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I refer to the submission of C.N. Geschke, former Victorian Director of Consumer Affairs and former Victorian Ombudsman, and his incorporation of my letter to the Victorian Minister of Transport and Draft Supreme Court Affidavit.

Insurmountable problems exist for competing businesses when dealing with airport lessees, even if enjoying a full and free right and liberty of way granted under an easement registered on the Commonwealth's title. Even with such a wide grant from the Commonwealth the highly aggressive business tactics of an airport lessee has rendered competing land zoned for airport-related industrial use, practically useless.

In 2009 an attempt was made to ventilate such issues by use of trade practices principles at the AAT by two Applicants in their '70s, who for decades relied upon the dominant tenement in a carriageway easement over the Melbourne airport site to travel to and from their land. Their land also enjoyed direct terminal precinct access which was used more often for 40 years, until this was cut off by the airport lessee without notice. This occurred in 1999 while my friends were stockpiling bitumen on their land for competitive near terminal airport car parking. By 2009 their funds had been exhausted in legal battles with the airport lessee, so I assisted them as much as I could purely as an unlearned friend. Unfortunately the trade practices principles that I put forward did not gain much traction at the AAT, due in part to insufficient trade practices references in the AAT's enabling Act providing it with authority over the airport site, namely the *Airports Act 1996*.

It seems to me this deficiency made it extremely difficult for the Tribunal to address trade practices issues in the context of reviewable decisions made under that Act

according to other considerations in the foreground. As things stand, one would need the skills of a QC to successfully make a case at the AAT based upon *Competition and Consumer Act* considerations, which are often only expressed in the *Airports Act 1996* indirectly in general terms. In my experience the Minister and the airport operator always used experienced counsel to represent them, while my sorely aggrieved and starved of funds friends went un-represented. Consequently, they only had limited success at the Tribunal in obtaining a variation to the Melbourne Airport master plan so as to address their easement. They were unable to make the case for the reconnection of the traditional terminal precinct access that was built for their land, which their land had enjoyed for over 40 years. The high cost of justice in the subsequent Supreme Court case forced my friends to sell their competing land to the airport lessee without compensation for over 20 years of disturbances to the enjoyment of their potentially competing land.

The following submission is based on those hard lessons learned from my experience assisting my friends who had the clearly inadequate provisions of the *Airports Act 1996* imposed upon their adjoining off-site land. I am not a lawyer but I realize at the end of the day a legal solution must be found. I have broken my submission up into the following sections:

I thank the Commission for its consideration.

Yours sincerely,
Eric Wilson
10 April 2010

EXECUTIVE SUMMARY

A. From its inception, the Airports Act 1996 was designed to be read together with State and Federal competition, consumer and trade practices laws, and airport lessees were granted their leases on that basis.

B. Despite the above, difficulties exist in carrying into effect the competition, consumer and trade practices laws of the Commonwealth and States referred to in the Airports Act 1996, because the Act does not mandate such considerations with absolute clarity nor create a clear enough path for affected parties to seek redress.

C. As a guide to all decision-making under the Airports Act 1996, the objects of the Act, and all subordinate legislation, should be amended to better acknowledge:
   i. the Constitutional guarantee of free trade among the states, and
   ii. Parliament's intention that the Act be interpreted in accordance with Commonwealth and State and Territory competition and trade practices laws, as the case may be.

D. Further to any other right or course of action, any decision made under the Airports Act 1996 falling within the purview of competition and trade practices law, should be reviewable by the Administrative Appeals Tribunal at the request of an affected party. To be absolutely clear, this should be a ground for review in its own right.

E. An airport site itself should be defined such that it shall constitute a "market" (not the only airport-related market) for the purposes of competition and trade practices law.

F. The Airports Act 1996 should make clear that any right or course of action made possible solely by a grant under the Airports Act 1996 (such as section 13) is subject to the other provisions of the Act. This will reinforce

understanding in State and Federal tribunals that the rights of airport lessees are limited by the Act.

G. When considering to give or refuse approval under the Act of an airport lessee's master plan, major development plan, or any variation, the Minister must consider the airport lessee's compliance with competition, consumer and trade practices laws of the Commonwealth, States and Territories as the case may be, and may seek the advice of the ACCC in doing so.

H. The Minister's dealings with the airport lessee, as a lessor/lesseee arrangement, should be expressly brought under the *Competition and Consumer Act 2010*. Section 2A of that Act is presently unclear about this.

I. That a decision of the Commonwealth not to enforce its rights or options under an airport lease granted under the *Airports Act 1996,* should on the application of an affected person be reviewed by the AAT; and the rights of the Commonwealth should be disclosed to third parties upon request.

