicial review.

2.5 The position is summarised by Mr Keel, QAC's CEO, who explains the status of QAC's decision-making at various points in the period at issue. He is clear that no decision has been made to develop Wānaka Airport as a Code C jet-capable facility. Mr Keel states that:[17]

> However, no decision by QAC, whether by the board of directors or otherwise, to do that [introduce Code C jet aircraft] has been made and the fundamental business processes needed to evaluate that possibility, including technical analysis and modelling, have not been completed.

2.6 The central facts can be briefly summarised:

(a) In 2016, QLDC considered options for a new governance model for Wānaka Airport, following external advice that the (then) management agreement approach was ineffective. QLDC considered that a long term lease to QAC appeared to be the best option. It consulted with the community on that basis.

(b) In 2017, QLDC decided to proceed with a long-term lease and negotiations with QAC began. Meanwhile, QAC undertook some preliminary planning activities in relation to Wānaka Airport.

(c) The Lease was concluded in March 2018, and QAC began community engagement about the community's future vision for the airport. The terms of the Lease prevented QAC from any use not contemplated by the terms of its applicable SOI. QAC's SOI at the time (and since) did not provide for any significant development of the airport.

(d) After QLDC's approval of the 2018 SOI, which provided for master planning to begin, QAC began master planning analysis with a view to completing a draft master plan for Wānaka Airport in late 2019. The draft master plan was intended to set out options for the future of Wānaka Airport, and a decision to advance an option would then be made following consultation with the community.

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15 See: Affidavit of Richard Colin Keel sworn 21 August 2020 ("**Keel**") at [10.1] **[CBD / 2 / 00523]**; Affidavit of Michael Renier Antonius Theelen sworn 21 August 2020 ("**Theelen**") at [2.1] and [2.8] **[CBD / 2 / 00463–00464]**; and Affidavit of Peter Jonathan Hansby sworn 21 August 2020 ("**Hansby**") at [4.8] **[CBD / 2 / 00481]**.

16 See, for example, WSG submissions at [139], [142], [311], [370] and [374].

17 Keel at [1.6] **[CBD / 2 / 00499]**. See also Keel at [10.1] **[CBD / 2 / 00523]**.

(e) No decision on development options can or will occur until a master plan has been developed. Due to Covid-19's effect on the aviation industry, draft master plans will not be completed for either Wānaka or Queenstown airports in the year to June 2021.

QAC

2.7 QAC is a CCTO under the LGA.[18] The obligations of a CCTO, and the mechanisms of control that a local authority has over a CCTO, will be addressed later in these submissions, but as a CCTO QAC must submit an annual SOI to be approved by QLDC,[19] which outlines the strategic priorities of QAC for the year. QAC must act consistently with its SOI.[20]

2.8 As a CCTO, QAC operates for the purpose of making a profit. In doing so, it must have regard to the principal objectives of a CCTO, as set out in the LGA.[21] The objectives of a CCTO are to:[22]

(a) achieve the objectives of its shareholders, both commercial and non-commercial, as specified in the SOI;

(b) be a good employer;

(c) exhibit a sense of social and environmental responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so; and

(d) conduct its affairs in accordance with sound business practice.

2.9 QLDC owns 75.01% of QAC's shares. The minority shareholder is Auckland International Airport Limited ("**AIAL**"). QLDC appoints five directors and AIAL appoints one director.[23]

The new governance model for Wānaka Airport

2.10 Between 2009 and 2016 operations at Wānaka Airport were managed by QAC under a management agreement with QLDC.[24] Following external reviews which found that this model was inadequate, QLDC started a public

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18 LGA, s 6. A CCTO is a council-controlled organisation (ie a company in which a local authority owns or controls 50% or more of shares or may appoint 50% or more of the directors) that operates a trading undertaking for the purposes of making a profit.

19 LGA, s 64(1). See also Schedule 8 Part 1 which sets out the process for the adoption of the SOI.

20 LGA, s 60.

21 LGA, s 59.

22 LGA, s 59.

23 Keel at [2.1] **[CBD / 2 / 00499]**.

24 Originally under the Contract for Management Services – Wanaka Airport (2013) **[CBD / 4A / 01107]** for a term of five years commencing on 1 July 2009, followed by the Management Services Agreement for Wanaka Airport (2016) **[CBD / 4A / 01113]** (the term of the previous agreement had expired on 30 June 2014 but QAC had continued to manage Wanaka Airport in accordance with the terms).

consultation process in 2016 on the governance options for Wānaka Airport. QLDC's preferred option was a long-term lease to QAC.[25]

2.11 QAC provided a written submission as part of the consultation process,[26] and Mr Keel spoke on behalf of QAC at the oral submissions hearing, explaining that if QAC received a lease it would engage with the community on developing a long-term plan for Wānaka Airport.[27]

2.12 QLDC approved the lease model in April 2017 and resolved to negotiate a long-term lease with QAC. At that time "QAC had no plans as to how the airport [at Wānaka] might develop … development was an option, but the nature and feasibility of any development had not been given any significant analysis and no decisions had been made".[28]

Preliminary planning steps for Wānaka Airport

2.13 QAC simply could not have made any decisions on development options at Wānaka Airport by April 2017. At that point, QAC had only received limited, "high level" planning documents that addressed merely the possibility of Code C aircraft operating at Wānaka Airport:

(a) A report from Astral Limited ("**Astral Report**"), commissioned jointly with QLDC, had in 2016 identified that, under the existing arrangement, long-term strategic and master planning of Wānaka Airport was being neglected and an alternative governance model should be considered.[29] It identified the potential to reintroduce scheduled services to Wānaka Airport, subject to demand, noting that turbo-prop aircraft were best suited to the existing runway length.[30] It was a "high level" report.[31]

(b) As part of its master planning processes for Queenstown Airport in mid- / late-2016, QAC commissioned a siting report from Arup Pty Limited ("**Arup Report**"). This "high level review of site options" considered 20 options for an airport that could operate in conjunction with Queenstown Airport or as a fully independent airport, ie to replace Queenstown Airport.[32] It recommended QAC adopt a dual

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25 Affidavit of Richard Donald Pope dated 26 August 2020 ("**Pope**") at [2.5]–[3.2] **[CBD / 2 / 00486–00490]**.

26 Keel at [4.4] **[CBD / 4B / 00511–00512]**; QAC *Submission on Wānaka Airport Governance* (23 November 2016) **[CBD / 4B / 02131]**.

27 Keel at [4.6] **[CBD / 2 / 00512]**; *Wānaka Airport Governance Options: Hearing of Submissions* (QLDC) (13 February 2017) **[CBD / 3 / 00761–00762]**.

28 Keel at [4.11] **[CBD / 2 / 00513]**. See also Wanaka Airport "QAC granted long-term lease for Wānaka Airport" (20 April 2017) **[CBD / 4B / 02337]** in particular comments by Mr Gilks: "We're pleased with today's decision by Council which is just the first step in the process. We also look forward to working with QLDC on the lease terms and engaging with the community to develop an airport at Wānaka that we can all be proud of well into the future."

29 *Wanaka Airport Planning and Development: Report prepared for Queenstown Lakes District Council and Queenstown Airport Corporation by Astral Limited* (20 April 2016) ("**Astral Report**") at 4 **[CBD / 3 / 00543]**.

30 Astral Report at 31 **[CBD / 3 / 00570]**.

31 Astral Report at 3 **[CBD / 3 / 00542]**.

32 Arup *Queenstown Airport Arup Pty Ltd Siting Study* (April 2017) ("**Arup Report**") at 3 **[CBD / 4B / 02179]**.

> airport model, favoured Wānaka Airport in that role, and recommended further studies.[33]

2.14 QAC then commissioned a concept plan from Arup in May 2017 ("**COP Report**"). The aim of the COP Report was to establish "at a high level" whether jet operations *could* be accommodated at Wanaka Airport.[34] Arup considered a number of runway alignments which were "believed to be feasible – given the scope of this study – and warrant further investigation".[35] It noted that "further refinement of the option and a full scale master planning process would be required to develop the Wanaka Airport layout to a deliverable concept"[36] and set out a range of further investigations that would be required.[37]

2.15 These documents – expressly described as high level – simply provided initial inputs into what would be a lengthy planning and development process. They were not decisions and no organisation could make decisions on the basis of such preliminary documents.

2.16 Consistently with its limited role at Wānaka Airport, QAC's SOI for 2018–2020 (effective from July 2017) stated that "we [QAC] look forward to working with QLDC on the lease terms and engaging with the community to develop an airport at Wanaka that we can all be proud of well into the future".[38] The key initiative relevant to Wānaka Airport identified in that SOI was to agree a long term lease over Wānaka Airport and "*if a lease is signed*, ensure a smooth transition and integration, with strong community support" (emphasis added).[39]

2.17 The preliminary nature of QAC's thinking was illustrated in August 2017 when QAC released the "Queenstown Master Plan Options" paper, which was released on 29 August 2017.[40] In this report QAC stated that it intended to:[41]

> … pursue the dual complementary airport model with Queenstown and Wānaka Airports. Once the long-term lease is finalised with QLDC, we will work with the community on future development plans for Wānaka Airport.

2.18 This clearly stated QAC's thinking in August 2017, but does not reflect a decision that a dual complementary model would go ahead, nor what that might look like.

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33 Arup Report at 3 **[CBD / 4B / 02179]**.

34 Keel at [3.32] **[CBD / 2 / 00509]**; and Arup *Queenstown Airport Corporation Wanaka – Concept Operation Plan Summary Report (Draft)* (18 May 2017) ("**COP Report**") at 2 **[CBD / 4B / 02213]**.

35 COP Report at 1 **[CBD / 4B / 02212]**.

36 COP Report at 2 **[CBD / 4B / 02213]**.

37 COP Report at 1 **[CBD / 4B / 02212]**.

38 SOI 2018–2020 at 2 **[CBD / 4B / 02230]**.

39 SOI 2018–2020 at 9 **[CBD / 4B / 02237]**.

40 QAC *Queenstown Airport – Master Plan Options: Let's start talking about tomorrow* (29 August 2017) ("**Queenstown Master Plan Options**") **[CBD / 4B / 02248]** see also Keel at [3.34]–[3.42] **[CBD / 2 / 00510–00511]**.

41 Queenstown Master Plan Options at 40 **[CBD / 4B / 02289]**.

QLDC and QAC agree the Lease

2.19 QLDC and QAC negotiated the terms of the Lease during 2017. The Lease was carefully negotiated over 11 months, on an arm's-length basis, and with expert assistance.[42] When the Lease was executed in March 2018, Mr Keel states "QAC did not have any definite plan for whether, or how, Wānaka Airport would develop, let alone made any decisions to implement a plan".[43] Indeed, Mr Keel explains that:[44]

> The introduction of scheduled flights, including Code C aircraft, was an option that we were interested in exploring. However, we did not know whether that was a viable option technically or financially. A great deal of technical work would be required to confirm the viability of scheduled services and, assuming viability, it would then be necessary to test the acceptability of development in the community and with our majority shareholder [ie QLDC].

2.20 That was consistent with what QAC said publicly at the time, which emphasised that QAC wanted to work with the stakeholders and communities it served "in shaping the future vision of the airport".[45]

2.21 The Lease is the focus of this proceeding. Its terms will be addressed in detail later, but it is important to note that:

(a) QAC had not committed to a Code C jet-capable airport development at that time (or at any time since);

(b) the Lease expressly prohibits QAC from any use, activity or event not within the contemplation of its SOI, insofar as the SOI relates to the development and operation of Wānaka Airport; and

(c) neither when the Lease was signed, nor since, has QAC's SOI contemplated development of a Code C jet-capable airport.

Planning and community engagement after the Lease executed

2.22 As QAC had said that it would, following agreement of the Lease, QAC undertook community engagement in May 2018.[46]

2.23 At this point, Mr Keel describes QAC as being in the "pre-concept" phase of the planning life-cycle. That is the first of five stages, and is followed by the concept phase (where block spatial work would occur) and the pre-feasibility

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42 Keel at [5.1] **[CBD / 2 / 00513]**.

43 Keel at [6.1] **[CBD / 2 / 00515]**.

44 Keel at [6.2] **[CBD / 2 / 00515]**.

45 Keel at [5.10] **[CBD / 2 / 00515]**; "Long-term lease for Wānaka Airport signed" Queenstown Airport News (21 March 2018) **[CBD / 4B / 02344]**.

46 Keel at [6.4]–[6.15] **[CBD / 2 / 00516–00518]**. See also Wānaka Airport News "Let's start talking about tomorrow" (1 May 2018) **[CBD / 4B / 02346]** and Wanaka Airport News "Community thanked for thinking big" (25 May 2018) **[CBD / 4B / 02400]**.

phase, which would include options development as part of a draft master plan.[47]

2.24 Following that engagement, QAC prepared an internal report setting out the next steps that would occur in relation to Wānaka Airport.[48] The internal document recorded that:

(a) QAC would complete detailed analysis, technical studies, options, infrastructure required and other research that would inform the draft master plan.[49]

(b) The aim was for a draft master plan to be released at the end of 2019, with comprehensive community and stakeholder engagement to occur on the basis of the draft master plan.[50] Due to developments since, the envisaged draft master plan has not proceeded and will not be completed this financial year.[51]

2.25 The importance of the master planning process to future decisions concerning Wānaka Airport is reflected in QAC's SOI for 2019–2021 (effective from July 2018). As set out in that SOI, the key strategic projects for Wānaka Airport were:[52]

(a) in the 2018 financial year: stakeholder and community engagement on vision for airport;

(b) in the 2019 financial year: develop draft master plan; and

(c) in the 2020 financial year: stakeholder and community engagement on draft master plan.

2.26 The SOI also noted that the master plan would explore "feasible opportunities to develop Wanaka Airport and contribute to services across the region".[53]

2.27 QAC was therefore publicly committing – in a document that it must comply with – to the preparation of a master plan in 2019/2020 that would (merely) explore "opportunities" on which it would engage with the community.

2.28 To put that planning status into context, QAC's master planning involves the following steps:[54]

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47 Keel at [6.12] **[CBD / 2 / 00517]** (ie the first stage of development planning: see Keel at [3.7] for the framework **[CBD / 2 / 00503]**).

48 Keel at [6.13]–[6.14] **[CBD / 2 / 00517–00518]**; and *Wānaka Airport 2045 Visioning Community Engagement May and June 2018* (November 2018) at 47 **[CBD / 4B / 02395]**.

49 Keel at [6.14] **[CBD / 2 / 00517–00518]**; and *Wānaka Airport 2045 Visioning Community Engagement May and June 2018* (November 2018) at 47 **[CBD / 4B / 02395]**.

50 Keel at [6.14] **[CBD / 2 / 00517–00518]**; and *Wānaka Airport 2045 Visioning Community Engagement May and June 2018* (November 2018) at 47 **[CBD / 4B / 02395]**.

