Keith Thomas McLaughlin

26/09/2011

Dear Productivity Commissioners,

RE: Eric Wilson's submission about the Draft Report
on the Economic Regulation of Airport Services

In order to help the Commission evaluate Eric Wilson's submission in the above-mentioned matter I provide the inquiry with the relevant documents in the attached Appendices.

In the light of these documents, the Commission should not take APAM's supplementary submission broadly denying Eric Wilson's contributions, and blustering official endorsement for themselves, at all seriously. As a matter of record, the AAT held that APAM's master plan did not comply with the Airports Act, so it was forced to vary the plan to include our interest accordingly. That is a matter of record. Version 17 of our development plan and our easement road rehabilitation plans were still being contested at VCAT and the AAT when we sold our property to APAM as part of a Supreme Court settlement. So those issues were not decided. That too is a matter of record. The denial of water as an essential service to our land was never litigated because we had enough on our plate already. This means the issues in Eric Wilson's submissions remain largely un-addressed, and, deserve the Commission's attention.

Concerning the Commonwealth Ombudsman's investigation – this helped us immensely by making the Department admit we had easement construction rights. Yet the Ombudsman was nevertheless misled by the Department that our carriageway easement rights were all the access rights we had. This was even though the Commonwealth and APAM had tendered a witness statement for their Supreme Court defence stating otherwise – that the Commonwealth had ongoing maintenance responsibility of the easement road and therefore wanted to transfer it to Council. But the AGS refused to let us produce that witness statement to the AAT and said we had to take them on in the Supreme Court to get it. We couldn't afford a court case over a Tribunal hearing, so the AAT was kept in the dark. Consequently, and for other reasons also, we were only partially successful at the AAT – we only had some of our land's access written into the Melbourne airport master plan.

Even if APAM had won all of these cases, which of course it did not, the outcome – where we needed to sell our land ending any near-terminal competition, effectively maintaining high airport car parking prices – is wrong. This alone is why the Commission should consider Eric Wilson's submission, regardless of APAM's claims.

If the Commission requires any further documents I may have to evidence any point Eric Wilson has raised, I would be happy to furnish it.

Yours sincerely,

Keith McLaughlin

APPENDIX KTM 1

Com/w DD

23

FEDERAL AIRPORTS CORPORATION

M E M O R A N D U M

TO: Airport General Manager - Melbourne

FROM: Commercial Manager

DATE: 15th. February 1988

SUBJECT: LAND ADJACENT TO MELBOURNE AIRPORT OWNED BY MR. McLAUGHLIN

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1. LOCATION OF LAND

Attached plan No. 1 shows the land is located immediately east of the J.U.H.I. lease.

- purchased by Mr. McLaughlin in July 1987
- area approximately 13 ha
- zoing Extractive "A" with revocation order in place

2. BACKGROUND

Mr. McLaughlin submitted an application to the Planning Authority to construct a moto-cross facility to incorporate both this parcel of land and another area immediately west of Moonee Ponds Creek. The process lead to appeals by Mr. McLauglin against conditions on one permit and refusal of the other. The appeals were not upheld.

Mr. McLaughlin now proposes to construct the facility at another location and to sell part of the subject land to Hertz.

3. LEGAL ACCESS TO SUBJECT LAND

Legal access is only available via a registered carriage easement along a part of Western Avenue which is within the Airport boundary.

To capitalize on the proximity of the site to the terminal direct legal access to the Airport is sought by Mr. McLaughlin. Refer attachment No. 2 (provided by McLaughlin) suggesting replacing the existing legal access (shown in orange) with a short direct access route (shown in pink).

From advice from the A.G.S. (attachment No. 3) we should not entertain granting an easement. A licence with a fee would be feasible.

com/w DD

LONG TERM PLANNING IMPLICATIONS

The subject land is directly in the path of the proposed heavy rail alignment.

Closure of Sunbury Road may be required particularly if an integrated terminal complex continues to develop. This will require changes to the road system at the Airport boundary interface.

AIRPORT REVENUE IMPLICATIONS

Bases of Calculation:

i) valuation of $150/m2 for the site in Melrose Drive
ii) valuation of $80/m2 for 10,000/m2 allotment on McLaughlin land
iii) valuation of about $4-5,000/ha for purchase of McLaughlin's land
iv) lease term of ten years on either site
v) site area of 10,000/m2
vi) 9% yield on valuation for annual rental.

OPTION 1	FAC COST($)	REVENUE($10)
Allocate site in Melrose Drive - fully serviced - savings to Hertz ccompared with options 2 & 3 not quantified	NIL	135,000
OPTIONS 2		
Hertz to purchase land from McLaughlin - Hertz to pay all development costs, including paved access to site boundary and services - revenue to the Corporation would result from issuing a licence for access by Hertz. The licence fee has been based on the savings to Hertz as calculated in attachment 4.	NIL	65,000
OPTIONS 3		
FAC to purchase land and lease part to Hertz - Hertz to pay all development costs	80,000	80,000

com/w DD

Attachment No 4.

V160/8/15

Note for File:

The following is an assessment of the additional cost Hertz would incur if access to the airport via Quarry Road was denied.

Travel distance (one way)
- via Quarry Road - 1.15km
- via Western Ave and freeway - 6.75km
  - 5.6km difference
- extra cost per trip @ 40 cents/km - $2.24

Travel time (one way at average speed indicated)
- via Quarry Road - 100 seconds (approx 40km/h)
- via Western Ave and freeway - 300 seconds (approx 80km/h)
  - 200 seconds difference
- extra cost per trip @ $10/hr - $0.56
- Total extra cost per trip - $2.80

Estimate number of trips per day
- gross turnover of Hertz 1986/87 approx $3,500,000
- using average charge of $50 per vehicle per day and average hire period of three days gives 63 hirings per day.

Estimate of extra costs per year
at 63 trips/day - $64,386
at 50 trips/day - $51,100
at 75 trips/day - $76,650

These figures do not allow for return of vehicles that are dropped off at the airport. This could affect the figures by up to 100% extra, but the analysis is rough in the first place.

T.M. CULLINAN
Acting Superintendent of
Business & Property

COM/W DD

- FAC costs include purchase, fencing, legal costs etc.

Allowing for interest payments the payback period on the purchase of the land could be 1-2 years.

SUMMARY

The above figures show that option 3 would provide a better return to the Corporation over the lease term compared with option 2. Purchase of the land would also provide additional lettable sites producing an even better return.

Option 1 is not presently under consideration and would produce the highest revenue of all options. In any case, securing another tenant-besides Hertz-should not be difficult given that the site is fully serviced.

