Eric Wilson

Response to the Productivity Commission (August 2011) Draft Report on the Economic Regulation of Airport Services

Dear Commissioners,

1. I refer to figure 11.1 of the Draft Report entitled *"Proposed regulatory enforcement pyramid for airports"* and my previous submission (No. 39) dated 10 April 2010. The metaphor of an "enforcement pyramid" is attractive: It's the enforcement of laws in response to monitoring that restrains airport lessees from abusing what the Department calls "natural monopoly characteristics"[1]. The five levels of the Commission's proposed "enforcement pyramid" of figure 1.11 are:

Price Caps

Declarations and notifications

Price Inquiries

Show cause notices

Price and Quality of Service Monitoring

Federal lease agreements & *Airports Act 1996*

General competition provisions & *Competition and Consumer Act 2010*

2. This submission examines the Commission's proposed "enforcement pyramid" as understood though Keith and Norma McLaughlin's experience of the monopoly characteristics of the Melbourne airport lessee. If the better laws of the "enforcement pyramid" come to fruition, would they be sufficient to allow the McLaughlins to compete with car parking, assuming they still owned their land within walking distance of the terminal?

1 See the Department's submission (No. 43)

3. In this regard, Keith McLaughlin will shortly provide by separate submission documents to support this submission (referred to in footnotes herein by "Appendix" number). This means the Commission can be confident that what is said in this submission will be backed by documentary evidence, given the Melbourne airport lessee in its supplementary submission has disputed my previous contributions to the enquiry.

TOP 5 LEVELS OF THE 'ENFORCEMENT PYRAMID'

4. The top five levels of the proposed enforcement pyramid are all operated by the ACCC (or similar government body). This looks like worthwhile reform. However, the efficiency of a government agency in curbing market abuses by delivering such "credible threats" as the Commission desires is limited by:

a) *Non-commercial time-frames:* by the time a problem has percolated up the five levels of the pyramid, adversely affected businesses may have disappeared. Therefore, while this measure may give others a chance, it cannot substitute for better access to direct action at the two base layers of the pyramid.

b) *Budgetary constraints:* the ACCC has limited staff to deal with airport disputes, which can be complex.

c) *Jurisdictional constraints:* the ACCC is shy of intervening in planning disputes under State law;

d) *Political accountability:* if litigation fails or would embarrass the government of the day, the ACCC may face public criticism or potential changes to budget or structure. With taxpayers money at stake the ACCC cannot help but being somewhat risk adverse.

e) *The need to be 'unbiased':* in an adversarial situation, a person may need an immediate injunction to save his or her business but the ACCC cannot be expected to always act as a person's own' advocate at very short notice.

f) *Limited purpose:* the ACCC is mainly geared to protect the public at large through precedent-setting litigation or at a Minister's direction or to ensure

market fairness, and cannot always act in the commercial interests of a particular competitor in a particular dispute with an airport.

g) In the case of airport interventions, the ACCC cannot be expected to investigate the Commonwealth's activities as a lessor, as the ACCC is an agency of the Commonwealth not entirely independent of government.

5. The above limitations mean that the two base levels of the "enforcement pyramid" need strengthening in addition to the proposed higher-level reforms. This is because in many cases, it is more efficient for aggrieved persons to rely on existing rights at a speedy low-cost Tribunal, than wait in hope of new rights being declared by a government agency process – which if contentious, would require enforcement by a Tribunal or court anyway.

6. Nevertheless, the Federal Airports Corporation's treatment of the McLaughlin's access concerning Hertz car rentals illustrates where a show-cause regime could flush out what is really going on behaind the scenes, and impose some reasonableness. Federal Airports Corporation (FAC) documents[2] show how the FAC calculated out its access fees for Hertz car rentals (using the established Quarry Road built for the McLaughlins land) so as to be deliberately uneconomic compared with locating Hertz on airport land instead. But under the *Airports Act 1996*, such access could be declared as a service on fair terms. This is perhaps why the access built for the McLaughlin land in 1967 was destroyed by the airport's new lessee in 1999 before the McLaughlins asked for it to be so declared.[3]

7. Whatever the motive, a Departmental memo[4] states that the McLaughlins Quarry Road access posed a competitive threat to the Melbourne airport lessee, just as the FAC had previously perceived it to be. The lessee did not negotiate access to the road but simply destroyed it, since under the new *Airports Act 1996* it could not as easily be priced out of the market as the FAC had done. Therefore, any

2 See Appendix 1 – FAC Memorandum, 2 x FAC letters to Hertz

3 The McLaughlin land had recently been appropriately rezoned for airport-related use after a 10 year battle, with one of the strongest objectors being the Commonwealth's lessee. The Melbourne airport lease gives the lessee a purported power to destroy "Structures" such as roads.

4 See Appendix 2 – Departmental Minute

show-cause provision contemplated by the Commission must be broad enough for the case where an airport lessee has discontinued service, not only refused or offered a service under disputed conditions.

8. To a certain extent, the *Airport's Act 1996* has already been strengthened to combat such road planning abuse[5] – at least in the narrow area of airport master planning[6]. As a result, it is no longer possible to create a master plan which allows competing road access to be destroyed without first making this clear. And it is no longer even barely arguable that affected persons, such as the McLaughlins were affected, have no standing at the AAT when their competing land is portrayed by the airport lessee's master plan as being landlocked.

