Report of the

Controller and Auditor-General

Tumuaki o te Mana Arotake

Inquiry into the sale of Paraparaumu Aerodrome by the Ministry of Transport

September 2005

This is the report of an inquiry we carried out under sections 16 and 18 of the Public Audit Act 2001.

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Foreword

I am pleased to present this report on the sale of Paraparaumu Aerodrome by the Ministry of Transport in 1995.

I was invited by the Minister of Transport to undertake the inquiry, following a report by the Transport and Industrial Relations Committee in May 2004.

Although the events in question took place over a decade ago, the conduct of the sale provides a useful case study of a sale of a Crown-owned asset.

The report also discusses issues that can arise under the Public Works Act 1981 with former owners of compulsorily acquired land, and in respect of the Treaty of Waitangi with former owners of MÜori land.

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Controller and Auditor-General

22 September 2005

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Summary

The Government sold Paraparaumu Aerodrome in 1995. In May 2004, Parliament's Transport and Industrial Relations Committee (the Select Committee) reported on a petition asking "that Parliament legislate to safeguard the long-term viability of Paraparaumu Airport as a full operational facility". The Select Committee recommended, among other things, that "the Government hold an inquiry into the sale process". On 19 October 2004, the Minister of Transport invited the Controller and Auditor-General to undertake the inquiry.

Scope of the inquiry

Our inquiry covered 2 phases by the Ministry of Transport in disposing of the aerodrome:

- consultation with MÜori and former owners of aerodrome land; and
- the sale of the aerodrome by a restricted tender process.

Structure of the report

The report first sets out the background to the sale (Part 2). It then deals with the 2 phases separately, largely in chronological order. We deal with the consultation phase in Parts 3 and 4, and the actual sale process in Parts 5 and 6.

In Part 7 we identify the lessons that can be learned from the sale.

Our conclusions on the terms of reference

We reproduce the terms of reference in Appendix 1. In this part of the summary, we set out our conclusions on each term of reference. (Note that the order of presentation of the issues here differs from that in the report.)

Term of reference 1:

What were the Government's policy objectives in relation to the sale, as expressed in Cabinet minutes or Ministerial and any other relevant directives? Matters to be considered will include:

a. whether the Government intended that the aerodrome should remain operational following the sale and, if so, why; and

b. how the rights and interests of former owners of aerodrome land (including MÜori) were to be addressed.

The overall policy framework which dictated the disposal of the aerodrome was that:

- Civil airports and aerodromes should be run as businesses.
- Government departments should not be involved in running businesses.
- State-owned businesses that were profitable should be corporatised and either operated as State enterprises or privatised.
- State-owned businesses that were not commercially viable should be disposed of on the open market.

Paraparaumu Aerodrome was not considered a commercially viable operation in public ownership. Accordingly, in April 1993 Ministers directed that it should be sold.

The directive to sell the aerodrome was "subject to the Crown meeting its obligations to MŌori under the Treaty of Waitangi and to former landowners under the Public Works Act".

The Ministry was influenced by 4 other policy considerations, which were endorsed by the Minister of Transport, when carrying out the sale:

- The aerodrome should preferably be sold as a single asset. Although it appeared that some aerodrome land may have been surplus to the Ministry's existing operational requirements, decisions on whether that land should be disposed of should be left to the new owners, taking account of their future intentions. However, a partial tender would be considered.
- Disposal should be both quick and complete, with no ongoing or residual Crown obligations in respect of the aerodrome or any aerodrome land. This concession was influenced by:
    - the pending capital charge on departmental assets (which would not, in the case of the Paraparaumu assets, be capable of being funded from revenue); and
    - consideration of the Crown's responsibilities under the Public Works Act to former owners of compulsorily acquired land.
- The aerodrome should remain operational for as long as possible, in accordance with the wishes of users and the local community. But there should be no obligation on any new owner of the aerodrome to keep it operational. This was influenced by:
    - the lack of commercial viability, as shown in independent valuations of the aerodrome as a going concern;
    - the aerodrome not having any critical significance in managing regional air traffic, or in aviation safety terms; and
    - the Ministry's wish to not place the Government in a position where it would have to re-acquire the aerodrome should it prove commercially unviable under new ownership.
- Proceeds from the sale should be maximised, subject to the sale process meeting government requirements.

Term of reference 2:

Was the sale process designed, and documentation prepared, in accordance with:

a. good practice as it applied at the time; and

b. the Government's policy objectives?

Consultation with affected parties

The Ministry was aware from the outset that the Crown had responsibilities to those with former interests in the aerodrome land. Broadly speaking, those responsibilities arose under:

- sections 40 to 42 of the Public Works Act 1981 (in respect of those who had owned aerodrome land at the time of its compulsory acquisition); and
- the principles of the Treaty of Waitangi (in respect of MŪori).

Former landowners

Between 1989 and 1991, the Ministry took steps (through another department) to identify – but not make contact with – former owners of aerodrome land that had been compulsorily acquired. In 1992, the Airport Authorities Act 1966 was amended to enable the Crown to transfer compulsorily acquired land to an airport company formed under that Act, and sell the Crown's interest in the company, without affecting the Public Works Act rights of former owners of the land.

From this time, the Ministry proceeded on the basis that, subject to the sale being undertaken through the airport company mechanism before any aerodrome land was declared surplus under the Public Works Act, it was unnecessary to contact former owners of the land to inform them of any sale of the aerodrome.

Our conclusion:

- The Ministry's approach was consistent with the legislation applicable at the time.

MŪori interests

The Ministry understood that the applicable Treaty principles were that the Crown had to:

- act in good faith;
- be well informed; and
- avoid creating impediments to redress.

To give effect to these principles, the Ministry decided (on advice from the Crown Law Office and other departments) to consult with groups that had lodged claims with the Waitangi Tribunal affecting the aerodrome land. The object was to forewarn them that the Crown was intending to dispose of the aerodrome and to find out if they had any specific interest in the land that might require its retention in public ownership.

Our conclusion:

- The approach of contacting Tribunal claimants was acceptable at the time.

The means used to achieve the sale

Between 1991 and 1993, the Government considered a number of options for disposing of the Crown's interest in the aerodrome (see Part 2 of the report). In April 1993, the Government decided to dispose of the aerodrome by:

- transferring its assets to an airport company; and
- selling the Crown's equity in the company, at market value as a going concern, to "user groups and/or other local groups".

Design of the sale process was completed in early-1995. The term "user groups and/or other local groups" was defined to mean those with some connection with, or interest or experience in, the aerodrome (whether or not for aviation purposes) or the aviation industry. The Ministry's approach to balancing the Government's policy objectives involved:

- the Ministry satisfying itself that tenderers had both the commitment and capability to continue to operate the aerodrome; and
- using external commercial expertise to undertake a robust financial analysis of each tender.

Once those hurdles had been satisfied, price maximisation would be the final determinant.

These were, in effect, the evaluation criteria. There was to be no binding requirement on a purchaser to keep the aerodrome operational.

Our conclusions:

- The Ministry's approach provided an acceptable means of balancing the competing objectives for the sale. It was also consistent with the overall policy framework for asset sales and the particular policy position of Ministers.
- However, the alternative of a more formal assessment process should also have been considered as part of an assessment of the risks involved in the sale.
- The approach set out above effectively encapsulated the criteria by which tenders would be evaluated. But there was no documented understanding of how the evaluation would be conducted. We expected to find a better-documented understanding of how key decisions were to be made during the process.

Valuation of assets

The Ministry decided to value the aerodrome for the purpose of sale on a "going concern" basis, in a way that both maximised the sale proceeds for the Crown and minimised the incentives on the purchaser to recoup the sale price through profits on resale of the aerodrome or land that was surplus to operations.

The Ministry commissioned a valuation of the aerodrome. The valuation assessed the market value of the aerodrome as a going concern as $1.6 million. This included a net cashflow valuation of the core aerodrome assets, together with the net realisable value of land that could be declared surplus (identified from a 1989 proposal to rationalise the aerodrome business, and valued at just over $700,000). The going concern valuation compared with a net realisable value for all of the aerodrome land (were it to cease operating) of $3.5 million.

Our conclusions:

- Sale on the basis of a "going concern" valuation was reasonable, given that the Government's policy objectives for the sale were not only to maximise proceeds, but also that the aerodrome should remain operational for as long as possible subject to commercial viability.
- Overall, the going concern valuation was reasonable.

The process of sale

The Ministry engaged Ernst & Young (EY) as commercial advisers and to manage the sale process. The Ministry also used a national law firm for legal advice.

EY's brief was to manage the sale process, including the receipt and evaluation of tenders and negotiation with a preferred tenderer. Upon completion of negotiations, EY would make a recommendation to the Secretary for Transport on the preferred purchaser, the sale price, and any other conditions. Officials of the Ministry were responsible for settling the sale parameters (including evaluation criteria) and preparing the tender documentation.

EY's consultancy proposal to the Ministry identified 4 phases to the process:

- preparation of an Information Memorandum;
- selection of tenderers and receipt of indicative bids;
- negotiation of final sale and purchase agreement; and
- settlement and transfer.

Our conclusion:

- This was a standard process for asset sales at the time.

Avoidance of conflicts of interest

The consultancy agreement between EY and the Ministry contained an undertaking by EY to not act for another party in any matter that may conflict with the interests of the Ministry in respect of the sale project.

Our conclusion:

- This was an appropriate requirement.

Term of reference 3:

Was the sale process undertaken:

a. in accordance with good practice as it applied at the time; and

b. in a manner that would have been likely to meet the Government's policy objectives?

Consultation with affected parties

The consultation is described in Part 3, and we set out our conclusions in Part 4. The Ministry took advice from the Crown Law Office and other departments throughout the consultation process.

In December 1994, Ministry and other officials reported that the Treaty consultation had been completed, and that "there was general agreement that the claims, if successful, could be satisfied with substitute land or … other assets".

Some of the claimants had urged the Ministry to exclude from the sale those parts of the aerodrome which were surplus to operational requirements. The Ministry's position was that:

- the purchaser of the aerodrome, not the Ministry, was best placed to decide what (if any) land was surplus; and
- if surplus land were identified as part of the tendering process, it would be disposed of in accordance with the Public Works Act, and MÜori interests would be protected.

At a late stage, the Ministry was approached by members of a hapÎ which was associated with one of the claimant groups the Ministry had consulted. The hapÎ members asked the Ministry to stop the sale process and recognise them both as eligible tenderers to purchase the aerodrome and as former owners of aerodrome land who were entitled to its return under the Public Works Act. The Ministry declined to halt the sale process.

Main points of our conclusions:

- It would have been advisable for the Ministry to have obtained more information on the nature of the former ownership of the aerodrome land – some of which was recognisable as MÜori land. There would have been a good chance that individual owners of that land were members of the same whÜnau or hapÎ. Had the Ministry taken this step, it is likely that it would have identified at an earlier stage the interests of the hapÎ which approached it.
- It would also have been desirable for the Ministry to have informed all previous owners (or their successors) of its sale intentions – including the effect of the amendment to the Airport Authorities Act.
- There was a genuine attempt at consultation. But the Ministry's decision to not inform former landowners about the proposed sale compounded its difficulties in meeting the Crown's Treaty responsibilities. After the initial round of consultation with Tribunal claimants, its approach focused too much on those groups and did

not take sufficient account of what they were saying about who was affected. Where an iwi group has stipulated that the issue is one for a specific hapÎ or whÜnau to consider, or that hapÎ or whÜnau has itself raised the issue, the obligation to consult and take account of Treaty principles should include that hapÎ or whÜnau, unless it is unrealistic to do so.

- It may well have been realistic for the Ministry to have consulted with the hapÎ concerned, once the Ministry was put on notice that the hapÎ had an interest in the matter. By the time the hapÎ representatives approached the Ministry, it was too late to consider whether any realistic tendering options were open to the hapÎ. But it might have been possible to do something had the hapÎ's interest been identified at an earlier stage.
- The Ministry could have done more to consider whether the concerns raised by MÜori during the consultation could have been accommodated by making an arrangement – either within the sale process or otherwise – as regards land that may have been surplus to operations.

Management and implementation of the sale

We describe the implementation of the sale in Part 5, and our conclusions in Part 6.

Main points of our conclusions:

- The tenders were analysed with the rigour to be expected for an asset sale of this nature. All tenderers clearly understood the importance of both capability and intention to continue operating the aerodrome, as well as price. But the evaluation criteria ought to have been formally documented.
- The actual process used to evaluate and make decisions in respect of the tenders fell short of our expectations. The project governance arrangements – and in particular the role of a project group comprising officials and the Ministry's advisers – were unclear. The project group took on a key decision making role, which had implications for the fairness of the process.
- In particular, a decision by the project group to recommend negotiations with a preferred tenderer, before the closing date for other parties to submit revised tenders, was premature and inconsistent with good tendering practice. There was no unfairness in the result, but that does not justify the deficiencies in the process.
- The standard of documentation for some parts of the sale process itself was poor. In particular, we expected the actual evaluation of the tenders to have been documented with reference to the criteria. They were not.

Avoidance of conflicts of interest

In our opinion, EY had a conflict between their role of acting as the Ministry's commercial advisers for the sale and being named as the accountants for one of the tenderers.

The Ministry acknowledged that its officials overlooked the reference to EY in the tender, and that the oversight created a perception of a conflict of interest in the eyes of the unsuccessful tenderers.

Our conclusions:

- Although a conflict of interest existed, it was not in our opinion so significant as to have required the commercial adviser to withdraw from the sale assignment. The position would have been different had EY advised or assisted the party in the preparation of its tender.
- The Ministry's commercial adviser appears to have dealt acceptably with the conflict of interest when it came to his attention. However, it does not appear that EY disclosed the conflict to the Ministry, as required under the consultancy agreement. Disclosure would have alerted the Ministry to the conflict and enabled it to assess its implications.

Lessons to be learned

We have drawn a number of lessons from the sale of Paraparaumu Aerodrome, that might be of value today. The main points are:

- There is a need for any department to be clear on how the Crown's Treaty partnership affects its work.
- It is important to consider the implications of both the Public Works Act and the Treaty when selling or transferring Crown-owned land.
- The events leading up to the sale provide a useful case study of what depth of consultation can be required in terms of the Treaty, the need to consider the full range of MŪori interests that may be affected, and the need to keep an open mind on how those interests might best be addressed.
- The sale itself is a good example of how competing policy considerations need to be balanced, and how there is sometimes no solution which can fully meet all of them. There is a positive lesson to be learned from the way the Ministry designed the sale process to achieve the best balance it could.
- The process for selling a publicly owned asset such as this ought to be clearly documented. Those involved in the Paraparaumu sale seem to have relied on their accumulated knowledge of asset sales. That should not have been at the expense of proper documentation.
- It is important to have clearly defined governance arrangements for any significant commercial transaction – especially when both officials and external advisers are involved.
- The final stage of the evaluation was completed in a hasty manner. The lesson to be learned is that, even though the Ministry might have been open to bids throughout the process in this case, the process of receiving and evaluating tenders needs to be sufficiently robust to be, and be seen to be, fair to all parties.

Part 1 – Introduction

What is this report about?

1.1 This is the report of our inquiry into the sale of the Crown-owned Paraparaumu Aerodrome (the aerodrome) in 1995. The government department responsible for the sale was the Ministry of Transport (the Ministry).

1.2 The Crown's objective at the time of sale was to sell the aerodrome to someone who would continue to operate the facility for as long as it remained commercially viable. But no condition to that effect was imposed on the purchaser. It also appeared at the time of the sale that significant parts of the aerodrome land could be surplus to operational requirements. The purchaser has realised a number of land sales since 1995. This has caused anxiety among aerodrome users (including aero and gliding clubs) about the aerodrome's future.

Why an inquiry now?

1.3 The sale took place a decade ago. The outcome of the sale was hotly contested at the time. It was the subject of 2 challenges in the courts.

1.4 In 2002, a group of users presented a petition to the House of Representatives requesting "that Parliament legislate to safeguard the long-term viability of Paraparaumu Airport as a full operational facility".

1.5 In May 2004, the Transport and Industrial Relations Committee (the Select Committee) presented a report to the House on an inquiry into the petition. The report recommended legislative changes to the Airport Authorities Act 1966 and the Public Works Act 1981, to address issues of concern arising from the sale. It also recommended that the Government hold an inquiry into the sale process.

1.6 In October 2004, the Minister of Transport invited the Controller and Auditor-General to conduct an inquiry. The Chairperson of the Select Committee confirmed that the Committee welcomed that decision. On this basis, the Auditor-General decided to conduct an inquiry under sections 16 and 18 of the Public Audit Act 2001.

1.7 The terms of reference for the inquiry are reproduced in Appendix 1. We consulted extensively over them.

1.8 Some parties encouraged us to include in the inquiry not only the sale process, but also events subsequent to the sale – including the role of the Kapiti Coast District Council in approving zoning changes to enable sales of aerodrome land to proceed, and the performance of Paraparaumu Airport Limited in maintaining the aerodrome as an operational facility.

1.9 After making preliminary inquiries, we decided that there was no basis for an inquiry into those matters. Accordingly, this report covers only the actions of the Ministry from the time of the first direction to sell the aerodrome until the completion of the sale and purchase agreement. That scope is consistent with the Select Committee's recommendation and the Minister's invitation.

What we did

1.10 We reviewed the Ministry's files. They had been reviewed several times before – most notably for the purpose of the court proceedings and the Select Committee inquiry.

1.11 We also reviewed the pleadings for the second court challenge. This was an application for judicial review in the High Court. The case never proceeded to trial, but substantial amounts of evidence were gathered during the interlocutory stages.

1.12 We then interviewed a number of people who had been involved in, or affected by, the sale process. We spoke to a former Minister of Transport, who had been Minister at the time of the sale. We interviewed 2 Ministry officials, a former consultant to the Ministry (the consultant), and a former partner of Ernst and Young (EY), the Ministry's commercial advisers for the sale (the commercial adviser), about their recollections of particular events at the time of the sale.

1.13 We also interviewed a representative of a MŪori group (which made the first court challenge to the sale) and 2 representatives of one of the unsuccessful tenderers (which made the second court challenge).

