Before the Environment Court
at Wellington

In the Matter of	section 87G of the Resource Management Act 1991
And	
In the Matter of	the direct referral of the Application for resource consents associated with an extension to the runway by Wellington International Airport Limited (ENV-2016-WLG-00058)

Memorandum of Counsel for **Wellington International Airport Limited**

Dated: 17 January 2018

Lane Neave
PO Box 25626
Wellington 6146
Solicitor Acting: Amanda Dewar
Email: amanda.dewar@laneneave.co.nz
Phone: 03 379 3720

lane neave.

May it please the Court:

Introduction

1. This memorandum is filed on behalf of Wellington International Airport Limited (**WIAL**) in response to the Fourteenth Minute of the Environment Court dated 24 March 2017.

2. In 2017, WIAL sought leave to appeal to the Supreme Court in respect of the decision, *New Zealand Airline Pilots Association Industrial Union of Workers Incorporated v Director of Civil Aviation* [2017] NZCA 27.

3. At the pre-hearing conference on 23 March 2017, WIAL sought this direct referral proceeding be adjourned under section 281 of the Act due to the potential implications of the Supreme Court's decision.

4. The Environment Court adjourned these proceedings and directed WIAL to advise whether:

   (a) Leave is refused by the Supreme Court;

   (b) The fixture date for hearing in the event that leave to appeal is granted;

   (c) The outcome of the appeal.

5. Counsel previously advised that leave was granted by the Supreme Court and a two day hearing was held on 24 and 25 August 2017.

6. Accordingly, Counsel advises that the Supreme Court released its decision on 21 December 2017 at 4pm. The decision dismissed WIAL's appeal. A copy of the decision is **attached** to this memorandum. The Supreme Court has upheld the Court of Appeal decision as to the flaws in the Director of Civil Aviation's RESA decision but for different reasoning.

7. In its decision, the Supreme Court observes that WIAL will need "…a further acceptance from the Director". That application will have to include such information as is required by the Director to give effect to the Court's reasoning[1]. WIAL intends to do this.

[1] [2017] NZSC 199 at [72]

8. In order to reapply, WIAL is urgently investigating the further information the Director of the Civil Aviation Authority will require. This exercise is ongoing and a timeline for the preparation and provision of this information has not yet been finalised. WIAL anticipates details of this timeline will be available in 4 to 6 weeks.

9. During this time, WIAL will also need to liaise with the Civil Aviation Authority to better understand how long the Director will require to determine the appropriate RESA length following receipt of updated information from WIAL and in light of the Supreme Court's direction. Due to the holiday season, these discussions have not yet occurred, however WIAL anticipates that it will have a greater understanding of these matters by late February 2018.

10. Accordingly, WIAL respectfully requests that these direct referral proceedings continue to remain on hold until the end of February 2018 in order for the matters discussed above at paragraphs [7] to [9] to be progressed. WIAL considers a further reporting date for it to update the Court on these matters and their impact on these direct referral proceedings at the end of February 2018 would be appropriate.

Dated: 17 January 2018

_____

Amanda Dewar / Joshua Leckie

Solicitor for Wellington International Airport Limited

IN THE SUPREME COURT OF NEW ZEALAND

SC 26/2017
[2017] NZSC 199

BETWEEN	WELLINGTON INTERNATIONAL AIRPORT LIMITED Appellant
AND	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED First Respondent
	DIRECTOR OF CIVIL AVIATION Second Respondent

SC 30/2017

BETWEEN	DIRECTOR OF CIVIL AVIATION Appellant
AND	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED First Respondent
	WELLINGTON INTERNATIONAL AIRPORT LIMITED Second Respondent

Hearing:	24 and 25 August 2017
Court:	Elias CJ, William Young, Glazebrook, Ellen France and Arnold JJ
Counsel:	D J Goddard QC, V L Heine and S E Quilliam-Mayne for Appellant in SC 26/2017 and Second Respondent in SC 30/2017 H B Rennie QC and E M Geddis for First Respondent in SC 26/2017 and SC 30/2017 F M R Cooke QC, M S Smith and D R Johnson for Second Respondent in SC 26/2017 and Appellant in SC 30/2017 C J Curran and A A Arthur-Young for New Zealand Airports Association as Intervener

Judgment: 21 December 2017

JUDGMENT OF THE COURT

A The appeals are dismissed.

B The Director of Civil Aviation and Wellington International Airport Limited are jointly and severally liable to pay costs of $30,000 to the New Zealand Air Line Pilots' Association Industrial Union of Workers Incorporated, plus reasonable disbursements to be determined by the Registrar if necessary. We allow for second counsel.

REASONS
(Given by Arnold J)

Table of Contents

	Para No.
Introduction	[1]
Factual background	[4]
Regulatory framework	[12]
International dimension	[13]
National dimension	[17]
(i) The Civil Aviation Act 1990	[18]
(ii) The Civil Aviation Rules	[30]
Basis of Director's decision	[38]
The dispute	[43]
Evaluation	[48]
Effect of 2004 Amendment Act	[49]
Relationship between Director and airport operator	[58]
Meaning of "practicable"	[63]
Drawing the threads together	[70]
Result	[72]

Introduction

[1] Overshooting or undershooting the runway is a major cause of aircraft accidents world-wide.[1] To limit the risk of such accidents, international instruments to which New Zealand is a party require that airports servicing particular categories

---

[1] Overshoots can occur on landing or take-off and are much more common than undershoots, which occur on landing.

of aircraft have runway end safety areas (RESAs) at each end to the runway. These requirements have been implemented in New Zealand through the Civil Aviation Rules (the Rules), made under the Civil Aviation Act 1990 (the Act). In particular, the Rules impose two relevant requirements:

(a) First, a RESA must extend to a distance of at least 90 m and, "if practicable", to a distance of at least 240 m, from the end of the runway strip (or the greatest distance practicable between 90 and 240 m).[2]

(b) Second, a RESA must be "acceptable" to the Director of Civil Aviation (the Director).[3]

[2] Wellington International Airport Ltd (WIAL) operates Wellington Airport, to which the RESA requirements apply. Currently WIAL operates with 90 m RESAs at each end of the runway, which the Director has accepted. WIAL wishes to extend the runway and approached the Director to ask whether RESAs of 90 m would be acceptable to him in respect of the extended runway. The Director advised that they would be. The New Zealand Air Line Pilots' Assoc Industrial Union of Workers Inc (NZALPA), which has long advocated for RESAs of at least 240 m, both generally and at Wellington, issued judicial review proceedings challenging the Director's decision. The challenge was unsuccessful in the High Court[4] but succeeded on appeal.[5] Both the Director and WIAL filed separate applications for leave to appeal to this Court. Both were granted leave, the single question being whether the Court of Appeal was correct to allow NZALPA's appeal to that Court.[6]

[3] The essential issue identified by the Court of Appeal was whether the Director had erred in law when deciding that a RESA of 90 m was acceptable.[7]

---

2 Civil Aviation Rules, pt 139 Appendix A.1(a).

3 Rule 139.51(c). The Director is the Chief Executive of the Civil Aviation Authority: Civil Aviation Act 1990, s 72I(1).