RECOMMENDATIONS

1. Neither the granting of a registered easement nor a licence should be pursued.

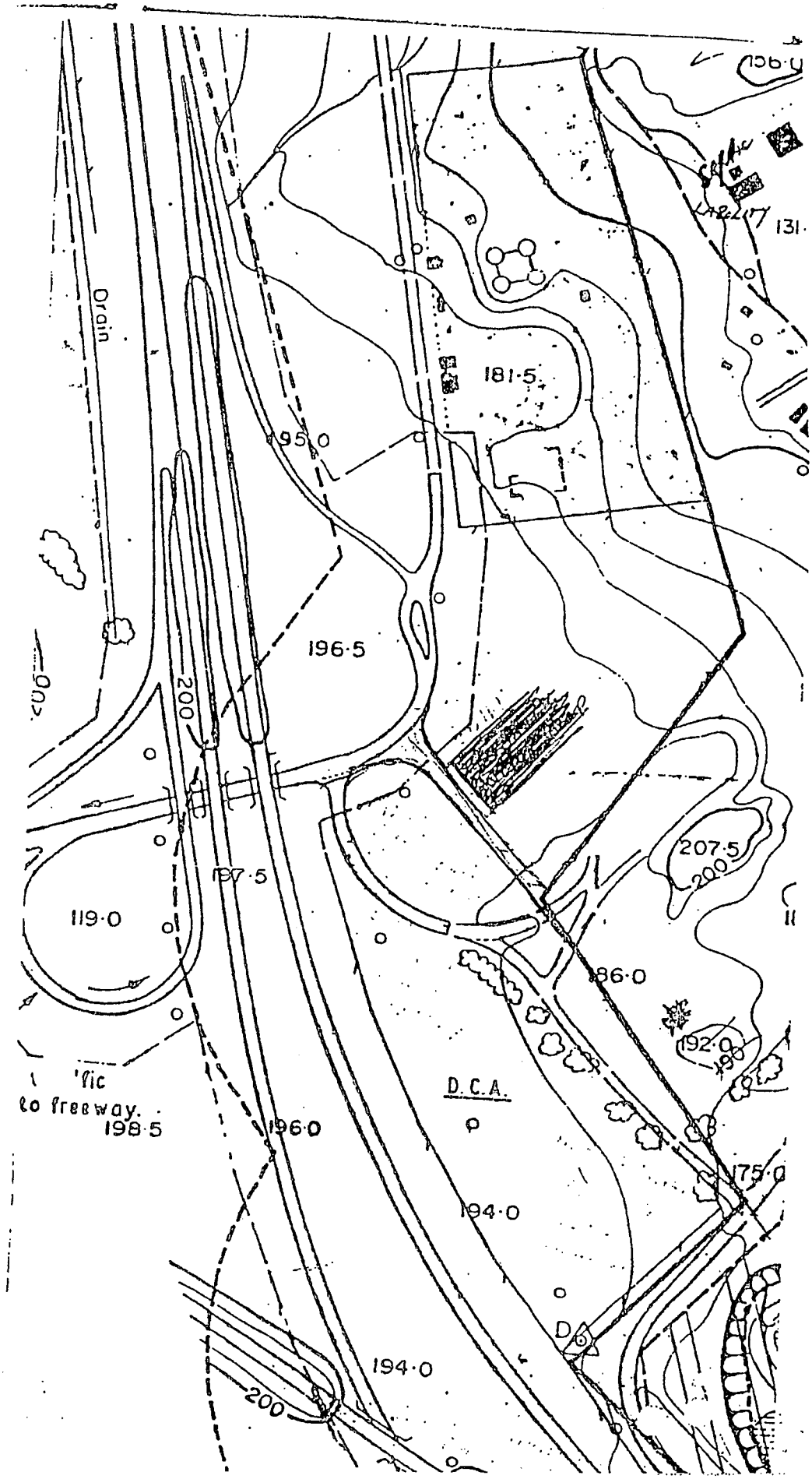
2. Purchase from Mr. McLaughlin would be in the best long-term interests of the Airport. Negotiations with Mr. McLaughlin should be commenced.

3. Efforts to lease an on Airport site to Hertz should be contined. Leasing rate to accord with the latest valuation and draft leasing policy.