51 Keel at [8.1]–[8.4] **[CBD / 2 / 00522]**.

52 Queenstown Airport Corporation Limited *Statement of Intent 2019–2021* (June 2018) ("**SOI 2019–2021**") at 15 **[CBD / 4B / 02417]**.

53 SOI 2019–2021 at 14 **[CBD / 4B / 02416]**.

54 Keel at [3.4] **[CBD / 2 / 00502–00503]**.

(a) **Analysis:** This stage involves analysis of the existing airport infrastructure the demand for air services and the opportunities and constraints of the airport. This includes working with experts to forecast demand based on existing and future population growth and economic development, and analyse the social, economic, and environmental impacts of any development (such as impacts on land, noise and traffic).

(b) **Develop options:** After collecting and evaluating the relevant data, the next step is to develop a draft master plan that sets out feasible opportunities for the development of the airport. The draft master plan is informed by the analysis referred to above. When going out to engage with the community it is essential to be able to present options of what the airport *could* look like taking into account forecast demand projections. That means that the work developing options must be done to ensure that the options are realistic *before* formal consultation begins (although, as in this case, community engagement on current thinking may occur earlier in the process too).

(c) **Engage with community:** The third stage is when the community is offered the opportunity to provide feedback on the draft master plan. In 2018, QAC was anticipating a nine-month period for consultation on the draft master plan. Mr Keel explains that:[55]

> Once viable options are developed and presented to the community in a draft master plan, these are in no way a "done deal" but should be considered as options from which we can build on and work with the community.

(d) **Identify final option:** Following consideration of feedback on the draft master plan, a final option is identified. A detailed design of the final plan is then prepared.

(e) **Implementation:** Implementing the plan and putting it into action.

2.29 Work on the master plan started in late 2018,[56] and QAC was still in the first, "analysis", stage of this process in 2019.[57]

2.30 A master plan is one of the key planning documents for airports and provides the roadmap for sustainable airport development.[58] As shown above, no decision on any possible development at Wānaka Airport could or would be made until (i) the draft master plan had been completed; and (ii) consultation on the options presented in the draft master plan was completed and considered (a process itself anticipated to take nine months).

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55 Keel at [3.6] **[CBD / 2 / 00503]**.

56 Queenstown Airport News "Statement from Prue Flacks, Chair – on Wanaka Airport" (13 September 2019) **[CBD / 4B / 02398]**.

57 Keel at [3.4(a)] **[CBD / 2 / 00502]**.

58 Keel at [3.2]–[3.3] **[CBD / 2 / 00502]**.

2.31 In April 2019, QAC updated the community on progress on the draft master plan, and sought to engage further on potential options. To that end, QAC set out its "current thinking" for Wānaka Airport in a press release.[59] QAC explained that its current thinking was that Wānaka Airport would develop as a regional airport capable of supporting scheduled domestic services using turbo-prop and narrow-body jet aircraft.[60] QAC also provided a number of "engagement channels" for the community to engage on this early thinking.

2.32 One of those channels was a briefing session for invited stakeholders held in Wānaka on 29 April 2019.[61] Although this has been described as a meeting at which QAC revealed a "plan"[62] (by which WSG witnesses seem to mean a concluded decision), Mr Keel is quite clear that what was described at that session was QAC's "current thinking".[63] The slide pack used confirms that tentative language.[64] The "current thinking" was for an airport that would support turbo-prop and narrow-body jet aircraft, with gradual phased development to meet natural demand, and continued support for the general aviation activities and events already at Wānaka Airport.[65]

2.33 In April and May, QAC also held 2:2 engagement sessions with various community representatives and stakeholders, including a meeting between representatives of WSG and Mr Keel, where Mr Keel explained the current thinking for Wānaka Airport as outlined above.[66]

2.34 Far from being a secretive decision-making process, in early 2019 QAC was openly communicating with the community what its ideas at the time were and seeking feedback from the community.

2.35 This appears to have been misconstrued by WSG's witnesses. No witness for WSG suggests that Mr Keel told them that QAC had made a decision, as opposed to discussing plans.[67] Instead, WSG seeks to elevate references to "planning" to the status of a "decision". However, on no view can planning for an option that could, if proven feasible, be included in a draft plan for community consultation, be equated to a decision.

Current status

2.36 In the various steps that QAC has taken in relation to Wānaka Airport, as outlined above, at no point has QAC made a decision in relation to the development, expansion and operation of Wānaka Airport to accommodate Code C jet-capable facilities.

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59 Keel at [6.19]–[6.20] **[CBD / 2 / 00519–00520]**, referring to QAC "Master plan update and engagement opportunities" (29 April 2019) **[CBD / 4B / 02428]**.

60 QAC "Master plan update and engagement opportunities" (29 April 2019) **[CBD / 4B / 02429]**.

61 Keel at [6.22] **[CBD / 2 / 00520]**.

62 Affidavit of Alistair Charles Wayne Hudson sworn 30 July 2020 ("**Hudson**") at [17] **[CBD / 2 / 00157]**.

63 Keel at [6.22] **[CBD / 2 / 00520]**.

64 QAC "Wanaka Airport Update: Community Get Together, 29 April 2019" **[CBD / 4B / 02434]**.

65 QAC "Wanaka Airport Update: Community Get Together, 29 April 2019" **[CBD / 4B / 02434]**.

66 Keel at [6.23]–[6.24] **[CBD / 2 / 00520]**.

67 See: Affidavit of Michael Ross sworn 30 July 2020 ("**Ross**") at [64] **[CBD / 2 / 00222]**; Affidavit of Andrew Michael Jeremy Waterworth sworn 31 July 2020 ("**Waterworth**") at [242]–[245] **[CBD / 2 / 00324–00327]**; and Hudson at [17] **[CBD / 2 / 00157]**.

2.37 Any future decision of that nature would first require an extensive development planning process to be completed to assess technical and economic feasibility. As outlined above, the master plan is a key document in any development planning.[68]

2.38 During 2019, QAC had been progressing pre-concept technical work for Wānaka Airport.[69] This work was necessary to progress development of the draft master plan which QAC was still targeting for late 2019.[70] Mr Keel states that "a great deal of technical work would be required to confirm the viability of scheduled services" and if viability were established "it would then be necessary to test the acceptability of development in the community and with our majority shareholder [QLDC]".[71]

2.39 Mr Keel outlines the following steps that are still to be taken, in order to reach a decision regarding development of Wānaka Airport:[72]

(a) completion of the analysis stage would be required;

(b) that analysis would inform the preparation of a draft master plan, which would set out feasible options;

(c) the draft master plan would be released to the community, providing a model of what Wānaka Airport *could* look like, and consultation with the community would begin on the draft master plan;

(d) following that engagement, a final option would be identified, taking into account feedback from the consultation process, and a decision would be taken by the QAC board of directors in consultation with its shareholders on whether a detailed investment case should be prepared for the future development of Wānaka Airport; and

(e) any implementation would need to comply with the relevant statutory planning and other processes.

2.40 Only at the end of this extended process could any development of Wānaka Airport begin.

2.41 In August 2019, QLDC announced a "pause":

(a) On 8 August 2019, Mayor Boult announced that "further work on the development of commercial services at Wānaka is on hold" except for "necessary planning and licensing steps".[73] The pause was to allow economic and social impact assessments to be completed.[74]

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68 See paragraphs 2.28 to 2.30 above.

69 Keel at [6.25] **[CBD / 2 / 00520]**.

70 Keel at [6.25] **[CBD / 2 / 00520]**.

71 Keel at [6.2] **[CBD / 2 / 00515]**.

72 Keel at [7.6] **[CBD / 2 / 00521–00522]**.

73 QLDC "QLDC Provides Clear Direction to QAC on Future Development" (8 August 2019) **[CBD / 4B / 2440]**.

74 QLDC "QLDC Provides Clear Direction to QAC on Future Development" (8 August 2019) **[CBD / 4B / 02439–2440]**.

(b) On 13 September 2019, then QAC Chair Prue Flacks released a public statement supporting QLDC's approach.[75]

(c) This was reflected in the SOI for 2020–2022, approved in December 2019, which confirmed that QAC would not seek to introduce scheduled services (whether involving jets or otherwise) at Wānaka Airport until QLDC's impact assessments were complete.[76] This commitment was carried over into QAC's SOI for the year ending 30 June 2021, which is still in effect.[77]

Impact of Covid-19

2.42 Any development planning is now significantly delayed due to the impacts of Covid-19.[78]

2.43 The full impact of Covid-19 is, as yet, unknown but QAC's business has been significantly affected,[79] and the future is highly uncertain. Mr Keel says:[80]

> What the future will look like for aviation at Queenstown or Wānaka is at present unknowable, but it goes without saying that the viability of scheduled services into Wānaka would have to be carefully considered once the impact of the pandemic is better understood and aviation demand can be modelled more accurately.

2.44 At present, QAC is unable to accurately model for the future, and considerable work is needed to identify what the future needs of the region are.[81]

2.45 That disruption is recorded in QAC's current SOI, finalised in April 2020:[82]

> Given the current operating conditions related to COVID-19, QAC will not complete its long-term development planning, as intended, for either airport [ie Queenstown or Wānaka] in FY21. As and when QAC completes draft master plans, it will work constructively and collaboratively with QLDC on the draft master plans and seek the endorsement of Council on them. QAC will then consult fully with the community on the draft master plans and seek the endorsement of Council on the final master plans before any decisions on future airport development are made.

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75 Keel at [7.3] **[CBD / 2 / 00521]**; and Queenstown Airport News "Statement from Prue Flacks, Chair – on Wanaka Airport" (13 September 2019) **[CBD / 4B / 02398]**.

76 Keel at [7.4] **[CBD / 2 / 00521]**; and QAC *Statement of Intent 2020–2022: Revised* (30 June 2019) ("**Revised SOI 2020–2022**") at 7 **[CBD / 4B / 02447]**.

77 Queenstown Airport Corporation Ltd *Statement of Intent: Year ending June 30 2021* at 10 **[CBD / 4B / 02109]**.

78 Keel at [8.4] **[CBD / 2 / 00522]**.

79 Keel at [8.1] **[CBD / 2 / 00522]**.

80 Keel at [8.1] **[CBD / 2 / 00522]**.

81 Keel at [8.3] **[CBD / 2 / 00522]**.

82 Queenstown Airport Corporation Ltd *Statement of Intent: Year ending June 30 2021* at 10 **[CBD / 4B / 02109]**.

No merit to WSG's argument that a decision has been made

2.46 In the face of Mr Keel's evidence, which WSG does not even mention in its submissions, WSG's position appears to be that a decision *must* have been made to develop Code C jet-capable facilities.[83] It relies on events that, it is inferred, "reveal" a decision if one starts from the position that a decision must already have been made. In fact, none of the matters relied on indicate that a decision had been made, and contemporaneous documents on the very matters in question prove that it has not been:

(a) *Land acquisition*:[84] QAC purchased land adjacent to Wānaka Airport in November 2016, and March 2017. This is not evidence of a decision to develop the airport. When land came on the market in April 2016, QAC's chair Mr Gilks wrote to QLDC that the timing was "unfortunate" – "there is little clarity around either of our positions" – but that the two parties should consider acquiring the land.[85] QLDC was unable to act at that time. In recommending acquisition, the report to QAC's board noted the risk of acquiring land (including the risk of no lease eventuating or if master planning "determines no future need for overflow GA and Corporate Jet space in Wanaka") could be mitigated, including by reselling when "market conditions favourable".[86] In August 2016, "the Board agreed that there were strategic and commercial benefits to acquiring land around Wanaka Airport whatever the outcome of the Wanaka Governance review."[87]

(b) "*Decision" to invest $300–$400m at Wānaka Airport*:[88] QAC has simply not committed to any such spend. This argument misunderstands the planning processes that would be required to make such a decision, ignores the sworn evidence that no decision to invest such funding has been made,[89] and overlooks the fact that any such decision would be have to clearly recorded in numerous public documents, including QAC's SOI, and would have required a completed master plan for the airport.[90]

(c) *Reference in Lease to planned runway*:[91] Although the Lease refers to a "planned" runway, no decision on runway options had been taken when the Lease was agreed.[92] Communications between the parties do not show any decision to develop Wānaka Airport in any particular way having been reached. To the contrary, they

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83 WSG submissions at [9].

84 WSG submissions at [367]–[370].

85 Keel at [3.23] **[CBD / 2 / 00507]**; and Email John Gilks to Vanessa van Uden (29 March 2016) **[CBD / 4B / 02197]**.

86 QAC Board Paper – Wānaka Land Acquisition (26 April 2016) **[CBD / 4A / 01601]**.

87 Minutes of meeting of Directors of QAC 19 August 2016 at [7.7] **[CBD / 4M / 09014]**.

88 WSG submissions at [141]; Waterworth at [244(m)] **[CBD / 2 / 00325–00326]**; and Affidavit of Richard John Somerville at [9] **[CBD / 2 / 00422]**.

89 Keel at [6.22] **[CBD / 2 / 00520]**.

90 QAC's SOIs provide a financial forecast that includes capital expenditure: see, for example, Revised SOI 2020–2022 at 15 **[CBD / 4B / 02455]** and Queenstown Airport Corporation Ltd *Statement of Intent: Year ending June 30 2021* at 24 **[CBD / 4B / 02123]**.

91 WSG submissions [234], [239] and [294].

92 Keel at [5.6] **[CBD / 2 / 00514]**.

demonstrate a prudent approach to preserving future options (and hence the operational future value of both assets in the area, namely Wānaka Airport and Project Pure) in the *absence* of any decision.[93]

(d) *References to "dual airport"*:[94] Mr Keel explained in evidence that "no one at QAC attached any particular meaning" to the "dual airport" expression used in various planning materials, but that it is intended (like its synonymous phrases "complementary" airport and the "one provider, two airports" approach) to refer to the possibility of an increased role for Wānaka Airport alongside Queenstown Airport, and the desirability of coordinated planning for both airport assets.[95] The phrase is not, contrary to what WSG appears to think, a "sort of code for a commitment to turn Wānaka Airport into a Queenstown Airport-scale Code C jet-capable airport".[96] In any event, as noted above,[97] QAC has not "decided" on any particular future for Wānaka Airport, including a dual airport option, but has merely referred to this as its current thinking.

3. THE LEASE DOES NOT TRANSFER CONTROL OR OWNERSHIP OF WĀNAKA AIRPORT

3.1 WSG's submission is that the Lease transfers control of Wānaka Airport to QAC. WSG at times suggests that *any* devolution of operations to QAC would be unlawful.[98] At other times it suggests that s 97 would be engaged if the devolution were "substantial" or material.[99] WSG's attempt to reduce its advocacy burden under s 97 is transparent. In fact, the glosses WSG places on s 97 neither appear in the text of that provision nor are otherwise warranted.

3.2 In QAC's submission:

(a) "Control" in s 97 is concerned with overall control of the asset, not with operational decision-making. Section 97 is concerned with the alienation of strategic assets from a local authority's portfolio. The Lease does not do that. Instead, the Lease represents a prudent delegation of responsibility to an entity with appropriate expertise to manage the asset, and over which QLDC retains substantive authority and control.