1.14 We took expert advice on the Crown's obligations under the Treaty of Waitangi and the Ministry's consultation with MŪori interests about the sale.

1.15 We also commissioned an independent valuation of the aerodrome (as at 1995) to ascertain the reasonableness of the valuation used by the Ministry.

1.16 We circulated a copy of our report in draft to affected parties. We are grateful for their help and co-operation.

What is the focus of the report?

1.17 The nature and circumstances of this inquiry were unusual. Many views have been expressed publicly about the sale, over many years. It has been an issue

that “will not go away”. We do not promise that our report will be the last word, or that it will make the controversy about the aerodrome “go away”. But we describe the sale process, and the events leading up to it, in a way that is consistent with the Ministry’s documents and the recollections of those involved. We hope that the report will give readers an understanding of what happened.

1.18 The focus of this report, then, is to:

- provide a comprehensive narrative of the events;
- discern what the Government’s intentions were as regards the sale, and examine whether, and if so how, the Ministry gave effect to them; and
- identify lessons that can be learned.

1.19 We found the documentary record comprehensive in most parts, but lacking in others. We have tried to piece together the gaps through people’s recollections. But, after such a long time, it is not surprising that most recollections were hazy. The report needs to be read with this in mind.

Part 2 – Events leading up to the decision to sell

Paraparaumu Aerodrome

2.1 Paraparaumu is on the Kapiti Coast, north of Wellington. In the 1930s, the Government wanted to build an aerodrome there, for defence purposes. Between 1939 and 1949, the Government used its compulsory acquisition powers to obtain some 130 hectares of land. The aerodrome served as a defence facility during World War II, and reverted to civilian use after the war.

2.2 There were several development proposals for the aerodrome in the 1950s and 1960s. By that time, urban development was taking place on the Kapiti Coast. This had resulted in the aerodrome being surrounded largely by residential properties. Its suitability for expansion was therefore limited, although it served as Wellington's main airport while the new airport at Rongotai was being constructed.

2.3 The aerodrome subsequently became a minor facility. It continued to be used for some government aviation functions – for example, the Civil Aviation Flying Unit (responsible for flight calibration) was based there for many years. But mostly it was used by aero clubs, flying schools, and small aircraft operators. Some aerodrome land was leased for other uses, both residential and commercial.

The Ministry of Transport

2.4 By the 1980s, Paraparaumu was one of many airports and aerodromes in which the Crown had an ownership interest. Some were owned jointly by the Crown and local authorities. Others were wholly owned by the Crown and operated by the Ministry. Paraparaumu was in the latter category.

2.5 In the mid-1980s, the Ministry was a large government department, with policy, regulatory, and operational functions. From that time, successive Governments separated off a number of its regulatory and operational functions. For example, the Airways Corporation was formed as a State enterprise in 1986 to operate the air traffic control system. The Civil Aviation Authority was formed as a Crown entity in 1992 to regulate air licensing and safety. Major airports, such as those at Auckland and Wellington, were corporatised and eventually sold. The Ministry also negotiated new arrangements with a number of local authorities with which it owned or operated airports on a joint venture basis.

First moves

2.6 The story of the Paraparaumu disposal began in 1988, when the Government decided that there was no justification for the Ministry to continue operating the aerodrome, and that it should be disposed of as a surplus asset.

2.7 For a number of reasons, the disposal had not proceeded by the time of the 1990 general election. The Government that took office after that election decided to introduce a capital charge on departmental assets. The aim was to create an incentive for departments to dispose of under-performing or unnecessary assets. Paraparaumu was one of 7 Crown-owned aerodromes that the Ministry of Transport operated at the time. None were considered capable of generating enough revenue to meet the proposed capital charge that the Ministry would have to pay in respect of them.

2.8 Accordingly, Ministers confirmed the previous Government's policy of aerodrome disposal.

Obstacles to a sale

2.9 Disposal of Paraparaumu was problematic, for 5 main reasons.

2.10 The first was that the land for the aerodrome had been compulsorily acquired. Under the Public Works Act, the Government had an obligation (with one qualification – see paragraph 3.3) to offer land back to the original owners (or their descendants) if it was no longer needed for a public work.

2.11 The second reason related to the Treaty of Waitangi. The Court of Appeal had recently held that the Crown's intention to transfer certain land to State enterprises without sufficient protection for MŪori claims was contrary to the principles of the Treaty and was therefore inconsistent with section 9 of the State-Owned Enterprises Act 1986 (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 – known as the *Lands* case). In the case of the Crown-owned aerodromes, the land was not subject to any legislative protection of that kind. Selling the land out of public ownership would remove the opportunity for it to be returned should there be a successful claim to the Waitangi Tribunal.

2.12 The third reason was financial. The commercial viability of the aerodrome and the other Crown-owned aerodromes was marginal, at best. In the late-1980s, the Ministry considered a proposal by Land Corporation of New Zealand Limited (Landcorp) to improve the aerodrome's commercial viability by reducing its operational size and subdividing off the remaining land.

2.13 But it was not government policy at the time to undertake land development. In March 1991, the Minister of Transport advised Cabinet that –

> *Expedited disposal of* [the Crown's] *aerodromes has become imperative because the Ministry does not believe it can generate sufficient revenue*

> *from the aerodromes to meet return requirements expected to be set under the proposed capital asset charging regime* [due to be implemented in July 1991]. *The problem in earning sufficient revenue stems from the return target that is expected to be set as well as an over-valuation of the aerodrome assets on the Ministry's balance sheet.*

2.14 It was thought unlikely that the aerodrome would ever be viable in a corporate structure. By 1991, its revenue position had worsened because of the closure of the Civil Aviation Flying Unit. Landing charges were not set at a level that enabled full cost recovery, and there were exemptions for some users. There was little prospect of any change while the aerodrome remained in Crown ownership and was earmarked for sale.

2.15 One of the options for securing a viable aerodrome operation under Crown ownership was for the Ministry to sell off aerodrome land that was surplus to requirements. But this would raise the issue of the Public Works Act requirements. Moreover, many of the properties that had been compulsorily acquired traversed the operational parts of the aerodrome (including runways and taxiways). Enabling former owners to exercise their "offer-back" rights could therefore frustrate continued operation of the aerodrome facility, and eventually result in its closure.

2.16 Ministry officials told us that the Government's general policy position was that it wanted the aerodrome to continue operating if it was commercially viable, but that it did not want to make the decision about viability itself. Hence, it preferred to sell the aerodrome as a going concern and let the market (and/or the local community) decide about its continued operation.

2.17 The fourth reason was a related one, which arose from a combination of the aerodrome's marginal commercial viability and the high value of the land if converted to other uses. The Government's corporatisation policy at the time involved valuing assets on a "full-value" basis, in order to avoid economic distortion and maximise the Crown's returns. But maximising sale proceeds could result in a purchaser deciding to offset purchase costs by converting the land to the most profitable form of use. That would conflict with Ministers' desire to keep existing airports operational if possible.

2.18 The final reason was aviation-related. The Minister's March 1991 memorandum to Cabinet noted the implications that closing the Crown's aerodromes could have for safety and congestion at other airports. It said –

> *The closure of Paraparaumu, with 50,000 aircraft movements annually, would place an increased strain on general aviation traffic in the Wellington region. It is likely that this traffic would either shift to Wellington International airport, or possibly Palmerston North or Masterton airports. Wellington International airport, with 120,000 movements annually, is already experiencing problems with airways congestion at peak hours, and these problems would be compounded. There would be increased risk to aircraft safety, if Wellington were to be required to absorb increased general aviation traffic from Paraparaumu,*

especially following the increase in commuter airline traffic stemming from the recent withdrawal of Friendship services by Air New Zealand.

The Airways Corporation also considers that Paraparaumu should be retained and has stressed its importance in relieving general aviation congestion at New Zealand's main domestic hub.

2.19 Ministry officials told us that these aviation issues made it desirable, although not in their view critical, that the aerodrome remain operational.

The corporatisation option

2.20 In response to this advice, Cabinet authorised the Ministry in March 1991 to hold discussions with Wellington International Airport Limited regarding a possible sale of Paraparaumu. The subsequent public announcement (made on 21 March 1991) said that the Government would consult with interested parties before making firm decisions on future management structures of its aerodromes, and that "it may be possible to arrive at a structure which would allow local communities to control and run their airports in a way best suited to their needs". We were told that this policy position was similar to that which the Government was taking to joint venture airports which were of marginal commercial viability.

2.21 Cabinet considered the matter again in July 1991. The Minister advised Cabinet in respect of Paraparaumu –

Paraparaumu is unlikely to be commercially viable although it could be after an extensive land rationalisation programme. However, there has been interest shown in its purchase for continued use as an aerodrome but prospective purchasers are also likely to have in mind the development potential of the surplus land. On balance, I believe that the best option for Paraparaumu would be sale on an open market basis.

2.22 Cabinet agreed that the aerodrome (and others) should be sold, but made it a specific requirement that the purchasers keep the aerodromes operational. Further investigation took place on how this could be achieved. Special legislation was identified as the best option, but this would take some time to prepare. An immediate sale was therefore impractical.

2.23 A proposal then emerged in August 1991 to place the assets of each aerodrome in separate airport companies (under the Airport Authorities Act), which would be subsidiaries of a holding company established under the State-Owned Enterprises Act. The holding company would be known as Airport Holdings Limited (AHL).

2.24 The Establishment Board of AHL commissioned a valuation of the aerodrome in June 1992. The valuation concluded that the aerodrome would be uneconomic as a business. The main reason was that a large amount of capital

and maintenance expenditure was needed to keep the aerodrome operational – but with insufficient increase in revenue.

The re-emergence of full disposal

2.25 In 1993, the Treasury and the Ministry concluded that the entire AHL proposal was uneconomic and should be abandoned, and that all the aerodromes should be sold. Advice was prepared for Cabinet recommending that it –

> *direct the Ministry of Transport, subject to fulfilling the Crown's obligations under the Treaty of Waitangi and the Public Works Act, to offer for sale:*
>
> *i the shares in an airport company established for each core aerodrome by:*
>
> *EITHER*
>
> ∉ *tender on the open market (preferred option):*
>
> *OR*
>
> ∉ *negotiation with user groups;*
>
> *ii the surplus assets by tender on the open market where separate disposal is expected to maximise return;*
>
> *agree that there be no restriction on purchasers designed to prevent closure of the aerodromes…*

2.26 Ministry officials told us that the preferred option, if accepted, risked closure of the aerodromes. They told us that Ministers continued to baulk at the prospect that the aerodromes would be closed. But the option of negotiated sale to user groups was also considered unacceptable. A compromise position was therefore developed. It involved transferring the aerodrome assets to airport companies, followed by a sale of the Crown's equity in each company at market value as a going concern, to parties that would be likely to continue operating the aerodromes – such as users, local authorities, or nearby airport companies. As a result, on 27 April 1993 Cabinet –

> *directed the Ministry of Transport, subject to fulfilling the Crown's obligations under the Treaty of Waitangi and the Public Works Act, to offer for sale the shares in an airport company established for each core aerodrome by negotiation with user groups and/or other local groups, or by restricted tender involving user groups and/or other local groups;*
>
> *invited the Minister of Transport to report back to the Committee on the use to which potential purchasers propose to put the aerodromes.*

2.27 This Cabinet minute became the final authority for Paraparaumu Aerodrome to be sold. But the sale process took another 2 years to complete.

Part 3 – Consultation with MŪori and former owners

3.1 In this Part, we examine the sequence of events from the time the Ministry was directed to dispose of Paraparaumu Aerodrome until the time the sale process was formally begun by the issue of an information memorandum. We also consider what happened when a MŪori group raised an objection to the sale when the process was well advanced.

The Crown's responsibilities

3.2 The Ministry was aware from the outset that the Crown had responsibilities to those with former interests in the aerodrome land, which would have to be considered. Broadly speaking, those responsibilities arose under:

- sections 40 to 42 of the Public Works Act (in respect of those who had owned aerodrome land at the time of its compulsory acquisition); and
- the principles of the Treaty of Waitangi (in respect of MŪori).

The Public Works Act requirements

3.3 Sections 40 to 42 of the Public Works Act provide that:

- Where land is held for a public work, and is no longer required for that or any other public work, the Crown (or other public owner) must offer the land back to the person from whom it was acquired (or that person's successor) at market value.
- Land need not be offered back for sale if it would be impractical, unreasonable or unfair to do so.
- An offer at less than market value may be accepted if it is reasonable to do so.
- Where the land in question is MŪori freehold land in multiple ownership, the Crown must apply to the MŪori Land Court for an order re-vesting the land as MŪori freehold land.

Treaty principles

3.4 Ministry officials told us that the applicable Treaty principles, as they understood them, were that the Crown had to:

- act in good faith;
- be well informed; and
- avoid creating impediments to redressing grievances.

3.5 The Crown had established an administrative procedure (the protection mechanism) in the wake of the *Lands* case, which involved placing surplus Crown land in a "land bank" to be available to meet future Tribunal claims. But the protection mechanism did not apply to land transferred to an airport company.

3.6 Ministry officials told us that it was necessary, therefore, to consult with interested groups to forewarn them that the Crown was intending to dispose of the aerodrome and to find out if they had any specific interest in the land that might require its retention in public ownership.

Relationship between the Public Works Act and Treaty interests

3.7 The Crown's statutory duties under the Public Works Act took precedence over any Treaty interests, in the sense that the aerodrome land was not subject to any statutory protection in terms of the Treaty.

3.8 That is not to say that the Treaty interests were of no importance. The Waitangi Tribunal had jurisdiction to consider any act or omission of the Crown that may involve a breach of Treaty principles. Treaty interests could have arisen, for example, through the way in which the Crown had:

- originally dealt with the land, resulting in its alienation from original MÄori owners;
- administered the land after that, and/or acquired it under the Public Works Act; or
- disposed of the land, whether or not it was surplus in terms of the Public Works Act.

3.9 A former MÄori owner could therefore have an interest in a piece of land both individually, under the Public Works Act, and as a member of an iwi or hapÎ group, under the Treaty.

3.10 It should also be remembered that, unlike the courts, the Waitangi Tribunal can consider whether legislation itself breaches the Treaty. Thus, although the Crown is clearly entitled to rely on legislation to authorise the sale of an asset, it does not necessarily follow that the sale will be consistent with the principles of the Treaty.

Identification of former owners: Public Works Act

3.11 In 1989, the Ministry asked the Department of Lands (the Department) to investigate the ownership history of the aerodrome land. The Department advised the Ministry that, were any aerodrome land to be declared surplus, the Public Works Act would have to be invoked "because of the highly coercive nature in which Paraparaumu land was compulsorily acquired from previous

owners" and to avoid "a considerable adverse reaction" if there was any attempt at a bulk sale as an airport.

3.12 In February 1990, the Ministry received a report from the Department's successor, the Department of Survey and Land Information (DOSLI), summarising the history of each of 15 land areas which formed the aerodrome land. Approximately 130 hectares of land had been compulsorily acquired. Of this, there had been 7 blocks of MŪori freehold land. These were described as parts of Ngarara West B4, B5 and B7, and they ranged in size from 43 hectares to under 2 hectares. In all but 2 cases, DOSLI recommended to the Ministry that the properties should be offered back to the previous owners.

3.13 The exceptions were one block of 2.14ha, where DOSLI considered offering back to the previous owner to be "unreasonable", and another of 11.9ha which comprised part of a housing area and the Metrological Office in Avion Terrace. In relation to this block and a similar block of general land, DOSLI said that –

> *...until clearer directions are given as to what is being declared surplus no decision* [on offer-back] *can be made at this stage.*

3.14 The balance of the blocks was general land, and DOSLI recommended they be offered back – with 2 similar exceptions.

3.15 DOSLI noted that offering the land back to former owners would be inconsistent with its continuing use as an aerodrome. But it advised the Ministry that section 48 of the Land Act 1948 allowed land taken for public works to be leased for a fixed period or to be leased on a perpetually renewable basis. DOSLI thought a lease arrangement was an option for Paraparaumu. A lease could be terminated if the land ceased to be used as an aerodrome, at which stage the offer-back provisions would apply.

3.16 The Ministry considered but did not accept this option. Instead, it asked DOSLI to try to locate former owners – but without contacting them. DOSLI reported to the Ministry in May 1991 that this would be a very difficult task without being able to approach people to find out if they were the former owners or their descendants.

3.17 The Ministry received an unsolicited approach from one former owner (whom we refer to from here on as "the one former landowner"). It corresponded with her on a number of occasions, and kept her informed about its intentions in respect of the aerodrome. This correspondence is of some significance, and we will return to it later.

The 1991 amendment to the Airport Authorities Act

3.18 As we report in Part 2, in 1991 the Government considered a proposal to form airport companies to operate Paraparaumu and other aerodromes, and to transfer aerodrome land to those companies under the Airport Authorities Act. DOSLI was clearly concerned at the implications, for former landowners, of

transferring compulsorily acquired land to an airport company. Its position is best summarised in a report by the Minister of Transport to Cabinet dated 1 August 1991 –

> *In addition to Treaty of Waitangi issues, DOSLI has strongly recommended that the Airport Authorities Act 1966 be amended prior to the transfer of any further Crown land to airport companies. It is of the view that the Act does not satisfactorily protect the rights of former owners who had land acquired for the purpose of establishing the aerodromes ... because of an apparent conflict between that Act and the Public Works Act in that a "public work", even if a "Government work" as in the Airport Authorities Act, must be operated by the Crown or a local authority. ... Accordingly, it is my recommendation that no further Crown land be transferred to airport companies until the issue has been thoroughly investigated and the Airport Authorities Act has been strengthened as necessary.*

3.19 Cabinet agreed to seek an amendment of the Airport Authorities Act. Subsequently, a new section 3A(6A) of the Act came into force on 10 August 1992. It said –

> *Nothing in sections 40 to 42 of the Public Works Act 1981 shall apply to the transfer of land to an airport company under this Act, but sections 40 and 41 of that Act shall after that transfer apply to the land as if the airport company were the Crown and the land had not been transferred under this Act.*

3.20 The effect of the amendment in relation to Paraparaumu was that the Ministry could transfer the aerodrome land to an airport company formed under the Airport Authorities Act, and sell the Crown's shares in the company, without the rights of former owners of the aerodrome land being affected. The obligation to consider the offer-back requirement would fall on the new owner (whether or not it was a public body), once the land became surplus in terms of the Public Works Act.