9. If the McLauglins were in business today within walking distance from the Terminal building as their land was, they would no longer face these hurdles. Therefore the Commission can take Parliament's amendment of the law as acknowledging the McLaughlins faced a very tough time trying to complete with the Commonwealth's airport lessee. According to the amendment's explanatory memorandum[7]:

> *"Investment and development on airport sites have on occasion generated controversy, especially when people affected by developments feel that their interests have not been adequately considered.*
>
> …
>
> *The current airport planning system is not properly integrated with the off-airport transport planning system. This is contributing to an uncoordinated transport system that is impacting cities' broader productive capacity and imposing unnecessary social and economic costs. "*

But does this recent reform, which only touches the lessee's master plan in quite specific ways, go far enough to be a "credible threat" as the Commission desires?

5 See Schedule 1 of the *Airports Act Amendments Act 2010*

6 In December 2010, after the McLaughlins settled their Supreme Court case and sold their competing land to their competitor1, the Airports Act 1996 was amended to embrace the issues the McLaughlins had argued before the AAT with only partial success.

7 See *Airports Amendment Bill 2010* explanatory memorandum.

SECOND LEVEL OF THE 'ENFORCEMENT PYRAMID'

10. To answer that question we must look at the second layer of the "enforcement pyramid", which is called "*Federal lease agreements & Airports Act 1996*". This is where the Commonwealth essentially acts as a lessee (i.e. with the intent of improving the facility on its own land)[8]. So when Keith McLaughlin's company reminded the Commonwealth of the National Competition Principles[9] the Commonwealth's conscience in its capacity of a commercial lessor should have been enlivened to use its discretion reserved from the airport lease to grant road and water easements – so as not to hinder competition. Instead, a Departmental memo shows that when considering that the McLaughlin land was competitive, the Commonwealth decided to show favouritism to its lessee[10].

> *"...[the airport lessee] APAM believe it against their own commercial interests to grant right of way to Mr. McLaughlin... If the Commonwealth were to intervene and grant Mr. McLaughlin right of way for Quarry Road , this would involve the alienation of APAM."*
> *Assistant Secretary, Airports Planning, 22 March 2001*

> The previous correspondence referred stated:

> *"McLaughlin is seeking to negotiate with Kendal Airlines to use his Melbourne Airport Trade Park site adjacent to Melbourne airport for administrative and staff car parking purposes. McLaughlin is in direct competition with APAM, which has earmarked in its approved Master Plan its intention to develop its adjacent land to provide for aviation support facilities."*
> *Assistant Secretary, Airports Planning, 3 June 1999*[11]

> *"I recognise you believe the Commonwealth should be responsible for this matter. However APAM have exclusive possession of the Airport Site under the*

8 See for example Department of Infrastructure and Transport submission dated 3 August 2011
9 See Appendix 3- Letter from Melbourne Airport Trade Park to John Anderson, Minister for Transport
10 See the Senate's Review of Government Compensation Payments, submission 183, attachment 3, pages 28-29.
11 See Appendix 2 – Departmental Minute

lease agreement, and have responsibility for dealing with matters such as these."
Peter Langhorne, Chief or Staff, 26 March 2001.

The same attitude continued even in 2010:

"As noted in the Department's letter to you of 29 January 2009 in relation to your suggestion that there is a conflict of interest because Australia Pacific Airports (Melbourne) Pty Ltd (APAM) and the Commonwealth are represented by Corrs Chambers Westgarth, we are advised there is no conflict of interest. APAM is conducting the defence of this matter on its own and the Commonwealth's behalf. The Australian Government Solicitor maintains a watching brief for the Commonwealth. The arrangement complies with the Commonwealth guidelines for managing the Commonwealth's involvement in such matters."
Gary Walker, Acting General Manager, Airports, 29 Apri1, 2010

11. Even where the Commonwealth is required to act as an independent regulator – in a judicial way and not in an adversarial way – it does so hand-in-glove with its airport lessee. This was expressly pointed out in a letter from the Commonwealth's Airport Building Controller [12]. It states the McLaughlins, when exercising their land's full and free right and liberty of way granted by the Commonwealth in their land's carriageway easement[13], nevertheless had to go to their competitor – the Commonwealth's airport lessee – to obtain its consent concerning the conditions under which the full and free access could be made usable, with which they desired to compete. But at law, the dominant tenement is only obliged to reasonably inform the servient tenement of any development of the easement which can be performed by the McLaughlin dominant tenement as of right[14]. But the airport lessee used its purported condition-making power from the Commonwealth to require compliance with its Permission to Commence Works (PERCOW) regime, as discussed below:

12. This private PERCOW process rests on the airport lessee's purported arbitrary

12 See Appendix 4 – Letter from Department Airport Building Controller to Consulting Engineer John Randle
13 See the Senate's Review of Government Compensation Payments, submission 183, attachment 2, page 3.
14 See Appendix 10 – McLaughlin submissions to the AAT

power to impose or waive conditions, including making and waiving fees however it pleases. A letter from the airport lessee regarding the McLaughlins "full and free right and liberty" carriageway easement access evidences this[15]. Relevantly:

> *Your letter to Craig Butler dated 30 October 2009 stated that your application is not subject to APAM's Building Activity Consent (BAC) or Permit to Commence Works (PERCOW) processes. We disagree with your view and advise that any party wishing to undertake any building works on APAM land must go through this process.* [Emphasis original]
> *...Any consent may be granted with conditions - as is permitted under Regulation 2.03(3)(b). To ensure that the conditions are complied with before any building works commence, APAM has developed the PERCOW process. Once the applicant has complied with all conditions, APAM is able to grant a works permit (permit to commence).*
> ...
> *There is a schedule of fees applicable to all applications. In order to assist you in expediting your application, for this application only, I will agree to waive all application fees, however I do require you to complete the BAC application form...*