(b) The SOI process provides effective control of the strategic asset as contemplated by s 97:

(i) There was no transfer of control because QAC is a Council-*controlled* organisation, and subject to significant and effective controls through the SOI process.

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93 Keel at [5.8] **[CBD / 2 / 00514]** and Email from Rachel Tregidga to Caroline Dumas dated 9 October 2019 **[CBD / 4B / 02340]**.

94 WSG submissions at [307].

95 Keel at [3.35] **[CBD / 2 / 00510]**.

96 Keel at [3.35] **[CBD / 2 / 00510]**.

97 See from paragraph 2.1 onwards.

98 See, for example, WSG submissions at [225] and [268].

99 See, for example, WSG submissions at [224], [232], [240], [243], [244] and [249].

(ii) QLDC can simply prohibit development at Wānaka Airport (or any other activity) should it wish to do so.

(iii) That control (of QAC through its SOI) has already been practically demonstrated in relation to Wānaka Airport.

(c) QLDC's super-majority shareholding provides additional control. QLDC cannot have ceded control of the assets in circumstances where QLDC has leased the facility to an entity that, as expressly recognised and defined in the LGA, is *controlled* by QLDC. Although WSG argues that the Strategic Alliance Agreement ("**SAA**") impermissibly diminishes QLDC's control, the SAA itself supplies no basis for that submission.

(d) The Lease:

(i) Does not transfer control of Wānaka Airport. It does not cede ultimate decision-making power to QAC, and is expressly subject to the SOI (and other LGA) processes.

(ii) Does not transfer ownership of the airport (as title in the land remains with QLDC).

(iii) Does not give QAC control over Project Pure, but merely provides for coordinated development of co-located assets.

(e) There has been no decision about the development of Code C jet-capable facilities at Wānaka Airport and therefore no decision to significantly alter service levels in terms of s 97(1)(a). WSG's related ground of review against QLDC must fail.

3.3 Those submissions are expanded on below.

"Control" in s 97 and the SOI control mechanism

3.4 QAC submits that s 97 is concerned with overall control of the strategic asset and that the SOI process, provided by Parliament in relation to council-controlled organisations ("**CCOs**"), ensures overall control of Wānaka Airport rests with QLDC.

Section 97

3.5 WSG realises that it cannot plausibly argue that control of Wānaka Airport has been transferred to QAC. Accordingly, it tries to water down the s 97 standard set clearly (and without qualification) by Parliament. WSG argues variously that "substantial" ownership or control has been transferred to QAC, by which it means "material" or "significant".[100] Its position is that "any decision" that "transfers either any material part of its ownership or of its control is prohibited", so that there will be a breach if QLDC "retains only some part of the control it once had".[101] Elsewhere, WSG goes as far as to argue that "any changes" to

100 See, for example, WSG submissions at [224], [232], [240], [243], [244] and [249].

101 WSG submissions at [224]–[227].

control of the relevant assets requires s 97 processes,[102] and that QLDC must in fact keep control over "business decisions".[103]

3.6 WSG's argument that such changes in de facto control of Wānaka Airport engage s 97 is unsupported by the text, purpose, or the history of s 97.

Text – WSG's s 97 argument relies on non-existent qualifications to "control"

3.7 Section 97 of the LGA provides:

> **97 Certain decisions to be taken only if provided for in long-term plan**
>
> (1) This section applies to the following decisions of a local authority:
>
> (a) a decision to alter significantly the intended level of service provision for any significant activity undertaken by or on behalf of the local authority, including a decision to commence or cease any such activity;
>
> (b) a decision to transfer the ownership or control of a strategic asset to or from the local authority.
>
> …
>
> (2) A local authority must not make a decision to which this section relates unless–
>
> (a) the decision is explicitly provided for in its long-term plan; and
>
> (b) the proposal to provide for the decision was included in a consultation document in accordance with section 93E.

3.8 Because of the extent of control retained by QLDC, WSG is required to read in a number of qualifiers to argue that "control" has been transferred, none of which are found in s 97. The qualifiers WSG seeks to add are, however, found in other provisions. Thus, WSG seeks to imply into the provision that which Parliament consciously omitted from s 97(1)(b):

(a) The very qualifier that WSG tries to read into s 97(1)(b) – "significant" – is in fact expressly provided in s 97(1)(a). Parliament clearly knew how to set a significance threshold in regulating local authority decision-making, but did not do so in s 97(1)(b).

(b) The other synonyms WSG seeks to import are also used throughout the LGA, but not in s 97(1)(b). CCOs must thus report on "material variations" to performance (s 68) and annual plans must address

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102 WSG submissions at [268].

103 See, for example, WSG submissions at [251]–[252].

"significant or material differences" from a long term plan (s 95). "Substantially" is also used (eg s 147A). Their absence from s 97(1)(b) is clearly not a drafting error.

3.9 As noted above, s 97(1)(a) concerns "significant" alterations to service levels. There is no equivalent qualification in s 97(1)(b). That is because that section is concerned with a decision to transfer "*the* ownership or control" of a strategic asset. That language (utilising the definite article for focus) is consistent with the concept of control being singular and unitary – a local authority either enjoys "the" control of the strategic asset or it does not. Section 97 is not concerned with arrangements that do not affect ultimate control.

3.10 Section 97 is thus not directed at transactions which devolve an element of operational control, but leave the local authority with overall control, for example through the SOI process.

3.11 To counsel's knowledge, the meaning of "control" in s 97 has not been expressly considered by the courts. Most analogous, however, is a decision of the Environment Court in 2006 that is supportive of QAC's interpretive approach: *Waitaki District Council v Waitaki District Council*.[104]

3.12 There, the Court considered whether a local authority (Waitaki District Council) with a mere 50% shareholding in a CCO (Omarama Airfield Ltd) had sufficient control over the proposed works regarding Omarama Airport to meet a jurisdictional threshold contained in the Public Works Act 1981 of work "by or under the control of a local authority". Even in that lesser shareholding situation, however, the Court was satisfied that the local authority *did* have sufficient control over the CCO's proposed works to meet the statutory control standard as a result of the SOI process in the LGA.[105]

Purpose – WSG's approach to s 97 precludes sensible management of community assets

3.13 Section 97 is concerned with the alienation of strategic assets to entities that a local authority does not control, not the distribution of assets or business structures within the Council's wider portfolio. That realises the LGA's vision by both preserving local authority control and accountability, while permitting the community's trading assets to be managed effectively by CCTOs that are competent to do so.

3.14 By contrast, WSG's interpretation would mean that:

(a) A local authority could only devolve functions to a CCO through its long term plan and associated special consultative procedure, even if those functions were limited to "business decisions" or the "operation" of a trading asset. The Long Term Plan is renewed every three years, and the consequence of WSG's interpretation would be gridlock and stasis while assets were stranded pending the next Long Term Plan update or completion of a specific amendment to the Long Term Plan.

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104 *Waitaki District Council v Waitaki District Council* [2007] NZRMA 68 (EnvC).

105 *Waitaki District Council v Waitaki District Council* [2007] NZRMA 68 (EnvC) at [29].

(b) Any number of arrangements would be captured on WSG's theory of s 97. For example, the management agreement under which QAC previously provided management services in respect of Wānaka Airport would have been caught by s 97, as would practically any variation to it, because of QAC's responsibilities under it. Among other matters, QAC provided operational management including "management of airport operations", "aeronautical management including asset improvement" and "business management".[106] Even renewing a lapsed management agreement would be impossible without triggering the s 97 process, because the renewal would change the level of control existing immediately before the renewal.

3.15 Such impediments to the practical operation of commercial assets cannot have been intended. Indeed, WSG's interpretive approach would be particularly problematic in the particular circumstances of the present case, where QLDC's evidence is to the effect that it lacked the in-house aviation expertise needed to manage an asset like Wānaka Airport.[107]

3.16 It is also unclear why the particular features of the Lease that WSG complains of would elevate the Lease into a different, problematic, category compared to other non-sale arrangements. For example, WSG argues that the term of the Lease is too long, but the duration of a lease does not affect the rights that a party has under it. Likewise, the way the payment for the Lease is structured is irrelevant to the control / rights held by the parties under the Lease. That is particularly so when the Lease affords the SOI (and thus QLDC) express primacy over the Lease's own allocations of rights and responsibilities (see further submissions below at paragraphs 3.71 to 3.79).

History – entry into a lease rejected as a regulated transfer of control

3.17 The Local Government Bill 2001 ("**Bill**") as introduced for its first reading in December 2001 addressed "significant proposals" by providing that a local authority must use the special consultative procedure before undertaking any significant proposal.[108] In determining whether a particular proposal was significant or not, cl 70 of the Bill stated:

> **70 Significant proposals**
>
> For the purposes of this Part, a significant proposal in respect of any local authority includes, but is not limited to, a proposal for–
>
> …
>
> (b) the transfer of control of an asset from the local authority to a council-controlled organisation or any other person (whether or not the local authority retains ownership of the asset) or from a council-controlled organisation or another

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106 Management Services Agreement for Wānaka Airport, Schedule, recitals B, C and P **[CBD / 4A / 01126]**. Compare the 2009 Management Services Agreement, Schedule 1 **[CBD / 4A / 01111]**.

107 See, for example, Theelen at [2.6]–[2.8] **[CBD / 2 / 00464]** and Pope at [6.1] **[CBD / 2 / 00495]**.

108 Local Government Bill 2001, cl 72.

> person to a local authority (whether or not that council-controlled organisation or other person retains ownership of the asset), including a transfer of control effected by or under a lease:
>
> …

3.18 Upon introduction, then, the Bill expressly provided that the transfer of an asset by or under a lease from a local authority to a CCO would trigger the special consultative procedure. However, when the Bill was reported back from the Select Committee in December 2002, cl 70 was removed.

3.19 During the Select Committee process, cl 70 attracted "considerable criticism".[109] Submissions argued that the wording of cl 70 had placed "significant consultation procedure hurdles on almost any change to delivery options".[110] As a result, the report on the Bill prepared by the Department of Internal Affairs recommended that the Select Committee delete cl 70, discontinue the concept of "significant proposals", and:

(a) include a general obligation to consult interested and affected persons in a manner appropriate to the circumstances and significance of the issue;[111] and

(b) require proposals involving "the *divestment* of strategic assets" (emphasis added) and other significant changes to be included, and consulted on, in a local authority's long-term plan before they could proceed.[112]

3.20 The departmental report's suggestion was adopted by the Select Committee, which recommended the Bill be passed with a new cl 77A (which later became s 97). Commentary released by the Select Committee alongside its report described cl 77A as intended "to require decisions of strategic importance or consequence to be consulted on in the context of the long-term council community plan".[113]

3.21 This history demonstrates a deliberate decision to step back from a prescriptive regime that prohibited a "transfer of control" to a CCO (including by deeming leases to be a species of such regulated transfer), instead preferring a regime that applied only where there was a transfer of *the* control of the strategic asset (ie equivalent to divestment) and removal of any reference to CCOs or leases. Parliament removed a provision that squarely prohibited the conduct now in question. The strong inference from that history, supported by the plain words of s 97 ultimately preferred by Parliament, is that a lease to a CCTO is not a regulated transfer of control.

3.22 That in turn strongly supports a reading of s 97 as focussing on ultimate control and against a reading that a lease to a CCTO requires s 97 processes.

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109 Department of Internal Affairs *Local Government Bill: Report on Part 5 and Schedule 8 for Local Government and Environment Committee* (LGB/DIA/60, October 2002) at 49.

110 At 57.

111 At 55.

112 At 66.

113 *Local Government Bill 2001 – As Introduced and as Reported Back from the Select Committee December 2002* at 6.

The SOI as an effective means of control in s 97

3.23 Once s 97 is properly interpreted, it is clear that the SOI mechanism provides QLDC with the control of Wānaka Airport contemplated by that provision. That follows as a matter of law and is also demonstrated by the way QLDC's control has actually been exercised in relation to Wānaka Airport.

The SOI control mechanism

3.24 The SOI provides local authorities with a powerful statutory tool for controlling CCO conduct. By s 60 of the LGA, all decisions relating to the operation of a CCO must be made consistently with the SOI. By s 58(1), the role of a CCO's board of directors is to assist the CCO meet its objectives and any other requirements set out in the SOI.

3.25 Further, the LGA contains a comprehensive process by which QLDC has the opportunity to contribute to QAC's SOI every year – and, ultimately, the ability to modify the SOI by resolution as it sees fit.

3.26 The LGA requires every CCO to prepare and adopt an SOI.[114] The purpose of an SOI is to:[115]

> (a) state publicly the activities and intentions of the council-controlled organisation for the year and the objectives to which those activities will contribute; and
>
> (b) provide an opportunity for shareholders to influence the direction of the organisation; and
>
> (c) provide a basis for the accountability of the directors to their shareholders for the performance of the organisation.

3.27 The SOI must be prepared and adopted in accordance with Part 1 of Schedule 8 to the LGA. Among other things, Part 1 of Schedule 8 stipulates that:

(a) the board of a CCO must provide a draft SOI to its shareholders on or before 1 March in the year preceding the final year to which the draft SOI relates;[116]

(b) the board must then consider any comments on the draft SOI received from the shareholders on or before 1 May, and deliver a final SOI to the shareholders before the commencement of the financial year to which it relates;[117]

(c) the board of a CCO may modify the SOI at any time, but only where it has first given written notice to the shareholders of the proposed modification and considered any comments made by the shareholders on it;[118] and

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114 LGA, s 64(1).

115 LGA, s 64(2).

116 LGA, Schedule 8, Part 1, cl 1.

117 LGA, Schedule 8, Part 1, cl 2–3.

118 LGA, Schedule 8, Part 1, cl 5.

(d) the shareholders of a CCO may, by resolution and following consultation with the board, require the CCO's board "to modify the statement of intent in the manner specified in the resolution".[119]

3.28 Thus, QLDC can – at any time – alter QAC's SOI to change its objectives and QAC must make all its decisions consistently with the SOI.

The SOI process in relation to Wānaka Airport

3.29 The Lease is explicitly subject to the SOI process (see cl 8 of the First Schedule, and cl 18.9 of the Second Schedule, and see paragraphs 3.71 to 3.74 below) and the facts of this case provide ample demonstration of QLDC's practical control over Wānaka Airport by way of the SOI process. They demonstrate that QLDC has been quite prepared to exercise its legal control in practice, including by rejecting and requiring amendments to an SOI in 2019, and by introducing a pause to the introduction of any scheduled services that has been so effective that to date it has prevented Sounds Air from introducing turbo-prop services at Wānaka Airport (a development which, in fact, WSG supports[120]).