Brien Mason

BM:DDM

com/w DD


Drain
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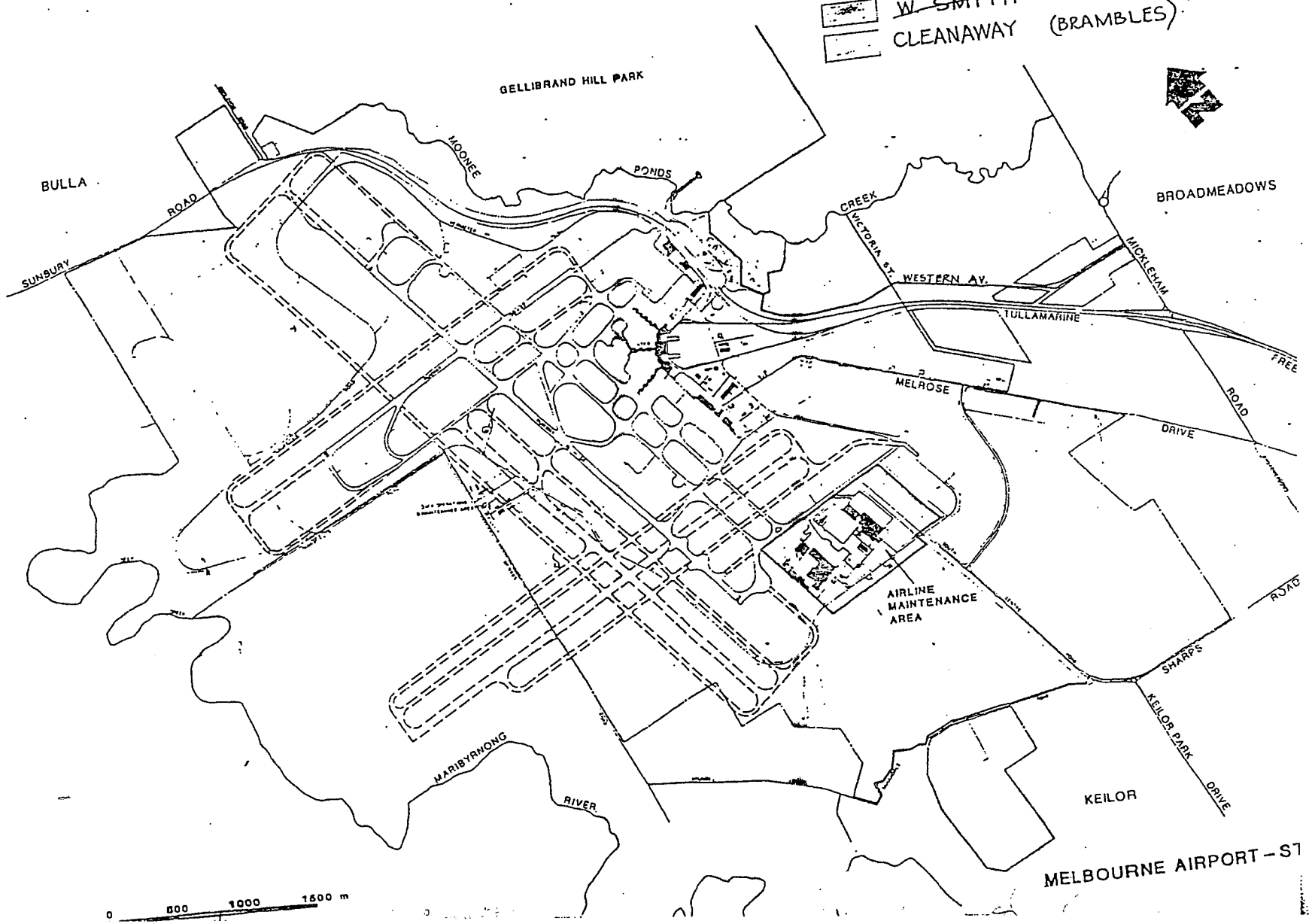
McLAUGHLIN
~~W SMITH~~
CLEANAWAY (BRAMBLES)
GELLIBRAND HILL PARK
MOONEE PONDS CREEK
BULLA ROAD
SUNBURY
VICTORIA ST.
WESTERN AV.
BROADMEADOWS
MICKLEHAM
TULLAMARINE
FREE
MELROSE
DRIVE
ROAD
AIRLINE MAINTENANCE AREA
SHARPS
KEILOR PARK DRIVE
KEILOR
MARIBYRNONG RIVER
MELBOURNE AIRPORT – ST
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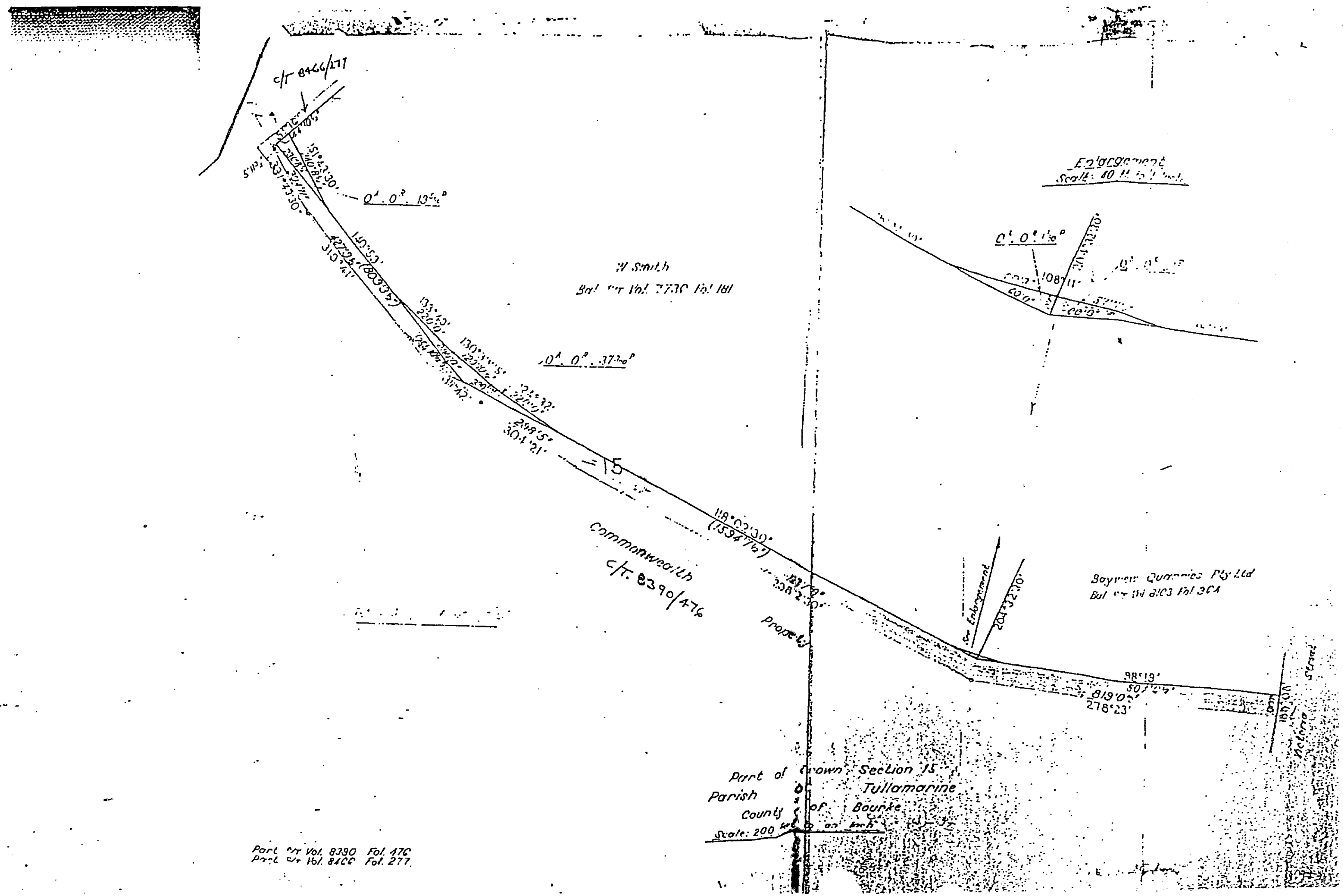


C/T 8466/177
0A. 0R. 13⅝P
W Smith
Bal C/T Vol. 7730 Fol. 181
0A. 0R. 37⅞P
Commonwealth
C/T. 8390/476
118°02'30"
(1534'7½")
Enlargement
Bayview Quarries Pty Ltd
See Enlargement
204°32'10"
98°19'
278°23'
Part of Crown Section 15
Parish Tullamarine
County of Bourke
Scale: 200 feet to an inch
Part C/T Vol. 8390 Fol. 476
Part C/T Vol. 8466 Fol. 277

C4-5-36

Federal Airports Corpor
MELBOURNE AIRP
PO Box 116
Melbourne Airport, 3045
Fax (03) 339 1628
Phone (03) 339 1600

12 December, 1988

Mr. Tim Harford,
General Manager,
Hertz Australia Pty. Ltd.,
6th Floor, 10 Dorcas Street,
SOUTH MELBOURNE. VIC. 3205

Dear Mr. Harford,

LICENCE FOR ACCESS TO HERTZ SITE
ADJACENT TO NORTH EASTERN BOUNDARY
- MELBOURNE AIRPORT

Further to our meeting of 5 December, I wish to confirm the matters discussed thereat.

Subject to formal delegate approval from the Corporation, a licence will be issued to Hertz to create access from their freehold support facilities site adjacent to the airport via Quarry Road in accordance with the following terms and conditions:-

- the licence will be an annual licence terminable by either party at any time by giving the other party one calendar years notice in writing.