3.21 This provision largely mirrored section 24(4) of the State-Owned Enterprises Act, which applied sections 40 to 42 of the Public Works Act to surplus land held by State enterprises. But land transferred by the Crown to State enterprises was also protected by the Treaty of Waitangi (State Enterprises) Act 1988 and by memorials placed on certificates of title, providing that the Waitangi Tribunal could order its return to MŪori. No such protection was inserted in the Airport Authorities Act.

3.22 Nevertheless, from this time the Ministry proceeded on the basis that the amendment to the Airport Authorities Act would preserve the Public Works Act rights of former owners of aerodrome land in the event that the aerodrome was sold before any land was declared surplus. The Ministry believed that it needed to ensure only that it used the new mechanism provided by the Airport Authorities Act to effect sale – i.e. establishment of an airport company to which the aerodrome assets would be transferred, followed by sale of the Crown's shares in the company.

3.23 A letter from the Ministry to the Crown Law Office on 16 August 1993 summarised the position as follows –

> *The reason for the proposal to dispose of ... Paraparaumu in this way relates to the aerodrome land being subject to the "offer back" provisions of section 40 of the Public Works Act 1981. The Ministry has had a long standing concern that the effect of disposal under section 40 could mean closure of* [Paraparaumu and other] *aerodromes because former land owners, if they wished to take up their offer back rights, could frustrate the operation of the aerodromes. With such a risk, the Ministry could not contemplate activating section 40 disposal unless the aerodromes were closed first. In the Ministry's view, closure would not be a realistic approach as two worthwhile aviation facilities would be lost. Closure would also be extremely costly for the Ministry because of the need to terminate existing leases which will involve compensation. However, the Airport Authorities Act 1966 allows land to be transferred to airport companies notwithstanding the provisions of sections 40 and 41 of the Public Works Act 1981, although those sections continue to apply to any subsequent disposal of surplus land. Therefore, the aerodromes can be sold as going concerns, using an airport company as a "sale vehicle".*

Addressing Treaty interests

3.24 The Ministry began its Treaty consultation in May 1993. It took advice from the Crown Law Office, the Treaty of Waitangi Policy Unit in the Department of Justice, and Te Puni Kokiri (TPK). That advice was to the effect that it should consult with those iwi and hapÎ groups that had submitted claims to the Waitangi Tribunal in the area in which the aerodrome was situated. Five claimant groups (claimants) were identified.

3.25 This was by no means the only Treaty consultation the Ministry was engaged in. Similar issues had arisen in the course of other corporatisations, and in negotiations with local authorities over the joint venture airports.

3.26 The Ministry was cautioned to not force the pace with the consultation. It allowed 6 weeks, in the first instance, for the claimants to notify it of any opposition to the sale.

3.27 Excerpts from the initial letter sent to the claimants are reproduced in Appendix 2.

3.28 The Ministry also wrote to the one former landowner, with whom it had previously corresponded and met. Its letter was in the following terms –

> *In order to fulfil the Crown's obligations in respect of the Public Works Act, the aerodrome will be sold as an airport company because the rights of former owners are safeguarded through this method of sale. In other*

> *words, if the airport company should later wish to sell land at Paraparaumu which it no longer requires for aerodrome purposes, it will be required to offer the land back to the former owners in accordance with the Public Works Act. Consequently, the position of former owners and their descendants will be unaffected by this disposal.* (Emphasis in original)

3.29 Only one response appears to have been received from a claimant group before the 1 July deadline. Ati Awa Ki Whakarongotai Inc summarised its concerns as follows in a fax to the Ministry dated 28 June 1993 –

> 1. *Ati Awa are happy to support their whanau who are the descendants of the original owners of the airport land in their quest for the return of any surplus land under section 40 of the Public Works Act.*
> 2. *Their* [sic] *are concerns regarding the payment for improvements when that land is returned both immediately and in the future.*
> 3. *Their* [sic] *are concerns with the limitations placed upon the land usage after it is returned.*
> 4. *Their* [sic] *are concerns about the lack of detail available to the Iwi in order to make informed decisions on this matter.*

3.30 A letter attached to the fax expanded on these points. The letter made clear that the claimant wished to be in a position to buy back surplus land, but would need government help to do so. It sought more information and time, and also mentioned the possibility of the claimant becoming involved in the tender process.

3.31 In August 1993, the Ministry told the Minister that it had received advice from the Treaty of Waitangi Policy Unit that, because transferring the aerodromes to an airport company would mean that land subsequently deemed surplus would not be available for use in a Treaty settlement, the Crown could be seen to be in breach of the Treaty principle that the Crown should avoid creating impediments to redressing grievances. Clearance of the land through the protection mechanism did not appear to be possible. One option was to place a covenant on aerodrome land so that it would revert to the Crown if it were declared surplus and not be disposed of by the airport company under the Public Works Act. Advice was to be sought from the Crown Law Office on the issue.

3.32 The Crown Law Office advice confirmed that the protection mechanism did not apply to the proposed transfer of aerodrome assets to an airport company. It said that the Crown should further consult with claimants in order to comply with its Treaty obligations. Only once that consultation had taken place, it said, could the Ministry assess whether a mechanism was needed to ensure that the transfers did not create a further impediment to redress of Treaty breaches.

3.33 The key point, the Crown Law Office advised, was to establish what, if any, particular significance claimants placed on the aerodrome land. If the land were not of special significance and therefore capable of substitution by other land, a mechanism to preserve redress options may not be required. It was also desirable to find out whether claimants would be satisfied with the land continuing to be used as an airport, provided they had ownership or control of the underlying title. This could also result in the need for a mechanism to preserve options for redress.

3.34 On the other hand, the advice also noted that where claimants were the immediate previous owners of land that was declared surplus, they would be protected by section 3A(6A) of the Airport Authorities Act – which could also be relevant in determining whether a mechanism was needed to preserve options for redress.

3.35 In October 1993 the Ministry wrote again to Ati Awa Ki Whakarongotai Inc, asking the following questions –

a *Do you claim that the land upon which the aerodrome is located is of particular significance? Is it for example wahi tapu?*

b *Does your claim extend to the whole of the land upon which the aerodrome is located or simply part of that land? If only part of the land, which part?*

c *Do you accept that the land should continue to be used as an airport, given that there is limited land in the vicinity available for airports and that the provision of airport facilities is of wider benefit to the community?*

d *In your claim to the Waitangi Tribunal (WAI 88) you have referred to the Paraparaumu Airport but given no particulars of the basis of the claim to that piece of land. Has any research been commissioned or completed in respect of particular claim to the aerodrome?*

3.36 At the same time it wrote to the claimants from which it had not heard in response to its May 1993 letters. This resulted in contact being established with all the claimants.

3.37 By early 1994, 3 claimants remained interested in the aerodrome. They were Ati Awa Ki Whakarongotai Inc, Te Runanga Ki Mua-Upoko (Inc), and Te Runanga O Toa Rangatira Inc. The Ministry's position at this point is best summarised in an internal memorandum dated 11 February 1994. This said –

> *In general, the concern that has been expressed by claimants seems to relate to the prospect that the disposal of the aerodromes will alienate the aerodrome land from Crown ownership while there are claims outstanding. Consequently, should any of the claimants be successful with their claims, the Crown would not be in a position to restore the land to Maori ownership.*

To avoid alienation of the land ownership, the Crown appears to have three main options:

a retain the aerodromes; or

b retain the ownership of the land until all claims affecting the land are settled and, in the meantime, lease the aerodromes to new operators; or

c sell the land with some sort of covenant attached, allowing the Crown to repurchase the aerodrome land at some future date.

All three options pose difficulties. The disadvantages of the first option needs [sic] *no further canvassing here. The second option would involve effort in establishing the lease (and then monitoring its operation), transferring the land to the Crown balance sheet if MOT wished to avoid the capital asset charge and, most importantly, would make it more difficult for long term management decisions to be taken in respect of the aerodromes. ... However, a long term lease would virtually amount to sale anyway, in the sense that Maori claimants, even if underlying land ownership could be transferred to them, would be precluded from putting the land to any other use for the term of the lease assuming that the lease would be difficult to break without compensation being paid to the lessee ... The third option of placing a covenant on the aerodrome land may be difficult to implement and may have the effect of forcing a discount in the price paid for the aerodromes.*

3.38 The memorandum went on to discuss the possibility of aerodrome land being substituted for other land or monetary equivalent should claims be proven, provided there was no particular significance attaching to the land. It said –

While the Government has decided that the aerodromes should be devolved from Government ownership ... it certainly has not decided that the aerodromes are surplus as it wishes to preserve their continued use for airport related activities. In this regard, even if a particular significance were ascertained, the Government might legitimately determine, as part of its right to govern under the Treaty, that the disposal should nevertheless proceed on the grounds of an overriding public interest. For example, it may be concluded that because the airports should forever be preserved as airports (given the expense of building new airports and the shortage of available land) that there is no realistic prospect of the land ever being available for any other use, including Treaty settlements.

3.39 The memorandum concluded –

The aerodromes must be sold as going concerns through the airport company sales vehicle because of the implications of the Public Works Act disposal for the aerodromes. As s. 40 will continue to take precedence over any claims, no matter what action is taken by the Crown to preserve ownership of land short of special legislation cancelling the rights of former owners, the claimants will never have any guarantee that land ownership could be transferred to them. As well, it is clear that Government policy puts emphasis on establishing protective mechanisms

only for those assets which are surplus and overcome the substitutability principle.

In light of these points, the Ministry should proceed to tender if, following reasonable efforts to ascertain the nature and type of Treaty claims, no particular significance attaching to the claim has been ascertained.

3.40 Accordingly, "one final effort" was to be made to establish significance before making a policy decision on how to proceed.

3.41 In May 1994, following unsuccessful attempts to obtain written comments from the 3 claimants, the Ministry took further advice from the Crown Law Office about what to do. The Crown Law Office advised that, in continuing to meet the Crown's Treaty responsibilities, the Ministry should proceed to meet, or make firm offers to meet, the claimants in order to ascertain the nature of their interest in the aerodrome and their views on whether they supported its ongoing use as an airport. Any subsequent decision about a protection mechanism would then be a policy one.

3.42 There followed a number of meetings and exchanges of correspondence with the 3 claimants. The meetings were arranged with the help of TPK. The Ministry's concern was to establish whether the aerodrome land had any particular significance to the claimants, such as to prevent it from being capable of substitution by some other form of redress in the event of a claim to the Waitangi Tribunal being upheld. There also appears to have been discussion of:

- the Ministry's intentions or expectations as regards future operation of the aerodrome;
- the proposed disposal process; and
- the prospect of a claimant taking an interest in the airport company upon sale.

3.43 Following the meetings, Te Runanga o Toa Rangatira Inc wrote to the Ministry on 21 November 1994 saying –

Should Ngati Toa be successful in its Treaty Claim then the most appropriate form of compensation is land. We have reconsidered our view on becoming part-owner in the new airport company and have decided to keep this option open.

We are in favour of the airport continuing in its present function and that any lands so disposed of be used exclusively for that purpose. We do not agree that the successful tenderer should determine the amount of lands required. Any excess lands not then required may appreciate in value thereby causing more difficulty in returning the lands, under the Public Works Act to the previous owners. We fail to understand why the Ministry as an experienced airport operator, cannot determine the requirement for the airport to function. Thus, lands surplus to requirements will be available for treaty compensation.

3.44 Representatives of Ati Awa Ki Whakarongotai Inc met with the Ministry on 22 November 1994. They said that the claimant's interest in the matter had been passed over to a representative of the one former landowner's family. There was a suggestion at the meeting that there was an urupa (burial ground) on the aerodrome land, but this was subsequently discounted. The Ministry wrote to the claimant after the meeting confirming what had been discussed – that the claimant would be prepared to accept other land as compensation; and that the claimant was happy for the aerodrome to continue in operation.

3.45 The Ministry's role in the consultation was led by a contractor (the consultant) who had been engaged to assist with the sale process. As a former director of a subsidiary of the Treaty of Waitangi Fisheries Commission, he was in a good position to understand the consultation process and the needs of the groups being consulted. We asked him about his recollections of the process. He told us that the consultation was in his view a genuine attempt on the Ministry's part to ascertain the interests and views of MÜori. He had been satisfied with the result of the consultation, which was that the land would be capable of being substituted by other forms of compensation in the event of a successful claim.

3.46 But the consultant also recalled that claimants were uncomfortable about the prospect of the aerodrome being sold in circumstances where it might not remain as an airport. Claimants could see it as an important facility, which provided a service for the area, and supported it remaining as such. If this was not to happen, claimants wanted to be in a position where their former land could be returned to them.

3.47 The consultant recalled concerns being raised, at the meetings, about the cost to claimants (as former owners) of having to buy land back at market value if declared surplus and offered back under the Public Works Act, and their inability to meet that cost. They knew it was valuable land, he said, and they would want their slice of it if it were not to continue as an airport once it had been sold.

The consultation concludes

3.48 In December 1994, Ministry officials reported to the Secretary for Transport about the outcome of the consultation. The report said that –

> *According to the information obtained from* [the Treaty of Waitangi Policy Unit] *and the advice received from TPK we have consulted with all the known claimants to the Waitangi Tribunal whose claims are likely to include Paraparaumu Aerodrome land.*
>
> *It is our view and that of TPK, a representative of which attended all the meetings, that the method of the consultation, the questions posed and the time frame for reply were reasonable. We believe that nothing more can be done to seek the views of these groups.*

3.49 Accordingly, the officials believed that the principles of the Treaty had been adhered to and –

> *the consultation process has been extensive and claimants have had every opportunity to express their views.*

3.50 The report expressed the outcome of the consultations thus –

> *During the meetings the views expressed by all three groups appeared to indicate a general consensus that the aerodrome should remain operational.*
>
> *There was also general agreement that the claims, if successful, could be satisfied with substitute land or, in the case of some groups, other assets.*
>
> *Some groups expressed a desire to become involved in the ownership of the aerodrome by using the aerodrome as part settlement for their claim.*

3.51 The officials also noted the view of Te Runanga o Toa Rangatira Inc that the Ministry, not a future buyer, should make decisions about the likelihood of surplus land. On this point, the report said –

> *Although a future buyer of the aerodrome may find some of the land surplus to its requirements for the efficient operation of the facility, the Ministry believes it is not in a position to make this judgement. This is a decision for a future commercial owner. The sale of any such surplus land would still be subject to s 40 but not the* [Treaty claims] *protection mechanism. One option to deal with this situation is to make provision in the tender documents for the subsequent sale of any land, identified by the airport company as surplus after purchase, to be subject to the protection mechanism as well as the offer back requirements of s 40. However the nature and extent of the consultation undertaken in the preparation of this report has effectively met this protection mechanism requirement and there would be little point in repeating the process.*
>
> *In the light of the earlier comments in this memo on special significance and substitutability of the land, and the observations in* [the previous paragraph], *I do not believe that there is any need for special measures to be put in place to take account of this issue.*
>
> *It may be that surplus land is identified as part of the tendering process. If this is the case then this land will be declared surplus by the Ministry and disposed of in accordance with s 40 and Maori interests will be protected through the application of the protection mechanism in the usual way.*

3.52 The Ministry then sought the Minister's approval to proceed with tenders for Paraparaumu and one other aerodrome. A memorandum dated 12 December 1994 noted that TPK, the Treaty of Waitangi Policy Unit, and the Crown Law Office all concurred in the recommendation, for the following reasons:

- All claimants considered that the aerodromes should continue to function.

- There was no evidence submitted to the Ministry which indicated that any areas of special significance, as interpreted under the Crown protection mechanism, were located within the aerodromes' boundaries.
- Based on the responses of those claimants who met with the Ministry, it was the Ministry's view that it would be possible to meet any successful claim by the use of substitute land or (in some cases) other compensation.
- There were considerable limitations in the way the aerodrome land could be used for the settlement of any claims, other than as a going concern, due to the implications of the offer-back provisions of the Public Works Act.
- Transferring the aerodromes as a going concern to settle claims would have to be delayed until the various issues had been resolved before negotiations with the Crown could commence. These issues were: which was the rightful claimant, which was the rightful claim, and what compensation, if any, was considered appropriate. The possibility of these being resolved would be some time away.
- There was an urgent need for commercial management of the aerodromes to enable decisions about the long-term future to be made. It would be unreasonable for aerodrome users and local residents to delay this any longer.

3.53 Calling for tenders was seen as the most appropriate course of action to achieve the objectives of –

> *... keeping the aerodromes operational and ensuring development decisions are able to be made, but* [this] *need not prejudice the satisfactory resolution of any claims before the Waitangi Tribunal.*

3.54 On 16 December 1994, the Ministry announced the Minister's decision to invite tenders, noting that the views of "MÜori claimants" had been sought as part of "an extensive consultation process".

Further approaches from former owners

3.55 We recount the sale process in Part 5. However, the story of the Ministry's communications with former owners of aerodrome land does not end at this point.

3.56 On 7 February 1995 (before the tender process had begun), solicitors for the one former landowner wrote to the Ministry about the proposed sale. This followed a telephone call to the Ministry from an unidentified family member. The Ministry replied on 15 February 1995, repeating earlier assurances about section 3A(6A) of the Airport Authorities Act and stating that –

> *It is the Government's expectation that Paraparaumu Aerodrome will continue operating following sale for as long as it remains commercially viable. For this reason, the Government has restricted the sales process*

to only those parties expected to have the objective of continuing the aerodrome business.

For the above reason, and to enable the new owners to make their own decisions about the future operational requirements, the aerodrome is being sold as a "going concern" comprising all aerodrome land and MOT assets. However, recognising that an amount of land at Paraparaumu aerodrome may be considered to be surplus to future requirements, tenders for a lesser area of land will be considered without prejudice. Should such a tender be accepted, any residual land left with the Ministry will be sold by the Department of Survey and Land Information in accordance with the Public Works Act 1981.