13. This purported power is not that of a lessee or lessor, since the McLaughlins owned the dominant tenement in the easement smiting the Commonwealth's title, which the AAT found had priority over the airport lease itself[16]. The purported overriding arbitrary power was imposed on the McLaughlin's competing land by the airport lessee using regulation 2.03 of the *Airport (Building Control) Regulations 1997 (Cth),* which reads:

> *If the applicant is a person described in paragraph 2.02 (1A) (b) or (c) [i.e. not the airport lessee], approval must be refused by the airport building controller for the airport site unless the application for approval has the consent of the airport-lessee company for the airport site.*

15 See Appendix 5 – Letter from the Melbourne airport lessee to the McLaughlins
16 See end of paragraph 18 of McLaughlin and Minister for Infrastructure, Transport, Regional Development and Local Government and Australia Pacific Airports (Melbourne) Pty Ltd (Party Joined) [2009] AATA 562 (31 July 2009)

(3) The airport-lessee company must:

(a) grant consent; or

(b) grant consent subject to any condition that it considers appropriate; or

(c) refuse consent.

[Emphasis added]

14. Because of this regulation, the McLaughlins' found themselves litigating their easement rights in two Tribunals simultaneously, with neither Tribunal understanding the other's previous decision. This is because federal sub regulation 2.03 3(b)'s requirement for the airport lessee's consent, which in the McLaughkin land's case could not be refused, yet could be granted with any conditions the lessee considers appropriate – an open-ended and uncertain law, with effects contradictory to a "full and free right and liberty of way" to which the Commonwealth and its lessee were subject under their serviant tenement.

15. The airport lessee exploited this effective acquisition of the McLaughlins' property by the regulation. As a result, State and Federal Tribunals were not in accord as to what the regulations really meant in practice, and, with the airport lessee having ripped up their access to the terminal precinct, the McLaughlins dared not compromise their remaining access under any conditions imposed by the airport lessee. What would their land be worth if they agreed to have their remaining access so arbitrarily "regulated"? Perhaps only a court with Federal jurisdiction could have untangled this mess by declaring the regulation invalid, yet this much is clear: somehow, State and Commonwealth Tribunals need to be better coordinated in matters concerning the areas surrounding an airport.

16. For the purposes of the Commission, the McLaughlins case shows that in any event, sub regulation 2.03 3(b) puts the lie to the idea of a light-handed regulatory regime. It's only light-handed on airport lessees and the Commonwealth itself; but is draconian on any external competitor or sub-lessee -- even with a "full and free right and liberty of way" over the airport land. On its face, the airport lessee's consent, even when required by law, may be granted subject to any condition an airport lessee might care to think up for its potential competitor. Thus the *Airport (Building Control)*

Regulations 1997 are effectively a private monopoly mechanism not a system of regulation for airports. It is difficult to imagine how the regulation's purported grant of arbitrary power to private airport lessee companies does not in effect acquire property from all other persons having interests in the airport land otherwise than on just terms, except for the Commonwealth's own interest.

17. It is also difficult to imagine how giving each lessee in different locations around Australia an arbitrary fee-making and fee-waiving power, does not also offend section 99 of the *Constitution*. This dubious regulation in the McLaughlin case made litigation almost unavoidable – as was convenient for the airport lessee to point this out to the McLaughlins on several occasions[17]. Therefore the regulation needs to be fixed to eliminate the sovereign risk of airport lessees adversely exercising the Commonwealth's power or purporting to do so over private property: e.g.

> *The airport-lessee company must:*
> *(b) grant consent subject to any condition that it considers appropriate other than a pecuniary burden, and in the all the circumstances the condition is reasonably necessary (with the airport-lessee company bearing the burden of proof);*

17A. As things stand, the "subject to any condition it thinks appropriate" regulation in favour of airport lessees over other people's private property rights (such as easements) is also an impermissible delegation of Parliament's power to make laws. However, if airport lessee's are to charge fees for service to regulate their competitors' private property as agents of the Commonwealth (a doubtful proposition), it should be on a cost-recovery basis only with fee scales equitably standardised and regulated across all airports to comply with section 99 of the *Constitution*. (The same can be said of the Airport Building Controller's fees, which although at least regulated are inconsistent between States). If this sub-regulation is not fixed, the show-case regime proposed by the Commission would be undermined in relation to building activities, since the present regulations for lessees purport to justify as of legal right an "anything goes" approach.

17 See appendix 6 paragraph 38 – extract of Melbourne airport lessee's submission to Victorian Civil Administrative Tribunal. See also the Commonwealth lessee's barrister's remarks (Mr. Finanzio) in the Senate's Review of Government Compensation Payments, submission 183, attachment 4, page 88 line 30 to page 89 lien 45

17B. However, sub regulation 2.03 3(b) is not the only example of an artificial monopoly within the legislative scheme. Master plans and their variations, and major development plans and their variations, may only be proposed by the airport lessee alone, yet once approved by the Minister, purport to carry the force of Federal law against any competitor[18]. Thus there is light-handed regulation for an airport lessee only because it is heavy-handed on everyone else. Under extremely limited circumstances, the minister might be compelled to require a replacement master plan by way of a High Court writ of mandamus[19]. But this is not an option in most cases and beyond the financial reach of most people even if it were.