3.30 In April 2017, QLDC resolved to lease the airport to QAC. Consequently, QAC's SOI for 2018–2020 (operative from July 2017) listed "[a]gree with QLDC a long term lease over Wānaka Airport" among QAC's objectives, as well as "[i]f a lease is signed, ensure a smooth transition and integration with strong community support".[121] During this period, in March 2018, the Lease was executed by QLDC and QAC, and QAC commenced initial rounds of consultation with the community.

3.31 QAC's SOI for 2019–2021 (operative from July 2018):

(a) noted that "QAC intends to plan, develop and operate Wanaka and Queenstown airports in a complementary way to provide sustainable long-term regional services";[122]

(b) listed "develop a Master Plan for Wanaka Airport with input from the community, that provides a spatial framework for the airport's future" among QAC's objectives;[123] and

(c) listed "prepare a Master Plan for Wanaka Airport which explores feasible opportunities to develop Wanaka Airport and contribute to services across the region" among QAC's key initiatives, which QAC said "will include technical studies, options, infrastructure and certification required, funding models, and timelines".[124]

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119 LGA, Schedule 8, Part 1, cl 6. The modification must be consistent with the constitution.

120 WSG submissions at [50]–[51].

121 SOI 2018–2020 at 9 **[CBD / 4B / 02237]**.

122 SOI 2019–2021 at 6 **[CBD / 4B / 02408]**.

123 SOI 2019–2021 at 14 **[CBD / 4B / 02416]**.

124 SOI 2019–2021 at 14 **[CBD / 4B / 02416]**.

3.32 During this period, consistently with its SOI on which QLDC had been consulted, and which it had approved, QAC began work on a draft master plan for Wānaka Airport.[125]

3.33 In April 2019, in light of the technical work being progressed, QAC updated its stakeholder communities that its "current thinking" was that Wānaka Airport could be developed to accommodate turboprop and narrow-body jet aircraft, and outlined some of the community consultation processes to follow.[126]

3.34 The proposed SOI for 2020–2022 provided to QLDC reflected that language. It was tentative, reflecting the early stages of consideration:[127]

> At Wanaka Airport, the proposed master plan approach supports the development of a regional airport to enable scheduled domestic services from approximately 2025. We expect a handful of such services operated by turbo-prop and narrow-body jet aircraft at the start and for several years thereafter in-line with demand. This planning approach is consistent with QLDC's aspiration to have scheduled services reintroduced at Wanaka Airport through the long-term lease to QAC.

3.35 However, this proposed SOI was rejected by QLDC and, in August 2019, QLDC announced that planning work in respect of any future development or expansion of Wānaka Airport would be paused pending the completion of economic and social impact assessment reports commissioned by QLDC.[128]

3.36 QAC publicly acknowledged its full support for QLDC's process in September 2019.[129]

3.37 The SOI for 2020–2022 was ultimately approved by QLDC in December 2019. That SOI:[130]

(a) confirmed that QAC would not seek to introduce scheduled services (ie of any kind) at Wānaka Airport until QLDC's impact assessments were complete; and

(b) emphasised QAC's commitment to ensuring it has a "strong mandate to go forward with the future development of Queenstown and Wānaka Airports".

3.38 In March 2020, in light of the developing Covid-19 crisis, QAC prepared an SOI for the year ending 30 June 2021. That SOI carried over QAC's commitment

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125 Keel at [6.17] **[CBD / 2 / 00519]**, referring to Queenstown Airport News 'Statement from Prue Flacks, Chair – on Wanaka Airport" (13 September 2019) **[CBD / 4B / 02398]**.

126 Keel at [6.19]–[6.22] **[CBD / 2 / 00519–00520]**, referring to QAC "Master plan update and engagement opportunities" (29 April 2019) **[CBD / 4B / 02428]**.

127 Queenstown Airport Corporation Ltd *Statement of Intent: 2020–2022* (30 June 2019) at 7 **[CBD / 3 / 00920]**.

128 Keel at [7.1] **[CBD / 2 / 00520–00521]**, referring to QLDC "QLDC Provides Clear Direction to QAC on Future Development" (8 August 2019) **[CBD / 4B / 02438]**.

129 Keel at [7.3] **[CBD / 2 / 00521]**, referring to Queenstown Airport News "Statement from Prue Flacks, Chair – on Wanaka Airport" (13 September 2019) **[CBD / 4B / 02397]**.

130 Revised SOI 2020–2022 at 7 **[CBD / 4B / 02447]**.

not to introduce scheduled services at Wānaka Airport until QLDC had completed its impact assessments. The SOI stated:[131]

> QLDC is currently undertaking independent economic and social impact assessments of future airport development on the district and its communities, as well as the regional spatial planning process. QAC has committed not to seek any expansion of the air noise boundaries at Queenstown Airport or begin development of Wānaka Airport to introduce scheduled services at this time.

3.39 Accordingly, and contrary to WSG's disparaging assessments, QLDC has proven itself perfectly capable of insisting on SOIs that meet its intended requirements. The SOI, as a key mechanism of legal control provided by Part 5 of the LGA, is proving a real one in practice.

3.40 QAC's commitment not to introduce scheduled services until the impact assessments and spatial planning processes were finished has also meant that QAC has not, of its own volition, been able to approve the recent proposal by Sounds Air to introduce a scheduled turbo-prop service between Wānaka and Christchurch. Instead, QAC is required to seek the necessary sign-off from QLDC by way of a revised SOI.[132] That is the position, notwithstanding the attractiveness of such an option in the post-Covid era, given dramatically reduced air traffic (and hence QAC revenue) at Queenstown Airport, and the support for such services at Wānaka Airport by community groups such as WSG. Again, the SOI has been proven to impose meaningful constraints on QAC's operations in practice (albeit not, in this particular case, a constraint that WSG supports).

3.41 Sounds Air will only be able to commence operations into Wānaka Airport if and when a revised SOI, anticipated to be approved in October 2020, permits such operations.

Specific factors relied on by WSG as evidencing a loss of control

3.42 Despite the legal control created by the SOI process, and the practical control demonstrated by QLDC in this case, WSG argues that the control is not legally sufficient. That is despite the SOI being the control mechanism specifically identified by Parliament in Part 5 of the LGA to hold council-*controlled* organisations accountable to their shareholders and influence their direction.[133] WSG's attempts in its submissions to undermine the controlling effect of the SOI are briefly addressed below.

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131 Queenstown Airport Corporation Ltd *Statement of Intent: Year ending June 30 2021* at 10 **[CBD / 4B / 02109]**.

132 See "Wānaka to Christchurch flights to help domestic recovery" *The Wānaka Sun* (online ed, Wānaka, 27 August 2020) accessed at: <https://www.thewanakasun.co.nz/news/13710-wnaka-to-christchurch-flights-to-help-domestic-recovery.html>. See also Theelen at [6.1] **[CBD / 2 / 00475]**: "Earlier this year, Sounds Air proposed a scheduled service to be run between Wānaka Airport and Christchurch. However, this proposal was rejected by QAC in light of the commitment made by QAC and QLDC not to undertake development or to allow for scheduled services to or from Wānaka Airport until impact assessments were complete… Acceptance of the Sounds Air proposal would not be consistent with the SOI for QAC." See also Mark Price "QAC backed on Sounds Air" *Otago Daily Times* (online ed, Dunedin, 2 July 2020) **[CBD / 4B / 01949]**.

133 LGA, s 64(2)(b) and (c).

Guiding principles and "economic control"

3.43 In 2018, QLDC and QAC agreed guiding principles for the management and development of Wānaka Airport, which have subsequently been set out in all SOIs. There are nine principles. They include principles WSG would no doubt endorse, such as the agreement to "engage with all stakeholders involved at the Wanaka Airport and the wider Wanaka community in future planning" and recognition that "the support of the communities served by Wanaka Airport is important".[134] One principle provides that:

> QLDC and QAC acknowledge that the long-term lease arrangement regarding Wanaka Airport should vest economic control of Wanaka Airport in QAC and its terms should encourage investment in the Airport by QAC.

3.44 WSG claims that this acknowledgement effects a transfer of control from QLDC in and of itself.[135] That is wrong for the following reasons:

(a) An intention to vest "economic control" does not equate to a transfer of "control" for the purposes of the LGA. The language simply reflects an intention that QAC would take responsibility for raising funds, designing business plans, strategic planning, investment, and implementation of any development plans that were, in fact, ultimately approved by QLDC through the SOI process.

(b) The principles do not displace QLDC's ultimate decision-making control over any mooted future development at Wānaka Airport.

3.45 As noted above, it is important to recall that the reason a long term lease was favoured was because QLDC does not have the expertise, experience, or capacity to plan for, manage or operate an airport.[136] Those processes inevitably had to be conducted by a third party, but QLDC retains ultimate decision-making power as to whether any activity is taken forward.

3.46 WSG's approach to s 97 of the LGA suggests that any devolution of economic / operational management responsibility over relevant assets to a CCTO would breach that provision. WSG argues that local authorities must retain control over "business decisions", and that "any change" of control breaches s 97.[137] If that were the case, the CCTO regime would be unworkable, with any change in commercial arrangements between a local authority and a CCTO needing to go through the long term planning and special consultation process. That is hardly a commercially sensible or efficient process in circumstances where the local authority, by definition, wishes to harness the assistance of an entity specifically required under s 59 to "conduct its affairs in accordance with sound business practice".

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134 SOI 2019–2021 at 19 **[CBD / 4B / 02421]**.

135 WSG submissions at [121]–[123].

136 See, for example, Theelen at [2.6]–[2.8] **[CBD / 2 / 00464]** and Pope at [6.1] **[CBD / 2 / 00495]**.

137 WSG submissions at [252] and [268] respectively.

Section 64(10) of the LGA

3.47 Section 64(10) preserves the validity and enforceability of contracts, deeds, rights and other obligations that have been created in circumstances inconsistent with an SOI. While it rejects (without explanation) this saving effect of s 64(10), WSG nevertheless argues that this effect would make the control of a CCO through an SOI process ineffective.[138] That argument amounts to an invitation to the Court to find that Parliament's chosen tool for controlling council-*controlled* organisations (namely the SOI) is in fact inadequate to perform the task legislatively assigned to it. That argument is clearly incorrect.

3.48 Section 64(10) certainly protects contracts that have been concluded, such as the leases that QAC has signed with users of the airport. WSG's argument seems to be that, relying on s 64(10), QAC would feel able to act however it wishes – for example, signing up to development contracts to realise a Code C jet-capable airport, in defiance of its SOI.

3.49 However, significant decisions, such as airport development, with substantial lead times, planning processes and public consultation phases are readily controlled by the SOI process. It is inconceivable that airport development could occur unless permitted by the SOI and attempting to do so would be a breach of the Lease.

3.50 WSG's submission amounts to the proposition that total legal control is not enough because somebody might nonetheless act unlawfully. The only control that it appears would satisfy WSG is total control, and oversight of every action by a CCO, but no legal regime can exclude the possibility of decision-makers acting unlawfully.

3.51 Acting in breach of an SOI is unlikely, not least because it could have significant consequences for QAC's directors:

(a) Such directors might expect to be removed from office by QLDC, who has the power to call special general meetings and appoint or dismiss directors.[139]

(b) They would also risk breaching their obligations to act in good faith in the best interests of the company. It is difficult to conceive of any situation where the company's best interests could involve acting contrary to its statutory obligation imposed by an SOI approved by its majority shareholder, and which it is required to abide by as a matter of law and under its Lease. Such directors could face civil and, potentially, criminal liability.[140]

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138 WSG submissions at [281].

139 See Companies Act 1993, s 121 (regarding special meetings) and s 156 (regarding removal of directors).

140 See Companies Act 1993, ss 131 and 138A.

Timing of the SOI

3.52 WSG appears to suggest that a currently governing SOI does not provide control because it necessarily antedates the execution of the Lease.[141] This is misconceived:

(a) The Lease expressly provides that no use is permitted at Wānaka Airport except as contemplated by the operative SOI. When the Lease was executed the governing SOI did not provide for development of Wānaka Airport. The argument that the SOI control "follows" the Lease is illogical. Future development would require permission through the SOI process.

(b) The SOI is an annually updating control mechanism, to which the Lease has always been (and remains) expressly subject.

3.53 WSG's real complaint seems to be that it does not trust QLDC to exercise control to prohibit decisions that WSG does not approve of.

Shareholding in QAC also a strategic asset

3.54 WSG also argues that the airport and the shareholding in QAC are both strategic assets and that the two should not be conflated.[142] There is no conflation. Because QAC is a CCTO, it is subject to control mechanisms that allow QLDC to control development of the airport. As set out below, that control is strengthened by its majority shareholding, but the SOI is an independent control mechanism.

QLDC's super-majority shareholding provides additional control

3.55 QLDC also retains control of QAC by way of its 75.01% shareholding in the CCTO. Under the Companies Act 1993, the level of that shareholding empowers QLDC (among other things) to pass a special resolution on behalf of QAC without the approval of other shareholders, control all major transactions and amend QAC's constitution as it sees fit.[143]

3.56 Ultimately, then, if QLDC forms a view as to whether QAC should or should not pursue a particular development strategy in respect of Wānaka Airport, QLDC can exercise its rights as 75.01% shareholder of the company to compel such a course of action.

3.57 WSG implicitly accepts that there could be no issue with the Lease if QAC were 100% owned by QLDC.[144] However, it argues that AIAL's minority shareholding strips QLDC of that control. That is a proposition that would surprise minority shareholders around the country. QLDC retains control in virtue of its super-majority shareholding.

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141 See, for example, WSG submissions at [251].

142 WSG submissions at [269].

143 Companies Act 1993, ss 2(1) and 106.

144 WSG submissions at [11]: "It is important to note that … QAC is not just QLDC by another name. It is not 100% owned by QLDC."

The SAA

3.58 WSG also argues that the SAA vests such control in AIAL that QLDC does not have control of QAC.[145]

3.59 The argument that QLDC has somehow lost control of QAC through the existence of the SAA is unsupported by any of the obligations in the SAA, including the expressly unenforceable and "aspirational" "stretch outcomes" referenced therein.[146] It is unsurprising that the SAA does not direct any particular outcome in relation to Wānaka Airport, which QAC managed but had no leasehold interest in when the SAA was updated in 2016. At that time, QLDC had only recently released its statement of proposal on governance options at Wānaka Airport, and had not made a final decision regarding that governance.[147]

3.60 WSG misunderstands the nature of this agreement. For example, it describes the SAA as a "joint venture" that confers joint decision making rights providing AIAL with substantial joint economic control over Wānaka Airport.[148] These assertions are not justified by anything in the SAA itself.

3.61 The SAA is a straightforward cooperation agreement that enables QAC to utilise AIAL's experience and market presence as the largest airport in New Zealand. It is primarily about information sharing and collaboration. The SAA provides a joint purpose and stretch outcomes to give a focus to the relationship between AIAL and QAC but does not provide AIAL with control, or anything like it, of QAC decision-making. In particular:

(a) Nowhere in the SAA is AIAL provided with joint management and decision making rights. WSG's claim to the contrary is at best mistaken. AIAL has no management control. Both parties have limited rights to be involved in management *discussions* but have no rights to make decisions. In AIAL's case, it can *participate* in *planning* processes "where matters to be considered are central to the delivery of any of the Stretch Outcomes".[149]

(b) The limited ability to contribute to board discussions creates no additional rights and is less extensive than the access QAC is given to AIAL's board.