- the licence will be subject to an annual fee, initially to be $10,000 p.a., and to be indexed annually in accordance with movements in the Consumer Price Index. The initial fee of $10,000 is subject to each party taking further advice from their valuer.

- should the above airport access be cut off in the future by the provision of a heavy rail connection to the Airport the Corporation will use its best endeavours to provide a reasonable alternative access.

- in the event that it is necessary to revoke direct access to the Airport in the future no compensation will be payable by the Corporation to Hertz (or any other owner of the land).

- Hertz will be responsible to construct and fully maintain Quarry Road to the Corporation's satisfaction to provide the above access.

- all Hertz operations (other than access and egress) shall be confined within the boundaries of the freehold site.

- no public access to the Airport is to be permitted from Western Avenue.

- the above licence does not confer an exclusive right to use Quarry Road.

- Hertz shall provide the Corporation with copies of the planning and building permits for their freehold site before the licence takes effect.

Upon receipt of your written agreement to the above conditions, I will arrange for the necessary licence agreement to be drafted.

Yours sincerely,

R.J. Young,
COMMERCIAL MANAGER.

Federal Airports Corporation
MELBOURNE AIRPORT
PO Box 116
Melbourne Airport, 3045
Fax (03) 339 1628
Phone (03) 339 1600

C4-5-36

4 July, 1989

Mr Jeff Morgan
National Operations Manager
Hertz Australia Pty Ltd
6th Floor
10 Dorcas Street
SOUTH MELBOURNE VIC 3205

Dear Sir,

PROPOSED HERTZ TURNAROUND FACILITY - MELBOURNE AIRPORT

Thank you for your letter of 2 June 1989 regarding your proposed turnaround facility. The two alternative proposals set out therein which involve the FAC have been considered at some length, and I advise as follows.

(a) Hertz lease land from the FAC

It is confirmed that we are able to provide you with a site of approximately 7000 square metres for a term of 10 years in the vicinity of Australian Airlines Valet Car park in Melrose Drive. However the rental you have proposed does not reflect the current market value in that area and we are unable to proceed on the basis of that figure.

Should you wish to continue discussions regarding this option, we would be pleased to do so at a more realistic level or alternatively to examine sites at the south-eastern end of the airport within the range $8.50-$10.00 pm² p.a. for the commencing rental. Please note that our policy regarding rent reviews provides for triennial reviews to market with annual reviews reflecting increases in the Consumer Price Index in the intervening years. Alternatively:

(b) Access licence via Quarry Road to FAC land

As indicated to you on previous occasions we have very real concerns regarding the impact of such a licence on our future capacity to develop the Airport in the interest of all airport users and the need to charge a licence fee which reflects a realistic value of access to the Airport.

Although we would prefer to limit any licence duration to 3 years we are unable to consider a term certain greater than 5 years at this time. However should the term of 5 years elapse and there is no requirement for airport development in that area we would be prepared to negotiate a further term with Hertz at that time with the same provision for termination related to development. In our view this approach provides your company with the same real level of certainty as your proposal but avoids any unrealistic expectations at this stage.

With regard to the fee for the access licence we believe that the real value of this access to your company is far in excess of the proposed commencement fee of $10,000 p.a. indexed and hence it should not be assumed that this rate would continue in the future should access beyond 5 years become possible.

I look forward to receipt of your advice regarding your preferred course of action at your convenience.

Yours faithfully,

R.J. Young,
COMMERCIAL MANAGER.

APPENDIX KTM 2

Attachment A.

COMMONWEALTH DEPARTMENT OF
TRANSPORT AND
REGIONAL SERVICES

Minute

Our Reference: H98/529

SENT TO MINISTER
13 JUN 1999
Schedule No. JA4020

Mr Stephen Oxley
Chief of Staff

PROPOSED RESPONSE TO MCLAUGHLIN (MINREP 99050202)

ACTION SOUGHT: That you note the following response in relation to the query you raised in relation to McLaughlin's earlier minrep (99030260) which you signed on 24/5 and sign the draft response to McLaughlin's latest minrep (Attachment A).

PRIORITY: High. The latest response is now over 3 weeks old. We awaited your clearance on the earlier minrep before responding.

ISSUE

You signed the earlier response but queried what is the position in terms of people being able to access the airport from adjacent land.

COMMENT

This type of access situation has arisen previously at Brisbane Airport. Last year the Department of Finance and Administration, which has been trying to sell the old Brisbane airport (OBA) site (which abuts Brisbane International Airport) for the past 10 years, requested that Brisbane Airport's new private operator (BACL) provide an easement for an access road to benefit the future development potential of the OBA site. As the matter could not be settled on commercial terms, BACL did not grant the easement. This approach was consistent with BACL's rights under its long-term Airport Lease with the Commonwealth.

As with Brisbane Airport, Australia Pacific Airports (Melbourne) Pty Ltd (APAM) which operates Melbourne Airport also enjoys the same rights. Under Clauses 15 (Quiet Enjoyment) and 16 (Non Derogation) of the Airport Lease, APAM has the right to exclusive possession of the Airport Site (except where the Lease provides otherwise) without any interference by the Commonwealth. The obligations under these two clauses are the only two obligations of the Commonwealth under the Airport Lease.

McLaughlin is seeking to negotiate with Kendell 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. We also note that McLaughlin's latest letter again fails to produce the "written assurance" he has referred to in his previous letter about a right of access/easement his company has down Quarry Road (ie. part of the airport site).

As indicated on the attached map, if McLaughlin cannot come to agreement on commercial terms for access across airport land with APAM, his company will have to access the Airport via Western Avenue (highlighted in pink) – a trip of seven kilometres, rather than the 400 metres he hopes for down Quarry Road (highlighted in blue).

In a legal sense, the Commonwealth is not exposed on this issue if McLaughlin makes good his threat (which he has been making to APAM since February 1999) of taking the matter to the Victorian Supreme Court because Clause 4 of the Airport Lease:

- ensures that the Lessor (Commonwealth) will be indemnified against any claim that is made by a third party in relation to the Airport Site and against any loss that the Commonwealth suffers; and
- also provides that the Lessee (APAM) itself is not able to bring any claims against the Commonwealth for any costs if suffers because of any act or omission on the part of the Commonwealth.

Given that APAM is the Commonwealth's successor in law in relation to the property matter currently in dispute, if McLaughlin wants his day in court, this is the appropriate way of conclusively settling this matter, without exposure for the Commonwealth.

RECOMMENDATION

That you note our response to your query regarding the position in terms of people being able to access the airport from adjacent land.

If you agree, respond to Mr McLaughlin's latest representation in the terms presented at Attachment B.