4 *New Zealand Air Line Pilots' Assoc Industrial Union of Workers Inc v Director of Civil Aviation* [2016] NZHC 1528 (Clark J) [*NZALPA* (HC)].

5 *New Zealand Air Line Pilots' Assoc Industrial Union of Workers Inc v Director of Civil Aviation* [2017] NZCA 27, [2017] 3 NZLR 1 (Harrison, Wild and Brown JJ) [*NZALPA* (CA)].

6 *Wellington International Airport Ltd v New Zealand Airline Pilots' Assoc Industrial Union of Workers Inc* [2017] NZSC 70.

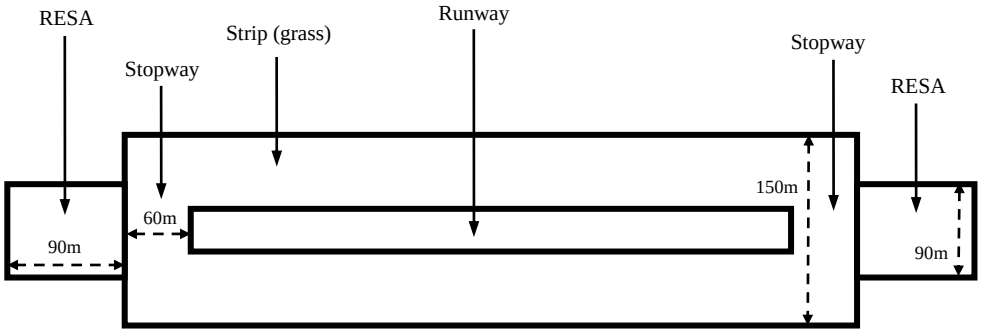
7 *NZALPA* (CA), above n 5, at [2].

Important to this issue is the meaning to be given to the qualification "if practicable" in the context of the rule relating to RESAs and the role of a cost/benefit analysis in the Director's decision-making.

Factual background

[4] The factual background can be stated briefly.[8]

[5] The existing runway at Wellington Airport includes at each end a 60 m area called a stopway and a 90 m RESA, which together provide 150 m in additional length against the possibility that an aircraft will over-shoot the main runway area on landing or take-off, or under-shoot it on landing. Both the stopway and RESA areas are also used as starter extensions to increase the distance available to aircraft when taking off, so that the various elements appear as a continuous strip. The following diagram is a simplified illustration of the layout:



[6] As presently configured, the airport cannot accommodate larger commercial aircraft, unless they operate under weight restrictions. Accordingly, WIAL considered extending the runway. In August 2012 WIAL wrote to the Director seeking clarification on the required length of RESA if it were to extend the runway "around 200 m" to the north, across Cobham Drive and into Evans Bay. WIAL expressed the view that 90 m RESAs would be adequate and highlighted various factors, including the likely cost of extending to the north (around $1 million per linear metre) and the substantial economic benefits that extending the runway

[8] This summary is largely drawn from the judgment of the Court of Appeal.

would bring to the Wellington region. The Director responded by asking WIAL to supply further information, principally the basis for its cost estimate of $1 million per linear metre and likely operational levels, and to undertake a cost/benefit analysis.

[7] In February 2013, NZALPA representatives met with personnel from the Civil Aviation Authority (the Authority) to highlight the importance of 240 m RESAs generally. NZALPA followed the meeting up with a letter in which it said it was pleased that the Authority had confirmed that a 240 m RESA would be the starting point for runway extensions over 15 m and that an engineered material arresting system (EMAS) would be considered as a practicable alternative to a full 240 m RESA.[9] NZALPA also asked about WIAL's proposal to extend the runway at Wellington.

[8] In July 2013, WIAL provided the Director with two reports, one of which was a cost/benefit analysis prepared by McGregor & Co (McGregor), consultants with expertise in aviation safety issues. That report addressed the benefits and costs associated with having RESAs longer than 90 m at Wellington, specifically, RESAs of 140 m and 240 m. NZALPA later commissioned its own report from Covec Economic Consultants (Covec), dated September 2013, which took the form of a peer review of the cost/benefit analysis undertaken by McGregor. Covec concluded that the McGregor analysis had a number of shortcomings, in particular underestimating the plausible benefits of longer RESAs. WIAL then commissioned an updated report from McGregor, dated October 2013. The updated McGregor report concluded that RESAs of 140 m or 240 m were not justified at Wellington on a cost/benefit basis. To gain an independent view, the Authority engaged Castalia Strategic Advisors (Castalia) in November 2013, to review the updated McGregor report. Castalia concluded that McGregor's cost/benefit analysis provided "a reasonable basis for concluding that RESA options of longer than 90 [m] at Wellington Airport would impose costs that exceed any safety benefits that would be

---

9 Various arresting systems are available, which allow airport operators to have shorter RESAs. An engineered material arresting system (EMAS) uses material such as crushable cellular cement blocks to slow an aircraft down – the blocks are crushed under the weight of the aircraft, absorbing its momentum and bringing it to a stop.

achieved". In addition, the Authority's Aeronautical Services Unit conducted an assessment of the McGregor report in November 2013 and concluded it was sound.

[9] All the reports were given to the Director. He considered them along with other material and internal legal advice. In February 2014 the Director advised WIAL that he considered it would not be practicable to require WIAL to provide RESAs exceeding 90 m, so that RESAs of 90 m were acceptable to him. The Director indicated that the projected cost of longer RESAs was a significant factor in his decision, which would be affected by a substantial reduction in costs. He indicated that if WIAL decided to proceed with the extension project, it would have to provide robust, updated costings. To that extent, then, the Director was expressing a provisional view.

[10] After further geotechnical investigation, WIAL revised its plans and decided to extend the runway to the south, into Lyall Bay. In October 2014 WIAL wrote to the Director confirming that its intention was now to extend the runway to the south and in November 2014 provided him with a further updated report from McGregor addressing extensions to the south of 100, 200 and 300 m. This report concluded that, on a cost/benefit basis, RESAs longer than 90 m were not justified. On this basis, WIAL sought the Director's acceptance of 90 m RESAs for a southern runway extension. On 20 March 2015 the Director prepared what was described as a file note, in which he said that RESAs of 90 m would be acceptable, and WIAL and NZALPA were advised accordingly.[10] This led to the issue of the present proceedings by NZALPA challenging the Director's decision.

[11] WIAL has subsequently modified its plans further. Its current proposal is to extend the runway by 355 m to the south, at a cost of approximately $330 million, and it has applied for a resource consent for that proposal. This will presumably require a further decision from the Director.

---

[10] The basis for the Director's decision is set out below at [38]–[42].

Regulatory framework

[12] The regulatory framework has both an international and a national dimension, as we now briefly describe.

International dimension

[13] New Zealand is a party to the Convention on International Civil Aviation made in Chicago in December 1944 (the Chicago Convention), under which the International Civil Aviation Organization (ICAO) was established.[11] Under art 37, the contracting states undertake to collaborate in:

> … securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.