(c) By WSG's logic, it would seem that QAC has obtained management control of AIAL, as its access to AIAL's management and the board are, if anything, greater than AIAL's is to QAC's board and management. That argument simply holds no weight.

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145 WSG submissions at [128] and [132].

146 Strategic Alliance Agreement (3 November 2016), cl 4.1 and cl 4.2–4.4 **[CBD / 4B / 02089]**. Failure to deliver the Stretch Outcomes has no consequence, other than to a trigger a good faith negotiation between the entities if at least half of them are not achieved.

147 The strategic alliance agreement was signed on 3 November 2016, and the statement of proposal was released on 8 October 2016.

148 See WSG submissions at [12], [240(b)] and [321].

149 Strategic Alliance Agreement (3 November 2016), Schedule 2, cl 4(a) **[CBD / 4B / 02099]**.

(d) The parties commit to aligning their respective interests, *where appropriate*.[150]

(e) The Joint Purpose has been mutually agreed, and represents typical commercial and safety "aspirations" that are consistent with QAC's role under the LGA and its SOIs.

(f) The QAC board is dominated by QLDC's appointees and its interests as majority shareholder are specifically noted.

3.62 It is clear that AIAL is not able to dictate any decision in relation to QAC's business, and Mr Keel confirms that it has not done so in relation to Wānaka Airport.[151]

3.63 WSG's challenge is limited to whether there has been a transfer of control of Wānaka Airport. The stretch outcomes of the SAA, which are addressed in cl 4 of the SAA,[152] do not directly involve, or even address, Wānaka Airport, and the evidence of Mr Keel is that none of the stretch outcomes drive any particular approach to Wānaka Airport.[153] Those outcomes were themselves approved by a board dominated by QLDC-appointed directors.

3.64 Mr Keel's evidence is further that QAC's approach to Wānaka Airport has not been directed by AIAL and that AIAL has also fully endorsed QAC's social licence approach to its operations.[154]

3.65 WSG's analysis of this agreement borders on the conspiratorial. For example, it spends almost a page speculating on the intended effect of wording that Mr Pope drafted for an internal QLDC meeting in which a reference to "the two airports" was replaced by "Queenstown Airport and Auckland International Airport", and tries to draw some significance from the assertion that the SOI that was approved months later instead referred to "two companies".[155] It is not clear why this would matter, but WSG is simply mistaken – the relevant text of the SOI approved by QLDC referred to two airports (not "two companies"), as had the previous SOI.[156]

3.66 Similarly, the description of this arrangement as a joint venture is incorrect.[157] The parties do not describe it as a joint venture, and the typical features of a joint venture are absent: there is no contribution of capital, no special purpose vehicle, and no profit share:[158]

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150 Strategic Alliance Agreement (3 November 2016), Recital E **[CBD / 4B / 0286]**.

151 Keel at [2.11] **[CBD / 2 / 00501]**.

152 See the Strategic Alliance Agreement (3 November 2016), cl 4 **[CBD / 4B / 02089]**.

153 Keel at [2.11] **[CBD / 2 / 00501]**.

154 Keel at [2.11]–[2.12] **[CBD / 2 / 00501]**.

155 WSG submissions at [124]–[125]. Mr Pope explains at [4.4] of his affidavit that he made tracked changes to a version of the SOI in April 2017 and provided it to councillors "to demonstrate how it could be amended" **[CBD / 2 / 00493]**. See also **[CBD / 4A / 01385]** for the tracked changes described by WSG.

156 Queenstown Airport Corporation Ltd *Statement of Intent 2017–2019* (30 June 2016) ("**SOI 2017-2019**") at 19 **[CBD / 4E / 04126]**; SOI 2018–2020 at 16 **[CBD / 4B / 02244]**.

157 See WSG submissions at [12], [240(b)] and [321].

158 David Quigg, John Horner and Dan Baker "Joint ventures and strategic alliances" (2002) NZLJ 98 at 99.

> Participants in a strategic alliance will not normally contribute any capital or equity to the venture but often resources or costs are agreed to be shared for mutual strategic purposes. A joint venture will usually give rise to a separate entity with a "life of its own" and can often be managed independently from the businesses of the participants.

3.67 In any event, of course, it would not matter if it were a joint venture, because the activities of QAC, however described, are controlled by QLDC.

3.68 WSG also suggests that the agreement should be between QLDC and AIAL.[159] However, the SAA is an agreement providing for certain measures of cooperation between airport operators. No evidence for what is "usual" is provided, other than a bare assertion from a deponent who has not referenced the Code of Conduct, and whose views depend on a materially inaccurate assessment of what the SAA does.[160] It is also irrelevant to the legal question of whether the SAA reduces QLDC control in a relevant way.

Application of s 97(1)(b): the Lease does not transfer control or ownership

3.69 WSG also argues that the Lease itself gives QAC control over both Wānaka Airport and Project Pure.[161] That cannot be right, because QAC is controlled by QLDC. Thus, activities that are not prohibited by the Lease are nevertheless subject to control by QLDC as the majority shareholder or through the SOI process.

3.70 However, WSG also misunderstands the effect of the Lease, which specifically preserves QLDC's control.

Lease does not transfer control of Wānaka Airport

3.71 WSG ignores the priority given in the Lease to the LGA / SOI processes. As outlined above, the Lease expressly emphasises the ultimate control provided to QLDC by the SOI process.

3.72 The Lease thus states that (emphasis added):[162]

> The Lessee **must ensure that the Land is not used for any use, activity or event which is not within the contemplation of the Lessee's statement of intent** (as required under section 64 of the Local Government Act 2002 and updated from time to time) insofar as the statement of intent relates to the **development and operation** of the Wanaka Airport.

3.73 The overriding control supplied by Part 5 of the LGA (which includes the SOI process) is further emphasised in clause 18.9:

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159 WSG submissions at [128].

160 Mr Hudson incorrectly describes the SAA as "conferring joint management and decision making rights" and that control "is vested equally in AIAL and QAC". See Hudson at [31]–[32] **[CBD / 2 / 00161]**.

161 WSG submissions from [220] onwards.

162 Memorandum of Lease for Wānaka Airport ("**Lease**"), First Schedule, cl 8 **[CBD / 3 / 00811–0812]**.

> **18.9 Governance under the Local Government Act not affected by this Lease**
>
> The parties acknowledge that QAC is a council controlled trading organisation subject to governance under the Local Government Act 2002. Nothing in this Lease will prejudice the statutory rights and obligations in Part 5 of the Local Government Act 2002 for so long as those statutory rights and obligations apply to those parties.

3.74 The SOI process is a complete answer to this claim. Through it, QLDC controls QAC, and the underlying rights and obligations in the Lease remain subject to the primacy of the SOI.

3.75 The general scheme of the Lease also demonstrates that both parties intended QLDC to retain ultimate control over Wānaka Airport. In particular, the Lease:

(a) restricts QAC's permitted use of Wānaka Airport to airport (or related) activities within the contemplation of the SOI, and which will not interfere with the safe and efficient operation of the airport;[163]

(b) requires QAC to keep the premises in good repair and condition as reasonably expected to maintain the safe and efficient operation of the airport;[164]

(c) requires QAC to comply with all relevant laws and statutory provisions affecting its use of Wānaka Airport (including, of course, the LGA);[165]

(d) requires QAC to actively operate Wānaka Airport and comply "in all respects" with statutes, ordinances, regulations, by-laws, orders and "other directives" issued by any Authority (which includes QLDC);[166]

(e) gives QLDC the right to require QAC to subdivide and sell to QLDC any land adjoining Wānaka Airport owned by QAC and developed for the purpose of carrying out aeronautical activities;[167]

(f) gives QLDC the right of first option to purchase additional land surrounding Wānaka Airport required for further development of the airport, even when identified by QAC;[168]

(g) requires QAC to obtain QLDC's consent to an assignment or sublease of its interest in the Lease;[169] and

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163 Lease, First Schedule, cl 8 **[CBD / 3 / 00811–0812]**.

164 Lease, Second Schedule, cl 7.1 **[CBD / 3 / 00820]**.

165 See, for example, the Lease, Second Schedule, cl 7.2, cl 8.1, cl 11.1, cl 11.4 and cl 11.8, among others **[CBD / 3 / 00806]**.

166 Lease, Second Schedule, cl 11.4 **[CBD / 3 / 00829–0830]**.

167 Lease, Second Schedule, cl 8.2 **[CBD / 3 / 00823–00824]**.

168 Lease, Second Schedule, cl 8.3 **[CBD / 3 / 00824]**.

169 Lease, Second Schedule, cl 9.1 **[CBD / 3 / 00825–0826]**.

(h) provides that nothing in the Lease fetters QLDC's regulatory capacity and no consent under the Lease is to be construed as consent in QLDC's regulatory capacity.[170]

3.76 QAC also notes cl 9.3 of the Lease, which states:

> …any change in the partnership, membership or shareholding of the Lessee or any reclassification of the rights attaching to any shares or any other arrangement altering the effective control of the Lessee (if a partnership or a company) shall be deemed a proposed assignment of this Lease and will require the consent of the Lessor.

3.77 In other words, *any change* in QAC's shareholding requires the express consent of QLDC. Clause 9.3 expressly ties alterations in the ownership of QAC to the lease of Wānaka Airport. Indeed, the Lease requires QLDC's consent for "any other arrangement" that alters the "effective control" of QAC – indicating that, at the date of execution, the status of the effective control of QAC was important to QLDC, because it contracted to preserve its right to withhold consent to a possible change in that control.

3.78 None of the matters raised by WSG transfer effective control over the airport to QAC through the Lease, either individually or in combination:

(a) *No veto on development*:[171] This is entirely logical in the context of this transaction. Any significant development would already require approval through the SOI process. It would be a nonsense for QAC to require separate approval under the Lease for a course of action that had already been approved. Leases between unrelated parties (with no other control mechanism) will often give the lessor the right to refuse consent to a development, but that cannot be unreasonably withheld.[172] It would obviously be unreasonable to withhold consent to an activity that QLDC had authorised through an SOI.

(b) *Assignment*:[173] WSG suggests that an assignment of the Lease could remove control from QLDC. However, any transaction that removed the control currently effected by QLDC's shareholding and the SOI process would involve a transfer of control over Wānaka Airport (a strategic asset). Accordingly, it would trigger s 97, and engage the special consultation process required under it. The need to ensure s 97 compliance would obviously provide QLDC with reasonable grounds under the Lease to refuse consent to the proposed assignment until the process had been completed. WSG cannot rely on a hypothetical (and as yet unapproved) future change of control to assert that the existing arrangement necessarily involves a present transfer of control.

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170 Lease, Second Schedule, cl 10.1 **[CBD / 3 / 00811–0827]**.

171 WSG submissions at [247].

172 Affidavit of Johannes (John) Bernadus Joseph Schellekens dated 21 August 2020 ("**Schellekens**") at [6.3(d)] **[CBD / 2 / 00454]**.

173 WSG submissions at [248].

3.79 WSG asserts that this Lease is unusual and inappropriate.[174] The only evidence it relies on is from Mr Hudson who appears to have no particular experience with commercial leases, let alone leases of this sort involving major infrastructure. As with other purported experts briefed by WSG, Mr Hudson has not referred to the code of conduct for expert witnesses. However, QLDC's evidence, from an appropriately qualified expert, is that such leases are not uncommon and QLDC has itself entered into a 125 year lease in a different case.[175]

Lease not a transfer of ownership under s 97(1)(b)

3.80 WSG asserts that the Lease is a transfer of ownership. QAC agrees that if the airport had been sold to it there would have been a transfer of ownership. That is not what happened. WSG argues that the Lease is "as good as" a sale. That is not the case. The prohibition on transferring ownership is concerned with actual transfers of ownership. There has been no transfer of title, and this limb of s 97 is simply not engaged.

3.81 QLDC agreed to sell Wānaka Airport's Buildings (as defined in the Lease) to QAC. Of course, the Buildings are not themselves identified as a strategic asset by QLDC's Significance and Engagement Policy.[176] The airport is the relevant strategic asset – it has not been sold, and QAC is required to continue to operate the airport. QLDC's control of the airport's direction is unaffected by the sale of the Buildings, and WSG points to no practical diminution in control of the airport itself. Ownership of the Buildings, at least as between QLDC and its CCTO, is irrelevant to operation of the airport. Instead, the sale of the Buildings – with an obligation to transfer the Buildings to QLDC at the end of the Lease – simply recognises the fact that the Buildings have a limited economic life and would have be replaced during the term of the Lease.

Lease does not transfer of control of Project Pure

3.82 QAC does not have control over Project Pure, for two reasons:

(a) first, the Lease does not purport to create rights that have the effect of transferring control of Project Pure; and

(b) for the reasons set out in the previous section, QAC's rights under the Lease are controlled by QLDC through the SOI process.

3.83 The Lease provides for the continued operation of Project Pure, including rights of access across the airport site.[177]

3.84 What QAC does have is a right, to be exercised reasonably, to prevent encroachment that would restrict development options for the airport.[178] It may also require the project to be moved (after giving a minimum of three years' written notice, not to be exercised before 8 March 2020 in respect of disposal

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174 See, for example, WSG submissions at [111].

175 Schellekens at [7.2]–[7.5] **[CBD / 2 / 00454–00456]**.

176 QLDC *Significance and Engagement Policy* (27 November 2014) at 3 **[CBD / 3 / 00527]**.

177 Lease, Second Schedule, cl 12.1(a) **[CBD / 3 / 00832]**.

178 Lease, Second Schedule, cl 12.1(b) **[CBD / 3 / 00832]**.

fields or 8 March 2023 in respect of the rest of the plant).[179] If relocation is required, QAC "will bear all of the costs of relocating Project Pure" based on the capacity of the system as at 2018 (ie on entry into the Lease).[180]

3.85 Under the Lease the parties have agreed that, even if such a transition were to take place, they would work together to ensure that QLDC is able to maintain the operation of Project Pure without interruption.[181]

3.86 This is not a transfer of control over Project Pure. Project Pure continues to operate with no involvement from QAC. QAC does not have a role in planning or developing Project Pure, except as that relates to its location, and even then only in so far as that interferes with QLDC's neighbouring strategic asset (the airport). The Lease does, however, provide a mechanism by which the two pieces of infrastructure can be developed without unduly interfering with the other. That is an outcome that QLDC has always intended. For example, the 2008 Wānaka Master Plan noted that QLDC had agreed that it would "always ensure that the development and use of the land as an airport shall not in any way be hindered and shall always be considered in priority to the use of the said land for wastewater disposal".[182]

3.87 Furthermore, the sort of major airport development that would require Project Pure to be relocated would require QLDC approval under the SOI process, which is specifically preserved in the Lease. A process which QLDC must first approve cannot be one that removes control from QLDC.