17B. The Airports Act 1996 therefore needs to be amended to specify the circumstances in which a replacement master plan must be required. It should be that a replacement master plan must be requested by the minister any time the execution of a master plan is likely to contravene legislation (reviewable by the AAT), or its execution is likely to break the law more generally (with an appeal to the minister's decision lying to the Federal Court). Any affected person must be allowed to petition the minister to have a master plan replaced on these grounds (reviewable/appealable in the same way). Such a "credible threat" to illegitimate master plans gives more teeth to the second tier of the Commission's enforcement pyramid, makes airport lessees take the public comments to draft master plans more seriously (the McLaughlins complaints were not given due regard), and would generally increase the quality of master plans.

18. Therefore Parliament's December 2010 amendment of the *Airports Act 1996* concerning the content of master plans is helpful but by no means solves the problem of airport leases being able to reduce competition by abusing Federal law, including airport master planning. Of course, it is true that the McLaughlins would have been more than partially successful at the AAT had these amendments been passed soon after the airport lessee dug up Quarry Road – the McLaughlins heavy duty bitumen access to the terminal precinct – in 1999. Yet the 2010 amendments fall short of posing any "credible threat" as the Commission puts it, to keep airport lessees honest. This is because:

(a) Presently, aggrieved persons can usually only have their access issues heard every five years (when a master plan is proposed) – which delay in many situations

18 See section 83 and section 101 of the *Airports Act 1996*
19 See section 75(v) of the *Constitution* and section 78(2) of the *Airports Act 1996.*

is commercially non-viable.

(b) The provision might stop an incompatible airport development but is not strong enough to *force* the airport lessee to allow legitimate competition against its own interests.

(c) Even if (a) and (b) can be overcome, the conditions under which a service (such as a road) can then be accessed may still be subject to the licencing whim of the airport lessee. This in tern will require the new service to be declared, a lengthy process which adds extra cost and delay to any potential competitor, further inhibiting competition.

19. It's quite a different story on the other side of an airport lessee's cyclone fence. Access to services (such as roads, telecommunications, gas, water and power) is handled under State law including through the compulsory creation of easements. A responsible authority may, as needs be, initiate such compulsory acquisition over property such as leaseholds on behalf of competing private interests[20]. However, such powers are excluded under section 110 of the *Airports Act 1996*. These were instead reserved to the Commonwealth's discretion in the Melbourne airport lease. As previously mentioned, the Commonwealth refused to intervene for the McLaughlins' sake, since it reasoned that granting such an easement would alienate its airport lessee[21]. The Commonwealth also (wrongly) concluded that because its discretion was under a lease agreement, this absolved it from providing natural justice to the McLaughlins concerning essential services, even water[22].

20. It's true that the easement of carriageway to the McLaughlin land contained no provision for water, gas or telecommunications services – it was only a full and free right and liberty of way. So the McLaughlins asked the airport lessee if the existing water services in the easement could be extended to their land. The airport lessee refused this essential service until a development plan had been approved for the McLaughlin land[23]. However, the local Council advised the airport lessee that a development plan was not

20 See for example, section 36 of the *Subdivision Act 1988 (Vic)*
21 See the Senate's Review of Government Compensation Payments, submission 183, attachment 3, pages 28-29.
22 See Appendix 7 – Departmental file note
23 See copied email from Bob Jones in Appendix 8 – Email exchange between airport lessee and local council

required for water access[24], which is after all, an essential service. Yet the airport lessee still refused a water connection to the McLaughlin land on the basis of an unrelated allegation it was making concerning landfill. The McLaughlins turned to the Commonwealth for help. The Commonwealth backed its lessee[25], citing its lessee's submission of the same unrelated reasons – without allowing the McLaughkins even the chance to refute its competitor's claims. A Departmental file note comments:

> *"A right of carriageway does not necessarily include an easement for the supply of services such as water. The Commonwealth's reserve power under the Airport Lease to grant easements is discretionary, and lease agreements are not subject to administrative law considerations such as natural justice."*
> *Ray Field, Airport Planning and Regulation, 12 July 2002*[26]

21. Therefore new regulations are required (irrespective of whether the above Departmental comment is correct or not), similar to those found in State law, by which the Department will exercise its rights in a reviewable way (e.g creation of easements for services, or to enable expeditious movement around the airport) over a lessee. Such regulations may never be used, but their existence would pose a "credible threat" to airport lessees to make them more negotiable.

21AA. Unless aggrieved parties can so use the Commonwealth's reserve powers as a last resort, as they could otherwise under State law, the second layer of the "enforcement pyramid" will fail in many cases. This is because the correspondence Keith McLaughlin provides shows the Department doesn't always believe in natural justice regarding essential services. Therefore the Commonwealth's rights as must be enforced by the Department under new regulations made to govern it's activities as a lessor without fear or favour, and its reserve power decisions should also be reviewable by the AAT; Additionally, the Commonwealth must be made to disclose what reserve powers it has excluded from airport leases. If these things are not done, the emergence competitive services will continue to be stifled for reasons perhaps beyond the scope of the Commission's proposed "show-cause" regime.

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24 See email of Michael Sharp in Appendix 8 – Email exchange between airport lessee and local council
25 See Appendix 9 – letter from Department to Keith McLaughlin of Melbourne Airport Trade Park
26 See Appendix 7-- Departmental file note

21A. The Department's view that its lessees are “natural monopolies” and that others are not entitled to natural justice need not be the case and is not true. While air traffic control is a natural monopoly, there is no reason why terminal management or car parking must naturally be monopolies. For example, there could be a number of car parks on airport land, sub-leased at rates relative to land values surrounding an airport, and run by competing commercial car parking companies. So if the Commission's proposed “enforcement pyramid” is not adopted or proves ineffective, the *Airports Act 1996* should be amended to provide for the breakup of monopolies on an airport site(s) such as the U.S. *Sherman Act* does more generally; since a grant of a monopoly (unless clearly intended by Federal Parliament) is against the common law and Victorian statute[27].