3.57 In April 1995 (after the Information Memorandum had been issued but before tenders had been received), the Ministry was approached by members of Te WhŪhau o Ngarara, who identified themselves as grandchildren of the one former landowner. They had only recently learned of the proposed sale, through the news media. Ministry representatives met with them on 13 April. A Ministry note following the meeting recorded their concern as follows –

They wished to express their concern about the sale because they believed that the Crown had changed the use of the aerodrome and deprived them of their offer back rights. Their argument centred on the issue that the aerodrome had been taken for "defence" or "emergency airport" purposes and was now being used as a recreational airfield ie offer back should have taken place.

...

It was agreed that they would present their concerns in writing including any research they had carried out. The Ministry would then respond. They asked for a delay in the sales' process to allow them to research the question. However, it was noted that the sales' process would continue.

3.58 A letter expressing the same concerns was received from the whŪhau representatives on 19 April. They identified themselves as "representatives of the concerned descendants of Puketapu Hapu" of Te Atiawa.

3.59 We spoke to one of the Puketapu representatives. He told us that Puketapu was the hapÎ that Ati Awa Ki Whakarongotai had referred to:

- in its fax to the Ministry on 28 June 1993; and
- at the meeting with the Ministry on 22 November 1994.

3.60 The Puketapu representatives subsequently wrote to the Minister of Transport, seeking negotiations to clarify the Ministry's intentions and the implications thereof for the descendants of the original landowners, and to discuss their concerns. The Minister declined their request, and referred the group to the Ministry.

3.61 A further, 4-hour, meeting with the Ministry took place on 19 May 1995, at the request of the Puketapu representatives. By this time, the Ministry had

completed negotiations with the preferred tenderer for the aerodrome, and had entered into an unconditional contract.

3.62 The Ministry's note of the meeting recorded the group's concerns as:

- ∉ The former owners had known nothing of the proposed sale until a month previously.
- ∉ The former owners of the land had not been consulted about the sale, even though the Ministry's documentation said there had been consultation.
- ∉ That as the use had changed from the original purpose for which the land was acquired then it should be offered back to the original owners.

3.63 There appears to have been lengthy discussion at the meeting. The notes recorded:

- ∉ The Ministry's surprise that none of the Puketapu representatives were aware of the intention to sell, given the regular and recent communication with the one former landowner about the Ministry's intentions.
- ∉ Its explanation to the representatives that it had consulted with only those iwi that had made claims to the Tribunal, and that there had never been any intention to consult former owners because of section 3A(6A) of the Airport Authorities Act.
- ∉ The representatives' response that the iwi which the Ministry had consulted had no claim to any of the aerodrome land, which was hapÎ land, and that even though there was no legal obligation to consult the former owners, there was a moral one.
- ∉ Their question why former owners of the land were not given a chance to tender for the aerodrome.
- ∉ The Ministry's response that the sale process was too far advanced to stop, and its acknowledgment that no consideration had been given to allowing former owners to tender for the aerodrome.

3.64 We interviewed Ministry officials and the consultant, who had been present at the meeting. They could not recall anything more of what was discussed than had been recorded in the note. The Puketapu representative gave us a written account of his recollection of the meeting. It said –

> *We immediately* [i.e. after initial response by Ministry officials to their concerns] *asked to be recognised as eligible tenderers, as users of Paraparaumu Aerodrome, since two of our families were tenants of Paraparaumu Airport houses situated in Avion Terrace. We were denied … eligibility to make a tender, yet according to the description, the families we represented were eligible as tenants of the aerodrome.*
>
> *…*
>
> *With so much surplus land already identified as "residential" in local District Plans, we raised concerns about the potential for land to be developed for non-aerodrome purposes. However we were refuted with*

the claim that surplus land was immediately subject to the provisions of s40-42 of the Public Works Act 1981.

…

The Ministry was already allowing the use of land for non-aerodrome purposes along Kapiti Road.

3.65 We asked the representative why he and the other members of the group were not aware of the Ministry's intention to sell the aerodrome, given its regular communications with the one former landowner about the matter. He told us that he believed that the one former landowner or her adult children may have overlooked the correspondence, or failed to understand its significance. He was adamant, however, that the Ministry was mistaken if it thought that it was sufficient to correspond with the one former landowner. Other former owners had interests and, in his view, they should have been consulted.

3.66 Ministry officials told us that they were satisfied the one former landowner had been the right person to deal with.

3.67 After the meeting with the Ministry, the Puketapu representatives took legal advice. On 22 May 1995 (before the sale process had been concluded), solicitors wrote to the Ministry on their behalf reiterating that it would have been "politic, at the very least" to have consulted with descendants of the original owners. The solicitors sought an assurance that the Ministry had "made it very clear to any successful tenderer of their obligations under S.3A(6A) of the Airport Authorities Act and, further, of our clients' concerns".

3.68 The Ministry's reply included the following –

… it is not common ground that the future ownership of the airport land is a Hapu matter. According to information provided to the Ministry by the Department of Survey and Land Information, the aerodrome land was acquired from several freehold owners, (including Maori owners) and not from Hapu as suggested. Regardless of your clients' views, it is a fact that five Iwi have lodged claims with the Waitangi Tribunal regarding the aerodrome land and the Ministry was specifically instructed by the Government to consult with any claimants. We see a clear distinction between the Crown's obligations under the Treaty of Waitangi and the rights of your clients under the Public Works Act, and understand this is accepted by your clients.

3.69 On 30 May 1995, the Ministry received a letter from another firm of solicitors acting for persons who claimed to be descendants of other former owners of the Ngarara West B No 5 Block, seeking reassurance about the proposed sale. Reassurance was given orally and in writing.

3.70 On 29 June 1995, following further meetings and correspondence, a group of former owners issued proceedings in the High Court, seeking declarations and an injunction to stop the completion of the sale process, due the following day. The Court refused to make the orders sought or to grant an injunction, on the

basis that section 3A(6A) of the Airport Authorities Act preserved the rights of former owners of the aerodrome land (*Jackson & ors v Attorney-General*, unreported, High Court, Wellington, CP 149/95, 30 June 1995).

Part 4 – Our conclusions on the consultation process

Public Works Act and Treaty consultation

Addressing the interests of former landowners

4.1 The Ministry believed that the rights of former landowners under the Public Works Act would be preserved by transferring the assets of the aerodrome to an airport company, formed under the Airport Authorities Act, and selling the shares in that company. Section 3A(6A) of the Airport Authorities Act would, the Ministry believed, protect the interests of former owners until such time as the purchaser of the airport company shares considered land to be surplus to requirements in terms of section 40 of the Public Works Act. The Ministry told us it was entitled to assume that any purchaser of the airport company would comply with its duties under section 40. For this reason, the Ministry considered it unnecessary to consult individually with any former owners of aerodrome land or to inform them of the proposed sale.

4.2 The Ministry had earlier expressly instructed DOSLI not to approach any former owner of aerodrome land. It responded to later inquiries about the sale by the one former landowner and one other party. But, other than advertising the proposed sale in local newspapers, it did not volunteer information about the sale to any other former landowner.

4.3 We do not question the faith which the Ministry placed, in the period leading up to the sale, in section 3A(6A) and the duties it imposed on the purchaser of an airport company. We also acknowledge that the Ministry acted on the advice of other departments in respect of the Public Works Act and the Treaty, and that it was cautious about taking any step which might unintentionally have triggered "offer-back" rights for former owners. However, we do not think the enactment of section 3A(6A) justified the Ministry taking no further steps to identify former owners of the aerodrome land and inform them of the forthcoming sale.

4.4 Ministry officials told us that they understood the distinction between the Public Works Act and Treaty interests, and the need to consider both. But, in our view, the decision to not inform former owners about the sale compounded the Ministry's difficulties in meeting the Crown's Treaty responsibilities. It was possible that a former owner of aerodrome land could have had interests under both the Public Works Act and the Treaty. Selling the land out of public ownership would not have affected Public Works Act rights, but it would effectively have placed the land beyond the reach of any claim to the Waitangi Tribunal seeking its return.

4.5 The Ministry would have been better advised, in particular, to have made more enquiries about the nature of the former ownership of the Ngarara West B blocks. Although the land would have had many owners listed, it was recognisable as MŪori land and there would have been a good chance that individual owners were members of the same whānau or hapÎ. It is clear to us that the members of the Puketapu hapÎ regarded the land as belonging to the hapÎ, even though in law it may have been owned in many individual shares.

4.6 Had the Ministry taken this step at the time it received DOSLI's report, the Ministry would have been likely to identify the hapÎ's interests. That would have alerted the Ministry to the need to consult with the hapÎ in terms of its Treaty of Waitangi interests.

4.7 We also think the Ministry should have informed all previous owners (or their successors) of its sale intentions – including the fact that the Crown's duties under the Public Works Act were to be transferred to the new owner of the airport company.

4.8 We have no doubt that Ministry officials communicated in good faith with the one former landowner, who had registered a concern about the aerodrome with the Ministry, and they took reasonable efforts to keep her informed of developments. The Ministry was clearly not responsible for any lack of communication between the one former landowner and other members of her whānau. However, it was open to the Ministry, at various points, to inquire whether the one former landowner was acting in her own behalf or as a representative of a wider group that may have had a Treaty interest. She did not identify herself as such until after the Puketapu representatives approached the Ministry.

Treaty consultation

4.9 The Ministry undertook the consultation by contacting those groups which had submitted claims to the Waitangi Tribunal in relation to Paraparaumu land. We understand that such an approach was acceptable at the time, and remains so.

4.10 There was a genuine attempt at consultation with MŪori interests. Ministry officials thought at the time they had gone to considerable lengths to treat the claimants as fairly as they could, and to give them every opportunity to satisfy themselves of the position. But it appears to us that, after the initial round of consultation, the Ministry's approach focused too much on the various claimants and did not take sufficient account of what they were saying about who was affected. The first response it received from Ati Awa Ki Whakarongotai made it clear that a whānau group was affected. Where an iwi has stipulated that the issue is one for a specific hapÎ or whānau to consider, or that hapÎ or whānau has itself raised the issue, the obligation to consult and take into account Treaty principles should include that hapÎ or whānau, unless it is unrealistic to do so.

4.11 In this case, the Ministry may have become aware of the hapÎ's interest at an early stage, had it sought information about former landowners (see paragraph 4.5). During the Treaty consultation, the representatives of Te Ati Awa clearly indicated to the Ministry that Te Ati Awa believed there was a Treaty dimension to the hapÎ's interests. The area of land was relatively confined, and only one hapÎ or whÜnau group was identified as having relevant interests. It may well have been realistic, therefore, for the Ministry to consult with the hapÎ, once it became aware that the hapÎ had an interest in the matter.

Surplus land

4.12 The officials who prepared the December 1994 report regarded the result of the consultation as that the land was "substitutable" in the event of a successful Treaty claim, and that there was no need to return it to any claimant. To them, once this had been established the sale could proceed.

4.13 But the Ministry was also clearly on notice, from its consultation with MÜori interests in respect of the Treaty of Waitangi, that former owners wished to exercise their rights under the Public Works Act, and that land which was surplus to current operational requirements should be available for Treaty-related compensation. One of the claimants, Te Runanga o Toa Rangatira Inc, noted in its letter of 23 November 1994 that the Ministry was an experienced airport operator and should be in a position to exercise judgement about surplus land.

4.14 Ministry officials told us that they did not accept that there was any need to consider the concerns which claimants expressed about wanting the land returned to them if the aerodrome ceased operating, nor the suggestions that they be able to tender for the aerodrome. But, in our view, the Ministry could have been more open to these concerns and suggestions. Had it been, it would have turned its mind to whether its proposed approach to the sale could be modified to meet or accommodate them.

4.15 We have a particular concern about the Ministry's approach as regards surplus land. From our review of the files, it seems possible that some of the aerodrome land was, in fact, surplus to requirements long before the sale took place even though it had not been declared as such. We appreciate that the Ministry considered that offering any land back as surplus would be problematic and could "frustrate" ongoing operation of the aerodrome to the point where it would no longer be operable. However, we also note that:

- The Ministry had been operating the aerodrome for many years. It was clearly in a position to form a judgement on what areas of land were required for operational purposes at that time.
- As early as March 1990, the Government planned to identify surplus land holdings for "rationalisation" in preparation for corporatisation and sale.

- Residences situated on aerodrome land (in Avion Terrace) had formerly been used by aerodrome staff but were now tenanted to members of the public.
- Advice to Cabinet in September 1991 (in respect of the proposed transfer of the aerodrome to AHL) noted the need to "rationalise assets"; that there were "considerable areas of land … which the airport company is unlikely to need, perhaps up to 40% of the current area"; and that the valuation of the aerodrome assets should recognise "the higher alternative use value of the surplus land, in order that the company has a strong incentive to rationalise its land holdings".
- Further advice to Cabinet in April 1993 (which was not accepted) recommended that surplus assets be sold on the open market separately from operational assets.
- The Information Memorandum for the sale left open the possibility of tenders being made for part or all of the aerodrome land.
- The Ministry asked its valuers (EY) to prepare their valuation on the basis that some land (namely that proposed as surplus in the 1989 Landcorp proposal) should be valued on the basis that it could be surplus. The first group of tenders for the aerodrome were rejected on the basis that they took insufficient account of the net realisable (as opposed to going concern) value of that land (see paragraphs 5.49 and 5.53).

4.16 Ministry officials told us that they accepted there could be reason to believe that some land at the aerodrome was surplus to operational requirements. But they emphasised that no surplus land had in fact been identified. The question from their point of view was whether the Ministry was in a suitable position to decide about what land was in fact surplus. They told us that:

- There was no practicable or reasonable way, in their view, of identifying land that was surplus and disposing of it separately from the core aerodrome business.
- Although the Ministry had been operating the aerodrome for some years, it was effectively in a "caretaker" role and had no development plans for it. Government policy was that the Crown would not be involved in development projects. The preference was to sell the aerodrome as a going concern, so that the new owner could decide how it wanted to operate the aerodrome into the future. Decisions about what land was needed for aerodrome purposes would be part of that.
- The 1989 proposal, which had been used to identify "surplus" land for the aerodrome valuation, had never been implemented.

4.17 Such case law as existed on the Public Works Act in 1995 required section 40 to be applied according to its "natural meaning" (*Auckland City v Taubmans (New Zealand)* [1993] 3 NZLR 361). Thus, if at any time the aerodrome land was no longer required for a public work, it would have to be offered back unless it would be impractical, unreasonable or unfair to do so (as section 40 stipulated).

4.18 It is not for us to form a judgement on whether the circumstances were sufficient, as a matter of law, to have required the Ministry to offer any part of the land back to a previous owner. We acknowledge that the Ministry considered that the judgement about surplus land was best left to a purchaser of the aerodrome, having regard to its own operational intentions, and that the Ministry saw limitations in the way the aerodrome could be used for settlement of claims, other than as a going concern.

4.19 But we do think the Crown could have considered whether the concerns which MŪori had raised during the consultation process might be accommodated by making an arrangement as regards "surplus" aerodrome land – either within the sale process or otherwise. Instead, it seems that officials were concerned about the time it would take to identify and negotiate a solution to a valid claim – it being government policy to not retain assets indefinitely pending resolution of claims over them. An over-riding concern seems to have been to complete the sale before 30 June 1995, without leaving any residual responsibilities or risks in the Ministry's hands.

4.20 We also note that the Ministry did not consider whether MŪori or other former owners could be invited to tender for the aerodrome (either on their own or in conjunction with another group). Officials considered they were not in a position to do so, because, although the Cabinet directive to sell the aerodrome referred to "other local groups" as well as user groups, and was also expressly subject to fulfilling the Crown's obligations under the Treaty, the Minister of Transport had instructed that the term "other local groups" should be confined to the Wellington airport company and the Kapiti Coast District Council.

4.21 We accept that, by the time the Puketapu representatives approached the Ministry, it would have been too late to consider whether any realistic tendering options were open to the hapÎ. But something might have been able to be done had the hapÎ's interest been identified at an earlier stage.

Part 5 – The sale process

5.1 In this Part we report on the sale process itself. Our discussion covers 7 distinct aspects or phases:

- The objectives for the sale.
- Valuation of aerodrome assets.
- Governance arrangements for the sale.
- Design of the sale process.
- Conditions of sale.
- What happened.
- Alleged conflict of interest.

Establishing the objectives for the sale

5.2 Once the consultation process had been completed, and the Secretary for Transport's approval to proceed had been obtained, Ministry officials turned their mind to the sale itself and how this would best be achieved. Officials told us they were under a directive by the Secretary to complete the sale by 30 June 1995. The Minister had also made it clear that he expected the sale to be conducted on an arm's-length basis, without political influence.

5.3 We found an internal memorandum, prepared in February 1995, on the sale of Paraparaumu and one other aerodrome. The Ministry staff we interviewed agreed that (subject to the Public Works Act and Treaty considerations also being addressed) it summarised the Ministry's thinking about what needed to be done –

> *The Ministry has a key objective to find a buyer for these aerodromes and thus terminate Ministry ownership.*
>
> *The Ministry wishes to do this with the minimum of adverse public or political reaction.*
>
> *There are two important considerations relating to the sale process which have implications for the way the sales are perceived. These are:*
>
> - ***The need for the continued operation of the aerodromes.***
> - ***The need to maximise the returns from the sale.***
>
> *It is recognised that these two considerations are to some extent mutually exclusive as the highest returns may be associated with a conversion of some or all of the land to some other purpose. The Ministry will need to balance these two factors in evaluating the tenders to try and minimise the likelihood of any closure or significant capital gain being achieved by the eventual purchasers in the short term. This will be a combination of assessing the intentions of the purchaser and the tender price in*

relationship to the realisable value of the land or a combination of the aerodrome business and realisable value of any surplus land. (Emphasis in original.)

5.4 We were told of considerable debate in the Ministry about how to ensure that the twin objects of continued use and price maximisation could be met. A number of options were canvassed. They included:

- writing a buy-back or offer-back clause into the sale and purchase contract, to be invoked if an aerodrome turned out not to be commercially viable under new ownership; and
- placing a caveat on the title, restricting use of the land to aviation purposes.