Section 97(1)(a): no change in service levels

3.88 WSG's alternative argument is that the grant of the Lease is an unlawful decision to "alter significantly" the intended service levels.[183] WSG does not suggest that the reintroduction of turbo-props would engage this section unless "that in turn carried with it the related decision to rebuild Wānaka Airport into a jet capable airport".[184]

3.89 This claim cannot succeed because no decision to develop the airport as a Code C jet-capable airport has been made, and thus no significant alteration to the service levels at Wānaka Airport is being effected.

3.90 It is therefore unnecessary to address the separate and additional question of whether the Lease could ever amount to a decision engaging s 97(1)(a), given that commercial flights into Wanaka would not be an activity undertaken by or on behalf of QLDC (but rather commercial airlines).

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179 Lease, Second Schedule, cl 12.1(b)(iii) **[CBD / 3 / 00833]**.

180 Lease, Second Schedule, cl 12.1(b)(iii)(5) **[CBD / 3 / 00834]**.

181 Lease, Second Schedule, cl 12.1(b)(iii)(6) **[CBD / 3 / 00834]**.

182 Wānaka Airport Management Committee *Wānaka Airport Master Plan* (11 September 2008) **[CBD / 4D / 03447]**.

183 WSG submissions from [282] onwards.

184 WSG submissions at [283].

4. NO CLAIM PURSUED AGAINST QAC; LACKS MERIT IN ANY EVENT

4.1 WSG does not advance any substantive grounds of judicial review against QAC in its submissions. In a single paragraph amongst 101 pages of submissions, WSG notes only that it originally pleaded QAC breaches and that those matters "may" be relevant to the Court's remedial discretion, "and will be addressed in reply as required".[185] WSG's submissions also assert (but do not explain or evidence) QAC's non-compliance with (unidentified) statements of intent as the eighth matter allegedly relevant to discretionary relief.[186]

4.2 The applicant has the standard burden to make out its pleaded grounds of judicial review.[187] That burden cannot be discharged in reply – by definition, a reply is wholly responsive in nature, and does not permit the applicant to raise and develop new arguments (out of basic fairness to the respondents). By failing to advance them in argument, WSG's stance can only be understood as abandoning the grounds of review originally pleaded against QAC. In light of the costs it has been put to in this litigation, QAC considers WSG's stance should have costs consequences – see the submissions below at section 6.

4.3 For completeness, however, QAC briefly explains why those grounds originally pleaded lacked merit and why in any event they could not, given s 64(10) LGA, have succeeded in invalidating the lease and related agreements (as WSG originally sought).

Pleaded grounds of judicial review against QAC lack merit

4.4 WSG's pleaded claims against QAC are predicated on the allegation that QAC has decided to develop, expand and operate Wānaka Airport so as to accommodate Code C jet aircraft operations.[188] QAC's entry into the Lease and Side Agreements with QLDC for that purpose, and purchase of land in the vicinity of the Wānaka Airport for that purpose, are thereby alleged in the pleadings to breach ss 58, 59 and 60 of the LGA – both for inconsistency with QAC's governing SOI at the relevant times, and for failing to adequately consider the community's related interests in such airport development / expansion.[189] (While WSG sought relief to declare the lease unlawful and of no effect, it did not seek relief in respect of the land purchases.)[190]

4.5 The problem with these pleaded claims is that their fundamental premise is incorrect. As explained above in section 2 of these submissions, QAC has

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185 WSG submissions at [326].

186 WSG submissions at [374].

187 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183 per Cooke J ("The burden of proof is on the plaintiffs"); *Re Royal Commission on Thomas Case* [1982] 1 NZLR 256 (CA) at 276 per curiam ("The applicants have the usual onus of making out their claim"); *Paterson v Dunedin City Council* [1981] 2 NZLR 619 (HC) at 625 ("the onus of establishing the grounds for relief rests on the applicant").

188 WSG's ASOC at [96], [98], and related prayers for relief (after [98]) at (a), (b) and (c)) **[CBD / 1 / 00112–00114]**. Note that references in WSG's pleading to Wānaka Airport's development and expansion into a "dual airport" encompasses the introduction of Code C jet aircraft operations: see, for example, ASOC at [26], [31], [60], and [61(a)].

189 WSG's ASOC at [96]–[98], and related prayers for relief (after [98]) **[CBD / 1 / 00112–00114]**.

190 WSG's prayers for relief (a) and (b) following [98] of the ASOC seek declarations only in respect of the lease **[CBD / 1 / 00113]**.

never decided to expand and develop Wānaka Airport to be a Code C jet-capable airport. As a result, the pleaded allegations must fail.

4.6 Further, once it is recognised that QAC has not decided to develop Wānaka as a Code C jet-capable airport, QAC's entry into the two transactions impugned in the pleadings (ie the Wānaka land acquisitions and the Wānaka Airport lease) are readily seen as consistent with its governing SOIs at the relevant times:

(a) **The purchase of land adjacent to Wānaka Airport:** These purchases were made on 4 November 2016 (of approximately 106ha of land on Wānaka-Luggate Highway, known as "Lot 3" and "Lot 6") and 23 March 2017 (of approximately 43ha of land at 825 Wānaka-Luggate Highway) respectively. As Mr Keel has explained, and the contemporaneous statements of the QAC Chair Mr Gilks show, these acquisitions were made in response to perceived competitor interest in the properties and the need to preserve options for any potential future development at Wānaka.[191] They also involved little evident downside risk given the Wānaka properties' likely appreciation in value following purchase.[192] Such commercial decision-making would be prudent for any airport operator given the long term investment horizon for such infrastructure, and was consistent with both QAC's statutory objective in s 59(1)(d) to "conduct its affairs in accordance with sound business practice" and QAC's property-related objectives in the governing SOI, which included to "acquire or rationalise land holdings to support our strategies" and to "develop land holdings to maximise return on investment while complementing long term aviation growth".[193]

(b) **Entry into the Lease:** Under its SOI for 2018–2020, which was in effect at the time QLDC and QAC executed the Lease in March 2018, QAC was recorded as looking forward to working with QLDC on negotiating the terms of a long-term lease for Wānaka Airport, and to "engaging with the community to develop an airport at Wanaka that we can all be proud of well into the future".[194] One of QAC's key initiatives was to "[a]gree with QLDC a long term lease over Wanaka Airport".[195] QAC's decision to enter a long-term lease in early 2018 was thus, plainly, expressly mandated by and consistent with QAC's operative SOI.

4.7 It is perhaps because of the weakness of WSG's pleaded grounds that, even when briefly raising SOI compliance as one of several matters said to be relevant to discretionary relief, WSG confines itself to a new and generalised

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191 Keel at [3.23] **[CBD / 2 / 00507]**.

192 Keel at [3.22]–[3.29] **[CBD / 2 / 00507–00509]**. See also "Land acquisition at Wānaka Airport" (13 December 2016) Wānaka Airport <www.wanakaairport.com> **[CBD / 4B / 02198]**; Marjorie Cook "Queenstown Airport's 'head-scratching' 106 hectare Wānaka land investment" (9 December 2016) Stuff.co.nz **[CBD / 4B / 02201]**; and QAC "Queenstown Airport acquires land adjacent to Wānaka Airport" **[CBD / 4B / 02207]**.

193 The SOI operative at the time of both purchases was QAC's SOI for 2017–2019, which had been finalised on 30 June 2016. See pp 11–12 for the quoted objectives **[CBD / 4E / 04118–04119]**.

194 SOI 2018–2020 at 2 **[CBD / 4B / 02230]**.

195 SOI 2018–2020 at 9 **[CBD / 4B / 02237]**.

criticism of QAC's investigations and planning work.[196] That allegation, if it is one, has no basis in WSG's pleadings and cannot be advanced now, after the evidence has been filed. In any event, it is plainly not inconsistent with the SOI framework for QAC to undertake prudent commercial planning for the future of its business. If it were, the LGA's vision for the proper operation of CCTOs would have miscarried indeed. Such activity in fact represents the kind of "sound business practice" required by s 59(1)(d) LGA.

4.8 Even had WSG pursed them properly in argument, the pleaded grounds of judicial review against QAC are devoid of merit.

Section 64(10) LGA precludes voiding of lease

4.9 Even had WSG been able to make out its SOI-based grounds of judicial review against QAC, s 64(10) of the LGA operates to prevent the Court from granting the main form of relief sought by WSG, namely that the lease should be declared invalid and of no effect.[197] The resulting futility of the allegations against QAC may be why WSG has not advanced them in submissions.

4.10 Section 64(10) is a savings provision. It provides that any failure by a CCO to act consistently with its SOI "does not affect the validity or enforceability of any deed, agreement, right, or obligation entered into, obtained, or incurred by" that CCO.

4.11 The plain wording of the subsection is clear: a court may not set aside an agreement entered into by a CCO on the basis that the CCO failed to act consistently with its SOI. In this way, s 64(10) is a complete answer to WSG's application for judicial review of QAC's decision to enter into the Lease on the basis of inconsistency with QAC's SOI.

4.12 This plain reading of the subsection is supported by the limited authorities on the point. Section 64(10) does not preclude judicial review of contracts, at least where the grounds do not rely on inconsistency with the SOI, but the savings provision does preclude an order setting aside such contracts.[198]

4.13 It is also consistent with the rationale underlying the CCO / SOI legislative model. In Part 5 of the LGA, the SOI is established and conceived as a key accountability mechanism as between the CCO and its shareholders (see s 55(b) LGA). Section 64(2) of the LGA expressly states that the purpose of the SOI is to "provide a basis for the accountability of the directors to their shareholders for the performance of the organisation", and correspondingly to "provide an opportunity for shareholders to influence the direction of the organisation".[199] The SOI sets requirements for CCO directors and CCO performance in ss 58–60 of the LGA. The SOI also sets standards for the local

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196 WSG submissions at [374].

197 WSG's prayer for relief (b) following [98] of the ASOC **[CBD / 1 / 00113]**.

198 See *Moncrief-Spittle v Regional Facilities Auckland Limited* [2019] NZHC 2399, [2019] 3 NZLR 433 at [21] and, in respect of the materially identical s 21 of the State-Owned Enterprises Act 1986, *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [116]–[117], and William Young J's dissenting comments at [231], suggesting judicial review would not be available.

199 Note that while s 64(2)(a) LGA recognises that an SOI is a public statement, the public are not recognised to have a direct accountability or influence interest in the CCO through the SOI (rather, their interests are protected indirectly through the relevant local authority).

authority shareholders' performance monitoring of their CCOs (in s 65 LGA), including through periodic and annual reporting processes (ss 66–68 LGA).

4.14 Parliament has thus established a detailed regime for the accountability of CCOs to its local authority shareholders, in which the SOI operates as the central control and standard-setting mechanism. Against that background of rigorous accountability, s 64(10) both reflects and underscores that an SOI creates no (indeed, needs to set no) standard of *vires* more generally. Parliament intended that CCOs like QAC should be able to enter into transactions as ordinary companies operating commercially – and, by enacting this savings provision, sought to eliminate the risk that litigants would seek to have transactions set aside on judicial review by challenging transactions as being in some way inconsistent with the SOI.

4.15 WSG originally pleaded that s 64(10) does not save contracts between a local authority and a CCO, but only applies to agreements between CCOs and third parties.[200] That position is hopeless – the language of the section is clear that "any" agreement is saved by the provision. Tellingly, WSG does not advance that pleaded argument in its submissions, confining itself to rejecting (without explanation) the saving effect of s 64(10).[201]

4.16 In any event, that pleaded position involves a distinction without a difference in this case, since voiding the Lease would inevitably have consequences for third parties – particularly the approximately 90 tenants who have agreed subleases with QAC in respect of Wānaka Airport since the Lease was agreed.[202] If the Court were to undo the Lease, it would also void (contrary to even WSG's pleaded interpretation of s 64(10)) those 90 or so sublease agreements whose efficacy depends on QAC having a valid leasehold interest.

4.17 Indeed, if WSG's pleaded position on s 64(10) were correct, then any aggrieved party could unwind contractual arrangements with a CCO simply by challenging the upstream contracts between the CCO and its shareholding local authority. That would significantly erode the savings role of the s 64(10), and cannot have been the intended effect of the provision.

QAC did not fail to act transparently and responsibly

4.18 WSG also pleaded that, in breach of its obligations under ss 58(1), 59(1)(a) and 59(1)(c) of the LGA, "QAC and its directors failed at material times to fully, fairly and openly disclose to QLDC details of its [Code C jet-capable airport development] plans and intentions for existing Wānaka Airport", so as to enable QLDC to properly consult prior to making arrangements that allowed such Code C jet-capable airport developments.[203] WSG neither advances this argument in submissions, nor makes any attempt to explain how the provisions invoked in its pleadings impose the kind of ongoing statutory duty of full and open disclosure of business activity on which the allegation would depend. (QLDC already benefits from the accountability mechanisms in the SOI, other

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200 WSG's reply to second respondent's statement of defence: reply paragraphs [99] and [100] **[CBD / 1 / 00073]**.

201 WSG submissions at [281].

202 Keel at [9.1] **[CBD / 2 / 00522–00523]**.

203 ASOC at [98] **[CBD / 1 / 00113]**.

reporting processes under the LGA, and the ordinary controls inherent in its super-majority shareholding in QAC.)

4.19 While it does not face a live allegation in this regard, QAC notes (again for completeness) that this pleaded allegation also has no merit:

(a) No development decisions regarding Wānaka Airport have been made (let alone to expand Wānaka to a Code C jet-capable airport). QAC cannot have failed to keep QLDC informed of non-existent decisions (in breach of a non-existent statutory duty).

(b) To the extent preliminary planning steps have been taken with respect to Wānaka Airport, QAC has kept QLDC appropriately apprised of those developments. That has included, for example, discussing potential land acquisition with QLDC,[204] raising with QLDC the possibility of future runway developments,[205] and disclosures to QLDC and the wider community about QAC's current thinking, including through the Queenstown master planning processes and other community engagement activities.[206]

5. RELIEF SOUGHT BY WSG INAPPROPRIATE IN THIS CASE

5.1 This section of QAC's submissions addresses the relief originally sought by WSG in its pleadings against QAC. In short, that relief was:

(a) declarations that the decisions of QAC to enter into the Lease, and (allegedly) to develop, expand and operate Wānaka Airport as a Code C jet-capable airport, were unlawful;[207]

(b) a declaration that the Lease is illegal and of no effect; and

(c) an order restraining QAC (and QLDC) from taking any steps to develop, expand and operate Wānaka Airport as a Code C jet-capable airport.

5.2 QAC notes that no relief was ever sought in respect of QAC's decisions to make two purchases of land adjacent to Wānaka Airport in late-2016 and early-2017, notwithstanding that those purchases were originally the subject of pleaded criticism.