1. MINISTERS & LESSEES UNDER COMMOMWEALTH COMPETITION & CONSUMER (TPA) LAW

1.1 Form its inception, the Airports Act 1996 was designed to be read in conjunction with consumer protection, competition and trade practices laws of the Commonwealth at all times. Section 248 of the original and current Acts provide:

> *(1) This Act does not, by implication, limit the application of the Trade Practices Act 1974.*

Section 148 of the original Act reads:

> *This Part does not, by implication, limit the powers conferred on the ACCC by the Trade Practices Act 1974 or the Prices Surveillance Act 1983 .*

1.2 Moreover, section 171 of the original Act expressly allows for the regulation of commercial trading under the Act:

> *(1) The regulations may make provision for and in relation to:*
>
> *(a) prohibiting or regulating the supply of goods or services at a specified airport; or*
>
> *(b) authorising the supply of goods or services at a specified airport; if the goods or services are acquired by an individual as a consumer (within the meaning of section 4B of the Trade Practices Act 1974).*

1.3 The original Act and is successors all specify where the *Trade Practices Act 1974* is to be read subject to the *Airports Act 1996* (see section 193 for example), implying that the rest of the *Airports Act* is to be construed with the *Trade Practices Act* as a legislative scheme.

1.4 These express notices in the original *Airports Act 1996* onwards demonstrate that unless the contrary intention appears, airport leases are in effect granted subject to the *Trade Practices Act 1974*, now known as the *Competition and Consumer Act 2010*. Therefore no loss of property, much less acquisition of property by the Commonwealth, occurs if Federal law relating to competition, consumers and trade practices is more fully referenced in the Airports Act 1996 and its subordinate legislation. This would enable greater traction of these considerations both in initial decision-making and in review at the AAT.

1.5 **However, the position is not so clear when it comes to the decisions of the Minister under the *Airports Act 1996* in relation to the *Competition and Consumer Act 2010*.** For example, at common law, an airport master plan is not a town planning document but a business plan[1]. So is the approval of the Minister and his ongoing involvement in approving major development plans of the airport lessee carrying on a business for the purposes of section 2A(1) of the *Competition and Consumer Act 2010*? I would say yes but this point was not recognized at the AAT, which cannot make new common law, as a ground for standing or a basis of review. Given the Minister is dealing with a commercial lessee, the Minister's dealings should be expressly brought under the *Competition and Consumer Act 2010*.

[1] Decision of Dowset J

2. STATE COMPETITION & CONSUMER (FTA) LAW AND THE AIRPORTS ACT 1996

2.1 Except where excluded by the Airports Act 1996, generally speaking, activities on an airport site are subject to State trade practices laws according to their tenor, by force of the *Commonwealth Places (Application of Laws) Act 1970*[2]. Moreover parts of the Airports Act 1996, specifies concurrent operation of Commonwealth and State laws[3].

2.2 A significant exception to the operation of all State laws exists over airport building activities, critically including roads, by reason of section 112. This can have the effect of granting an airport lessee a near-monopoly over airport access through master plans specifying "surface access" road designs advantageous to the lessee but disadvantageous to potential competitors. Is this preventing or hindering access to a market? While it is arguable that an airport site constitutes a market, that is not yet the law, so I found making a case at the AAT to have road access restored or provided as an access to market issue to be extremely difficult. Of course the effect of the *Airports Act 1996* is to create a unique market (such as for property and access to services) existing within the boundaries of an airport site. This is only partly recognized under Part 13 of the *Airports Act 1996*. The Act needs amending to declare that for the purposes of competition, consumer and trade practices law, an airport site itself may also constitute a "market".

2.3 Nevertheless, the exception to State laws of section 112 of the *Airports Act 1996* is only an expression of the intent of Federal Parliament rather than express total exclusion. For example, the intention has been overridden elsewhere in the legislative scheme, by federalizing State health and safety laws under the Building Control Regulations. Thus State laws can become surrogate Federal legislation without offending the intentions of Federal parliament. There is no reason why provisions for road service laws could not also be similarly adopted, although this would not address the future needs of

[2] See section 4 of the *Commonwealth Places (Application of Laws) Act 1970*
[3] Such as section 61 of the *Airports Act 1996*

competing airport users.

2.4 A clause in the Melbourne airport lease makes it mandatory for the airport lessee to comply with "legislation", which includes State legislation. Failure to do so allows the Commonwealth to intervene. The Commonwealth has other rights under the lease, such as the granting of easements of way or to insist on the development of expeditious movement around the airport site. The lease gives the Commonwealth the ability to enforce proper maintenance of airport structures including roads. However there is no way to force the Commonwealth to intervene in issues so leased out yet directly affecting others, which matters have been purposely privatized so as not to involve the Commonwealth anymore. Therefore the provisions of the lease are of little practical use to the public interest, since the airport lessee claimed to my friends' it owes no such duties to them, only to the Commonwealth, even though the airport land was acquired for public purposes.