5.5 There was also discussion of the long-term lease option which had been advanced by the Department of Lands in 1988.

5.6 The consultant, who prepared the internal memorandum, told us that he had favoured placing a caveat on the title. However, Ministry officials did not agree, and it was decided (with Ministers' agreement) not to include any binding conditions or other form of restriction on use. There was pressure on government departments at the time to maximise revenue from asset sales, and it was considered that conditions or restrictions would unduly affect that objective.

5.7 The commercial adviser had a different perspective from the Ministry about the sale objectives. He told us that, as far as he was concerned, the whole basis of undertaking the sale was to maximise the Crown's return, and that the desirability of the aerodrome remaining operational was only a political response to pressure from recreational users.

5.8 It is clear to us that the Government's objective was to be removed from the ownership and operation of the aerodrome. It did not want the Crown to be in a position where it may have to resume ownership or operational responsibility in future. Nor did it want the sale to be encumbered or conditional in any way. Ministry officials told us that they understood Ministers wanted a solution that would give the best likelihood that there would be continued operation of the aerodrome as long as it proved commercially viable. But there would not, and (in their view) could not, be any guarantee that the aerodrome would remain open forever.

5.9 This left the Ministry in the position of implementing the Government's decision to sell the aerodrome to those who had a demonstrated interest in, or commitment to, keeping it operational for the foreseeable future, but without any legal obligation to do so. The Minister of Transport approved this course of action.

Valuation of aerodrome assets

5.10 Valuation was clearly a critical part of the exercise. The Ministry was aware that some land at Paraparaumu could be surplus to aerodrome operations. It had decided to leave the judgement about this to the purchaser. But it was also aware that there was a significant difference between the aerodrome's value as an operational aviation facility (because of its marginal commercial viability) and the value of the land for other purposes – most notably industrial or residential subdivision.

5.11 The Ministry decided to value the aerodrome as a going concern, in a way that both maximised the sale proceeds for the Crown and minimised the incentives on the purchaser to recoup the sale price through windfall profits on the sale of surplus land.

5.12 The Ministry contracted EY to prepare a valuation for the sale. The valuer (a partner of EY) had previously prepared valuations of the aerodrome for other purposes – including for the establishment board of AHL in 1992.

5.13 The 1992 valuation had been prepared on a "discounted cashflow" basis, which allowed for future income and business cost assumptions and cashflow projections to be taken into account over a 15-year period. That valuation showed that the aerodrome was unlikely to be profitable over that period.

5.14 The Ministry and EY agreed that a different valuation approach was needed for the purpose of the sale. The approach was recorded as follows in an internal memorandum:

> *E&Y will complete a "market value for existing use valuation" plus a "NRV" (net realisable value) valuation. This will give us an indication of the aerodrome's business value and its alternative use value (taking into account closing costs eg lease termination) ... except that E&Y will attempt to derive a value for the surplus land based on the 1989 Landcorp proposals ...*

5.15 The valuation approach was further refined through draft valuations prepared by EY. The final valuation assessed the value of Paraparaumu Aerodrome as a going concern at $1.6 million. This included a net cashflow valuation of the core aerodrome assets, together with the net realisable value of land that may be surplus to operational requirements (identified from the 1989 Landcorp proposal to rationalise the aerodrome business, and valued at just over $700,000). The going concern valuation compared with a net realisable value for all of the aerodrome land (were it to cease operating) of $3.5 million.

5.16 We reproduce the valuation in Appendix 3.

5.17 A Ministry official, in an internal memorandum dated 4 April 1995, commented on the valuation as follows –

> *The key issue to arise out of* [the Paraparaumu and one other] *valuations is that the going concern valuations are less than the alternative use*

valuations in both cases. If we sell at the going concern value, this suggests that the Ministry would not be recovering the full economic value of the aerodromes. Indeed, unless a new owner could increase the value of the airport in its use as an airport, he/she would have incentive to put the aerodromes into their alternative use (of course there would be many practical impediments preventing a new owner moving quickly to close the aerodromes and dispose of the land for alternative use).

In ... [Paraparaumu's] *case, the gap is ... $1.9 m and it should be noted that the going concern valuation includes the assumption of an amount of surplus land ie the going concern valuation equals the net realisable value of the surplus land plus the net cashflow valuation of the core aerodrome assets.*

5.18 Ministry officials and the commercial adviser told us that the approach to valuation of Paraparaumu was no different to that taken in respect of other airports, including the joint venture airports. In preparing the aerodrome for sale, the approach was always the same – to assume that it would remain operational but with greater efficiency and higher service charges fixed on a commercial basis. The income and expenditure scenario developed in the 1995 valuation seemed to them more closely to reflect the actual position of the aerodrome at the time. But it also assumed a significant increase in revenue from landing charges. That assumption was based on a comparison with new charges which had already been instituted on a cost-related basis at other airports.

Governance arrangements for the sale

5.19 The Ministry also contracted EY as commercial adviser and to manage the sale process. Both the partner responsible for this aspect (the commercial adviser) and EY had unique and extensive experience in the matters with which the Ministry was dealing – including the corporatisation and/or disposal of ports and airports. Indeed, EY had been working continuously on such matters for the Ministry for some years on a retainer basis. In the case of the Paraparaumu sale and one other, however, there was a specific consultancy agreement.

5.20 The commercial adviser ceased to be a partner of EY during the period of the sale. However, with the Ministry's agreement, he continued to act as the representative of EY.

5.21 The Ministry also used the services of a national law firm for legal advice. Ministry officials told us that they used the law firm and EY because the sale was to be on a commercial basis. The expertise of Ministry officials lay mostly in policy development and implementation. They relied on the firms' involvement to ensure that the necessary commercial discipline and "best practice" were used.

5.22 On the face of it, the governance arrangements were straightforward. EY was to manage the sale process, including the receipt and evaluation of tenders and

negotiation with a preferred tenderer. Upon completion of negotiations, EY would make a recommendation to the Secretary for Transport on the preferred purchaser, the sale price, and any other conditions. Officials of the Ministry were responsible for settling the sale specifications (including evaluation criteria) and preparing the tender documentation. The external legal advisers were available to provide legal advice both to EY and to officials.

5.23 In practice, the arrangements were more fluid. The commercial adviser worked closely with Ministry officials throughout the process. As far as everyone was concerned, it was a joint project – with Ministry officials responsible for policy matters and ensuring that Ministers' political objectives were met, and the external advisers responsible for ensuring that the process was lawful and had the necessary commercial discipline. There was a project group that met on at least 3 occasions, attended each time by Ministry officials, the consultant, and the commercial adviser – and on one occasion also by the external legal advisers. The consultant prepared notes of the meetings.

5.24 We were unable to ascertain whether the project group was intended to have any formal status in the sale process. The notes of its meetings suggested to us that it had decision-making and oversight roles in respect of the process. One Ministry official described it as a group that the commercial adviser used to keep the Ministry informed and report back on his work, but also as one to which he was accountable. Another official described the group as an element of the shared process, employing both commercial and public sector disciplines, working towards a common objective. The commercial adviser had a similar understanding.

5.25 As we shall see, the project group in fact played a key role in decision making.

Design of the sale process

5.26 EY's consultancy proposal for the Paraparaumu (and one other) sale identified 4 phases to the process:

- preparation of an Information Memorandum;
- selection of tenderers and receipt of indicative bids;
- negotiation of final sale and purchase agreement; and
- settlement and transfer.

5.27 We were told that this was a standard process for asset sales at the time.

Conditions of sale

5.28 Cabinet had directed that the aerodromes be sold –

> *by negotiation with user groups and/or other local groups, or by restricted tender involving user groups and/or other local groups.*

5.29 It had also invited the Minister to report back on the use to which potential purchasers proposed to put the aerodrome.

5.30 Several parties were known, at that time, to be interested in purchasing Paraparaumu Aerodrome. They included the Kapiti Coast District Council, Wellington International Airport Limited, and a group known as the Paraparaumu Airfield Users Group. However, once the sale decision was publicised, several other individuals and companies approached the Ministry expressing interest. The Ministry told those parties that they would be informed when it was in a position to call for tenders. It continued to keep them informed of its sale intentions, and of the Treaty consultation that took place between May 1993 and the end of 1994.

Eligibility

5.31 Once it was in a position to proceed, the Ministry decided to use the "restricted tender" option rather than direct negotiation with users. However, it needed at this point to turn its mind to the question of eligibility, given that Cabinet had directed that the tender process be restricted to "user groups and/or other local groups".

5.32 We were told that there was considerable discussion about how to address the "user group" requirement. It was considered inappropriate to broaden eligibility to include any group with a local connection. Accordingly, officials settled on an approach which would limit eligibility to those who had some connection with, or interest or experience in, the aerodrome or the aviation industry – in other words, current aerodrome users, nearby international airports, and local authorities.

5.33 We were told that this was the first time the term "aerodrome user" had been used as an eligibility criterion for sale of an asset. It was not given a precise definition. But Ministry officials regarded it as a term that had been in common use, for some time, to describe not only aircraft operators but also tenants of airport land. They thought the term should include any person who had some real connection with the aerodrome – whether or not for aviation purposes. Using the term broadly in this manner was seen as consistent with the objectives of both maximising sale proceeds and ensuring as far as possible that the aerodrome remained operational after sale. A broad definition would also avoid the Ministry finding itself in a situation where it had to make arbitrary judgments about who was or was not a "user" in a narrower sense.

5.34 The Ministry was aware of concerns in the community about the possibility of a "development-led" bid. Those concerns were expressed by the local authority and in telephone calls and letters to the Ministry and the Minister. The Ministry was confident that the "user" criterion would be adequate to address any concerns about eligibility.

Evaluation criteria

5.35 The internal memorandum prepared in February 1995 (see paragraph 5.3) also contained a useful summary of how the Ministry would take account of a prospective purchaser's operational intentions. It said –

> *In the process of evaluating the tenders the matters of the long term commitment to continuing aerodrome services and the commercial ability to operate the business can be assessed. Such a process should not have any implications for the tender prices submitted and will give some assurance of the likely intentions of the buyer at the time the aerodrome is sold. The fact that the information was asked for and taken into account in evaluating the tenders should be enough to ensure that the Ministry is seen to have tried to honour the intention that the aerodromes should continue to operate as aerodromes. However it must be stressed that approach will not give the guarantee of some of the earlier mechanisms for the continued operation of the aerodromes. Nevertheless neither does it have the complicating factors of these other mechanisms nor the adverse affects* [sic] *on tender price.*

5.36 The memorandum concluded that the evaluation process should consider:

- The commitment to the aerodrome as a facility.
- The involvement of other interests with a concern for the provision of the facility – for example, the local authority.
- The financial resources of the bidders.
- The commercial expertise of the bidders.
- The intentions of the bidders with respect to aerodrome development.
- The price in relation to the possible alternatives for the use of all or part of the land.

5.37 The Information Memorandum prepared for interested parties, as a basis of their tenders, contained, under the heading "Policy Objectives", the following –

> *The Government in 1991 directed the Ministry of Transport (Ministry) to devolve its operation of six aerodromes, consistent with the intended restructuring of the Ministry into a policy department without operational responsibilities. While continued Government ownership is not considered necessary, the importance of Paraparaumu Aerodrome to the aviation industry and the local community is recognised.*
>
> *It is the Government's intention that Paraparaumu Aerodrome should be sold to parties who will continue operating the facility for as long as it remains commercially viable. For this reason, the Government has restricted the sales process to only those parties expected to have the objective of continuing the aerodrome business.*
>
> *For the above reason, and to enable the new owners of Paraparaumu Aerodrome to make their own decisions about the future operational requirements, the aerodrome is being sold as a "going concern" business with all aerodrome land and Ministry assets in one "parcel".*

However, recognising that an amount of land at Paraparaumu aerodrome may be considered to be surplus to future requirements, tenders for the operational areas and any lesser area of land than the total amount described in this Memorandum, will be considered without prejudice.

The Ministry reserves the right to select any tender, not necessarily the highest. The likelihood of a tenderer successfully continuing the aerodrome after sale will be considered as part of the evaluation of tenders.

5.38 We reproduce a longer extract from the Memorandum, dealing with the conditions of and framework for the sale, in Appendix 4.

5.39 We asked Ministry officials and the commercial adviser about the statement that the Ministry reserved the right to select any tender, and that the likelihood of a tenderer successfully continuing the aerodrome after sale would be "considered" as part of the evaluation. We had expected to find a clear statement of the criteria that the Ministry and EY would use in evaluating tenders. Ministry officials told us that the Information Memorandum contained the criteria, i.e. that both commitment and capability to operate the aerodrome were matters about which tenderers would need to satisfy the Ministry before any further consideration could be given to a tender on the basis of price.

5.40 We do not agree that a reference to certain matters being "considered" amounts to a formal statement of evaluation criteria. Nevertheless, it was clear from each tender that tenderers understood not only that price would be a major factor, but also that capability and intention to continue operating the aerodrome were major considerations for the Government.

What happened

5.41 The Ministry advertised for expressions of interest from eligible bidders on 24 January 1995. EY also wrote to the parties that had previously expressed interest, seeking formal registration. A number of parties expressed interest.

5.42 The Information Memorandum was sent to interested parties on 17 February 1995. EY received 3 tenders by the due date of 21 April 1995. They were from Kapiti Avion Holdings (KAH), Kapiti Regional Airport Limited (KRAL), and a third tenderer. Submission of bids followed a process of "due diligence" conducted by prospective tenderers. The District Council and Wellington International Airport Limited decided not to tender.

5.43 KAH was a partnership of 4 individuals who described themselves as follows –

- *The members of the partnership are airport users, who want to influence the future of the aerodrome for the benefit of all users and the community.*
- *The partners are businesspeople. Ownership of the aerodrome is a viable commercial proposition, if operated properly and effectively.*
- *As residents of the Kapiti Coast and owners of the aerodrome, the partners have an opportunity to redefine the aerodrome, to maximise its use and the benefits from it for the community.*

5.44 One of the former partners of KAH told us that the partners had at first encouraged the District Council to invest in the aerodrome. They formed KAH after the Council decided not to become involved. They submitted what is known as a "relative" bid – that is to say, it was for "$100,000 above the next highest tender bid (as disclosed to KAH) to a maximum of $3,110,000".

5.45 KRAL was a company that had been incorporated by "four current major operators based at Paraparaumu Aerodrome". The shareholders included a flying school and air charter business based at the aerodrome, a local aero club, and a gliding club. KRAL's bid was for $700,000.

5.46 The third tenderer also represented aviation interests and put in a bid for $1,100,000. However, this tenderer did not proceed beyond submitting an initial bid.

Initial consideration of tenders

5.47 The commercial adviser produced handwritten notes of his financial analysis of the tenders. He told us that the essential criterion he looked for in the tenders was a cash offer that reflected the market valuation. He also examined the tenderers' business plans for operating the aerodrome (in terms of both their operational intentions and their financial projections) and their management capability.

5.48 The project group met on 26 April 1995. Present were the commercial adviser, the consultant, and a Ministry official. We were told that the group satisfied itself that all 3 tenderers met the eligibility criteria of being "users" of the aerodrome, and that each had the capability and intention of operating it as a going concern. The commercial adviser told us that he had reservations about the financial forecasting used in the KRAL tender, including the robustness of its revenue assumptions. But those reservations were not such as to cause him to advise the Ministry to decline to consider the bid. That left the project group in the position where the only factor distinguishing the 3 tenders was price.

5.49 The project group decided that none of the 3 tenders were acceptable. The consultant's note of the meeting recorded as follows –

> *None of the bids at an acceptable level.*

Agreed that E&Y go back to all three and indicate that we do not think their bid took into account the value of the surplus land. They can either come back with a revised bid or we can take their bid as being for the operational areas only without the surplus land.

Check with [legal advisers] *if the form of* [KAH's] *bid is valid.*

5.50 On 28 April 1995 the Ministry received written legal advice that the KAH bid –

> ***is not**, in our opinion, a legally valid tender and that you would be unwise to proceed to sell the Aerodrome to the tenderer on the basis of the tender.* [Emphasis added]

5.51 Subsequent oral advice was recorded in a fax to EY by the Ministry in the following terms –

> *I have discussed* [the opinion with the legal adviser] *and it seems that it is necessary for you to go back to* [KAH] *(urgently) and advise him we have received legal advice suggesting that his bid **may be** invalid because of its "relative" nature. To ensure that there can be no question as to validity of the bid,* [KAH] *should recast it as a specific offer price. Of course, we would still retain the right to negotiate over that price if we were not happy with it.* [Emphasis added.]

5.52 We took it from these contrasting statements that the Ministry was keen to consider a bid from KAH if it could. The initial legal advice was that the tender did not conform to the requirements of the Information Memorandum and that the Ministry would be unwise to consider it. However, the subsequent oral advice was less certain.

Revised tenders sought

5.53 In any event, the commercial adviser told us, he contacted all 3 tenderers as agreed by the project group. In each case, he told the tenderers that a number of bids had been received, but that none of them had put sufficient value on aerodrome land that may be surplus to operational requirements. He invited them to resubmit their tenders (in the case of KAH, with a specific price).

5.54 Representatives of KRAL produced for us 2 handwritten notes of their contact with the commercial adviser. The first was a note of a telephone call from the commercial adviser to one representative on 27 April. The second was a note of a meeting with the commercial adviser, attended by 2 representatives. The commercial adviser produced an entry from his diary which indicated that the meeting took place on Monday 1 May 1995.

5.55 The KRAL representatives' note of the meeting recorded that they were told the Ministry had received a bid of over $1.4 million, and that it wanted a "clean unconditional deal" and a "serious indication by Friday pm" of whether KRAL intended to make a further bid. It also recorded their advice to the commercial adviser that KRAL was to meet and review the situation.

5.56 A shareholders' meeting of KRAL took place the following day, 2 May. Its representatives told us that the shareholders accepted that they were being steered in the direction of a bid that took into account the realisable value of surplus land. The notes of the meeting also recorded that KRAL's solicitors were to be instructed to ask the Ministry formally about the eligibility of the other bidders.

5.57 The commercial adviser received a new bid from KAH on 2 May, for $1.7 million. It was conditional on payments being staggered over a 12-month period and the Ministry giving an indemnity against claims under the Treaty of Waitangi.