BASE LEVEL OF THE 'ENFORCEMENT PYRAMID'

23. At the base of the Commission's “enforcement pyramid” proposal is the *Competition and Consumer Act 2010*. This is the only part of the pyramid not (at least in the first instance) subject to the discretion of government agencies or airport lessees, whereby competing business can exert a direct “credible threat” that the Commission finds is necessary for economic efficiency. Relevantly, section 248 of the *Airports Act 1996* reads:

> *(1) This Act does not, by implication, limit the application of the* Competition and Consumer Act 2010

24. Nevertheless, the problem with the *Competition and Consumer Act 2010* (and its *Trade Practices Act 1974* predecessor) lies in its enforcement. For example, the McLauglins submitted to the AAT that their access issues amounted to trade practices contraventions[28]. Yet the AAT decision did not recognise these issues in its decision. This is in part because although the *Airports Act 1996* is designed to work with the *Competition and Consumer Act 2010*, there is no direct reference to trade practices in master planning, nor building regulations, nor licencing or sub-leasing decisions, nor the granting or maintenance of easements. A Federal administrative tribunal cannot make

27 See Division 4 of section 8 of the *Imperial Acts Application Act 1980 (Vic)*
28 See Appendix 10 – submissions by the McLaughlins to the AAT

common law, so unless the common law states the *Airports Act 1996* and *Consumer Competition Act 2010* should be read together it would be a very brave Tribunal which did so prior to a judge. Yet these are all essentially lessor/lessee/third party business decisions[29].

25. In other areas of endeavour on an airport site, trade practices disputes may be resolved in a low-cost State tribunal by reason of section 4 of the *Commonwealth Places (Application of Laws) Act 1970* and the text of the *National Consumer Law* adopted by each State. (See for example section 8 of the *Victorian Fair Trading Act 1999 (Vic)*.) However, concerning airport access to services requiring installation – such as electricity, gas, water and telecommunications – such well-proven State laws are excluded. This means litigation in a more expensive Federal court is the only option, because the relevant Part of the *Airports Act 1996* makes no mention of the *Competition and Consumer Act 2010 (Cth)* to which the jurisdiction of the AAT can alight. Parliament needs to give the Tribunal a direct reference to "compliance with legislation" in the *Airports Act 1996* to help it out. Compliance with "legislation" is a term of the Melbourne airport lease after all.

26. The perverse result is that it's possible for a person to have no standing at the AAT even if a decision concerning airport building activity breaches legislation such as the *Competition and Consumer Act 2010 (Cth),* such as by hindering competition, restrictive trade practices or unconscionable conduct. This effectively means little or no access to justice for small to medium business. For example, the McLaughlins should have been able to go to the AAT to be heard on grounds of unconscionable conduct concerning denial of water or restrictive trade practices concerning the cutting of their terminal precinct access. They might have gained speedy access to all essential services, irrespective of whether or not they owned a recognised interest in the airport land. Since they could not afford yet another expensive court battle against the Commonwealth and its lessee, they did without water. Yet the mere existence of proper regulation and a low-cost administrate review, in cases like these, may cause the Commonwealth to relent.

29 See the Brisbane Airport Case at paragraph 37.
(Brisbane Airport Corporation Limited ACN 076 870 650 v Wright [2002] FCA 370 (28 March 2002))

27. There is also a need to recognise that the privatisation of the nation's major airports has in effect created separate marketplaces on Commonwealth land, a gathering of the travelling public and interstate and overseas trade that is marketed as such – e.g. Melbourne airport is "the gateway to Victoria" or "Gateway to southern Australia". Airports should therefore be declared as markets for the purposes of the Competition Consumer Act 2010 (which should be amended for markets to be so declared), since they are, according to the Department's submission, "monopolies". The decision-maker deciding to approve or refusing to approve a "monopoly" master plan should therefore also be subject to trade practices law as any other lessor would. This is covered in detail in my my first submission (No. 39) to the Commission's enquiry.

28. Thus the overall answer lies not in trying to micro-manage airport activity but making sure existing trade practices and other legislation can be easily enforced. This means the base of the Commission's proposed "enforcement pyramid" requires reinforcement with a general provision in the *Airports Act 1996,* which makes decisions made under that *Act* or its regulations reviewable by the AAT on grounds of not complying with other legislation. This would include trade practices, anti-discrimination, and other laws protecting liberty or property rights. It would not strip airport lessees or the Commonwealth of rights because they are already required to comply with legislation, which is also expressly stated (concerning the lessee at least) in the Melbourne airport lease.

BENEATH THE 'ENFORCEMENT PYRAMID'

29. The AAT's jurisdiction should be attracted by decisions made under the *Airports Act 1996* which contravene legislation also to ensure the protection of individuals without reference to State authorities or planning regimes. This is because at times, the rights of the individual can slip between the cracks of Federal and State jurisdictions. The proposal that airport planning should be referred to various forums largely composed of big State bodies, which do not represent the individual stakeholders involved, looks to be very unsatisfactory. While keeping in mind that the Commission's ability to do forensic investigation is limited, the example described in the next few paragraphs illustrates this point:

30. The airport lessee was not the only party in the McLaughlin's legal battles wishing to impinge[30] on the McLaughlin land's easement over the airport land. The local council, Hume City Council, also had a road on the drawing board (E14 dated August 2008) running over the easement[31] on the Commonwealth's land. This was the same Council which was supposed to make an unbiased decision on the McLaughlin land's development which relied on that very easement[32]. The year before, Council had an agreement drafted for attachment to the McLaughlin land's title – a powerful "173 agreement" – capable of binding any successors in title. The agreement contemplated transferring the easement land to Council, and meanwhile, imposed many costs and burdens on the McLaughlin land in favour of the Commonwealth and its airport lessee[33]. Of course the McLaughlins refused.