J. Elliott

John Elliott
Assistant Secretary
Airports Planning
3 June 1999

Contact Officer: Kym Foster
Telephone No : 6274 7968

1. Noted
2. Approved

Stephen Oxley

Stephen Oxley
3/6/99

APPENDIX KTM 3

476

Melboune
Trade Park
Quarry Rd
Melbourne Airport
PO Box 34
Tullamarine
3043 Victoria
Australia
Phone
(03) 9330 4880
Fax
(03) 9330 2411

23rd February 2001

Hon J Anderson MP
Minister for Transport and Regional Services
Parliament House
Canberra ACT 2600

Dear Minister,

Re: Commonwealth responsibility for APAM wrongful interference to permanent right of way over Quarry Road at Tullamarine Airport.

We write to inform the Minister of the relevant facts concerning our claim against the Commonwealth and in response, after correspondence, to the remarkably incorrect letters of 24 May 1999 (sent 1 June 1999) and 8 September 1999 (sent 10 September 1999) signed by Stephen Oxley (Chief of Staff), referring to advice from the Department.

Relevant facts:

the Commonwealth

(1) The Commonwealth holds title to lands comprising the Tullamarine Airport land, and in consequence holds ultimate responsibility for all the incidents of title affecting the Tullamarine Airport land.

(2) We are the registered owners of Lot 1 Sunbury Road Melbourne Airport comprising land adjacent to the Tullamarine Airport land.

(3) That portion of the Tullamarine Airport land called Quarry Road is affected by (serves) our permanent right of carriageway over Quarry Road, for the benefit of our land.

(4) We and our predecessors in title have used Quarry Road freely and continuously for a period of more than 34 years to the present time, by right of carriageway, (until the wrongful interference by APAM referred to at point (11)). The Commonwealth, including in the form of the Federal Airports Commission, over the full succession of title to the Tullamarine Airport land, have had full knowledge of the use of this right of way during this time.

(5) The Quarry Road right of way is a direct result of the action of the Commonwealth by accepting from our predecessors in title the full performance of agreements reached with the Commonwealth (which acceptance continues in full effect to the present time). The Commonwealth received, and continues to receive, the benefit of those parcels of land transferred to the then Department of Civil Aviation for the Tullamarine Airport infrastructure without payment of financial consideration. As quid pro quo the Commonwealth was to give permanent access over the land comprising Quarry Road to benefit our land (then held by our predecessor in title) to fully resolve as amongst all relevant parties all the then outstanding road access issues.

(6) The infrastructure to construct Quarry Road was paid out of public funds from Victoria by the then Country Roads Board (now Vic Roads).

(7) The Commonwealth is bound by the actions of the then Department of Civil Aviation that have encumbered that portion of the Tullamarine Airport land comprising Quarry Road that serves our permanent right of way in favour of our land. The Departmental file(s) material cannot justify the Commonwealth in derogating this right of way..

the APAM / Commonwealth lease

(8) The Commonwealth has presently leased the Tullamarine Airport to Australia Pacific Airports (Melbourne) Pty Ltd ACN 076 999 114 (APAM) as lessee and occupier of the Tullamarine Airport land.

(9) The Commonwealth commercial dealing with APAM can only give to APAM whatever the Commonwealth has to give. The Commonwealth could not and cannot give to APAM the land comprising Quarry Road as unencumbered by our right of way, nor any valid powers whatsoever to interfere with that right. APAM must follow whatever the Commonwealth must do concerning our Quarry Road right of way.

(10) The Commonwealth commercial dealing with APAM does not affect the ultimate responsibility of the Commonwealth for the incidents of title affecting the Tullamarine Airport land. APAM possession of the Tullamarine Airport land as Commonwealth lessee does not make APAM the Commonwealth's successor in law in relation to the Commonwealth title. The Commonwealth cannot validly give APAM responsibility concerning the Quarry Road right of way, either via by the commercial agreement with APAM, or by a Department decision.

(11) APAM have wrongfully interfered and continue to wrongfully interfer with our Quarry Road right of way, from 23 February 1998.

(12) APAM have no lawful basis for interfering with, disturbing or derogating from our right of way over the Tullamarine Airport land comprising Quarry Road.

(13) The Commonwealth must bear the ultimate responsibility for the actions of APAM in virtue of the Commonwealth lease of the Tullamarine Airport land to APAM (leaving aside any indemnity or guarantee from APAM to the Commonwealth).

(14) The Commonwealth is presently treating with Vicroads for a transfer of lands comprising the Tullamarine Freeway lands from the current Tullamarine Airport land.

Department replies of 24 May 1999 and 8 September 1999

The letters of 24 May 1999 (sent 1 June 1999) and 8 September 1999 (sent 10 September 1999) signed by Stephen Oxley (Chief of Staff), refer to advice from the Department. These letters give (a) incorrect matters in reply on our request for the Commonwealth to deal with the actions of APAM and (b) clearly mistaken reviews as to the parties positions.

The letters say that the APAM / Commonwealth lease due diligence procedures failed to disclose the Quarry Road right of way and consequently gives ground for denial of Commonwealth responsibility. With respect, the failure of the due diligence in the APAM / Commonwealth commercial dealing would go only to any claims of APAM on that contract. The fact that the APAM/Commonwealth lease required due diligence procedure, and whatever any results from the procedure, could never derogate our Quarry Road right of way. Our use of this right of way made clear to see every effect of this encumbrance on the Commonwealth title to the Quarry Road land, at all relevant times to the APAM / Commonwealth commercial dealings and/or lease.

The letters also say that because the Commonwealth has leased the Tullamarine Airport land to APAM somehow our claim to the Quarry Road right of way reverts from the Commonwealth into APAM's powers for decision. With respect, the effects of the APAM / Commonwealth commercial dealing cannot give APAM any valid powers that would allow APAM to derogate any encumbrance affecting the Commonwealth title over the Tullamarine Airport land in favour of any lands adjoining. This commercial dealing cannot allow APAM to derogate our Quarry Road right of way. APAM are clearly not a proper party with whom to deal concerning our Quarry Road right of way.

Clearly, the due diligence for APAM failed to reveal the fact of our Quarry Road right of way in direct result of the Commonwealth (then Department of Civil Aviation and successors) and Victoria (then Country Roads Board and successors) omitting to carry out all steps in good faith that were consequential to, and required by the agreement(s) for land transfers referred to at point (5) above. The Commonwealth received and continues to receive valuable, even immeasurable, benefit (however leased to APAM) through those land transfers that allowed the then Department of Civil Aviation eastward expansion of the Tullamarine Airport infrastructure.

We recognise that APAM may wish they had been able to find from their due diligence that we hold a right of way over the Quarry Road land. Clearly the due diligence has shown that the then Department of Civil Aviation should have fully and properly attended to this matter about 35 years ago. In the event, whatever the APAM / Commonwealth contract provides concerning due diligence the result of that due diligence could never detract from our Quarry Road right of way.