5.58 The project group met again on 3 May. The external legal advisers were also present. The consultant's note of the meeting recorded that –

> *Firm bid by* [KAH] *at $1.7m is at an acceptable level. $100,000 above E&Y valuation.*
>
> *...*
>
> *It was noted that the price of $1.7m was well below the alternative use valuation of $3.5m. However this valuation cannot be compared with the prices bid as these prices relate to the aerodrome as a going concern. It was not in the Ministry's brief to call for bids for the land in any form other than as part of an operational aerodrome. It is also recognised that the Ministry is not able to control the future use of the land.*
>
> *However it was noted that the most likely future owner* ([KAH]) *would be most unlikely to close the aerodrome and develop the land for the following reasons:*
>
> > *There would be considerable Council and local opposition.*
> >
> > *The group has substantial local interests and would not want to get off-side with the community.*
> >
> > *The users would cause considerable difficulty through political channels.*
> >
> > *Many of the leases are long term which would make a buy out expensive.*
> >
> > *The buyer has indicated his intention to involve the users/community in the operation.*
>
> *It is recommended that negotiations be undertaken with* [KAH] *with a view to finalising the sale and purchase agreement.*
>
> *The possibility was raised of accepting the* [KRAL] *bid for just the operational areas (which they had indicated was an option for them) and selling off the surplus land. The advice was that a sale of considerably more than $1m, due to the costs of selling land for subdivision, would be needed to equate to the* [KAH] *bid. This would also not be as clean as the current bid and leave the Ministry with land on its books for which a sale might take some time and trouble.*

5.59 It was not until Friday 5 May that KRAL wrote to EY with a revised bid. It faxed its letter to EY and the Ministry. The letter noted that, since submitting the original tender, it had become apparent that it had given insufficient weight to the surplus land. It submitted a revised price of $1.5 million – subject to the Ministry, before settlement, effecting separate titles for the land which KRAL had identified as surplus.

5.60 We are perplexed by the timing of these events. KRAL's note of the meeting with the commercial adviser on Monday 1 May said clearly that a "serious indication" of KRAL's revised position was needed "by Friday pm". KRAL's representatives were both adamant that they met that timetable with the letter dated Friday 5 May, and that they would not have given any indication, before then, of the amount of the revised bid. Their shareholders' meeting did not take place until the evening of Tuesday 2 May. The commercial adviser's diary recorded another conversation with the representatives on that day, but neither representative recalled any contact with the commercial adviser from the time of their meeting on Monday 1 May until they submitted their revised bid on Friday 5 May.

5.61 Neither the commercial adviser nor Ministry officials could explain why the project group had met on Wednesday 3 May, and recommended negotiations with KAH as a preferred tenderer, when revised bids from the other 2 tenderers had not been received. In the event, the third tenderer did not submit a revised bid. But KRAL's revised bid was received 2 days later – in accordance with the timetable agreed with the commercial adviser.

5.62 The commercial adviser and Ministry officials were also unable to explain why the note of the project group meeting did not refer to the amount of a revised bid from KRAL. The consultant, who prepared the note, recalled that there was only one revised bid before the group when it met. He told us that he expected he would have recorded the amount of any other bid, had it been known at the time. Nevertheless, the note does indicate that the commercial adviser was aware that KRAL had concerns about making a bid that reflected the value of surplus land.

5.63 The commercial adviser told us that he was sure that he was aware of the nature of the revised bid when the project group met, and that considerable weight had been placed, in discussion, on the condition that the Crown first meet subdivision costs. He regarded that as unacceptable, because of the uncertain amount of time and expense to the Ministry that would be involved.

5.64 KRAL's representatives explained to us that they took it from the Information Memorandum (in particular the reference to tenders for all or part of the aerodrome land) that the Ministry did not have a preference about selling the aerodrome as a single block, and would be prepared to produce separate titles if necessary. Their research into the previous ownership history of the land had indicated that realising some of the potentially surplus land would be a complex exercise.

5.65 They acknowledged that they would have made the commercial adviser aware that KRAL saw difficulties in achieving subdivision of surplus aerodrome land, and that the costs associated with those difficulties had been factored into KRAL's initial bid. They told us that KRAL considered it necessary, in return for an increased tender price, to attach a condition that the Crown would deliver the surplus land in a form which would enable it to be sold and the increased price recouped.

5.66 We think the most likely order of events is as follows.

5.67 When the commercial adviser spoke with a KRAL representative on 27 April, and met with both representatives on 1 May, he learned of KRAL's concern about the uncertainty in achieving a clean subdivision of surplus land. The representatives indicated that, if there were to be an increased tender price, they were of a mind to prefer that the Crown undertake the subdivision work itself. There may have been a similar discussion between the KRAL representatives and the commercial adviser on 2 May. The commercial adviser reported that information to the project group on 3 May.

5.68 The project group did not know for certain that KRAL would make its revised bid subject to such a condition. Nor did it yet know of the amount of any revised KRAL bid – which explains the speculative nature of the recorded discussion about the relative merits of the KRAL and KAH positions. Nevertheless, the project group decided to proceed on the basis that there was a "firm bid" from KAH which was likely to be the highest offer – particularly if the likely costs to the Crown of having to undertake a subdivision before selling to KRAL, as its representatives had suggested, were taken into account.

5.69 The commercial adviser told us that, until a contract was signed, he would have been willing to negotiate with any party, including KRAL, which came up with a higher bid. He said that asset sale processes were designed deliberately with this flexibility, in order to ensure that the vendor achieved the highest price.

5.70 Whatever the case, it appears that the commercial adviser met with representatives of KAH on Friday 5 May to begin negotiations over its revised bid. Negotiations continued through its solicitors on Monday 8 May, and focused in particular on the terms of payment and the proposed indemnity over Treaty claims. Those conditions were withdrawn, in return for a reduced purchase price of $1,650,000.

5.71 Either on the same day or on the following day, it appears that the commercial adviser telephoned KAH's solicitors to say that the bid was acceptable.

5.72 We note that by this time it would have been clear that KAH was the highest tenderer.

Challenge to KAH's eligibility

5.73 KRAL's solicitors wrote to EY on Wednesday 3 May, expressing concern about KAH's bid and challenging KAH's eligibility as "users" of the aerodrome.

5.74 It appears that the question of KAH's eligibility as a user was raised with its solicitors by telephone on 8 May. They replied in writing on 9 May providing evidence of "use". They also noted that KAH had been invited to bid and had been accepted as an interested party since July 1993, and that the Information Memorandum had made it clear that the Crown could deal with whomsoever it chose.

5.75 EY referred the matter to the external legal advisers. Their advice acknowledged that the term "user" could be interpreted broadly or narrowly. On a broad definition, a "user" could include persons who leased land or premises on aerodrome land, even if not for aviation purposes. On a narrow definition, the term would be confined to those who made use of the aerodrome for aviation purposes.

5.76 The advice noted that the Ministry had insufficient information from its own records to verify KAH's eligibility in the narrow sense, and said that the Ministry could determine the matter beyond doubt by making inquiries of KAH's representatives. However, it went on to say –

> *We also consider that (notwithstanding the "narrow" view set out above) persons who lease parts of the Aerodrome (such as hangers* [sic] *etc.) for business or other purposes will also be users of the Aerodrome in the broad sense even though they may not actually use the Aerodrome for the purposes of flying or maintaining aircraft. Accordingly, we consider that lessees will also be "users" in the broad sense.*
>
> *It is also our view that, provided the Ministry has made reasonable inquiries to confirm the eligibility of the successful tenderer (and the basis upon which it has made that determination is reasonable) then it is unlikely that its assessment of this matter will be able to be challenged successfully unless it can be shown that it was not reasonably possible for the Ministry to form the view that the purchaser was a "user" of the aerodrome.*

5.77 EY and the Ministry accepted this advice, and proceeded on the basis that KAH had been eligible to tender.

5.78 Later, on 26 May 1995, the Ministry made written inquiries of Landcorp to confirm the lease holding of one KAH partner at Paraparaumu, and to inquire whether another partner had any association with the aerodrome. These inquiries appear to have been made in response to a threatened injunction to stop the sale.

5.79 We asked why the written inquiries were not made earlier. Ministry officials told us that they were already aware that one partner in KAH owned a

company which was a tenant at the aerodrome. Ministry officials, the commercial adviser, and the consultant were all quite clear in their minds that each tenderer, including KAH, met the "user" criterion. The written verification was obtained only to have a full record of the matter.

5.80 On 1 June 1995, KRAL's solicitors wrote again to the Ministry providing evidence that suggested KAH did not meet eligibility criteria. The Ministry responded in writing on 8 June 1995. It confirmed it was satisfied that the KAH partners were "users", and that it was not intended to draw a distinction between tenants and operators or other users of the aerodrome.

Recommendation to the Secretary for Transport

5.81 EY made a formal recommendation to the Ministry on 9 May 1995 that it should accept the KAH tender. The recommendation noted that KAH was "committed to maintaining the aerodrome as a commercially viable activity providing the current operational services". It noted that the agreed price of $1,650,000 exceeded EY's going concern valuation and was higher than KRAL's revised bid of $1,500,000, and that KAH proposed to make payment in full by 30 June 1995.

5.82 Officials submitted the recommendation to the Secretary for Transport on 10 May 1995. She approved it the same day.

5.83 The sale and purchase and share transfer agreements were executed on 23 May 1995.

5.84 No one has raised any concerns about the terms and conditions of the agreements, or any other aspect of the documentation.

Alleged conflict of interest

5.85 Some time after the sale had taken place, KRAL commenced judicial review proceedings in the High Court, in a bid to have the result of the sale overturned. Its statement of claim included an allegation that EY had a conflict of interest which ought to have prevented it from acting as the Ministry's adviser on the sale, because the successful tenderer, KAH, had named EY as its accountants in its tender.

5.86 The allegation was later canvassed in the Transport and Industrial Relations Committee's report, and was the subject of written correspondence from EY and the commercial adviser, which was appended to the report.

5.87 We are satisfied that the factual circumstances have been fully disclosed:

- KAH named EY as its accountants with the intention that it would seek its advice on tax issues;

- EY had previously undertaken some work for a KAH partner on an unrelated matter;
- EY was not involved in any way in the preparation of KAH's tender or in subsequent negotiations over the sale;
- the commercial adviser was unaware of EY's prospective involvement with KAH until he noted the reference in the tender document; and
- on becoming aware of EY's prospective involvement, the commercial adviser took steps internally within EY to ensure that no engagement with KAH was accepted while the tender process was ongoing.

5.88 The consultancy agreement between EY and the Ministry contained an undertaking by EY not to act for another party in any matter that may conflict with the interests of the Ministry in respect of the sale project. We were also given a copy of EY's internal policy on independence and conflicts of interest, as it applied at the time. The policy required immediate disclosure to all those involved, and steps being taken to determine –

> *... whether it is a*ppropriate to continue to advise either client or to advise both clients to seek independent advice on the matter in question.

Part 6 – Our conclusions on the sale process

The Government's policy objectives

6.1 Our terms of reference say that we will examine what the Government's policy objectives were for the sale of Paraparaumu Aerodrome, as expressed in Cabinet minutes or Ministerial and any other relevant directives.

6.2 The decision to sell was first made by one Government, and was later confirmed and implemented by another. The overall policy framework which dictated the disposal was broadly the same under each administration. It was that:

- Civil airports and aerodromes should be run as businesses.
- Government departments should not be involved in running businesses.
- State-owned businesses that were profitable should be corporatised and either operated as State enterprises or privatised.
- State-owned businesses that were not commercially viable should be disposed of on the open market.

6.3 Paraparaumu Aerodrome was not considered a commercially viable operation in public ownership. Accordingly, Ministers directed that it should be sold, subject to the Crown meeting its obligations to MŪori under the Treaty of Waitangi and to former landowners under the Public Works Act.

6.4 We have recorded our conclusions in respect of the Public Works Act and Treaty aspects in Part 4. In our opinion, the Ministry was influenced by 4 other policy considerations, which were endorsed by the Minister, when carrying out the sale:

- The aerodrome should preferably be sold as a single asset. Although it appeared that some aerodrome land may have been surplus to the Ministry's existing operational requirements, decisions on whether that land should be disposed of should be left to the new owners, taking account of their future intentions. However, a partial tender would be considered.
- Disposal should be both quick and complete, with no ongoing or residual Crown obligations in respect of the aerodrome or any aerodrome land. This consideration was influenced in turn by –
  - the pending capital charge on departmental assets (which would not, in the case of the Paraparaumu assets, be capable of being funded from revenue); and

- consideration of the Crown's responsibilities under the Public Works Act to former owners of compulsorily acquired land.

- The aerodrome should remain operational for as long as possible, in accordance with the wishes of users and the local community. But there should be no obligation on any new owner of the aerodrome to keep it operational. These considerations were influenced by –
  - the lack of commercial viability, as demonstrated in independent valuations of the aerodrome as a going concern;
  - the aerodrome's significance in managing regional air traffic, and in aviation safety terms; and
  - the Ministry's wish to not place the Government in a position where it would have to re-acquire the aerodrome should it prove commercially unviable under new ownership.
- Proceeds from the sale should be maximised, subject to the sale process meeting the Government's requirements.

Design of the process and sale conditions

Balancing the objectives

6.5 Paraparaumu was one of many assets which the Ministry was dealing with at the time. In comparison with other disposals – such as those of ports, major international airports, and other joint venture airports – it involved a relatively straightforward trade sale (i.e. a direct sale of a state-owned business).

6.6 The Ministry and its commercial adviser approached the sale on the same basis as other trade sales, which were designed primarily to maximise the return to the Crown.

6.7 However, the particular objectives in respect of the Paraparaumu sale required the standard approach to be modified. As well as maximising sale proceeds, the Ministry had to give effect to Ministers' wish that the aerodrome remain operational for as long as commercially viable, subject to the wishes of local communities.

6.8 We do not agree with the commercial adviser's assessment that the desirability of the aerodrome remaining operational was no more than a political response to community concerns and users' wishes. In our view, the desirability of the aerodrome remaining operational was a government policy consideration, mandated by Ministers – albeit in response to community concerns about the future of the aerodrome.

6.9 We noted in Part 5 that the Ministry considered the competing interests to be, to some extent, mutually exclusive. The Ministry's approach to balancing the various objectives set out above involved:

- introducing the criterion of "aerodrome user", as a basis of eligibility to tender;
- the Ministry satisfying itself that tenderers had both the commitment and capability to continue to operate the aerodrome; and
- using EY's commercial expertise to undertake a robust financial analysis of those factors.

6.10 Once those hurdles had been satisfied, price maximisation became the final determinant. These were, in effect, the evaluation criteria.

Other possible approaches

6.11 There were 2 other possible approaches. The one the Ministry considered involved the use of conditions or caveats requiring a purchaser to continue operations. There are indications from the papers that such conditions were considered unacceptable in the Government's overall policy on asset sales. This emerges in particular from the policy debate which took place in 1993, when the AHL proposal was abandoned. (As mentioned earlier, that proposal involved operating Paraparaumu and other aerodromes as separate airport companies under a holding company established as a State enterprise – see paragraph 2.23.)

6.12 The Treasury favoured disposal of the aerodromes on the open market. Although the Ministry at first concurred in a recommendation to Ministers to that effect, its officials became aware that Ministers would not support the recommendation if it would mean closure of the aerodromes. The notion of a sale to "user groups and/or other local groups" emerged at that point.

6.13 The use of conditions was considered and debated further in 1995, when the sale process was being designed. The position which emerged was that conditions would have skewed the balance, to an unacceptable degree, between the competing objectives of continuing operation and price maximisation. Ultimately, the Ministry's reasoning was that:

- continuing operation of the aerodrome could not be guaranteed, and should not be;
- it would be unacceptable for the Ministry to dispose of the aerodrome with a condition that a purchaser may find it commercially impossible to meet, resulting in the Crown having to resume ownership or control of the aerodrome at a later date; and
- sale to local interests gave the best chance of the aerodrome's future being determined by the local community.

6.14 The other possible approach was to use a "weighted attributes" approach. This would have involved assigning points to attributes such as capability and intention to operate the aerodrome as a going concern – as well as the price tenderers were prepared to pay. The commercial adviser told us that he thought this approach would not have been appropriate, given that future operation of

the aerodrome was not to be the subject of any contractual requirement. Moreover, the Information Memorandum said that there was no requirement to accept the highest price. The commercial adviser was in no doubt that the approach adopted was in accordance with best practice at the time, for a business of this type.

6.15 Ministry officials took a similar view. What was most important, one official told us, was to be able to assess each bid on its merits in terms of the Government's sale objectives.

6.16 We accept that a weighted attributes approach would have been unusual for an asset sale at that time. But it would not necessarily have been inappropriate. The over-riding consideration was to have sound and defensible criteria for evaluating bids, having regard to the particular requirements of the sale. Guidelines issued by the International Organisation of Supreme Audit Institutions (INTOSAI) in 1988 (*Guidelines on Best Practice for the Audit of Privatisations*) say, in relation to trade sales, that –

> *Without robust criteria against which to evaluate bids received, the vendor will not be in a position to assess to what extent each bid meets the objectives for the sale: in the absence of a tender evaluation plan, which incorporates the priority to be ascribed to each criterion, it can be difficult to demonstrate the reasons for, and fairness of, the decision to select a particular bidder. But this can be difficult because in the typical case the objectives for the sale are likely to be in competition with each other and not all of them are likely to be measurable ... Even if the vendor succeeds in applying a set of weighted criteria consistently, there is a danger that the appraisal will be too mechanistic ... The same potential drawbacks apply to an extent if the vendor, instead of assigning weights to each criterion, chooses one major objective – a quantifiable one – and treats all other objectives as constraints that must be satisfied.*

6.17 If anything, the intention not to impose any binding obligation to continue to operate the aerodrome made it more important to assess tenderers' intentions alongside the price they were prepared to pay. This would have ensured that the competing policy objectives of operating intention and price maximisation were considered together.

Identification of risks

6.18 In our view, the choice of approach was best made by identifying the risks to achieving the Government's policy objectives for the sale. It seems to us that a number of potential risks converged at the start of the sale process. They were:

- The Ministry was made aware of concerns in the community about the possibility of a tender for the aerodrome being made with a focus on developing the aerodrome land, possibly at the expense of the long-term viability of the aerodrome as an operational facility.