2.5 Indemnities provided by airport lessees to the Commonwealth under the terms of those leases insulate the Commonwealth from any wrongdoing, which in effect allows the Commonwealth to withdraw from peace, order and good government of Australia's national airports. My friends have a document showing how the Commonwealth expressly relied on such indemnities when considering its responsibilities to them and others. Therefore, in view of what amounts to lazy fraud upon the power of the *Airports Act 1996,* the Act needs amending to allow review by the AAT on the application of an affected person, of any decision by the Commonwealth not to enforce a provision of a lease granted under the Act.

2.6 The public should also be advised of what the Commonwealth's rights are under an airport lease.

3. AIPORTS PLANNING

3.1 Airport master plans once approved by the Minister under section 83 of the *Airports Act 1996*, make the plans of the airport lessee binding on other persons inasmuch as almost all activities inconsistent with the plan will not be approved under federal law. So although not a legislative instrument tabled in parliament, the plan is nevertheless stated by section 83 of the Act to be "in force".

3.2 It is also unlikely that a local council or state government necessarily cooperating with an airport lessee would approve of competing building activity near an airport site likely to conflict with a master plan. This can have devastating effects on competition, such when it was proposed with Commonwealth approval, to put a railway line to the airport through the middle of my friends' competing land, which took years of inquires to resolve before being rejected. Moreover, under section 72 of the Act, Master plans span a 20-year planning period, which can blight competitive lands surrounding the airport, with little recourse for the owners. Alternatively, the alignment of airport access roads to and from a freeway can cut off competitive lands. The present plan to build an APAC drive extension for Melbourne airport could easily fall into this category.

3.3 For the above reasons, a master plan necessarily involves balancing competing interests. The same can be said of major development plans approved under section 94 of the Act. Yet there is no direct reference in the Act to the Minister having to consider competition, consumer or trade practices laws. Consequently there is very little traction at the AAT for review of decisions on that basis. The Airports Act 1996 should be amended to expressly require the Minister to consider competition, consumer or trade practices laws when approving a master plan, major development plan or any variations.

3.4 The Minister should also be empowered to seek the advice from the ACCC when considering any approval under the *Airports Act 1996*, to take into account competition, consumer or trade practices considerations.

4. GENERAL DECISION-MAKING

4.1 A great deal of decision-making occurs under the Airports Act 1996 or subordinate legislation regarding the granting of licences and permits and the like. Frequently, before the Commonwealth will consider these grants or approvals, the approval of the airport lessee is required[4]. This gives the airport lessee tremendous bargaining power against potential competitors. In the case of my friends, the airport lessee asserted arbitrary fee-making powers and fee-waiving powers under Commonwealth regulations, even over their right to maintain a road as the dominant tenement of a registered easement smiting the Commonwealth's title.

4.2 It was also asserted against my friends by the Commonwealth that there was no obligation on the airport lessee to allow terminal precinct access, since the proposal would compete with the airport lessee's own interests. (Even though the access existed for 30 years.) The Commonwealth's position was that if my friends wanted such access, it was a commercial matter between them and the airport lessee. The constitutional freedom of trade commerce and intercourse among the States via Melbourne airport was not a consideration. Public airport access is, according the Commonwealth, a commodity to be bought and sold. The former managers of the airport actually calculated how much my friends should be charged for their land's terminal precinct access so as to make it uneconomic when compared to leasing airport land directly from the Commonwealth.

4.3 Contrary to the above positions of the Commonwealth and its airport lessee stands section 2 of the Competition and Consumer Act 2010:

> *The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.*

4.4 Thus there is need to incorporate into the *Airports Act 1996* an overarching concept under which it should be interpreted: the promotion of competition. As

[4]

a guide to all decision-making under the Airports Act 1996, the objects of the Act, and all subordinate legislation, should be amended to better acknowledge:

(a) the Constitutional guarantee of free trade among the states, and

(b) Parliament's intention that the Act be interpreted in accordance with Commonwealth, State and Territory competition, consumer and trade practices laws as the case may be.

4.5 The objects of the *Airports Act 1996* are little use however if there is no enablement of the AAT under the Act to review decisions on the basis of compliance with competition, consumer or trade practices legislation. Therefore further to any other right or course of action, any decision made under the *Airports Act 1996* falling within the purview of competition and trade practices law, should be reviewable by the Administrative Appeals Tribunal at the request of an affected party. This would be a new, but long overdue, freestanding grounds for review under the Act.