The letters further say that since the 1990's the Federal Airports Commission as the Commonwealth's business enterprise at the time responsible for operating Tullamarine Airport consistently denied the Quarry Road right of way. With respect, (leaving aside the particulars purported as comprising these denials (if any)), the Federal Airport Commission as the Commonwealth's successor in title to the Tullamarine Airport land was clearly bound in law at all relevant times to follow whatever the Commonwealth must do concerning our Quarry Road right of way. Federal Airports Commission could never have derogated our Quarry Road right of way by mere denials. Federal Airports Commission denials (if any) cannot support:
(a) the Commonwealth in acting to derogate from, or
(b) APAM's wrongful interference (presently continuing) with,
our Quarry Road right of way.

In the event, we have at all relevant times used our Quarry Road right of way without respect to whatever mere denials (if any) the then Federal Airports Commission is said to have advised.

These letters constitute a clear denial by the Commonwealth of our lawful right of way over the Quarry Road land. The Commonwealth should not want to rely for this denial on past omissions by the Commonwealth to ensure the due performance of what should have been done, (either as may be recorded in the Department files or inferred from relevant gaps in the Department files) at the proper time about 35 years ago. Clearly the Commonwealth should not take advantage in this dealing on any basis that would deny equity.

The Commonwealth obtained immeasurable benefit from the agreements referred to above that allowed the then Department of Civil Aviation eastward expansion of the Tullamarine Airport infrastructure. The Commonwealth (then Department of Civil Aviation and successors) and Victoria (then Country Roads Board and successors) omitted to carry out all the steps in good faith that were consequential to, and required by the agreement(s). This may have seemed convenient in the views of relevant Departments at the relevant time (and subsequently).

However, all relevant parties accepted and performed the mutual rights conferred by the agreement(s) or else allowed those rights to be exercised fully and freely. We and our predecessors in title have used Quarry Road freely and continuously for a period of more than 34 years to the present time, by right of carriageway, (until the wrongful interference by APAM referred to at point (11)). The Commonwealth, (including as the Federal Airports Commission), over the full succession of title to the Tullamarine Airport land, have had full knowledge of the use of this right of way during this time.

The Minister would be aware that in equity that which should be done must be done.

Federal Government national competition policy

APAM's wrongful interference with our Quarry Road right of way is also contrary to the Federal government's national competition policy presently expressed by the Minister as the Deputy Prime Minister. APAM's wrongful interference with our Quarry Road right of way done as the lessee from the Commonwealth of the Tullamarine Airport land denies competitive access into the Tullamarine Airport for businesses wanting to locate at the Melbourne Airport Trade Park development site. This site comprises our land served by the Quarry Road right of way and adjoining the Tullamarine Airport land. The Commonwealth holds responsibility in virtue of title over the Tullamarine Airport land and should not allow APAM as lessee of the Commonwealth to deny competitive access into the Tullamarine Airport by wrongful interference with our Quarry Road right of way.

Action required for resolution

The Commonwealth should immediately resolve this matter, as follows:

*The Commonwealth should immediately duly acknowledge in writing to us that the portion of the Tullamarine Airport land called Quarry Road is affected by (serves) our permanent right of carriageway over Quarry Road, for the benefit of our land.

*The Commonwealth should immediately notify APAM, in virtue of the Commonwealth / APAM lease that APAM must not interfere with, disturb or derogate from our Quarry Road right of way.

*The Commonwealth should make arrangements with VicRoads that require the transfer of the Quarry Road land over to VicRoads as part of the Tullamarine Freeway lands transfer arrangements, to further ensure and guarantee continuation of our right of way.

Request to meet with the Minister

We have recourse to a writ presently issued for service on the Commonwealth as first defendant, inter alia, for declarations of our Quarry Road right of way and for the wrongful interference by APAM as lessee of the Commonwealth. Having regard to the earlier correspondence over this matter, since APAM first wrongfully interfered with our Quarry Road right of way, we give notice that we would rely on this letter on the question of party/party legal costs in the writ proceedings.

If the Minister should consider that the Commonwealth would guarantee our Quarry Road right of way to fully resolve this matter then we would request an urgent meeting with the Minister, (or executive representing the Minister holding proper delegation to make the required guarantee).

We await the reply of the Minister.

Yours faithfully

Keith McLaughlin
Melbourne Airport Trade Park, Tullamarine

Norma McLaughlin

APPENDIX KTM 4

Australian Government

Department of Infrastructure, Transport, Regional Development and Local Government

11th November 2009

BCS Consulting Engineers Pty Ltd
5A Hamilton Street
GISBORNE VIC 3437

Attention: John Randles

Dear John,

RE: ROAD RECONSTRUCTION – WESTERN AVENUE, MELBOURNE AIRPORT, ABC REF: 09/14304

I can now advise that your application for a Works Permit to upgrade Western Avenue can be re-submitted.

To assist in expediting the review of the works approval application, please ensure that all relevant information relating to the works is submitted. The information should include the following:

1. The Works Permit application form fully filled out, signed and dated;
2. Payment of the Works Permit application fee in the form of a cheque or electronic fund transfer (EFT payment advice attached). The amount payable is dependant on the estimated contract price of the proposed work to be carried out;
3. 2 copies of works plan;
4. 2 copies of computations, where applicable;
5. 2 copies of the specifications for the proposed work;
6. Where applicable, all certificates required, under any applicable law, approving arrangements for sewerage, drainage, lighting, ventilation, fire resistance and fire protection;
7. Any certificates given by an appropriate works expert, approving the structural elements of the works plan;
8. Details of the progress stages that it is proposed will be the inspection stages; and
9. Details of the construction materials to be used for the works.

Regulation 2.12 of the Airports (Building Control) Regulations 1996, requires that the Airport Building Controller, "must not approve a building activity unless he is satisfied that the airport-lessee company has consented to the proposed building activity".

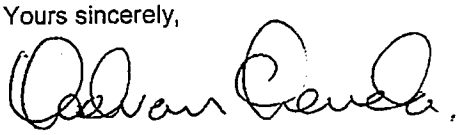
It is therefore advised that you formally apply to Australia Pacific Airports Melbourne, for building activity consent at the same time as you make your application to the Airport Building Controller. Once again, this will assist in expediting the respective approvals. Contact Phil Ginnivan of APAM on 03 9297 1310 for further assistance.

Airport Environment Protection and Building Control Office
Appointed by the Australian Government
2nd Floor, Terminal 3 (PO Box 5005)
MELBOURNE AIRPORT VIC 3045

T: 03 9338 5226 (Building) T: 03 9338 5943 (Environment) F: 03 9338 8047

Should you require any clarification on this matter, please do not hesitate to contact me on (03) 9338 5226.