5.3 QAC also recognises that as WSG has failed to pursue the substantive grounds of judicial review it pleaded against QAC,[208] no question of

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204 Keel at [3.23] **[CBD / 2 / 00507]**, referring to Email John Gilks to Vanessa van Uden 29 March 2016 **[CBD / 4B / 02197]**.

205 Keel at [5.5] **[CBD / 2 / 00514]**.

206 Keel **[CBD / 2 / 00497]** including at [3.36]–[3.41], [6.4]–[6.11] and [6.19]–[6.23]; and Queenstown Airport Company Ltd *Master Plan Options: Let's start talking about tomorrow* (29 August 2017) **[CBD / 4B / 02248]**.

207 Note that references in WSG's pleading to Wānaka Airport's development and expansion into a "dual airport" encompasses the introduction of Code C jet aircraft operations: see for example ASOC **[CBD / 1 / 00077]** at [26], [31], [60], and [61(a)]. See further prayers for relief (a), (b) and (c) after [98] ASOC, which bind these concepts together.

208 Note section 4 of the submissions above.

discretionary relief properly arises. For completeness, however, and also to assist the Court on the relief questions that could (at least in principle) arise on the claims WSG does pursue in its submissions against QLDC, QAC sets out its submissions on relief below.

5.4 Remedies in judicial review are discretionary.[209] Where an application is successful, the Court takes "a broad-based view of the features of the case" to determine whether, and in what form, relief should be granted.[210] While good reasons are generally required in order for the Court to refuse to grant a remedy where unlawfulness has been established,[211] relief might be declined in a range of circumstances.

5.5 QAC's position is that its decision to enter into the Lease was lawful – and that no decision has been made, at any point, to turn Wānaka Airport into a Code C jet-capable airport. However, if any of WSG's claims against QAC were to succeed (despite not being fairly advanced in argument), QAC submits that the Court should decline to grant the following relief:

(a) Even if (contrary to QAC's submission) s 64(10) LGA does not operate to protect the validity of the Lease,[212] the Court should nevertheless decline to declare that the Lease is illegal and of no effect due to the harm such an order would cause to QAC and innocent third parties, and because such relief would be "academic" in light of subsequent events.

(b) The Court should decline to restrain the respondents from taking any particular action with respect to Wānaka Airport in future, because such relief would run contrary to basic principles of judicial review, and would be unnecessary in the circumstances.

Lease should not be voided because of prejudice to QAC and third parties, and mootness

Prejudice to QAC

5.6 It is well accepted that the conduct and position of a respondent to judicial review proceedings is relevant to the discretion of the Court to withhold a remedy.[213] In this case, QAC submits that the Court should decline to void the Lease – even if it finds it to have been unlawfully entered into by QAC (or indeed separately by QLDC) – because of the harm such an order would cause to QAC.

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209 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136 per Cooke J; *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 123 per Cooke J; and *Wendco (NZ) Ltd v Auckland Council* [2015] NZCA 617, (2015) 19 ELRNZ 328 at [59].

210 *Just One Life Ltd v Queenstown Lakes District Council* (2003) 9 ELRNZ 210 (HC) at [50].

211 *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [155]. See Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at 179.

212 See paragraphs 4.10 to 4.17 above for QAC's argument that s 64(10) does so protect the continued validity of the Lease.

213 See, for example, *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 243; *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (HC) at [282]; and *Tap (New Zealand) Pty Ltd v Attorney-General* CA48/06, 13 December 2006 at [59].

5.7 QAC's conduct in this matter has not been effectively challenged by WSG. The applicant has not been able to establish that QAC – at any point – acted unlawfully or improperly. Rather, as described in submissions above, QAC's actions in respect of Wānaka Airport have been consistent with QAC's obligations under the LGA and SOI at the relevant times.

5.8 Instead, the extent of WSG's attack on QAC is found in its arguments as to why the Court should grant the discretionary relief sought. There, at some length, WSG makes eight submissions as to why QAC's conduct allegedly warrants the undoing of the Lease. Among other allegations, WSG contends that QAC:[214]

(a) "must be taken to have known that it could not legally obtain ownership or control via a "lease" of this sort";

(b) "did not follow the recommendation to disclose to QLDC in advance of any decision the terms of any lease which QAC sought";

(c) "did not fully disclose and discuss the significance of AIAL's 24.99% shareholding";

(d) "did not disclose its real interest in building the "planned runway" and in making Wānaka a second jet capable airport for dual operation with Queenstown Airport";

(e) "did not candidly disclose its plans behind its advance acquisitions of millions of dollars of land adjoining Wānaka Airport"; and

(f) breached, by its conduct, "either the letter or the spirit of its obligations under the LGA".

5.9 These arguments both misstate the facts (for example, WSG appears committed to wilfully misinterpreting the significance of AIAL's minority shareholding, and QAC did not have the intentions or knowledge of illegality implied in these submissions) and are ultimately irrelevant. Indeed, that WSG resorts to making the vague allegation that QAC has acted inconsistently with the "spirit" of the LGA reinforces its inability to point to any unlawfulness on the part of QAC.

5.10 Having acted lawfully and fairly throughout, QAC would now be prejudiced by any order of the Court voiding the Lease. As Mr Keel describes in his affidavit, since agreeing the Lease with QLDC, QAC has taken numerous steps in reliance on the Lease, including:[215]

(a) spending 18 months negotiating leases with commercial and recreational users of Wānaka Airport;

(b) agreeing and executing approximately 90 leases with such third parties;

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214 WSG submissions at [327]–[371].

215 Keel at [9.1]–[9.4] **[CBD / 2 / 00522–00523]**.

(c) investing significant cost and resource in the operations centre at Wānaka Airport, as well as the technical work needed to progress the draft master plan; and

(d) devoting considerable time to community engagement activities concerning the future of Wānaka Airport.

5.11 Mr Keel's evidence is that these investments of company time and money would be wasted if the Lease were now set aside.

Prejudice to third parties

5.12 The courts will also be prepared to withhold relief where the remedy sought would cause harm to innocent actors,[216] and have recognised that the remedial discretion may be influenced by "subsequent irrevocable transactions involving third parties".[217] For example, in *Northcote Mainstreet Inc v North Shore City Council*, the High Court considered that it told against the granting of relief that setting aside the impugned decisions "would potentially signal the closure of 46 businesses currently being carried on".[218]

5.13 In *Judicial Review: A New Zealand Perspective*, Graham Taylor argues that prejudice to third parties is "likely to be critical" to a court considering the exercise of its discretion.[219] The relevance of third party harm is particularly significant where it is coupled with other factors telling against granting a remedy, such as delay in bringing proceedings.[220] Indeed, the "courts will usually refuse relief where the respondent or some third party relies, to their detriment, on the applicant's inaction".[221]

5.14 In this case, WSG failed to file proceedings until late-October 2019 – some 19 months after QLDC agreed the Lease with QAC in March 2018. While WSG makes much of its alleged inability to bring judicial review until it received a copy of the lease in September 2019,[222] the reality is different. The key features of the lease WSG now challenges, namely its 100-year term and the cost to QAC ($14.5m), have been public facts since March 2018.[223] Further, WSG was committed to the view that QLDC and QAC had acted unlawfully well prior to the release of the lease, as seen for example in Michael Ross' presentation to QLDC on behalf of WSG in June 2019,[224] and his letter for

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216 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at 194, citing: *Turner v Allison* [1971] NZLR 844 (CA); *Anderson v Valuer-General* [1974] 1 NZLR 603; *Ritchies Transport Holdings Ltd v Otago Regional Council* CA152/91, 16 August 1991; *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA); and *Gunn v Quota Appeal Authority* [1993] NZAR 102.

217 *Martin v Ryan* [1990] 2 NZLR 209 (HC) at 236, citing *R v Newborough* (1869) LR 4 QB 585 and *R v Licensing Authority of Logan and Denny, ex parte Bahr* [1910] St R Qd 391.

218 *Northcote Mainstreet Inc v North Shore City Council* [2006] NZRMA 137 (HC) at [289].

219 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at 190.

220 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [66].

221 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1194.

222 WSG submissions at [29], [143], [325(a)].

223 See Keel at [5.10] **[CBD / 2 / 00515]** and "Long-term lease for Wānaka Airport signed" Queenstown Airport News (21 March 2018) **[CBD / 4B / 02343]**.

224 Presentation by WSG (Michael Ross) to QLDC dated 27 June 2019 **[CBD / 4G / 05570]**.

WSG to Mayor Jim Boult on 7 August 2019, where allegations of unlawful action (including in respect of the lease) were made.[225] In the time between executing the Lease and being named as second respondent to the application, QAC entered into approximately 90 leases with third party users of Wānaka Airport, as described at paragraph 5.10 above.

5.15 These sublessees include tour providers, fuel companies, recreational users and others – such as those listed in the Sixth Schedule to the Lease.[226] Entering into subleases with that number of tenants is a lengthy process, as is reflected in some of the evidence prepared for WSG.[227] Each of QAC's tenants will have also made their own business decisions based on the arrangements they had put in place with QAC. Invalidating the Lease would mean cancelling those subleases and putting those tenants, and their other obligations, in jeopardy.[228] At the very least, given changes in market conditions, there can be no certainty that either or both of the necessary parties to any new lease arrangements (ie QLDC and the present sublessees) will be content to re-execute leases incorporating the existing terms, including length and rental, of the current leases.

5.16 Therefore, QAC submits that, even if WSG is successful on its application, the Court should not exercise its discretion to invalidate the Lease because to do so would prejudice innocent third parties. That harm could have been avoided – or at least minimised – had WSG acted promptly in applying for judicial review of the Lease.

Futility of relief

5.17 Relief will also generally be declined in cases where it would be "futile and moot".[229] Remedies are granted to correct injustices, not to merely give satisfaction to an applicant, so no relief is required where a dispute has been effectively resolved by other means.[230] Such mootness might arise where a change in circumstances between the making of an impugned decision and a judicial review decision overtakes the original decision-making error, rendering any relief "academic".[231]

5.18 In this case, WSG's concerns about imminent development at Wānaka Airport have been overtaken by events since the Lease was executed. The Lease was agreed prior to the Covid-19 crisis, in a different economic environment.

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225 Letter from WSG (Michael Ross) to Jim Boult dated 7 August 2019 **[CBD / 4G / 05625]**.

226 Lease, Sixth Schedule **[CBD / 3 / 00845]**.

227 See, for example, the affidavit of Shaun Quintin Gilbertson sworn 30 July 2020 at [7] **[CBD / 2 / 00240]**.

228 Per the general common law position that a sublease "automatically and simultaneously comes to an end" when the head lease ends. See, for example, *Pennell v Payne* [1995] QB 192 at 197, *NZPS Investments Ltd v Registrar-General of Land* (2006) 7 NZCPR 298 (HC) at [61] and *Taste of Asia Ltd v Hillcrest Properties Ltd* [2020] NZHC 2081.

229 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1202, citing *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC) at 502.

230 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1201.

231 *Fowler & Roderique Ltd v Attorney-General* [1987] 2 NZLR 56 at 78: "…events have overtaken this application, rendering any order that the Court may now make of academic interest only"; *Maddever v Umawera School Board of Trustees* [1993] 2 NZLR 478 (HC) at 502–503.

For obvious reasons, QAC has been significantly affected by the pandemic. Mr Keel's evidence is that the future of aviation at Queenstown and Wānaka Airports is "at present unknowable", but that "it goes without saying that the viability of scheduled services into Wānaka Airport would have to be carefully considered once the impact of the pandemic is better understood and aviation demand can be modelled more accurately".[232] Mr Keel says that much of the preliminary planning work previously undertaken with respect to Wānaka Airport "will now have to be reviewed and considerable work would be needed to identify what the future needs of the region are and what is feasible in the new environment".[233]

5.19 Similarly, Mark Sinclair's evidence for WSG is that "no-one yet knows what will be the full extent and nature of the international economic downturn that results from Covid-19", so any assessments of future passenger movements and the like "must be substantially guesswork and largely baseless".[234]

5.20 In light of the economic consequences of Covid-19, QAC submits that the remedies sought by WSG (both the voiding of the Lease and the restraint of future QLDC / QAC conduct) are futile. Even if it were inclined to make a decision to do so, QAC would not be in a position to take further development steps at Wānaka Airport in the near future.

No basis for restraining future conduct by QLDC and QAC

5.21 WSG asks the Court to make a prohibition order preventing QLDC and QAC from taking steps to develop Wānaka Airport. QAC respectfully submits that such an outcome would be extreme, and inconsistent with fundamental judicial review principles whereby Courts respect Parliament's ultimate allocation of decision-making responsibility to the impugned decision-maker. As Graham Taylor observes in *Judicial Review: A New Zealand Perspective*:[235]

> The courts are reluctant to make an order that effectively requires a particular result from a power that contains practical assessment or the exercise of discretion… It is felt to be more in keeping with the judicial function to say: "You have broken the law, this is the way you should have gone about matters or these are the legal requirements for you, go back and do it properly."

5.22 QAC respectfully submits that decisions concerning the future management and operation of QLDC's strategic assets are for QLDC to make in accordance with proper processes, not the High Court.

5.23 Nor is it obvious how WSG, even if it succeeded on all its claims, could establish an interpretation of the LGA enabling the High Court to permanently restrain QLDC and/or QAC from taking any steps in the future to develop and expand Wānaka Airport into a Code C jet-capable airport. Even if the Lease were thought to involve an impermissible transfer of control to QAC, for example, s 97 would not prevent a decision to enter a similar Lease in the

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232 Keel at [8.1] **[CBD / 2 / 00522]**.

233 Keel at [8.3] **[CBD / 2 / 00522]**.

234 Affidavit of Mark Graham Sinclair sworn 31 July 2020 at [72(f)] **[CBD / 2 / 00370–00371]**.

235 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [5.23].

future. Section 97(2) would allow such a Lease, provided the decision to do so was explicitly provided for in QLDC's long term plan and the proposal included in a consultation document in accordance with s 93E LGA.

6. COSTS

6.1 QAC has been involved in these proceedings since WSG's original statement of claim was served on it in early November 2019. This has involved considerable cost and effort: QAC has been required to discover its relevant documents (which on WSG's expansive requests required the collation of 40,000 documents and manual review of approximately 5,000), prepare evidence by briefing a busy Chief Executive already dealing with significant Covid-19 disruption to QAC's business, and review no less than 21 WSG affidavits, some of which were lengthy and/or had extensive exhibits (the (ir)relevance of which is revealed by the fact that approximately one-third of the affidavits were not even referred to in WSG's submissions), and submissions over 100 pages in length. The common bundle exceeds 10,000 pages, very little of which appears relevant. QAC has now been required to attend a 5 day hearing for a judicial review, despite sharing QLDC's view that a much more efficient hearing was always possible.

6.2 As an airport operator, QAC's business was severely impacted by the Covid-19 pandemic, and at one stage it considered whether its ongoing participation in this litigation and associated costs was a prudent use of limited funds. It concluded that it should continue to participate, including because grounds of judicial review were specifically pleaded against it and it faced allegations of breaches of its statements of intent. It now finds on reading WSG's submissions that WSG has, for all intents and purposes, abandoned its pleaded grounds of review against QAC.