Article 37 goes on to say:

> To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with:
>
> …
>
> (b) Characteristics of airports and landing areas;
>
> …

[14] The Chicago Convention distinguishes between standards (which are binding) and recommended practices (which are not binding), and allows for the possibility of notifying the ICAO of differences (or making reservations) where a state finds it "impracticable to comply in all respects with any such international standard or procedure" or "deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard".[12]

[15] Before 1998, there were no standards for RESAs, simply recommendations. But in April 1998 the ICAO adopted a 90 m RESA as a minimum standard for

---

11 Convention on International Civil Aviation 15 UNTS 295 (opened for signature 7 December 1944, entered into force 4 April 1947) [Chicago Convention].

12 Article 38.

international aerodromes, and Annex 14 to the Chicago Convention, which deals with standards and recommended practices relating to the design of aerodromes, was amended to this effect in 1999.[13] The Annex explains the difference between standards and recommendations as follows:[14]

> *Standard:* Any specification for physical characteristics, configuration, matériel, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the [Chicago] Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38.
>
> *Recommended Practice:* Any specification for physical characteristics, configuration, matériel, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States will endeavour to conform in accordance with the [Chicago] Convention.

[16] The standards and recommendations for the dimensions of RESAs are found in cl 3.5 of Annex 14. For an airport such as Wellington:

(a) Clause 3.5.3 sets the standard that a RESA "shall extend from the end of a runway strip to a distance of at least 90 m", although the length may be reduced if an arresting system is installed, according to its design specifications and "subject to acceptance by the State".

(b) Clause 3.5.4 provides the recommendation that a RESA "should, as far as practicable, extend from the end of a runway strip to a distance of: at least 240 m …; or a reduced length when an arresting system is installed".[15]

The reference to arresting systems (such as EMAS) came about because, in November 2013, the ICAO amended Annex 14 so to permit the length of a RESA to be reduced if an arresting system was installed. Guidance is provided in para 10.2 of Attachment A to Annex 14 as follows:

---

13 Annex 14, cl 3.5.3.
14 Foreword to Annex 14.
15 Emphasis removed from original.

> Where provision of a runway end safety area would be particularly prohibitive to implement, consideration would have to be given to reducing some of the declared distances of the runway for the provision of a runway end safety area and installation of an arresting system.

National dimension

[17] In discussing the national dimension, we deal with the Act and the Rules in turn.

(i) The Civil Aviation Act 1990

[18] As described in its long title, the Act has two relevant purposes:

> (a) to establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety; and
>
> (b) to ensure that New Zealand's obligations under international aviation agreements are implemented; …

[19] When the Act was originally enacted in 1990, s 14 dealt with the Minister's functions and provided:

> **14 Functions of Minister**
>
> (1) The principal functions of the Minister under this Act shall be to promote safety in civil aviation at a reasonable cost, and to ensure that New Zealand's obligations under international civil aviation agreements are implemented.
>
> …
>
> (3) For the purposes of subsection (1) of this section, a cost is a reasonable cost where the value of the cost to the nation is exceeded by the value of the resulting benefit to the nation.

As detailed below, this version of s 14 has been repealed and replaced. But three features of it are pertinent to the issues in the appeal. First, one of the Minister's two functions under s 14(1) was to "promote safety in civil aviation at a reasonable cost". Second, the standard of "a reasonable cost" in s 14(1) was to be assessed by way of a cost/benefit analysis. Third, that cost/benefit analysis had a national rather than a local or regional focus.

[20] Section 14 was repealed and replaced as from 1 December 2004, when the Civil Aviation Amendment Act (No 2) 2004 (the 2004 Amendment Act) came into effect.[16] New provisions in relation to the Civil Aviation Authority and the Director also came into effect at this time. These new and amended provisions, along with others mentioned below, resulted from the Government's adoption of the New Zealand Transport Strategy, to which we return later in these reasons.[17]

[21] Under the Act as it presently stands, the responsible Minister has both objectives and functions. The Minister's objectives are set out in s 14, which provides:

> **14 Objectives of Minister**
>
> The objectives of the Minister under this Act are—
>
> (a) to undertake the Minister's functions in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system; and
>
> (b) to ensure that New Zealand's obligations under international civil aviation agreements are implemented.

[22] Section 14A deals with the Minster's functions and relevantly provides:

> **14A Functions of Minister**
>
> The functions of the Minister under this Act are—
>
> (a) to promote safety in civil aviation:
>
> (b) to administer New Zealand's participation in the [Chicago Convention] and any other international aviation convention, agreement, or understanding to which the Government of New Zealand is a party:
>
> (c) …
>
> (d) to make rules under this Act.

As will be obvious, ss 14 and 14A are in much broader terms than the original version of s 14. Moreover, s 14A(a) refers to promoting safety in civil aviation without the "at a reasonable cost" qualification that appeared in the original s 14(1).

---

16 Civil Aviation Amendment Act (No 2) 2004 [2004 Amendment Act], s 4.

17 *New Zealand Transport Strategy* (Ministry of Transport, December 2002).

[23] The words "in a way that contributes to the aim of achieving an integrated, safe, responsive, and sustainable transport system" in the current s 14(a) occur again in s 72 AA, which describes the objective of the Authority as follows:[18]

> **72AA Objective of Authority**
>
> The objective of the Authority is to undertake its safety, security, and other functions in a way that contributes to the aim of achieving an integrated, safe, responsive and sustainable transport system.

When it was established in 1992, the Authority did not have a statutory objective.[19] Section 72B(1) set out its principal function as being "to undertake activities which promote safety in civil aviation at a reasonable cost", adopting the (then) s 14(1) language. The section went on to identify additional functions which the Authority had "[i]n furtherance of its principal function".[20] The 2004 Amendment Act inserted the Authority's objective section, s 72AA,[21] and amended s 72B by repealing s 72B(1) and modifying the Authority's list of functions.[22] The first of the Authority's enumerated functions in the current s 72B(2) is "to promote civil aviation safety and security in New Zealand" and the second "to promote civil aviation safety and security beyond New Zealand in accordance with New Zealand's international obligations".[23] There is no reference to cost in the list of functions.

[24] The functions of the Director are set out in s 72I(2) and (3) as follows:

> (2) The Director shall have and may exercise such functions and powers as may be conferred or imposed on the Director by this Act, or regulations or rules made under this Act … .
>
> (3) Without limiting subsection (2), the Director shall—
>
> (a) exercise control over entry into the civil aviation system through the granting of aviation documents under this Act; and
>
> (b) take such action as may be appropriate in the public interest to enforce the provisions of this Act and of regulations and rules made under this Act, including the carrying out or requiring of inspections and monitoring; and

---

18 We explain the background to this language below at [51]–[54].
19 The Authority was established by the Civil Aviation Amendment Act 1992.
20 Civil Aviation Act 1990, s 72B(2).
21 Inserted by s 7 of the 2004 Amendment Act.
22 2004 Amendment Act, s 8.
23 Civil Aviation Act, s 72B(2)(a) and (b).