Yours sincerely,



Jadran Genda
Airport Building Controller – Melbourne, Moorabbin and Essendon Airports

APPENDIX KTM 5

Received 26 11 09

MELBOURNE AIRPORT

AIRPORT MANAGEMENT
LEVEL 2, T2
MELBOURNE AIRPORT

LOCKED BAG 16
GLADSTONE PARK
VICTORIA 3043 AUSTRALIA

TEL: (61 3) 9297 1600
FAX: (61 3) 9297 1886

www.melbourneairport.com.au

By facsimile: 9744 1662

KT & NA McLaughlin
1 Priorswood Way
SUNBURY VIC 3429

24 November 2009

Dear Mr McLaughlin,

Application for approval to carry out building activity

I refer to your letters of 14 and 29 October 2009 enclosing correspondence to the Airport Building Controller (ABC) and addressed to Mr Gilbert Richardson. Please note that all further correspondence in relation to APAM's consent under *the Airports (Building Control) Regulations* should be addressed to me.

Your letters appear to be seeking APAM's consent for building approval under Regulation 2.03. For a valid application to be made, you are required to provide me with a copy of the application and all documents you have submitted to the ABC. The ABC, by letter of 11 November 2009 has requested that you re-submit your application for a Works permit as it was incomplete. I also understand that your engineer intends to prepare a new set of plans (that differ from the ones initially submitted) for submission to the ABC. Therefore, before APAM is able to consider your application, I advise that you must also re-submit your application to me with the same application and documents that are being submitted to the ABC.

The letter from the ABC dated 11 November confirms that his approval is conditional upon APAM providing it's consent and directs you to apply to me to expedite our respective approvals. This is consistent with regulation 2.12(1)(a).

APAM's process for approving applications for building approval (including a works permit)

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.

In order to comply with the Regulations, Melbourne Airport has developed these processes to properly review and assess all requests to carry out building activity consents under the Regulations. The BAC process involves APAM seeking comments on all applications from our internal stakeholders. 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).

At the completion of all works, APAM also requires that a formal Building Activity Completion be issued by us, as this will also be required by the ABC.

There is a schedule of fees applicable for 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 complete the BAC Application form (attached) upon submitting your new request. Before the end of 28 days after receipt of a compliant application, APAM will provide you with written notice of it's decision.

You have said that you are not applying but rather requiring APAM's consent under s22(3) of the *Airports Act* in accordance with Regulation 2.04(2)(b). This Regulation however only refers to a refusal of consent. As we have not even reviewed your application, it is premature for you to claim that you are exempt from our processes. For us to be able to make a determination of your application, we must first undertake a review under our BAC process.

Should you have any queries about APAM's BAC or PERCOW process, I would be happy to provide you with any further information as required.

Your sincerely,

Phil Ginnivan

CC. John Randles by facsimle – 5428 4900

APPENDIX KTM 6

IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

AT MELBOURNE

PLANNING LIST

Application No.P

BETWEEN

K T McLAUGHLIN & N A McLAUGHLIN

Applicant

AND

HUME CITY COUNCIL

Responsible Authority

AND

AUSTRALIAN PACIFIC AIRPORTS (MELBOURNE) PTY LTD

Respondents

SUBMISSION ON BEHALF OF AUSTRALIAN PACIFIC AIRPORTS (MELBOURNE) PTY LTD

INTRODUCTION

1. This submission is made on behalf of Australian Pacific Airports Melbourne Pty Ltd ("APAM").

2. APAM is:

   (a) the lessee of the Airport land from the Commonwealth;

   (b) the operator of Melbourne Airport and as such specifically referred to as a body whose views must be sought on any development plan; and

   (c) an immediately abutting land owner.

3. The history of the attempts by Mr McLaughlin to obtain approval for a development plan under the schedule is long, complicated, controversial and in the end largely

requirement that a Geotechnical assessment ought to be carried out before there is any use, development or subdivision of the land.

21. In response, on 29 May 2008 Mr McDonald wrote:

> *A geotechnical assessment report on the internal road alignment has been carried out to the satisfaction of the City of Hume. That is all that is required by the Responsible Authority at this stage. The Development Plan will require a geotechnical assessment prior to approval of any planning permit for buildings and works on the land. Such assessment will be carried out after the approval of the Development Plan and as the development proceeds.*

22. It appears that it is contemplated that geotechnical issues for all of the land other than the road alignment, and environmental issues affecting the whole of the land go entirely undealt with at this stage of the process, and that potential environmental issues arising from the orders of the Tribunal (which came about after years of illegal filling activities) go entirely unstated in this very important planning document.

23. This is not orderly and proper planning. The very purpose of a development planning exercise is to ensure the coordinated development of land covered by the plan. There is no attempt to articulate how these matters will be dealt with on the ground, or how the issues affecting various landowners will be co-ordinated.

24. APAM relies upon the evidence of Mr Linke which is to the effect that whatever geotechnical and environmental issues affect the land should be resolved at this stage.

ACCESS

25. The second fundamental aspect of this proposal is that of access.

26. The only legal access to the subject land is via an easement of carriageway over Commonwealth land which extends the same alignment Western Avenue.

27. The land over which the easement is provided is not and cannot be affected by Victorian planning laws.

28. The development plan must address the fact that the access way is an easement only and that while the McLaughlins, their servants, agents and invitees are entitled to traverse the easement to obtain access to the land, the servient tenement remains the property of the Commonwealth and in the possession of APAM.

29. The proposed development of the subject land will, on any view, significantly increase the amount of traffic and could potentially alter the nature of the use of the easement.

30. Substantial road works are required before any use of the McLaughlin land can proceed.

31. APAM maintains that the Applicant has no right to construct improvements to the surface of the carriageway without the consent of the Commonwealth and APAM.

32. APAM refuses to give that consent until such time as an agreement is reached which is satisfactory to APAM which, at a minimum, sets out sufficient detail as to a standard of construction acceptable to the owner, and where the rights and obligations with respect to maintenance and insurance are clearly established.

33. In the circumstances this is not an unreasonable position.

34. APAM has remained ready and willing to negotiate on this matter as did the Commonwealth.

35. While it is not for the Tribunal to embark upon or seek to resolve the failed attempts at a negotiated outcome, the fact of the matter is that at present the future construction of the road surface remains unresolved.

36. Importantly, the resolution of the location, design and construction within the easement is specifically identified in the decision guidelines as a matter that must be considered. At present it is not a matter that can be considered in any way at all because the location design and construction has not been agreed.

37. Indeed, independent of the decision guidelines, there can be little doubt that the failure of the Applicant to finalise the location and design of the road access leading to the subject land is a relevant planning consideration in its own right: See *Port Phillip CC v. Hickey* (2003) 14 VPR 108.

38. In this case, finalisation of access arrangements is a fundamental planning consideration. In the absence of agreement between the parties the matter may be litigated in other places. The consequences of that litigation simply cannot be pre-empted at this stage. If this development plan is approved at this time, it will facilitate the grant of a planning permit for subdivision and the sale of lots to third parties, in circumstances where critical issues affecting access – including obligations of insurance and maintenance, have simply not been finalised.

39. Again – that is not an outcome that is in the interests of orderly and proper planning.

DRAINAGE EASEMENT

40. The same drainage pipe that is a conduit for freeway run off also drains the Commonwealth land adjoining the McLaughlin land.