5. CURBING ABUSES OF PROCESS

5.1 As the affidavit in the former Victorian Ombudsman's submission indicates, my friends were involved in multiple legal battles with the airport lessee. I believe, when taken together, these constituted oppressive conduct using Victorian planning laws, by litigating matters not directly affecting the airport[5] or unlawfully asserting control over the dominant tenement of the carriageway easement granted by the Commonwealth in favour of their land. Moreover ten years earlier, the airport lessee wrote to Hume City Council opposing my friends' land's rezoning for airport-related industrial use because it was said it would among other things, cause bird strike on aircraft. At the same time, the airport lessee privately offered to withdraw the objection if my friends accepted a downgrading of their rights in their land's carriageway easement. And while asserting control over the airport's road network in 2010 including that easement, one of the airport lessee's objections to the Victorian Administrative Appeals Tribunal was that my friends' competing car parking development plan could not go ahead because of potential traffic management issues.

5.2 While abusing Victorian planning laws or procedures to frustrate my friends' competing development, the airport lessee also employed the master planning process to portray their competing land as landlocked. This was despite my friends objections to the Minister and the airport lessee. The master plan was then approved by the Minister acting on his Department's advice. The AAT found that the Minister's approval was unlawful. This was also because it showed the APAC drive extension road impinging on my friends' carriageway easement, which was supposed to be a full and free right and liberty of way. The AAT further found this portrayal of his land could affect my friends' finances. So while from the outset the Commonwealth's actions and that of its lessee were untenable, the AAT proceeding may have been very valuable to their land them in terms of disturbing the development of my friend's competing land by adding further delay.

[5] The competing land was located downhill and downstream from the airport, yet the airport lessee opposed my friends' development on the grounds that their soil was contaminated.

5.3 When considering whether or not there was any anti-competitive abuse of process in various Tribunals, it is important to note the airport lessee never acted alone. Melbourne Water, the airport lessees' licensee of a water main running over the airport site, also acted as a co-litigant. Hume City Council also opposed my friend's development plan. The airport lessee has stated that the airport is Hume City Council's biggest rate-payer, and that it has strong links with the Council. So strong that the Council even referred the drafting of my friends'"173 agreement" (meant to encumber their land's title) to the Commonwealth and airport lessees lawyers, who were known to Council as being engaged in litigation against them.

5.4 After a costly and lengthy battle ending in 2011, my friends' competing development plan was rejected by the Victorian Civil and Administrative Appeals Tribunal "primarily" because of access issues under the control of the airport lessee. The fact they were the dominant tenements of their land's carriageway easement effectively counted for nothing. But in 2009 the Commonwealth tried to argue before the AAT in 2009, with the joined airport lessee not disagreeing, that my friends had no standing to object to their land being shown as landlocked in the airport master plan because of the Constitution's force preventing the acquisition of property in their easement's dominant tenement.

5.5 One would ordinarily assume a trade practices case could be made out of all this but that was not practical. The Commonwealth and the airport lessee opposed incorporation of trade practices causes into litigation already on foot on the basis my friends were out of time. After ten years of litigation pressure my friends in their '70's had to settle by signing away their rights without any compensation for twenty years of disturbances to their competing development proposals from the Commonwealth and its lessee.

5.6 The solution to this type of multi-jurisdictional bullying could be very simple. This is because all rights arising out of "core user" airport leases such as Melbourne airport, concern a Commonwealth place under the exclusive jurisdiction of Commonwealth law. By reason of section 248 of the Airports Act 1996, such leases are expressly granted under section 13 of the Act without implying limitations on the application of the Trade Practices Act 1974. Thus

there never arises a case where rights granted under State law, even choses in action in various Tribunals, can undermine the force of Federal competion and consumer law. However to give better effect to this provision, the *Airports Act 1996* should be amended to make it especially clear that any right or course of action made possible solely by a grant or approval under the Act (such as under section 13) is subject to the limiting provisions of the Act and regulations made under it. This should go without saying, yet could assist tribunals in assessing the true legal position of airport lessees, to curb abuses of process.

CONCLUSION

The Airports Act 1996 needs to be amended to give the Administrative Appeals Tribunal and if necessary the Courts, clear signposts that competition, consumer and trade practices laws are to be applied at all times and should be considered in most decisions. This is because by nature the Airports Act and its subordinate legislation is a balancing act between competing interests. Such a course as described above should have negligible compliance costs on the Commonwealth and airport lessees, which in theory should be operating in full compliance with these laws already. The above proposals merely give teeth to that tiger in the context of the running of airports.

Yours Faithfully,

Eric Wilson
10 April 2011