(c) monitor adherence, within the civil aviation system, to any regulatory requirements relating to—

(i) safety and security, including (but not limited to) personal security:

(ii) access and mobility:

(iii) public health:

(iv) environmental sustainability:

(v) any other matter; and

(d) ensure regular reviews of the civil aviation system to promote the improvement and development of its safety and security.

Paragraphs (c) and (d) of subs (3) were added by the 2004 Amendment Act.[24]

[25] The Minister is empowered under s 28 of the Act to make ordinary rules for a number of purposes, relevantly:

28 Power of Minister to make ordinary rules

(1) The Minister may from time to time make rules (in this Act called ordinary rules) for all or any of the following purposes:

(a) the implementation of New Zealand's obligations under the [Chicago] Convention:

…

(c) assisting aviation safety and security, including (but not limited to) personal security:

(ca) assisting economic development:

…

(cd) ensuring environmental sustainability:

(ce) any matter related or reasonably incidental to any of the following:

(i) the Minister's objectives under section 14:

(ii) the Minister's functions under section 14A:

[24] 2004 Amendment Act, s 9.

(iii) the Authority's objectives under section 72AA:

(iv) the Authority's functions and duties under section 72B:

(v) the Director's functions and powers under section 72I:

(d) any other matter contemplated by any provision of this Act.

…

Section 28(1)(c), (ca), (cd) and (ce) were inserted by the 2004 Amendment Act.[25]

[26] Under s 31 of the Act, the Director is authorised to make emergency rules in specified circumstances. Under s 33(1), the rules made by the Minister and by the Director respectively:

> … shall not be inconsistent with the following:
>
> (a) the *standards* of ICAO relating to aviation safety and security, to the extent adopted by New Zealand:
>
> (b) New Zealand's international obligations relating to aviation safety and security.
>
> (emphasis added)

[27] In addition, s 33(2) provides that, when exercising their respective rule-making powers, the Minister and the Director must "have regard to" and "give such weight as he or she considers appropriate in each case to" a number of considerations, as follows:

> (a) the *recommended practices* of ICAO relating to aviation safety and security, to the extent adopted by New Zealand:
>
> (b) the level of risk existing to aviation safety in each proposed activity or service:
>
> (c) the nature of the particular activity or service for which the rule is being established:
>
> (d) the level of risk existing to aviation safety and security in New Zealand in general:

---

[25] 2004 Amendment Act, s 5.

(e) the need to maintain and improve aviation safety and security, including (but not limited to) personal security:

(f) whether the proposed rule—

(i) assists economic development:

(ii) improves access and mobility:

(iii) protects and promotes public health:

(iv) ensures environmental sustainability:

(fa) the costs of implementing measures for which the rule is being proposed:

(g) the international circumstances in respect of—

(i) aviation safety and security; and

…

(h) such other matters as the Minister or the Director considers appropriate in the circumstances.

(emphasis added)

Paragraphs (e), (f) and (fa) of s 33(2) were amended by the 2004 Amendment Act.[26] When initially enacted in 1990, paragraph (e) read: "The need to maintain aviation safety and security". The reference to improving as well as maintaining aviation safety came in with the 2004 Amendment Act.

[28] There are two features of s 33 which require immediate emphasis:

(a) First, s 33 distinguishes between the ICAO's standards and its recommendations. Rules made under the Act may not be inconsistent with the former; the latter are simply mandatory considerations in rule-making.

(b) Second, the significance of cost in the rule-making process changed after the 2004 Amendment Act. As originally enacted, the Act required a cost/benefit analysis, conducted on a national basis, as the basis for the performance by the Minister of his or her functions,

---

[26] 2004 Amendment Act, s 6.

including rule-making.[27] After the 2004 Amendment Act, cost became one of 12 mandatory considerations in the rule-making process. The effect of this change is a matter of contention between the parties.

[29] For the sake of completeness, we note that:

(a) The Director has the power to grant exemptions from the Rules if satisfied that one of four specified criteria is met and that the risk to safety will not be significantly increased by granting the exemption.[28] No issue of exemption arises in the present case.

(b) The Director must act independently of the Minister and the Authority in performing his or her functions as to the granting, suspension and revocation of aviation documents and medical certificates and in his or her enforcement role.[29]

(ii) The Civil Aviation Rules

[30] Part 139 of the Rules was originally issued in 1992. It regulates the "Certification, Operation and Use" of aerodromes in New Zealand and implements the standards and recommended practices adopted in annexes to the Chicago Convention.

[31] In anticipation of the 1999 amendments to Annex 14 to the Chicago Convention concerning RESAs, the Authority began a lengthy process of technical evaluation and industry consultation to assess how New Zealand should respond and what changes should be made to pt 139. This included obtaining a cost/benefit analysis from McGregor in December 2002 in relation to requiring RESAs at international airports in New Zealand (the 2002 McGregor report).

---

27 See above at [19].
28 Civil Aviation Act, s 37.
29 Section 72I(4).

[32] McGregor identified the objective of the study as being "to determine whether the value to New Zealand of requiring RESAs at international airports is exceeded by the cost to the nation". This was consistent with s 14 as it then stood, which required the Minister to undertake a nationally-based cost/benefit analysis.[30] Later, when discussing the place of a cost/benefit analysis in relation to the Annex 14 provisions concerning RESAs, the 2002 McGregor report noted that a cost/benefit analysis did not apply in relation to standards (which, subject to any reservation, were mandatory), but would be relevant to recommendations. The question, therefore, was not whether RESAs should be required but whether their length should be 90 or 240 m.

[33] The 2002 McGregor report went on to note the limitations of a cost/benefit analysis:

> Intangible costs and benefits (those that cannot be measured) will also need to be identified and considered. In this regard there may be an industry or public perception and emotive element attached to RESAs. 'Intangibles' can be very important in assessing the conclusions of an economic analysis and can have a significant bearing on recommendations. Sometimes economic development costs or benefits can fall into the intangible category.

The report also noted that a regulator would have a broader set of cost and benefit interests than an airport operator, which would be concerned with the costs and benefits that directly affect its operation rather than with costs and benefits to the wider aviation system and to the nation.

[34] On 2 July 2004, the Authority issued a Notice of Proposed Rule Making in relation to pt 139 and sought public comment. In September 2005, the Authority prepared a summary of the public submissions and the Authority's response to the points raised. The Authority noted strong disagreement among those consulted as to adoption of the ICAO recommended practice in the Rules but nevertheless took the view that the "RESA should be 240m where possible". The Authority referred to statistical information that accidents at landing and take-off constitute a high proportion of overall aircraft accidents and that the rates at which such accidents are attributed to overruns or overshoots is significant. It noted that "statistics indicate

---

[30] The 2004 Amendment Act came into force on 1 December 2004, mid-way through the rule-making process.

that 240 metres will capture approximately 90% of the events compared to approximately 68% for 90 metres" (footnote omitted). This, and the reinforcement of a cost/benefit analysis, had led it to the conclusion that the RESA length should be 240 m where practicable. Although the Authority acknowledged that it had received expressions of concern about the indeterminacy of the term "practicable", its recommendation emphasised that assessment would be on a case by case basis and that advisory materials would be developed as cases were dealt with. The materials would provide guidance on what might constitute acceptable processes and steps taken to show that all practicable measures had been taken to meet the RESA requirements.