31. Alarmingly, Council's agreement for binding the McLaughlins' land contained a copyright notice indicating the document belonged to Corrs Chambers Westgarth[34.] This firm was the Commonwealth and its airport lessee's own solicitors at that time acting against the McLaughlins at VCAT and in the Supreme Court[35]. In July 2008, Keith McLaughlin and I went to meet the Council's CEO, Domenic Isola, to discus this bias in Councils conduct and Councils poor service concerning the McLaughlin land development[36]. At that meeting, Michael Sharp of the Council's planning department was asked by his superior, David Keenan, to join in. Mr. Sharp acknowledged that he had delegated the drafting of the agreement between the McLaughlins and Council to the solicitors of the McLaughlin's competitors[37].

32. One of the lessee's financial reports boasts that the airport is the Council's biggest ratepayer. Melbourne airport also has a "Hume Conference Room" with the Council's logo advertised on a big door handle. More substantially, on 5 January 2001, the airport lessee's planning and environment managers held a meeting with Council officers at

30 See paragraph 13 of McLaughlin and Minister for Infrastructure, Transport, Regional Development and Local Government and Australia Pacific Airports (Melbourne) Pty Ltd (Party Joined) [2009] AATA 562 (31 July 2009)
31 See letter to Minister in Appendix 11 – Letter to Minister re minor variation of master plan
32 See Appendix 16 – Letter from local council to Keith McLaughlin of Deep Creek Park Pty Ltd
33 See the Senate's Review of Government Compensation Payments, submission 183, attachment 3, pages 14-21
34 See the Senate's Review of Government Compensation Payments, submission 183, attachment 3, base of page 14
35 See the Senate's Review of Government Compensation Payments, submission 183
36 See Appendix 12 – Correspondence by Keith McLaughlin of Melbourne Airport Trade Park to local council
37 See Appendix 13 – Correspondence by Keith McLaughlin of Melbourne Airport Trade Park to local council

Melbourne airport. The meeting's record of conversation[38] record that the topic of discussion was the McLaughlin's property. The McLaughlin's road access was discussed. After that, according to the record, it was decided that the airport lessee would write to Council alleging run-off from the McLaughlin land was causing erosion on the airport land, and that the quality of the run-off would be questioned.

33. This interface between an airport lessee and surrounding State government officials (including local Council) is where much anti-competitive mischief can occur. This is because the airport lessee in effect is under few town-planning controls, since a master plan has been judicially found to be a business plan, not a town-planning document[39]. (This was a reason why Kevin Rudd's challenge to a master plan on noise pollution failed in the Brisbane Airport Case.) Thus State government officials are dependent on the airport lessee to connect with State strategies and plans concerning trade, commerce and intercourse with other States and Territories and overseas. Airport lessees on the other hand, don't rely on State authorities nearly as much, being immune under section 110 of the *Airports Act 1996* from State government planning controls. (The 2010 reforms really only allow the Minister to monitor this.)

34. In this power imbalance, the law of the jungle can sometimes prevail, with much wheeling and dealing between the airport lessee and State government officials needing to get things done. The airport's competitors on the other hand, are subject to State town planning and other laws, which the airport lessee can exploit against their businesses, even using its State government connections to cause frustration and delay[40]. This is especially so if a competitor relies on airport infrastructure over which the lessee asserts control. The above scenario is summarised briefly below in the McLaughlin's case, bearing in mind the close links between the local Council and the airport lessee previously described:

35. In 2002, the McLaughlins applied to VCAT for approval of their Development Plan, (which the Council had not approved since 1999). The airport lessee then involved itself

38 See Appendix 14 – airport lessee File Record of Conversation obtained under FOI from local council
39 See the Brisbane Airport Case at paragraph 28.
(Brisbane Airport Corporation Limited ACN 076 870 650 v Wright [2002] FCA 370 (28 March 2002))
40 See attachment 1 of Norman Geschke's submission (No. 37)

in a priority application (made by its licensee Melbourne Water), which alleged (among other things) the entire McLaughlin land was contaminated. So all the site was tested at great expense and easily passed. The litigation nevertheless continued unresolved even until 2010, and was only dropped after the McLaughlins sold their land to their competitor. Yet at no time was any evidence produced of any airport land contamination by run-off from the McLaughlin land, or any contaminated run-off from the McLaughlin land at all. And when VCAT finally ruled on the McLaughlin land's development plan in 2008, that State Tribunal found that the litigation could have been avoided but for the stance of the Melbourne airport lessee and to a lesser extent, (its licensee) Melbourne Water[41].

36. VCAT's refusal to approve the McLaughlin land development was primarily because of access issues[42] over which the airport lessee claimed control – which turned out to be a legal misunderstanding according to the airport lessee[43]. The case put to VCAT was that the McLaughlins' carriageway easement rights were subject to the McLaughlins making an agreement with the airport lessee[44]. It was almost a year before the Federal Administrative Appeals Tribunal (AAT) stated that the lessee's consent was needed but could not be refused[45]. But this was not enough for VCAT[46] which appointed a former road engineer as a mediator. So the battle shifted to trying to get the McLaughlins to compromise their full and free right and liberty of way by acquiescing to the lessee's aforementioned purported arbitrary condition-making powers. The McLaughlins once again refused, and the mediation failed.