- At the same time, the valuation of the aerodrome had highlighted the difficulty the Ministry could have in settling on a value which created the right incentives for a purchaser to continue operating the aerodrome (as opposed to realising the higher value of the land for other uses), while at the same time maximising the return to the Crown.
- As discussed in Part 3, the Ministry believed that it had consulted adequately with MŪori interests, and that they had agreed that the aerodrome could be sold, but this agreement was subject to 2 important riders –
  - MŪori were keen to see the aerodrome continue in operation as an aerodrome, as a public good asset. Their approach to the sale would have been quite different were the aerodrome likely to close. There were also indications that MŪori interests would be interested in being involved in the running of the aerodrome, as an alternative to closure.
  - There was ongoing concern about "surplus" aerodrome land, and a clear indication that MŪori would expect surplus land to be returned to former owners.

6.19 We asked Ministry officials what steps they took to identify those risks and to consider what, if any, mitigation strategies were called for. They told us that they did consider the risks, but did not see any need to change the Ministry's approach – which was to dispose of the aerodrome in its entirety at the earliest opportunity to those who met the eligibility criteria. Officials had knowledge of each of the tenderers, and were satisfied not only that they met the eligibility criteria but also that they were both capable of and committed to continuing to operate the aerodrome.

6.20 The officials did not consider that it would be appropriate to second-guess a particular tenderer's aspirations as regards the aerodrome. They preferred an approach that would allow them to consider each tender on its particular merits. Thus, the Information Memorandum did not exclude tenders being lodged by those with a commercial interest, provided they also had a "user" association with the aerodrome.

Our conclusion

6.21 We are satisfied that the approach the Ministry adopted provided an acceptable means of balancing the competing objectives. It was also, in our view, consistent with the overall policy framework for asset sales and the particular policy position of Ministers. However, we think that the alternative of a more formal assessment process (such as one using weighted attributes) should also have been considered as part of an assessment of the risks involved.

Valuation of aerodrome assets

6.22 The Ministry decided to sell the aerodrome as a going concern. Accordingly, it used the "going concern" element of the valuation prepared by EY as the benchmark for assessing tender prices.

6.23 In our view this was a reasonable approach, given that the Government's policy objectives for the sale were not only to maximise sale proceeds, but also that the aerodrome should remain operational for as long as possible subject to commercial viability.

6.24 We commissioned an independent valuation to ascertain the reasonableness (in the context of valuation standards existing in 1995) of the EY valuation. The independent valuation examined 2 aspects of the original valuation:

- the value of just over $700,000 given to the land identified as possibly surplus to operational requirements; and
- the net realisable value valuation of the entire property of $3.5 million.

6.25 The independent valuation had an effective date of April 1995. It assessed the value of the "surplus" land at $735,000, and the net realisable value of the entire property (in other words, its value if sold for other uses) at $3.861 million.

6.26 It was impracticable, after the passage of time, to re-perform the other component of the going concern valuation (the net cashflow valuation of the core aerodrome assets). However, in our view, that aspect was not unreasonable. We are therefore satisfied that, overall, EY's going concern valuation was reasonable.

The implementation of the sale process

Project governance arrangements

6.27 All of those involved had a common view that the sale process was a joint exercise, involving collaboration and reliance on each other's expertise. We agree with the Ministry's contention that a multi-disciplinary approach was necessary – given the need not only to conduct the sale on a commercial basis but also to ensure that the Government's policy objectives were met. The project group appears to us to have been intended as an internal forum for this purpose and to enable the commercial adviser to report back to the Ministry on his conduct of the process.

6.28 But the meetings of the project group on 26 April 1995 and 3 May 1995 turned into key decision-making meetings, which had implications for the fairness of the process. To this extent, we consider the project governance arrangements to

have been unclear. We expected to find a better-documented understanding of how key decisions were to be made in relation to the sale process, given that EY had been engaged expressly to manage the process and produce a recommendation for the Ministry.

Evaluation of tenders

6.29 We reviewed the commercial adviser's handwritten notes of his financial analysis (see paragraph 5.47). We are satisfied that the tenders, including the financial projections of each tenderer, were analysed with the rigour that would be expected for an asset sale of this nature.

6.30 But there was no documented understanding of how the evaluation against the criteria would be conducted. We are concerned about 2 particular aspects.

6.31 First, the Information Memorandum made it clear that tenders were to be submitted on a particular basis, by a particular date. This gave a clear signal to tenderers that they were required to follow due process, and in our view it also created an expectation that the Ministry itself would also adhere to that process when considering tenders. Yet, we found no documented evidence of what that due process was to be.

6.32 This became a particular issue when one of the tenderers submitted a "relative bid". The project group was clearly concerned about whether the bid conformed to the requirements of the Information Memorandum, and decided to seek legal advice. It received written advice that the bid did not conform. But subsequent discussions appeared to result in a softening of that advice.

6.33 Ministry officials maintained that the "relative" bid was excluded by the decision to go back to all tenderers inviting revised bids. The commercial adviser pointed to the following statement in the Information Memorandum to justify the decision to continue dealing with KAH –

> *The Crown and Ministry may at any time negotiate with one or more potential purchasers and enter into an agreement for the sale of the Aerodrome in any manner whatsoever without prior notice to any or all interested parties. Furthermore, the Crown and the Ministry also reserve the right to terminate, at any time, further participation in the investigation and proposal process by any party and to modify procedures without assigning any reason therefore* [sic].

6.34 It is not for us to say what the Ministry's legal obligations were at this point. We accept that the external legal advisers were kept appraised of the situation in writing, and did not demur. But, if the written legal advice had been followed, the tender would have been excluded and/or the process recommenced. Ministry officials maintained that this was, in effect, what happened. But no such decision was communicated in writing to the tenderers. In our view, it would have been good practice for the Ministry to have obtained further written legal advice, mandating its intended approach, before it allowed the non-conforming tenderer to make a revised bid.

6.35 Our second concern relates to the lack of any formally documented evaluation criteria. All tenderers clearly understood the importance of both commitment and capability, and all met those requirements. But the criteria, and the evaluation against them, ought to have been documented.

Consideration of revised bids

6.36 We are satisfied that the commercial adviser properly informed all tenderers of the need to take account of the value of surplus aerodrome land when submitting their revised bids. However, we do not think that a fair process was followed from that point.

6.37 We have no doubt that the commercial adviser gave tenderers until Friday 5 May 1995 to submit their revised bids. Yet the project group met on Wednesday 3 May and –

> *recommended that negotiations be undertaken with* [KAH] *with a view to finalising the sale and purchase agreement.*

6.38 Good tendering processes begin with a strictly process-driven stage of appraising tenders, followed by a more open-ended stage involving negotiation of contract terms with a "preferred tenderer". It is not clear to whom the project group's "recommendation" was directed. But, in our view it was, in effect, a decision to move from the first to the second stage. The decision was premature and was inconsistent with good tendering practice. It created significant procedural unfairness. The project group did not know what the other bids would be at that point, and was not in a position to do any more than speculate about any condition(s) that KRAL would attach to its bid.

6.39 We do not think that the provision referred to in paragraph 6.33 justifies the departure from good practice.

6.40 The commercial adviser told us that he would have accepted any higher bid until the time a contract was signed. We presume that, had KRAL's revised bid been higher than that of KAH, he would have asked for the project group meeting to be reconvened. In our view, it would have been essential to have done so – especially because the condition attached to the bid (that the Crown deliver separate titles to the land identified as surplus) had financial implications.

6.41 In the event, KRAL's revised bid was less than that of KAH. It could therefore be said that there was no unfairness in the result. But that does not justify the deficiencies in the process.

Standard of documentation

6.42 The standard of documentation of some parts of the sale process was poor. We have already commented on the lack of documented governance arrangements,

evaluation process, and evaluation criteria. We also expected the actual evaluation of the tenders to have been documented with reference to those criteria, but they were not.

Conflict of interest

6.43 In our opinion EY had a conflict between their role of acting as the Ministry's commercial advisers for the sale and being named as KAH's accountants in its tender. We do not think that the fact that EY had previously acted for a KAH partner on an unrelated matter necessarily created a conflict.

6.44 It is important that conflicts of interest be identified and disclosed, and that appropriate steps be taken to manage them. Some conflicts are so significant that they are not capable of being managed short of the conflicted party withdrawing from the assignment. Others can be managed by steps being taken to mitigate their effects – for example, additional disclosures or reassigning staff.

6.45 Although a conflict of interest existed, it was not in our opinion so significant as to have required the commercial adviser to withdraw from the sale assignment. We think the position would have been different had EY advised or assisted KAH in the preparation of its tender. In either of those cases, withdrawal from the sale assignment would have been the only option open to EY.

6.46 There is also, in our view, no risk that the commercial adviser's work for the Ministry was in fact influenced by EY having been identified in KAH's tender.

6.47 EY told us that in its view everyone acted in accordance with its internal policy on independence and conflicts of interest. The commercial adviser also told us that he acted in accordance with EY's internal policy. He said the matter could have been dealt with by creating a "Chinese wall", but he did not regard that as acceptable and instead took steps to ensure that there was complete separation from KAH.

6.48 The commercial adviser appears to have dealt acceptably with the conflict of interest when it came to his attention. However, it does not appear that EY disclosed the conflict to the Ministry, as its internal policy required. Disclosure would have alerted the Ministry to the conflict and enabled it to assess its implications.

6.49 The Ministry acknowledged to us that its officials overlooked the reference to EY in KAH's tender, and that the oversight created a perception of a conflict of interest in the eyes of the unsuccessful tenderers.

Part 7 – What lessons can be learned?

7.1 In this Part, we attempt to draw lessons from the sale of Paraparaumu Aerodrome, that would be of value today in comparable circumstances.

Public Works Act and Treaty issues

7.2 There is a need for any department to be clear on how the Crown's Treaty partnership affects its work, and therefore clear on what specific Treaty-related considerations might apply to each particular piece of work. Where a matter involves the sale or other transfer of land, there are likely to be Treaty considerations – as were recognised in this case.

7.3 In this case, the Ministry needed to consider the implications of both the Public Works Act and the Treaty. It acted correctly by seeking advice from other departments. But it did have an opportunity to identify the full range of affected interests, by seeking more information about former owners of the land as well as claimants. Section 3A(6A) of the Airport Authorities Act protected the rights of former owners. It would have been desirable, at the least, to have informed them of the proposed sale and of the protection of their Public Works Act rights by section 3A(6A).

7.4 Former MÜori owners and the hapÎ were, it appears, effectively the same group. Contacting the former owners (including non-MÜori owners) would have provided additional assurance that all those with an interest in the sale had been identified and, where appropriate, informed of their rights under section 3A(6A).

7.5 The art of Treaty consultation is an evolving one. There was a genuine attempt at Treaty consultation in this case. Ministry officials thought at the time that they had gone to considerable lengths to treat the groups they consulted as fairly as they could, and to give them every opportunity to satisfy themselves of the position. The advice they received was that the Ministry should consult with claimants to identify whether they accepted that the aerodrome land was "substitutable". But it is important, when consulting, to keep an open mind to all concerns and possibilities, and to give active consideration to them.

7.6 We acknowledge that it is often very difficult for government departments to find out accurately who is representing whom, and relatively easy for a claimant group to say it was not consulted when in fact some of its members have been consulted. But it is important to bear in mind the need to obtain the views not only of iwi but also of hapÎ.

7.7 We think the events leading up to the sale of Paraparaumu Aerodrome provide a useful case study of what depth of consultation can be required, the need to

consider the full range of MŪori interests that may be affected, and the need to keep an open mind on how those interests might best be addressed.

The sale process

7.8 The Ministry followed a robust and considered approach when giving effect to the Government's policy objectives for the sale. It conducted the sale on an arm's-length basis, without Ministerial or other political involvement.

7.9 Price maximisation was normally the driving consideration of asset sales. Other criteria needed to be factored into this particular process. This was a good example of how competing policy considerations need to be balanced, and how there is sometimes no single solution which can fully meet all of them. There is a positive lesson to be learned from the way the Ministry designed the sale process to achieve the best balance it could. It is also important to bear in mind that when agreed policy objectives conflict, the task of determining the balance falls ultimately to Ministers. The Ministry referred matters to Ministers throughout – except in the actual sale process, which rightly needed to be conducted without Ministerial involvement.

7.10 The process for the sale ought to have been better carried out and documented. All of those involved seem to us to have relied on accumulated knowledge of asset sales. That should not have been at the expense of a properly documented process.

7.11 It is also important to have clearly defined governance arrangements for any significant commercial transaction – especially when both officials and external advisers are involved.

7.12 For the future, we would expect that there would be a complete documented record of the evaluation process (including the timetable), the governance arrangements (including decision-making responsibility), and the evaluation criteria and how they were applied. All external advice, including legal advice, should be in writing to the point that all process decisions can be fully justified after the event.

7.13 The final stage of the evaluation process was completed in a hasty manner. The lesson to be learned is that, even though the vendor of a public asset might think it is open to bids throughout the process, the process of receiving and evaluating tenders needs to be sufficiently sound and defensible to be, and be seen to be, fair to all parties.

Appendix 1: Terms of Reference

Paraparaumu Aerodrome Inquiry: Terms of Reference

The Report of the Transport and Industrial Relations Committee ("the select committee") on *Petition 1999/231 of Ross Sutherland and 584 others* (May 2004) recommended, among other matters, that "the Government hold an inquiry into the sale process of Paraparaumu Airport in 1995". On 19 October 2004 the Minister of Transport invited the Controller and Auditor-General to undertake the inquiry. The Auditor-General has accepted the Minister's invitation.

The Auditor-General has noted that other matters addressed in the select committee's report and recommendations are being considered by the Ministry of Transport and other officials – including work on the identification of the strategic value of airport and aerodrome facilities and the review of the Public Works Act 1981. Accordingly, the Auditor-General will limit his inquiry to the sale process, in accordance with the select committee's recommendation and the Minister's invitation.

Matters to be examined

The Auditor-General will examine the following matters concerning the sale, under sections 16(1)(a) and (d) and 18 of the Public Audit Act 2001:

1. What were the Government's policy objectives in relation to the sale, as expressed in Cabinet minutes or Ministerial and any other relevant directives? Matters to be considered will include:
    a. whether the Government intended that the aerodrome should remain operational following the sale and, if so, why; and
    b. how the rights and interests of former owners of aerodrome land (including MŪori) were to be addressed.

2. Was the sale process designed, and documentation prepared, in accordance with:
    a. good practice as it applied at the time; and
    b. the Government's policy objectives?

    Aspects of good practice to be considered under paragraph (a) will include:
    - the means used to achieve the sale (involving the formation of a company followed by the sale of the Crown's shares in it);
    - consultation with affected parties, including former owners of aerodrome land;
    - the tendering process, the evaluation of tenders, and any subsequent negotiations with prospective purchasers;
    - standards of probity, including in respect of the identification and management of conflicts of interest; and
    - standards of record keeping.

3. Was the sale process undertaken:

    a. in accordance with good practice as it applied at the time; and

    b. in a manner that would have been likely to meet the Government's policy objectives?

The Auditor-General will report to the House of Representatives on the above terms of reference, on lessons that can be learned, and on any other matter arising from the inquiry that he considers it necessary or desirable to report on.

Matters excluded from the inquiry

The issues of public concern in respect of Paraparaumu Aerodrome are complex and long standing. The Auditor-General has not been invited, and nor is it appropriate for him, to address all of those issues. Also, the Auditor-General is not able to exercise judicial functions in respect of legal rights and obligations. Accordingly, the inquiry will not address:

a. whether, as a matter of law, the Crown or any other person has at any time complied with its legal obligations in respect of the offering back of any aerodrome land to previous owners under section 40 of the Public Works Act 1981;

b. whether, as a matter of law or otherwise, the Crown has at any time met its obligations under the Treaty of Waitangi in respect of former MÜori owners of any aerodrome land;

c. any matter relating to the zoning of the aerodrome land under the Resource Management Act 1991, or the actions of any person in consequence of any zoning decision;

d. the significance of Paraparaumu aerodrome in aviation terms, or the performance of Paraparaumu Airport Limited in maintaining it for aviation use; or

e. the adequacy of legislation in respect of airports, or of government policy (at any time) on the significance of aerodromes or their role in aviation infrastructure.

4 April 2005

Appendix 2: Extract from letter to Treaty claimants, 14 May 1993

The Government ... has now decided that the Ministry of Transport should offer the aerodromes, including Paraparaumu, for sale to the current aerodrome users and/or nearby international airports and/or local authorities. However, before disposing of the aerodrome the Ministry of Transport must fulfil the Crown's obligations under the Public Works Act and the Treaty of Waitangi.

Development of disposal options for disposing of the aerodrome has been difficult because the majority, if not all of the aerodrome land is subject to the Public Works Act, which requires any land that is no longer required by the Crown for public works to first be offered back to its former owners prior to any sale on the open market. Acceptance by the former owners of the offer back under the Public Works Act may have led to closure of the aerodrome, and the loss of a worthwhile aviation facility.

In order to allow the aerodrome to remain operational, the Government has decided that the aerodrome will be formed into an airport company which will then be sold. The Airport Authorities Act allows for land to be transferred to an airport company without requiring the land to first be offered back to the former owners. However, if the airport company should later wish to sell land at Paraparaumu which it no longer requires for aerodrome purposes, it will be required to offer the land back to the former owners in accordance with the Public Works Act.

In recognition of the Crown's Treaty of Waitangi obligation of good faith, the Ministry of Transport seeks the comments of the iwi and hapu that may be affected by the proposal for the sale of Paraparaumu aerodrome, before inviting any tenders. If you have any concerns about the proposed timetable or you wish us to provide you with further information, please contact me without delay.

Any submissions you wish to make should be forwarded to the Ministry of Transport by 1 July 1993, but as a first step we would be grateful if you could indicate before the end of May whether or not you wish to comment.