[35] On 7 July 2006, the Director reported to the Minister for Transport Safety, Hon Harry Duynhoven, recommending the promulgation of various rules, including amendments to pt 139. The Director described the objective of the proposed amendment to pt 139 as being "to improve aviation safety by incorporating into Part 139 the ICAO Annex 14 requirements for runway end safety areas to be provided at each end of a runway". On 5 September 2006, the Minster acted on the recommendation and promulgated the new rules. The amended pt 139 came into effect on 12 October 2006.

[36] Under r 139.5(a) as it now reads, no one may operate an aerodrome to which r 139.5 applies "except under the authority of an aerodrome operator certificate granted by the Director under the Act and in accordance with this Subpart". Rule 139.51 deals with aerodrome design requirements. There are two relevant requirements:

(a) Under r 139.51(b), an applicant (WIAL in this case) "must ensure that a runway end safety area that complies with the physical characteristics prescribed in appendix A.1 is provided at each end of a runway at the aerodrome".

(b) Under r 139.51(c), a RESA "must be acceptable to the Director".

[37] In relation to the first requirement, Appendix A.1 to pt 139 provides:

> **A.1 Physical characteristics for RESA**
>
> (a) A RESA *must extend* –
>
> (1) to a distance of at least 90 metres from the end of the runway strip, and
>
> (2) *if practicable* –
>
> (i) to a distance of at least 240 metres from the end of the runway strip; or
>
> (ii) to the greatest distance that is *practicable* between the 90 metres required in paragraph (a)(1) and the 240 metres required in paragraph (a)(2)(i).
>
> (emphasis added)

As can be seen, Appendix A.1 to pt 139 deals with RESAs rather differently than cl 3.5 of Annex 14 to the Chicago Convention. Whereas cl 3.5 set a standard of a 90 m RESA in cl 3.5.3 and a recommendation for a 240 m RESA in cl 3.5.4 (a RESA "should as far as practicable extend"),[31] Appendix A.1 expresses both elements in mandatory terms, subject to a practicability test for RESAs beyond 90 m.

Basis of Director's decision

[38] When the Director advised WIAL that he considered that a 90 m RESA would be acceptable for a northern extension,[32] he explained that the reason he had earlier sought further information from WIAL (which included a cost/benefit analysis)[33] was because:

> … the CAA accepts that ultimately, whether an individual RESA is of the greatest practicable length will come down to a balancing exercise in which safety considerations (benefits) are weighed against the cost and difficulty of providing a RESA length greater than the minimum required in Rule Part 139.

[39] The decision under challenge is, of course, the Director's decision that 90 m RESAs in relation to the proposed southern extension to the runway were acceptable to him. Unsurprisingly, he adopted the same approach as he had in relation to a

---

31 See above at [16].
32 See above at [9].
33 See above at [6]–[8].

possible northern extension. In the file note dated 20 March 2015 setting out the basis for his decision, the Director summarised the background as follows:[34]

> Wellington airport has advised that it is considering an extension of its runway to the south into Cook Strait. They have advised that if they proceed with the extension they will be providing 90m RESAs in satisfaction of the requirements of CAR 139.101(4) with respect to the design requirements in 139.51(b) [and Appendix A].
>
> While that decision is legitimately theirs, they have asked for an indication from the Director whether I would find such RESA acceptable in accordance with 139.51(c). As I understand it, they have asked for my view on this matter because they need certainty in relation to what they are proposing to construct for the necessary resource management, construction and planning approvals.

[40] The Director's reasoning, which drew heavily on the final report provided by McGregor, contained two elements:

(a) First, he considered that a 90 m RESA provided an acceptable level of safety at the airport "in light of the nature of operations, their frequency, the type of aircraft using the aerodrome, and the consequent risk attendant upon these operations". He concluded that the McGregor cost/benefit analysis showed a "very low risk of overrun or undershoot occurrences at Wellington airport".

(b) Second, he considered, on the basis of the McGregor cost/benefit analysis, that WIAL had appropriately assessed that longer alternatives to 90 m RESAs were not "practicable" because although there were additional safety benefits from extending the RESAs beyond 90 m, these were significantly outweighed by the costs involved.

As to the possibility of employing an EMAS as an alternative to a longer RESA to provide additional safety benefits, the Director said that he had not considered that as it was not part of WIAL's "decision", so that he did not have any information to

---

[34] See above at [10].

assess. He also said that he did not need to consider the use of an EMAS because a 90 m RESA was acceptable to him.[35]

[41] In his file note, the Director described the approach he took to "practicability":

> That approach [to practicability] involves the following:
>
> - Practicability should be interpreted as incorporating elements of feasibility and reasonableness; some element of pragmatic limitation must be applied;
> - "practicable" does not equate to "that which is possible";
> - The test of practicability involves balancing safety benefits to be achieved against associated cost and difficulty.
>
> The fact that rule compliance may involve significant cost or the allocation of significant resources does not of itself mean that compliance is "impracticable"; instead the cost and difficulty must be carefully weighed against the safety benefits to be achieved.

[42] Finally, the Director noted that his view was based on the cost and other information provided to him by WIAL. If "things were to change materially" he would need to re-visit his decision. As the current proposal is to extend the runway by 355 m into Lyall Bay, WIAL will presumably have to approach the Director again to obtain an indication of acceptance.

The dispute

[43] Principally at issue is the second of the two mandatory requirements in Appendix A.1(a) to pt 139, namely that, "if practicable", a RESA must extend to at least 240 m (or to whatever distance between 90 and 240 m that is "practicable" from the end of the runway strip). While there were several differences between the parties, the essential difference was whether "practicable" meant feasible in a physical sense, with cost coming into play when extreme, or whether it meant reasonably practicable assessed on a cost/benefit basis. This in turn raised questions

---

[35] The latter point was consistent with advice provided to him by Authority personnel. That advice expressed the view that the issue of EMAS only arose if the Director was to find that WIAL's proposal did not meet the RESA requirements in Appendix A.1 to pt 139 and if the Director considered that the inclusion of an EMAS would contribute to the requirements being met.

as to the effect of the 2004 Amendment Act and the precise role of the Director when assessing RESA proposals by airport operators.