6.3 As made clear in its submissions above, QAC can understand why those arguments are no longer advanced. The pleaded grounds of review lacked merit and, in light of s 64(10), could not achieve the invalidation of the lease that is the primary remedy sought by WSG. Nonetheless, the contents of both the relevant statements of intent and s 64(10) were available to WSG prior to its proceedings, and the key elements of QAC's defence (including its reliance on s 64(10)) were pleaded as far back as December 2019.

6.4 Despite this, WSG chose not to formally discontinue its proceedings against QAC (as it should have done). Instead, it waited until filing its (late) submissions on 4 September 2020 to adopt a position equivalent to discontinuance. Even then, WSG's submissions put QAC in an invidious position: by purporting to reserve some rights vaguely for reply,[236] QAC has been forced to attend the hearing of WSG's application, but no arguments are advanced by WSG to which QAC is able to respond.

6.5 In these circumstances, QAC considers that WSG's conduct in this proceeding warrants adverse costs consequences (regardless of the outcome).

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236 WSG submissions at [326].

6.6 QAC formally reserves its position on costs pending the decision in the case and, following judgment, requests the opportunity to advance brief submissions on costs by way of memorandum.

Dated 17 September 2020

C J Curran | M L Campbell
Counsel for the second respondent

Annexure – procedural issues

1. WSG's submissions give rise to two procedural matters which, while adjacent to the substantive legal arguments made by the parties, may require some attention in the proceedings. The first is WSG's reliance on evidence that is, for a variety of reasons, inadmissible. The second is WSG's invocation of the "duty of candour" on public authority respondents in judicial review proceedings.

Admissibility

2. Substantial portions of the affidavits filed by WSG are not admissible as they contain inadmissible opinion, purport to provide expert opinion by deponents who are not properly qualified and have not agreed to comply with the Code of Conduct for expert witnesses. The High Court Rules recognise that a basic requirement of evidence provided by way of affidavit is that it be "confined … to matters that would be admissible if given in evidence at trial by the deponent".[237] Given the judge-alone nature of this proceeding, QAC does not consider it a necessary or prudent use of the scheduled hearing time to seek orders at the outset of the hearing precluding your Honour from reading this material, but submits that the identified evidence is inadmissible and as a consequence the Court should not rely on it in its determination of WSG's application for review.

3. Given the time constraints, QAC has not identified every instance of inadmissible content.

Expert evidence not compliant with rules of court

4. The Evidence Act requires that experts in civil proceedings conduct themselves in accordance with the applicable rules of court.[238] One of these rules is that the expert must expressly agree to abide by the code of conduct for expert witnesses (the "**Code**").[239]

5. Failure to comply with the Code has been described as making the evidence "presumptively inadmissible" merely for want of compliance putting aside issues of substantial helpfulness.[240] Indeed, the evidence of an expert witness who has not complied with the requirement to read and agree to comply with the Code may only be offered with leave of the court.[241] No leave has been sought.

6. None of WSG's witnesses refer to the Code. The witnesses who appear to rely on expertise to support their opinions include:

    (a) Richard Somerville **[CBD / 2 / 00420]** (also irrelevant as predicated on a commitment to spend $400m, when no such decision has been made);

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237 High Court Rules 2016, r 9.76(1)(d).

238 Evidence Act 2006, s 26.

239 Evidence Act, s 26. See also High Court Rules 2016, r 9.43(2)(a) and sch 4 cl 3(a).

240 *Prattley Enterprises Ltd v Vero Insurance* [2016] NZCA 67, [2016] 2 NZLR 750 at [98].

241 Evidence Act, s 26(2).

(b) Alastair Hudson **[CBD / 2 / 00152]** who purports to provide expert opinion from paragraphs [21]–[25] and for most of [31]–[52]. Mr Hudson's evidence violates several other rules of expert evidence, including by straying into the role of an advocate in much of the affidavit from paragraph [34]; and

(c) Dr Carly Green **[CBD / 2 / 00175]** (also irrelevant as predicated on a decision to develop Wānaka Airport to an operation equivalent to Queenstown Airport, when no such decision has been made).

Inadmissible non-expert opinion evidence

7. A statement of opinion is generally inadmissible unless it is used to explain a person's first-hand experience or the person is qualified as an expert.[242] The fundamental principle is that an expert can only give opinion evidence on matters on which he or she is an expert.[243]

8. There are numerous instances in WSG's evidence where witnesses offer opinion that is not expert opinion and is, therefore, impermissible. The below is by no means a comprehensive list:

(a) Mark Sinclair **[CBD / 2 / 00346]**: see for example [37], [51], [101], [104], [107].

(b) Andrew Waterworth **[CBD / 2 / 00254]**: see for example [136]–[137], [201], [212], [237], [246].

(c) Shaun Gilbertson **[CBD / 2 / 00237]**: see for example [8]–[12].

(d) Michael Ross **[CBD / 2 / 00205]**: see for example speculation on other people's motivations ([43]) and the meaning of the Lease ([45]).

(e) Ella Lawton (second affidavit) **[CBD / 2 / 00432]**: provides her opinion on the Lease and SAA.

(f) Noel Williams **[CBD / 2 / 00412]**: see for example [11]–[12] on his opinion of what a long-term lease means and how other people might have reacted, and speculation about events of which he has no knowledge ([18]–[19]).

(g) Terry Hetherington **[CBD / 2 / 00243]**: at [12]–[13] opines on runway development.

(h) Aaron Heath **[CBD / 2 / 00248]**: see for example [22]–[23] where he purports to state what the Council *would* have done in 2003 based on his opinion of the Lease.

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242 Evidence Act, ss 23–25. See also the definitions of "expert" and "expert evidence" in s 4(1).

243 *Platt v R* [2010] NZCA 43 at [44].

Affidavits contain submission

9. Evidence must be confined to matters of fact and must not contain submission.[244] The court may refuse to read an affidavit that unnecessarily sets forth any argumentative matter.[245]

10. WSG's evidence contains numerous examples of impermissible submission, including:

    (a) Andrew Waterworth **[CBD / 2 / 00254]**: Mr Waterworth's affidavit is largely a submission, but see for example [20]–[25], [111], [122], [162], [168], [237]–[240].

    (b) Mark Sinclair **[CBD / 2 / 00346]**: see for example [46]–[72], [101]–[103].

    (c) Alastair Hudson **[CBD / 2 / 00152]**: generally from at least paragraph [34].

    (d) Michael Ross **[CBD / 2 / 00205]**: see for example [43], [51]–[57], [73].

    (e) Christopher Riley **[CBD / 2 / 00328]**: the entire affidavit is a submission.

    (f) Richard Somerville **[CBD / 2 / 00420]**: the affidavit is in the nature of a submission, but see particularly [14] (reliance on undisclosed and hearsay "peer review"), [29], [37] and [40].

    (g) Nicolas Page **[CBD / 2 / 00226]**: the entire affidavit is a submission.

Opinion evidence not substantially helpful

11. Even if the expert is suitably qualified and complies with the rules of court, opinion evidence is only admissible if it is substantially helpful.[246] Substantial helpfulness is an amalgam of relevance, reliability and probative value.[247] Evidence will not be substantially helpful if it traverses a matter or matters that the Court is equally well-placed to assess, such as a question of law or procedural processes.[248]

12. Examples of opinion evidence that is not substantially helpful because the Court is well placed to address these matters include:

    (a) Alastair Hudson **[CBD / 2 / 00152]**: from [34] provides his views on the interpretation of documents and the Companies Act 1993.

    (b) Michael Ross **[CBD / 2 / 00205]**: provides his opinion on consultation processes, which the Court needs no assistance with ([26]–[30]).

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244 *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433 at [32].

245 High Court Rules, r 9.76(2)(a)(i).

246 Evidence Act, s 25.

247 *Prattley Enterprises Ltd v Vero Insurance* at [94].

248 *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609; [2017] 2 NZLR 470 at [82].

(c) Terry Hetherington **[CBD / 2 / 00243]**: views on the consultation document at [7] of no assistance to the Court.

(d) Graeme Perkins **[CBD / 2 / 00333]**: opinions on consultation process (for example [5], [17]) of no assistance to the Court.

Duty of candour – neither breached nor of assistance to applicant

13. WSG's submissions contain a section directed to the "duty of candour" said to rest on QLDC as a public sector respondent (and in QAC's case, also on "quasi-public authorities"[249]).

14. It is unclear what WSG intends by this section. No clear allegation or evidence of breach of the duty of candour is levelled at either QLDC or QAC in WSG's submissions. Nor does the WSG identify a clear consequence that should follow if in fact there has been such a breach.

15. Instead, WSG alludes vaguely to "differences between the parties" on the duty of candour,[250] before giving an exposition of what it considers to be the relevant law. In summary, that section appears to advance the propositions that:

(a) The duty of candour imposes an obligation on public authority respondents in judicial review to disclose relevant material to the applicants through discovery.[251] Public authorities should also file affidavits explaining their decision-making.[252]

(b) To the extent a public authority respondent has breached its duty of candour, and the applicant's own evidence is "compelling", the Court may draw adverse inferences on evidential matters against the public authority.[253]

16. The (somewhat ironic) failure by WSG to explain exactly what is intended by its references to the duty of candour leaves QAC guessing as to the duty's significance (if any) to WSG's substantive arguments. In circumstances where QAC does not understand the case (if any) against it on this point, QAC submits that it would be unfair for WSG to ask the Court to make any use of the doctrine in these proceedings.

17. However, to the extent that any response is required, QAC submits that:

(a) The "duty of candour", developed in the United Kingdom, reflects the particular context of judicial review in that legal system. As New Zealand Courts have recognised, the doctrine's importance in the United Kingdom stems from the fact that there was no right to obtain

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249 WSG submissions at [179].

250 WSG submissions at [157].

251 WSG submissions at [167]–[177].

252 WSG submissions at [181]–[186].

253 WSG submissions at [187]. It is not clear that it is, but if [130] of WSG's submissions is intended to invoke a breach of the duty of candour to support an inference that AIAL is "fully behind" decisions to develop Wānaka Airport, the precondition to such an inference (ie a compelling case on the existing evidence) is missing here – the evidence instead demonstrates that no decision has been taken regarding the development of Wānaka Airport, and that AIAL has not directed Wānaka Airport decision-making by QAC.

discovery in judicial review cases prior to 1978; that even post-1978, formal discovery or "disclosure" requires the leave of Court and leave is given sparingly;[254] and that an applicant needs the leave of Court to even bring a judicial review challenge.[255]

(b) By contrast, in New Zealand case law, the duty of candour is said to be "indistinguishable" from the duty of disclosure already imposed on public authority respondents under New Zealand's orthodox discovery regime.[256] The duty of candour will thus "crystallise" in the form of orders for discovery made under either s 14(2)(h) Judicial Review Procedure Act 2016 or the High Court Rules.[257] In the present case, Dunningham J made orders providing for a form of tailored discovery in her Honour's Minute of 16 December 2019.[258]

(c) QAC has complied with those discovery obligations, and thus considers there is no credible foundation for alleging a breach of the duty of candour in this proceeding (if WSG in fact intends to do so).[259] Even the high level statements of the duty in WSG's submissions expect public authorities to discover only "relevant" materials.[260] The authorities are equally clear that the duty does not license fishing expeditions for "new and hitherto unperceived grounds of complaint".[261]

(d) In this respect, QAC made clear its position on the scope of material relevant to the pleaded issues it intended to discover in correspondence with WSG on the latter's discovery requests in February and March 2020.[262] It appeared WSG disagreed with QAC's position. WSG wrote to QAC on 6 March stating that, as a result, "the remaining [QAC discovery] issues will require (sic) to be dealt with by the Court".[263]

(e) Despite this indication, WSG never applied to the Court for further and better discovery, or otherwise raised complaints to the Court about discovery issues. It had ample opportunity to do so in the six months following the parties' correspondence. Instead, in May, WSG

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254 *Bain v Minister of Justice [Privilege]* [2013] NZHC 2123, (2013) 21 PRNZ 625 at [33]–[36].

255 *Hager v Attorney-General* [2014] NZHC 3293 at [19].

256 *Bain v Minister of Justice [Privilege]* at [36]. The duty may inform discovery, but not impose an obligation different in type: see *Hager v Attorney-General* at [19].

257 *Bain v Minister of Justice [Privilege]* at [39].

258 Minute of Dunningham J dated 16 December 2019 at [6]–[8].

259 Compliance with discovery orders in turn discharges the duty of candour: see *Bain v Minister of Justice [Privilege]* at [43].

260 WSG submissions at [161]: "The Court normally expects public bodies to disclose *relevant* material" per *Henderson v Privacy Commissioner* at [108]); and at [168]–[169] repeating passages from Garry Williams, "Judicial Review: the duty of candour" [2013] NZLJ 156 "The duty requires … candid disclosure of the *relevant* facts"; "a public authority … must provide full and fair disclosure of *relevant* evidence and material"; "All materials *relevant* to, or bearing upon, the decision-making should be disclosed …".

261 *R v Lancashire County Council* [1986] 2 All ER 941 (EWCA Civ) at 942; *Bain v Minister of Justice [Privilege]* at [35] and [42].

262 Letters from QAC to WSG dated 21 February 2020 and 5 March 2020 **[CBD / 4C / 03073]** and **[CBD / 4C / 03098]**.

263 Letter from WSG to QAC dated 6 March 2020 at [2] **[CBD / 4C / 03099]**.

filed a memorandum acknowledging that its evidence was overdue and proposing a revised timetable seeking a hearing as soon as possible after 24 July and making no provision for further discovery.[264] In July, WSG elected to accept the present fixture offered by the Registry and agreed to a timetable with no provision for discovery applications.[265] QAC has provided its evidence and submissions in accordance with, and reliance on, that timetable. Indeed, if disclosure remained a concern for WSG, it should at the very least have taken the last opportunity to raise those concerns with the Court, namely at the final pre-hearing case management conference scheduled for 4 September 2020. Instead, WSG disavowed any need for that conference and (when the other parties agreed) it was vacated.

(f) Against that background, WSG cannot now be heard to point to any perceived inadequacies in the respondents' discovery. Those matters were fully within WSG's power to advance before the Court, in accordance with New Zealand's orthodox discovery framework, but WSG chose not to do so. QAC has acted throughout the proceeding in compliance with its obligations under that framework. In those circumstances, there is no assistance to be derived from the duty of candour.

(g) Indeed, rather than seek a ruling, it appears that WSG has preferred to sit on its hands and rely on accusations based on vague statements of principle. That is unfair to QAC, as well as unhelpful to the Court, and should be rejected wholesale.

264 Memorandum of counsel for applicant dated 8 May 2020.

265 Joint memorandum of counsel regarding timetable dated 16 July 2020, at [2].