37. After the Commonwealth was put on notice that the McLaughlin's property was being acquired otherwise than on just terms, the dispute eventually evolved into whether or not there was sufficient detail about the proposed road works for the airport lessee to even consider giving an approval. In the Department's view, it's lessee hadn't

41 See square bracket paragraph [32] of McLaughlin v Hume CC [2008] VCAT 1766 (25 August 2008)
42 See McLaughlin v Hume CC [2009] VCAT 2009 (30 September 2009) at paragraph 4 of the reasons.
43 See the Senate's Review of Government Compensation Payments, submission 183, attachment 4, page 73 line 15 to page 76 line 35, and page 88 line 15 to page 89 line 45.
44 See Appendix 6, paragraphs 25 to 39.
45 See paragraphs 8 and 14 of McLaughlin and Minister for Infrastructure, Transport, Regional Development and Local Government and Australia Pacific Airports (Melbourne) Pty Ltd (Party Joined) [2009] AATA 562 (31 July 2009)
46 See McLaughlin v Hume CC [2009] VCAT 2009 (30 September 2009) at paragraph 4 of the reasons.

been given enough detail to approve nor refuse to approve. (The McLaughlins tendered professionally drawn plans and details, the Commonwealth's Airport Building Controller increased how much detail was said to be required.) Thus the Commonwealth regulations continued to stifle the McLaughlin land development[47], for lack of funds to have them declared invalid, while the Department claimed no acquisition of the McLaughlins property had taken place[48].

38. The airport lessee also argued before VCAT that even if the McLaughlins won their case before the Supreme Court[49] to reopen their direct Quarry Road access to the terminal precinct, they should not be allowed to use it because it would cause traffic problems. I argued (because at this stage the McLauglins had no money for lawyers) an extra minibus every ten minutes would not jam up the airport, and if it did, this could be fixed under a new Commonwealth regulation[50] favouring the McLaughlins. I found it necessary to resort to covering clause 5 of the *Constitution* to show VCAT that the new Commonwealth regulation bound that State law Tribunal regarding the McLauglin land's access from the Federal jurisdiction. The case was adjourned for about seven months to enable better preparation. “Sufficient is the evil of the day” the senior member had cryptically said. But after 27 years and over a million dollars wasted on litigation and planning procedures battling the Commonwealth and friends, the McLaughlins now in their 70's, could go no further. They settled by selling their land to their competitor, the Commonwealth’s Melbourne airport lessee, with the Commonwealth signing off on the settlement also.

39. This is why CBD car parking prices are said to apply to Melbourne airport when they should not – the airport is surrounded by industrial land and farmland, which could be used for parking if access was made available. Unfortunately, the present planning and legal system around airports is such that only big government and big business can afford to enforce their rights. Consequently, they will do deals with each other while the little guy who wants to compete with his or her land gets crushed under the weight of litigation and government trade-offs. This is the stifling inefficiency on which the

47 See paragraph 16 of McLaughlin and Minister for Infrastructure, Transport, Regional Development and Local Government and Australia Pacific Airports (Melbourne) Pty Ltd (Party Joined) [2009] AATA 562 (31 July 2009)
48 See Appendix 15 – Letter from Department's Airport Branch General Manager to the McLaughlins
49 See the Senate's Review of Government Compensation Payments, submission 183
50 See subregulation 1A(c) of the *Airports (Building Control) Amendment Regulations 2009 (No. 3)*

proposed “enforcement pyramid” is founded in the case of Melbourne Airport. However, a departmental memo states similar access issues have also occurred at Brisbane Airport[51].

40. If access to any of the nation’s major airport terminal precincts is partially restricted for competitive considerations, as the FAC and Department stated it was in the McLaughlin’s case (see above), then the Constitutional absolute freedom of intercourse among the States has been compromised[52]. Such restrictions of a protectionist kind are inherently inefficient, unconstitutional[53] and completely unnecessary. Our airports are profitable enough to compete and should be, where applicable, made to compete fairly (e.g. subject to local government) with the land surrounding each airport. This should become a new Departmental policy.

41. In Melbourne Airport’s case, equity also requires the transfer of the Tullamarine Freeway over to the State of Victoria as the Commonwealth promised in exchange for land upon which the airport was built[54]. Only then will Melbourne airport’s access become de-commercialised as should be the case in every State. This is needed to free up airport access to allow competitive car parking on the east side of the freeway. This does not mean airport lessees cannot make profit. It means they cannot use terminal precinct access restrictions to help support profitability, as the Melbourne airport lessee appears to have done under the *Airports Act 1996* with the Department’s blessing. If so, this has been not only bad for the community, but could jeopardise the constitutional validity of major airport leases by impinging the Constitutional freedom of intercourse among the States[55].