[44] The Director, supported by WIAL, maintains the interpretation of "practicable" set out in the file note of his decision,[36] an interpretation accepted in the High Court by Clark J.[37] The Judge rejected NZALPA's contention that practicability is a question of what is physically feasible. She said:

> [75] Ascertaining the practicability of the length of a runway end safety area will require a case by case assessment engaging a range of complex factors which will encompass:
>
> - elements of physical feasibility, and reasonableness — because the unvarnished formula in Appendix A.1(a) does import an element of pragmatic limitation. Simply because something is possible does not mean it is practicable in all contexts.
>
> - a balancing exercise in which safety considerations will be weighed against the cost and difficulty of extending a runway end safety area.
>
> - potentially a cost-benefit analysis which may be an aspect of a safety case.
>
> (footnote omitted)

The Judge considered that the Director had summarised the information on which he relied in his file note and explained his decision.[38] She found that the decision was not reached in error of law. Relevantly, the Director's approach to what was "practicable" was not flawed as it accorded with the approach that the Judge considered permissible.[39] In addition, he was not in error in balancing safety benefits of RESAs longer than 90 m against the associated cost and difficulty of providing them.[40] The Director had also not been in error in relying on the economic cost/benefit analysis undertaken in the updated McGregor report.[41]

---

36 See above at [39]–[42].
37 *NZALPA* (HC), above n 4.
38 At [103].
39 At [98]–[108].
40 At [105].
41 At [109]–[123].

[45] By contrast, NZALPA's position throughout has been that "practicable" refers to what is physically feasible or what is able to be constructed; it does not mean what was reasonable on the basis of a cost/benefit analysis. This view was accepted by the Court of Appeal.[42] First, the Court said that the word "practicable" had a well-known meaning:[43]

> … as something that is feasible or able to be accomplished according to known means and resources; it links the feasibility or practicality of something to the availability of resources. When dealing with the construction of an aerodrome runway, "practicable" must refer to what is actually able to be constructed, importing considerations of practical issues such as the nature of the site and surrounding physical environment, available engineering technology and potential construction options.

Second, it said that the word "practicable" imports a stricter or higher standard than the words "reasonably practicable".[44] While cost had a part to play in the determination of what is "practicable", its role was a limited one, as where cost makes an objective "economically infeasible or impracticable, which WIAL does not contend for here".[45] Following the changes effected by the 2004 Amendment Act, "reasonable cost" was a factor of subordinate importance.[46]

[46] Third, the Court of Appeal rejected the notion that the Chicago Convention provided states with considerable flexibility – any flexibility was "limited and constrained".[47] Quite apart from that, it was the language of Appendix A.1(a)(2) to pt 139 that was important and it was unequivocal – "must extend … if practicable" to a distance of at least 240 m.[48]

[47] Finally, the Court considered that the fact that cost was a relevant consideration under s 33(2) in relation to rule-making meant that it was not relevant when the rule was being implemented because "the costs of implementation are already accepted as part of the rule".[49] Moreover, the Court said that the fact that the words "where physically practicable" were used in another Appendix to pt 139 of the

---

42 *NZALPA* (CA), above n 5.
43 At [52] (footnote omitted).
44 At [53].
45 At [54].
46 At [54].
47 At [56].
48 At [60].
49 At [62].

Rules did not indicate that a broader view of practicability was intended where "practicable" was used on its own.[50]

Evaluation

[48] We will structure our discussion in the following way. First we discuss the effect of the 2004 Amendment Act. Then we address the relationship between the Director and an airport operator. Next we turn to the meaning of "practicable". Finally, we draw the threads together.

Effect of 2004 Amendment Act

[49] The Court of Appeal saw the changes brought about by the 2004 Amendment Act as "discarding the existing two-factor analysis of balancing safety against cost"[51] and increasing the emphasis on promoting aviation safety.[52] This was a significant factor in its reasoning. Mr Rennie QC for NZALPA submitted that the Court was correct in this.

[50] To recap, when work commenced on the revision of the Civil Aviation Rules after the inclusion by the ICAO of the new provisions on RESAs in Annex 14 in 1999,[53] the original s 14 was in force. It required the Minister, when exercising his or her functions under the Act, to promote safety in civil aviation at a reasonable cost, a reasonable cost being assessed on the basis of a nationally oriented cost/benefit analysis.[54] The 2002 McGregor report was prepared with that focus.[55] However, by the time that pt 139 was amended in 2006, the 2004 Amendment Act had come into effect.

[51] As is clear from the explanatory note to the Bill, the 2004 Amendment Act implemented aspects of the New Zealand Transport Strategy (the Strategy).[56] The replacement of the original s 14 with the current ss 14 and 14A (setting out the

---

50 At [63].
51 At [17], citing *NZALPA* (HC), above n 4, at [28].
52 At [17]–[18].
53 See above at [15]–[16].
54 See above at [19].
55 See above at [31].
56 Transport Legislation Bill 2004 (172-1) (explanatory note) at 1.

Minister's objectives and functions respectively)[57] and the introduction of s 72AA and the amendments to s 72B (setting out the Authority's objective and modifying its functions respectively)[58] were intended to "align" the legislation with the Strategy.[59] Importantly, the explanatory note explains that the amendments to s 33 (matters to be taken into account in making rules) were also intended to align that section with the Strategy.[60]

[52] The Strategy was published in December 2002. It summarised the background as follows:[61]

> Historically, investment in transport in New Zealand has been heavily dependent on government funding. Public investment helped establish an extensive network of roads, railways, ports and airports. These evolved and developed under a mode-based regulatory structure and, in time, separate government entities (central and local) owned road, rail, ports, shipping lines, airports and airlines. The country's geography, small population size and low population density, and the development of a strong commodity-based economy, have significantly influenced the development of the transport system.
>
> Beginning in 1983, the transport sector was systematically deregulated. Central and local government interests in the aviation, rail and maritime sectors were corporatised. Many were sold or partly privatised. *However, the changes of the 1980s and 1990s have not delivered all the results expected of them. While economic efficiency was increased, these changes by and large ignored the broader linkages between transport and other issues such as regional development, urban form and social cohesion*.
>
> (emphasis added)

[53] The Strategy was underpinned by four principles – sustainability, integration, safety and responsiveness.[62] These principles are presently reflected in the language of ss 14(a) and 72AA of the Act. The Strategy identified the Government's objectives for transport as being assisting economic development, assisting safety and personal security, improving access and mobility, protecting and promoting public health and ensuring environmental sustainability.[63] The language of these

---

57 See above at [20]–[22].
58 See above at [23].
59 Transport Legislation Bill, above n 56, at 3–4.
60 At 4.
61 *New Zealand Transport Strategy*, above n 17, at 4–6.
62 At 2.
63 At 8.

objectives is reflected in s 33(2)(e) and (f) in relation to rule-making and in s 72I(3)(c) in relation to the Director's functions and powers.

[54] As its text indicates, the implementation of efficient resource use policies remained important under the Strategy.[64] This is reflected in the insertion of para (fa) into s 33(2) by the 2004 Amendment Act, which makes the costs of implementing measures for which a rule is being proposed a mandatory relevant consideration in rule-making.[65] Other mandatory relevant considerations concern risk: s 33(2)(b) refers to "the level of risk existing to aviation safety in each proposed activity or service" and (d) to "the level of risk existing to aviation safety and security in New Zealand in general". But for present purposes the critical point is that the Strategy undoubtedly had a focus that was both different and broader than the cost/benefit approach that underpinned the Act as originally enacted and that changed focus can be seen in the language of a number of the amendments to the Act in 2004.