Appendix 3: Valuation of Paraparaumu Aerodrome, dated 20 April 1995

7-123

ERNST & YOUNG

Majestic Centre
100 Willis Street
PO Box 490
Wellington
New Zealand

Phone: 04 499 4888
Fax: 04 495 7400

96/20/0

20 April, 1995

Air Services Branch
Ministry of Transport
PO Box 3175
WELLINGTON

Attention Mr J Edwards

Dear Sir

8 SEP 2005

Valuation - Paraparaumu Aerodrome

Following receipt of your recent instructions we have again inspected the Paraparaumu Aerodrome for the purpose of valuation. You will be aware that the writer has undertaken a number of valuations of this aerodrome on the Ministry's behalf over the last six years. This particular valuation is undertaken concurrent with the Ministry's present intention to sell the business of the Paraparaumu Aerodrome. To this end we have been provided with a copy of the Ministry's *Information Memorandum* relating to the business and assets of the Aerodrome. We have perused the Memorandum and reviewed the lease documentation relative to tenancies on the Aerodrome.

The task set us was to provide assessments on the following bases:

- Net current value or market value of the assets of the Aerodrome as a "going concern" business;
- Net realisable value or market value highest and best use of the surplus land;
- Net realisable value or market value alternative use of the Aerodrome.

Background

Policy objectives noted in the Memorandum state that it is Government's intention to dispose of the Aerodrome as an ongoing business in a single parcel of assets. It is

recognised that some of the land may be surplus to operational requirements and that any separate sale of the surplus land will be subject to offer back provisions of the Public Works Act 1981. Purchase of the Aerodrome will be by way of shares in Paraparaumu Airport Ltd which will be designated an Airport Company in terms of the Airport Authorities Act 1966.

The assets being sold are listed in the Memorandum as being:

- land;
- runways, taxiways and roads;
- Ministry leases at the Aerodrome;
- residential houses;
- Ministry buildings in the Aerodrome; and
- windsocks and boundary fences.

The Aerodrome land comprises an area of approximately 130.7689 hectares and is to be incorporated into a single title upon sale.

It does not appear that any of the Aerodrome leases are perpetually renewable and those perused had fixed termination dates including (in most) special grounds for termination which typically provided as follows; *if the Lessor decides to redevelop all or part of the aerodrome to an extent that it interferes with the Lessee's operations the Lessor may determine the lease by giving 12 months notice and compensating for improvements.*

Ground leases and rented buildings are generally located within that area of the Aerodrome which might be described as the operational or core business area and potential rental income from this source is said to equate $109,000 per annum. Grazing licences and residential rentals make up the balance of the property income on what might be described as non-core or surplus land. Potential annual rental income from this source is estimated as being $68,000. The various leases are managed by Landcorp Property Wellington.

Income from airport charges is said to be low. In our discussions with Mr Taylor of Ernst & Young, as advisor to the Ministry, he has suggested potential income from airport charges could be as much as $63,000 per annum.

Based on the above projections we have built up the following income statement.

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Ministry of Transport

	Core Assets		Surplus Assets		Total
Ground leases	36,000				
Building rentals	73,000				
		109,000			109,000
Grazing licences			3,000		
Residential houses			65,000		
				68,000	68,000
Landing charges		63,000			63,000
TOTAL REVENUE		172,000		68,000	240,000
Expenditure					
Management	25,000				
Rates	16,000		10,000		
Maintenance	35,000		7,000		
Other expenses	10,000		3,000		
		86,000		20,000	106,000
NET CASHFLOW		86,000		48,000	134,000
Depreciation		8,000		1,000	9,000
		82,000		47,000	125,000
Tax @ 33c		25,000		15,000	40,000
NET PROFIT AFTER TAX		$53,000		$32,000	$85,000

Valuation Process

1 *Net current value or market value of the assets of the Aerodrome as a "going concern" business.*

The primary driver of a "going concern" valuation is the net profits after tax figure that is capitalised at a real rate which we have taken to be between 6% and 8%.

We have broken the profits figure down to that derived from the business of the core assets as distinct from the surplus assets, the latter being the residential land in the south-west corner of the Aerodrome which has no operational significance.

To capitalise profits from the Aerodrome in its totality would be to understate the value of the potentially subdivisible surplus residential land and to therefore understate the value of the overall Aerodrome.

We have not included the industrial land within our definition of surplus as the cost of relocation or compensation in breaking the existing leases would in our opinion not equate the added value likely to derive from sale of the subdivided land.

2. *Net realisable value or market value highest and best use of the surplus land.*

We estimate the area of land involved in the south-west corner of the Aerodrome to be about 21 hectares in total. Some land would be lost in roading and reserves so that about 155 sites might be developed on the land. Ten of these sites are already encumbered with existing Aerodrome houses.

Cost of sale estimates include for profit and risk and development costs.

3. *Net realisable value or market value alternative use of the Aerodrome.*

In this exercise we have assumed the airport to cease operating as such and for the entire property to be available for subdivision, part as residential (the bulk of the property) and part as industrial (the Kapiti Road frontage).

The realisation period would be considerable and values would not be expected to rise above CPI increases over the period. Development costs including time delays in gaining approvals because of the offer back process and the requirement to compensate existing lessors will impact on the block valuation.

Valuation Assessments

1 *Net current value or market value of the assets of the Aerodrome as a "going concern" business.*

Net cashflow of core assets		
capitalised @	6% real	$883,333
	7%	757,142
	8%	662,500
Adopt		$833,333

20 April, 1995
Ministry of Transport

plus Net realisable value surplus land (residential)	703,017
	$1,586,350
SAY	$1,600,000
Net cashflow of surplus assets as return on net realisable value	4.55%

2. *Net realisable value or market value highest and best use of the surplus land.*

Subdivision of Surplus Residential Land
Block Value Assessment
Income

Description	#	**Per Lot**	**Total**
Stage 1 Sections	10	$40,000	$400,000
Stage 1 Houses	8	90,000	720,000
Stage 2 Sections	28	40,000	1,120,000
Stage 2 Houses	2	90,000	180,000
Stage 3 Sections	46	42,500	1,955,000
Stage 4 Sections	34	42,500	1,445,000
Stage 5 Sections	27	42,500	1,147,500
Total Income	155		6,967,500
Costs of sale @ 4%			278,700
Profit & Risk @ 25%			1,337,760
Outlay			$5,351,040
Development Costs			
Preliminary & General	1,775		275,125
Earthworks	6,425		995,875
Storm Drainage	1,550		240,250
Sewers	2,050		317,750
Watermains	2,225		344,875
Roading	4,250		658,750
Miscellaneous Charges	650		100,750
Total Construction	2,704		2,933,375
Fees & Utilities	2,000		310,000
Total Payments	4,704		3,243,375

Interest on Outlay	10.5%	1,404,648
Total Expenses		$4,648,023
Block Value/NRV Surplus Land		$703,017

3. *Net realisable value or market value alternative use of the Aerodrome.*

• NRV surplus residential land	$703,017
• Industrial land off Kapiti Road net 15 hectares @ $45,000 per ha	$675,000
• Core aerodrome as residential net 72 hectares or $30,000 per ha	2,160,000
	$3,538,017
	SAY $3,500,000

Summary

As it is the Ministry's firm intention to dispose of Paraparaumu Aerodrome on a "going concern" basis even though the value of the airport is potentially greater in its alternative use, we have approached our valuation on the basis of an economic assessment for the core or operational assets and have added for the block value of the realisable surplus assets to suggest a total value of $1.6 million.

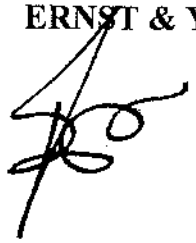
It must be noted that our valuations are best estimates only. We have not had access to detailed subdivisional plans that might ordinarily have been expected nor have we been able to prepare definitive development costings.

ERNST & YOUNG

20 April, 1995
Ministry of Transport

We would be pleased to discuss any aspect of our report with you.

Yours faithfully
ERNST & YOUNG



G J Horsley FNZIV
Partner

Appendix 4: Extracts from Information Memorandum dated 17 February 1995

IMPORTANT NOTICE

This Information Memorandum relates to the business and assets of Paraparaumu Aerodrome (the "Aerodrome") owned by Her Majesty the Queen in right of New Zealand (the "Crown"). The Crown, through the Ministry of Transport (the "Ministry") is undertaking the sale of the Aerodrome described in this Information Memorandum and in the manner described herein. The Ministry is acting as agent for the Crown in the sale. Ernst & Young, Chartered Accountants of Wellington, are acting as advisers to the Ministry.

This Information Memorandum is confidential and is being supplied only to parties who comply with pre-published eligibility criteria and who have entered into a Confidentiality Agreement with the Crown and the Ministry

This Information Memorandum is for use by selected parties solely in considering their interest in acquiring the Aerodrome which is offered for sale by the Crown. The Information Memorandum has been prepared solely for information purposes in order to assist interested parties in making their own evaluation of the Aerodrome and does not purport to be comprehensive or to contain all of the information that potential purchasers may require. In all cases, interested parties should conduct their own investigation and analysis of the Aerodrome and of all other data set forth in this Information Memorandum.

Neither Ernst & Young nor any other person has verified any of the information contained in this Information Memorandum. The Crown, Ernst & Young and the Ministry make no representation or warranty as to the accuracy or completeness of information contained in this Information Memorandum and shall have no liability for any statements, opinions, information or matters (expressed or implied) arising out of, contained in or derived from, or any omissions from, this Information Memorandum or any other written or oral communications transmitted to the recipient in relation to the Aerodrome.

The information contained in this Information Memorandum is believed to be correct as at the date of publication, however neither the Crown nor any other person will be responsible for the effect of any amendments or other variations to the statutory or regulatory framework on the future ownership and operation of aerodromes in New Zealand or on any other aspect of the operation of the assets and business referred to herein.

In accepting delivery of this Information Memorandum, the recipient confirms its acknowledgment and agreement that this Information Memorandum and all of the other information in it is information supplied under the Confidentiality Agreement previously executed by the recipient, and that the recipient shall observe and perform all the covenants and agreements required of the recipient under the Confidentiality Agreement.

This Information Memorandum is not an offer to any recipient or any other person but is intended to provide information to those recipients to assist in the process of

formulating tenders for the purchase of shares in an Airport Company constituted for the purpose of acquiring the Aerodrome. The Crown and Ministry may at any time negotiate with one or more potential purchasers and enter into an agreement for the sale of the Aerodrome in any manner whatsoever without prior notice to any or all interested parties. Furthermore, the Crown and the Ministry also reserve the right to terminate, at any time, further participation in the investigation and proposal process by any party and to modify procedures without assigning any reason therefore.

The Crown will not be bound to accept the highest or any tender that may be made.

1. FRAMEWORK OF SALE

1.1 Policy Objectives

The Government in 1991 directed the Ministry of Transport (Ministry) to devolve its operation of six aerodromes, consistent with the intended restructuring of the Ministry to a policy department without operational responsibilities. While continued Government ownership is not considered necessary, the importance of Paraparaumu Aerodrome to the aviation industry and the local community is recognised.

It is the Government's intention that Paraparaumu Aerodrome should be sold to parties who will continue operating the facility for as long as it remains commercially viable. For this reason, the Government has restricted the sales process to only those parties expected to have the objective of continuing the aerodrome business.

For the above reason, and to enable the new owners of Paraparaumu Aerodrome to make their own decisions about the future operational requirements, the aerodrome is being sold as a "going concern" business with all aerodrome land and Ministry assets in one "parcel".

However, recognising that an amount of land at Paraparaumu aerodrome may be considered to be surplus to future requirements, tenders for the operational areas and any lesser area of land than the total amount described in this Memorandum, will be considered without prejudice.

The Ministry reserves the right to select any tender, not necessarily the highest. The likelihood of a tenderer successfully continuing the aerodrome business after sale will be considered as part of the evaluation of tenders.

1.2 Sale of Shares in an Airport Company

The business of Paraparaumu Aerodrome and the assets comprised in that business will be transferred to a company wholly owned by the Crown. The Crown will then sell all its shareholding in that company to the successful tenderer. The transfer of the assets to the company and the on-sale of the shares will take place concurrently.

The company, *Paraparaumu Airport Ltd*, has been constituted with a nominal capital as a private company under the Companies Act 1955. *Paraparaumu Airport Limited* will be designated an "*Airport Company*" by Order-in-Council pursuant to section 3 of the Airport Authorities Act 1966 prior to the Crown transferring the business and assets of the Aerodrome to that company. The obligations of an Airport Company are described in section 1.6 of this Information Memorandum.

The capital structure and balance sheet of *Paraparaumu Airport Limited* at the time of settlement of the sale of shares to the successful tenderer will reflect the successful tenderer's requirements, including if necessary re-registration under the Companies Act

1993. Tenderers will need to specify their preferred capital structure for *Paraparaumu Airport Limited*. The Crown reserves the absolute right to reject any structure proposed.

The sale of the business and the assets of the Aerodrome to an Airport Company and the on-sale of shares in that company is required to enable the Crown to dispose of the Aerodrome business without being obliged to comply with the offer-back provisions of sections 40 and 41 of the Public Works Act 1981 in relation to the land. The implications of the Public Works Act 1981 are further discussed in section 9.3 of this Information Memorandum.

Net working capital and taxation liability (if any) will be retained by the Ministry. However the Ministry will not accept any liabilities (if any) of any type whatsoever associated with the ownership or operation of the assets and business being transferred to Paraparaumu Airport Limited. That policy is reflected in the form of agreement for sale and purchase of the aerodrome assets between the Crown and Paraparaumu Airport Limited which is attached as Appendix 1

Apart from the normal arrangements for the provision of water, electricity and telephone services the only other contract for supply of services is for mowing which is on a month by month basis. The leases will of course be transferred with the sale of the land.

1.3 Eligibility to Tender

Those eligible to tender are Wellington International Airport Ltd, the Kapiti Coast District Council and users of Paraparaumu Aerodrome

1.4 Sales Process and Timetable

The Crown is offering Paraparaumu Airport Limited for sale by negotiated tender. The procedure for undertaking the sale is set out below.

Eligible tenderers who have indicated interest have been provided with copies of this confidential Information Memorandum. Parties who wish to proceed to due diligence must notify Ernst & Young in writing of their intention to do so before 5pm on 1 March 1995. Parties should not attempt to have any direct dealings with the Ministry of Transport or any employees of the Ministry. Those parties who choose not to proceed to due diligence are required to return promptly this Information Memorandum and any other confidential information to Ernst & Young. Those parties wishing to undertake a further detailed review of the assets and business of Paraparaumu Aerodrome will have the opportunity to visit the aerodrome site, interview Ministry of Transport senior management and have access to confidential information so as to satisfy themselves as to the value of Paraparaumu Aerodrome

Following the completion of due diligence, prospective purchasers will be given a period of time to complete their analysis. At the end of this period, they will be required to submit formal, final and binding bids. The bids will form the basis of

selecting the party or parties, if any, with whom to negotiate a final sale and purchase agreement. The form of agreement for sale and purchase of shares in Paraparaumu Airport Limited is attached to this Information Memorandum as Appendix 2. It is envisaged that the form of agreement will be further negotiated to reflect the successful tenderer's requirements as to capital and structure of Paraparaumu Airport Limited (see Section 1.2 of the Information memorandum for further explanation). It is the Crown's policy to provide no representations or warranties other than clear title to the shares and the assets to be acquired by Paraparaumu Airport Limited and the ability to transact.

Prospective purchasers should note that they are required to have all necessary approvals before submitting final bids.

To ensure comparability and evaluation against the Crown's policy objectives (see Section 1 1 of this Information memorandum) all final, binding bids should not only state an offer price but also demonstrate the tenderer's management, financial and technical ability and commitment to maintain Paraparaumu Aerodrome as a going concern. Formal bids should, without limitation, specify:

- The price in New Zealand dollars;
- Financial and legal structure of the tenderer (including where a consortium is bidding, clear identification of all members, or major shareholders);
- Sufficient financial information to enable an assessment of the tenderer's financial capacity to complete the transaction and operate the aerodrome;
- The tenderer's aerodrome or related aviation industry experience;
- Major assumptions on which the bid is based (to ensure comparability); and
- Any material conditions affecting the offer.

Final bids are to be in writing and delivered by 5pm on 21 April 1995 as follows:

By post: Ernst & Young
P O Box 490
Wellington

By hand: Ernst & Young
24th Floor
Majestic Centre
100 Willis Street
Wellington

Marked for the attention of Mr Roger Taylor

The current timetable for the sale process is as follows:

Key dates for prospective purchasers

Information Memorandum available from	17 February 1995
Notice of request for due diligence	1 March 1995
Due diligence commences	20 March 1995
Final bid submitted	21 April 1995
Preferred tenderer selected	26 April 1995
Negotiation of sale documentation by	5 May 1995
Settlement	31 May 1995

The above dates may change depending on the level of interest shown in the sale process. Any changes will be notified to all parties who have requested an Information Memorandum.

1.5 Treaty of Waitangi claims

In 1993, the Ministry of Transport was directed to sell Paraparaumu Aerodrome, subject to fulfilling any duties on the Crown in terms of the *Treaty of Waitangi*.

The Crown believes that it has properly discharged its *Treaty of Waitangi* duties concerning disposal of the land by extensively consulting with interested Maori. A protection mechanism will not be invoked to protect the as yet unproven claims after alienation of the land from the Crown.

Accordingly, once the Aerodrome land has been transferred to Paraparaumu Airport Limited, it will not be available to satisfy existing or future Maori claims.

1.6 Obligations of an Airport Company

Prospective tenderers should, of course, seek their own legal advice as to the requirements of an airport company. In addition to the normal Companies Act requirements, special features of an airport company include:

- it must operate a commercial undertaking;
- annual reports and accounts must be supplied to the Minister of Transport for tabling in Parliament;
- accounts must be audited by the Audit Office;

- charges can only be set after consultation with airlines using the airport and must be disclosed publicly;

- it is defined as a network utility operator under the Resource Management Act 1991,

- it has limited powers to set bylaws for the operation of the airport subject to consent through Order-in-Council;

- any land that becomes surplus to aerodrome purposes must be sold subject to sections 40 & 41 of the Public Works Act 1981 This will usually involve offering the land back to its former owners, at current market value. If the former owners opt not to take up their offer back rights, the land will then become free for open market disposal;

- it is subject to the provisions of the Official Information Act 1982; and

- it and any subsidiaries are subject to the provisions of the Ombudsman Act 1975.