42. How can the Commonwealth defuse and resolve much of the aforementioned expensive turmoil around its airports? I recommend the Commission carefully consider if there should be a new Federal Airports Planning Authority (FAPA). The FAPA would perform the present functions of the Minister under Part 5 Land-use, planning and

51 See Appendix 2 – Departmental minute
52 Para 28 of Cole v Whitfield ("Tasmanian Lobster case") [1988] HCA 18; (1988) 165 CLR 360; (1988) 78 ALR 42; (1988) 62 ALJR 303 (2 May 1988)
53 See section 92 of the *Commonwealth of Australia Constitution Act 1900 (Imp)*
54 See attachment 2 of Norman Geschke's submission (No. 37)
55 See section 92 of the *Commonwealth of Australia Constitution Act 1900 (Imp)*

building controls of the *Airports Act 1996,* except for that of airport Building Controllers. This would leave the Minister and the Department free to exercise the functions of the Crown impartially, including powers to grant access reserved from airport leases, and of course law making. The Crown would be judicial rather than adversarial in character. In my view, this option is the best way forward, as FAPA could be commercially sympathetic to airport lessees, yet subject to increased AAT jurisdiction and diligent regulatory scrutiny by an independent Minister.

43. In this way, the Minister's conflict of interest between the Commonwealth's commercial interest as a lessor, and the duty to act impartially towards third parties, can be reconciled. The National Competition Principles would guide the Minister and the AAT, meaning State authorities would no longer need to do as much market-distorting wheeling and dealing with airport lessees. And the presence of a "credible threat" in a quick and low-cost review by the AAT when a lessee must consider allowing access to new off-site services, should prompt genuine and legitimate access negotiations for granting access for those proposed new services.

44. For example, in the case of a dispute over future service provision to an airport site, the AAT could insist that nothing in a master plan be allowed to bock such provision if consistent with the needs of State planning or adjacent property (thanks to the 2010 amendments of the *Act*), and the Minister would retain the power to grant any easement or make regulation to allow the establishment of such a new service on the airport site (e.g. a new road connection). If the Minister refused to grant an easement, that would be a reviewable decision by the AAT also, so the rule of law (at least administrative law) prevails. This reorganising of the Commonwealth's interests and responsibilities would promote peace, order and good government to improve market confidence for complimentary investment around airports, without derogating the grant of existing airport leases.

CONCLUSION

45. Although the reforms proposed by the Commission are necessary, a weakness of the Draft Report is it doesn't recognise and deal with competitors being excluded from

the “airport market”[56]. This fact leads to another – that “CBD rates” for airport car parking, in some cases, represents artificial price inflation through the exertion of monopoly power.

46. In light of the above, the recommendations of my first submission (No. 39) still seem pertinent, and that of Norman Geschke (No. 37) also. The Commission may wish to revisit them. I hope it does.

47. Further, the following summarises this submission's recommendations regarding inefficiencies in airport planning and governance:

(a) The top five levels of the Commission’s enforcement pyramid are worthy reforms. However, any show-cause provision contemplated by the Commission must be broad enough for the case where an airport lessee has already discontinued service, not only refused or offered a service on unacceptable terms.

(b) The second layer of the proposed “enforcement pyramid”, called “Airport lease and *Airports Act 1996*”, needs strengthening by:

i. A decision of the Department regarding the use of its rights (or refusal or failure to exercise rights) under an airport lease (such as grant of easement or provision of expeditious movement around an airport site) should be regulated and made reviewable by the AAT. The Department must also be regulated to disclose what rights it has under each airport lease;

ii. State and Commonwealth Tribunals need to be better coordinated in matters concerning the areas surrounding an airport; and

iii. The purported grant of arbitrary power to airport lessees under sub regulation 2.03 3(b) of the *Airports (Building Control) Regulations 1997* should be amended to read:

(b) grant consent subject to any condition that it considers

56 . See the recommendations of my first submission (No. 39)

appropriate other than a pecuniary burden, and in the all the circumstances the condition is reasonably necessary (with the airport-lessee company bearing the burden of proof);

iv. A replacement master plan or minor variation must be requested by the minister any time the execution of a master plan is likely to contravene legislation (reviewable by the AAT), or its execution is likely to break the law more generally (with an appeal to the minister's decision lying to the Federal Court). Any affected person must be allowed to petition the minister to have a master plan replaced or varied on these grounds (minister's decision reviewable/appealable in the same way).

v. if the Commission's proposed "enforcement pyramid" is not adopted or proves ineffective, the *Airports Act 1996* should provide for the breakup of monopolies on an airport site(s) such as the U.S. *Sherman Act* does more generally.

(c) The base of the Commission's proposed "enforcement pyramid" requires reinforcement with:

i. a general provision in the *Airports Act 1996,* which makes all decisions made under that *Act* or its regulations reviewable by the AAT on grounds of "does not comply with other legislation". This is because it is more efficient for aggrieved persons to rely on existing rights at a speedy low-cost Tribunal, than wait in hope of new rights being declared by a government agency;

ii. new Departmental policy that where applicable, airports should be made to compete fairly with the land surrounding each airport;

iii. airports being declared a market for the purposes of the *Competition and Consumer Act 2010* (which should be amended for markets to be so declared);

iv. the decision-maker deciding to approve or refusing to approve a master

plan being made subject to trade practices law as any other lessor would be;

v. the Tullamarine Freeway being transferred to the State of Victoria as the Commonwealth promised in exchange for land upon which the airport is built. This is required to free up airport access to allow competitive car parking on the east side of the freeway; and

vi. a new Federal Airports Planning Authority created to perform the present functions of the Minister under Part 5 Land-use, planning and building controls of the *Airports Act 1996*, subject to increased AAT jurisdiction with diligent regulatory scrutiny by an independent Minister.

48. I believe these recommendations are in the best interests of civil aviation in Australia, and ensure value for airport users by fostering healthy competition with the landside activities of airport lessees. I thank the Commission for its important work.

Yours sincerely

Eric Wilson
26 September 2011