[55] This change in focus was relevant to the Minister when he promulgated the new Rules in relation to RESAs in 2006.[66] When presenting the final version of the Rules to the Minister for promulgation, the then Director noted that although in the development and consultation stages of the Rules the Strategy had not been taken into account as it was not in force, the final version of the Rules had been assessed against the Strategy. The Director noted that the objective of the new pt 139 was to improve aviation safety by incorporating the Annex 14 RESA requirements. He described how the new Rules fitted in with each of the considerations identified in the amended s 33(2), which presumably gave the Minister some assurance that the Rules were appropriate to the new statutory environment.

[56] We agree with the Court of Appeal that an important effect of the 2004 Amendment Act was to give greater emphasis to the promotion of aviation safety – promoting aviation safety is a purpose of the Act; it is the first-identified function of

---

64 As Mr Goddard QC for WIAL noted, for example, the description of "sustainability" refers to being guided "by medium- and long-term costs and benefits": *New Zealand Transport Strategy*, above n 17, at 2.

65 See above at [27].

66 See above at [35].

both the Minister and the Authority; and it is a mandatory relevant consideration in rule-making. Promoting safety is, however, not the same as guaranteeing that there will never be any accidents. Generally speaking, "safety" is about reducing risk, not eliminating it. Prior to the 2004 Amendment Act, an acceptable level of risk was to be determined on the basis of a national cost/benefit analysis, balancing cost against safety benefits in the form of avoided accidents. Following the 2004 Amendment Act, a wider range of considerations became relevant to that determination, at least in the context of rule-making – cost remained relevant but it was only one of a number of mandatory relevant considerations.

[57] An issue for the Court is the relevance, if any, of this new statutory environment implementing the Strategy to the Director's decision as to the acceptability of a RESA under r 139.51(c) of the Rules. Neither the Act nor the Rules explicitly address the basis on which the Director should make his decision as to acceptability (beyond identifying the test of practicability for RESAs over 90 m). Although s 72I was amended by the 2004 Amendment Act to reflect the Strategy, it sets out the Director's powers and functions rather than identifying relevant considerations in relation to the exercise of decision-making powers.[67] Nevertheless, in exercising some of his functions at least, the Director must act within the framework of the purposes and principles reflected in the statutory changes made to implement the Strategy. The Rules were made under the amended s 33, in light of the mandatory considerations set out in s 33(2). The concept of what is "practicable" in Appendix A.1 to pt 139 must be viewed in that overall context, rather than simply through a narrow cost/benefit lens.

Relationship between Director and airport operator

[58] The question here is whether the Director's role is a reactive one, in the sense that the Director simply considers the proposal that an airport operator puts forward and (subject to the ability to seek further information) determines whether or not he or she finds it acceptable; or whether the Director has a more active regulatory role, one that may involve the active identification of alternatives to what the airport operator has proposed.

---

[67] See above at [24] and [53].

[59] Mr Cooke QC for the Director described the New Zealand aviation system as being a devolved one. In this context, that meant that WIAL as the airport operator decided how it would meet its obligations as to RESAs and the Director assessed whether its choice was acceptable to him. This approach is reflected at two points in the Director's file note recording his decision on WIAL's southern extension application. First, in setting out the background, he describes that WIAL advised it was considering extending the runway and that it would provide a 90 m RESA in satisfaction of the RESA requirements in the Rules. He then says that "[w]hile that decision is legitimately theirs", WIAL sought an indication as to whether he would find a 90 m RESA acceptable under r 139.51(c). Second, and more starkly, the Director said that he did not consider the possible use of an EMAS (as NZALPA had suggested in consultations) because it was not part of WIAL's "decision" about the extension and, as a result, he had no information to assess.[68]

[60] Under the Act airport operators must hold an "aviation document", which is an authority to operate the airport.[69] The operator must comply with, among other things, rules made under the Act.[70] The Rules require an applicant for the grant of an aerodrome operator certificate to ensure that it has RESAs which comply with the requirements in Appendix A.1 if it operates a qualifying airport, subject to the additional requirement under r 139.51(c) that any RESA be acceptable to the Director.[71] The requirement for the Director's acceptance appears to reflect two considerations:

(a) First, the obligations as to RESAs are ultimately New Zealand's obligations as a signatory to the Chicago Convention. It makes sense, then, that the person with the ultimate say on the length of a RESA should be a regulator.

(b) Second, the practicability test under Annex 14 of the Chicago Convention and Appendix A.1 to pt 139 can be assessed in

---

68 He also said that he saw no need to consider it given that a 90 m RESA was acceptable to him. See above at [39]–[42].

69 Civil Aviation Act, s 12 and see the definition of "aviation document" in s 2.

70 Section 12(2).

71 See above at [36].

> different ways, both generally and in specific contexts. As the 2002 McGregor report pointed out, the incentives and interests of airport operators and regulators do not always coincide. Clearly, in promulgating the Rules, the Minister considered that an airport operator's decision as to RESA length should be subject to independent regulatory scrutiny. The question is, what is the basis of that scrutiny?

[61] We accept that the system is a devolved one in the sense that airport operators and other participants in the aviation industry have the ability to make decisions within a framework of statutory and other responsibilities that they are expected to meet. In this context, though, the Director must determine whether what an airport operator proposes is acceptable to him or her. This means that the Director must assess any proposal against the requirements of the relevant rules. In this case, Appendix A.1 requires a RESA of at least 240 m "if practicable", or any length between 240 m and 90 m that is practicable, subject to an absolute minimum of 90 m (whether practicable or not, given that New Zealand has not notified a difference). As the Court of Appeal said, the starting point under the Rules is not what the airport operator proposes but what the Rules require and that should be the Director's focus.

[62] Mr Cooke argued that this was simply a matter of semantics as the Director had considered whether RESAs longer than 90 m were practicable. We do not agree with that characterisation. To repeat, the Director's responsibility is to enforce the requirements of r 139.51(b) and Appendix A.1. They require a RESA of at least 240 m if practicable. That should be the starting point. If a RESA of that length is impracticable, the Director must consider whether a length between 240 and 90 m is practicable. Only if it is not is a 90 m RESA acceptable. Starting with what the Rules require rather than with what the airport operator proposes is not an inconsequential difference of approach. Rather, it is a matter of mindset, and the Director's mindset in this case is illustrated by his first reason for refusing to consider an EMAS solution, namely because it was not part of WIAL's "decision", so that he did not have any information about it. It may be that an EMAS is not a viable technique at Wellington and could be quickly dismissed, but the Director did not turn his mind to its merits even though it was a matter raised by NZALPA in the

course of consultations.[72] He did not see that as part of his function, which was, as he perceived it, focussed on assessing what WIAL had proposed. This is an erroneous approach.

Meaning of "practicable"

[63] As it emerges from the decisions of the High Court and Court of Appeal, the question here is whether the concept of practicability focusses on what is physically feasible, with cost coming into play at the extreme, or whether the concept means what can reasonably be required, balancing the cost to the airport operator against safety benefits to be achieved. We consider that "practicability" in this context requires a more nuanced approach.

[64] The material which was before the Director and formed the basis of his view that 90 m RESAs were acceptable to him if WIAL were to extend the runway either to the north or to the south were cost/benefit analyses, confined to assessing the benefits to safety and the cost to WIAL of longer RESAs at Wellington. As we have already noted, the Director said that practicability would come down:[73]

> … to a balancing exercise in which safety considerations (benefits) are weighed against the cost and difficulty of providing a RESA length greater than the minimum required in Rule Part 139.

That is very much the language of a cost/benefit analysis.

[65] "Practicable" is a word that takes its colour from the context in which it is used. In some contexts, the focus is on what is able to be done physically; in others, the focus is more on what can reasonably be done in the particular circumstances, taking a range of factors into account. Unlike the Court of Appeal, we do not find the dictionary definitions of much assistance given the flexibility of the word and the

---

[72] Counsel for the Director and WIAL argued that the possibility of installing an EMAS could not be a mandatory relevant consideration. Unlike Annex 14 of the Chicago Convention, the Rules do not refer to EMAS and, bearing in mind that 90 m RESAs are required at Wellington, an EMAS would be a way of reducing the length of a longer RESA, which would bring it within the category of a recommendation rather than a standard under Annex 14. However, the Director consulted with NZALPA. NZALPA suggested an EMAS as an option, which the Director did not consider in part because WIAL had not proposed it, so that he had no information. This reflects a misunderstanding of his role vis à vis an airport operator: see above at [62].

[73] See above at [38].

importance of context to determining its meaning.[74] Rather, we consider that the assessment of what is "practicable" must take account of the particular context of Appendix A.1 and the statutory framework that produced it and will depend on the particular circumstances of the relevant airport, including the context in which the request for the Director's acceptance is made.

[66] Counsel for the Director and for WIAL argued that if a 90 m RESA was not acceptable for an extended runway, it was therefore not acceptable for the runway as presently configured. They pointed out that, in physical terms, longer RESAs could readily be required and provided at the airport at the moment, by the simple expedient of painting on RESAs of the relevant length and reducing the declared distance of the runway (that is, shortening the available runway). The consequence would be that some planes that presently use the airport would not be able to do so, or could do so only if more lightly laden. Counsel emphasised that the cost of such a solution should include WIAL's opportunity costs from the necessary changes in use of the runway.

[67] We do not accept the hypothesis that the Director's determination in relation to a proposal to extend the runway has necessary consequences for current, previously accepted arrangements at the airport. This is because we consider that what is "practicable" must be assessed in the particular context in which the issue is raised. We consider that different considerations are engaged where the issue of RESA length arises in the context of a proposal to substantially increase the length of the runway by reclamation so as to increase the airport's capacity than where it arises in the context of an existing operation with significant physical constraints. In some environments, it may not be "practicable" to require an extension to an existing runway for the sole purpose of creating a longer RESA; but it may be "practicable" to require a longer RESA as part of a larger project to enhance the capacity of the airport by lengthening the runway. We do accept the point that WIAL's opportunity costs in the hypothetical example are relevant to the analysis of cost. However, that

---

74 See above at [45].

raises the question why what may be described as opportunity benefits to an airport operator of a particular proposal should not also be taken into account when assessing what is "practicable".

[68] As the 2002 McGregor report noted, economic development benefits may be intangible and so not accounted for in a cost/benefit analysis. As we have said, the Act has the promotion of safety in civil aviation as one of its purposes and as the first of the functions of the Minister and of the Authority; it identifies improving aviation safety as a mandatory relevant consideration in rule-making.[75] Against that background, the broader benefits to the airport operator may be relevant to the Director's decision-making. If, for example, an extension to a runway would make available to an airport operator a new and substantial income stream, that additional benefit accruing to the operator may mean that a longer RESA is "practicable", given that it is accepted that a longer RESA will enhance safety by reducing risk.

[69] One of the mandatory relevant considerations identified in s 33(2) for rule-making is whether a proposed rule assists economic development. We should make it clear that we are not suggesting that the Director must somehow take into account the benefits to a particular region that may flow from a longer runway (although we note that WIAL did invoke the substantial benefit to the Wellington region when seeking the Director's acceptance of a 90 m RESA for the northern extension).[76] We are concerned here with determining the approach to what is "practicable" for the purposes of Appendix A.1. We consider that it is not consistent with the Act as it presently stands to assess practicability solely by reference to WIAL's costs as balanced against the increased level of safety that would result. We see WIAL's intended benefits as being relevant to the practicability analysis as well.

Drawing the threads together

[70] How, then, does all this come together? We agree with the Court of Appeal that following the 2004 Amendment Act, the Act's focus shifted. Promoting safety in civil aviation at a reasonable cost was no longer the core principle. Rather, a different framework was introduced for both the Minister and the Authority,

---

75 See above at [56].
76 See above at [6].

involving new objectives and revised functions. The Minister had four functions, the first of which was to promote safety in civil aviation; the Authority had more functions but again, the first was to promote civil aviation safety and security in New Zealand. The words "at a reasonable cost" were removed. This focus on the promotion of safety per se carried over into the identification of matters to be taken into account in making rules in s 33. Besides risk and cost, the mandatory relevant considerations include (among other things) the need to improve aviation safety.

[71] We do not agree with the limited role that the Court of Appeal has assigned to cost when practicability is assessed. We accept that a cost/benefit analysis may provide assistance to the Director in reaching a determination as to what RESA length is acceptable to him. But such an analysis is simply a tool, as McGregor was careful to point out in its 2002 report, and it is an incomplete tool in the context of the Act as it currently stands. By basing his decision on a cost/benefit analysis, the Director acted as if the Act had not been amended in 2004. To that extent, we consider he erred in law. He was required to consider whether safety could be improved, and in considering that ought to have considered benefits accruing to WIAL as a result of the extension; in this instance, they are relevant to the practicability assessment and it is possible that they are such as to justify him requiring an incremental improvement in safety in the form of a RESA longer than 90 m.[77] We also consider that the Director erred in his starting point, by focussing on WIAL's proposal rather than the requirements of Appendix A.1, and in not turning his mind to EMAS because it was not part of WIAL's "decision".

Result

[72] Although our reasoning differs in some respects from that of the Court of Appeal, we agree that the Director erred in law. Accordingly, we dismiss the appeals. As we understand it, WIAL's current extension proposal will require a further acceptance from the Director. The Director should consider that application in the light of the Court's reasoning. The Director and WIAL are jointly and

[77] We express no view one way or the other about whether this is in fact the case.

severally liable to pay costs of $30,000 to NZALPA, plus reasonable disbursements to be determined by the Registrar if necessary.[78] We allow for second counsel.

Solicitors:
Chapman Tripp, Wellington for Appellant SC 26/2017 and Second Respondent SC 30/2017
R R McCabe, New Zealand Air Line Pilots' Association Industrial Union of Workers Incorporated, Auckland for First Respondent SC 26/2017 and SC 30/2017
J G Sneyd, Civil Aviation Authority, Wellington for Second Respondent SC 26/2017 and Appellant SC 30/2017
Russell McVeagh, Wellington for Intervener SC 26/2017 and SC 30/2017

[78] To reflect a hearing of a day and a half.