41. This pipe was constructed to alleviate the flooding that occurred on the Commonwealth land when Mr McLaughlin unlawfully deposited fill on his land and altered the natural flow of water downhill toward the Creek.

42. APAM wants the existing pipe included in a drainage easement and obligations imposed upon the body corporate which will be created upon the subdivision to maintain the easement.

43. This issue has been around for more than 8 years.

44. As recently as 9 April 2008 Corrs wrote to the representatives of Mr McLaughlin.

45. There was no reply until 21 July 2008.

46. The matter remains unresolved.

47. The fact that a drainage easement is required should be included in appropriate terms in the proposed development as it is an issue directly related to any proposed future subdivision.

QUALITY

48. The document is poorly drafted and contains a variety of inconsistencies.

APPENDIX KTM 7

NOTE FOR FILE H2001/0500

MEETING WITH KEITH McLAUGHLIN ABOUT HIS CLAIMS TO RIGHTS IN RELATION TO MELBOURNE AIRPORT LAND

Time and place: 10 July 2002, DoTARS premises

Attendees: Keith McLaughlin and business associates, Ray Field

KEY ISSUES DISCUSSED

McLaughlin's application for an easement

McLaughlin claimed that the Western Avenue right of carriageway, located within and along a section of the North Eastern boundary of the airport site, also gave him a right of easement for a water main, and that he could go ahead and have the water main extension constructed along that easement even without the approval of the Commonwealth or APAM.

I gave McLaughlin a copy of the Department's 9 July 2002 reply (attached) to his application for an easement for the water main extension. He was not satisfied with the response, claiming we were taking APAM's side and that our reasons for withholding approval were not relevant. Bill McDonald pointed out that they had been denied natural justice, as the Department had consulted APAM prior to the letter but had not consulted McLaughlin.

Comment: 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.

McLaughlin's claim to a right of way via the old Quarry Road

McLaughlin outlined his claim to a right of way, via the old Quarry Road, to his land through a parcel of airport land located North of the Tullamarine Freeway. He indicated that after the leasing of Melbourne Airport to APAM in 1997 he had continued to use Quarry Road for access to his land, until APAM had ripped up the road and, when he then lay on the road, had fenced it off at the boundary.

McLaughlin has recently provided us with what he believes to be evidence of his right of way via Quarry Road (ref. Ministerial MPS No. 2002040518). I asked him whether he had any additional evidence to support his claim. He said he had found additional evidence but was withholding it until possible legal proceedings.

McLaughlin indicated that if he did not succeed in establishing his Quarry Road right of way, or obtaining approval for an easement for the water main extension, he would be left with no other option but to take legal action.

Comment:
McLaughlin's primary source of income from his land adjacent to Melbourne Airport has been through the dumping of land fill. No other development has to date been undertaken on his land, although he currently has an Outline Development Proposal before Hume City Council. A right of way to his land via the old Quarry Road would enable him to establish a direct route between his land and Melbourne Airport, thereby greatly increasing the value of the land.

Mr McLaughlin first submitted his claim to a Quarry Road right of way to the Department a short time after Melbourne Airport was leased to,APAM. At that time the Department instructed AGS to do a search to establish whether his claim had legal standing. The AGS established that it did not.

Since then McLaughlin has made several submissions to the Minister and Department seeking to establish his right of way. The responses have indicated that his supporting documentation did not provide evidence of a right of way. He has also issued writs for legal action to establish his right of way, but these have lapsed.

McLaughlin's recent submission to the Minister does not include any new documentary evidence to support a right of way.

FURTHER ACTION
McLaughlin might reply to the Department's 9 July letter on his easement application, as he has expressed dissatisfaction with the outcome. At the meeting he indicated an intention to take legal proceedings to establish his Quarry Road right of way, although I note that he has not carried through with similar threats of legal action in the past.

I will draft a reply to his recent letter on his right of way.

Ray Field
Airport Planning and Regulation
12 July 2002

APPENDIX KTM 8

(488)

7

13/02/003

Michael Sharp

From: Michael Sharp
Sent: Thursday, 9 May 2002 13:12
To: 'Bob Jones'
Subject: RE: McLaughlin ODP

Bob,
Council wrote to the developer's consultant on 3 December 2001 which outlined specific requirements on a geo-technical investigation of the site. It was advised that further consideration of the Outline Development Plan would not occur until a satisfactory geo technical investigation has been received. Council is yet to receive this information.

My discussions with the consultant have indicated that this investigation is underway and should be received soon. However no firm timeline has been proposed.

It is Council's intention to further assess the Outline Development once a satisfactory Geo-Technical investigation has been received. This would include the comments of all parties which who have indicated an interest in the outcome of the development plan (including Melbourne Airport).

I would expect that Mr McLauglin's request for an easement to install a water main across Commonwealth land is made in response to the servicing requirements of Yarra Valley Water. It would appear that Mr Mclaughlin is undertaking works to satisfy other authorities while the Geo Tech survey is being undertaken.

It should be noted however that the actual provision of water is not a requirement of the Development Plan. The draft development plan merely notes that the water supply facilities are available from an existing main and will be provided by the owner entering into an agreement with Yarra Valley Water. What would be required will depend on the layout approved as part of the development plan. The actual provision of water (and associated easements) is normally addressed as part of the planning permit and subdivision processes, NOT at the Development Plan stage.

It trust this information meets your requirements.

Please call me if you require additional information.

Regards

Michael Sharp

-----Original Message-----
From: Bob Jones [mailto:bob.jones@melair.com.au]
Sent: Thursday, 2 May 2002 13:55
To: 'MichaelS@hume.vic.gov.au'
Subject: McLaughlin ODP

Michael , as you are aware APAM has responded to the latest version of the
Outline Development Plan (ODP) for the McLaughlin land and I am unsure of
where this matter is currently at. Mr McLaughlin has recently made approaches to the Commonwealth concerning the granting of an easement across
Commonwealth land to instal a water main to service the development area.
The Airport is reluctant to agree to this easement until the ODP has been
approved by Hume Council, especially as there are matters concerning possible land contamination from imported fill being placed on the

development site.
Can you please respond by return email on what Council is doing concerning
assessment and approval of the ODP and what the likely time lines are.
Regards,
Bob Jones

APPENDIX KTM 9

DOTARS
DEPARTMENT OF TRANSPORT AND REGIONAL SERVICES

Mr Keith McLaughlin
Managing Director
Melbourne Airport Trade Park
PO Box 34
TULLAMARINE VIC 3043

Dear Mr McLaughlin

APPLICATION FOR AN EASEMENT ACROSS MELBOURNE AIRPORT LAND

I am writing in relation to your application to the Department for an easement across Melbourne Airport land, to enable a water main extension to your land adjacent to Melbourne Airport.

You will recall that the Department's letter of 8 April 2002 to Australia Pacific Airports (Melbourne) Pty Ltd (APAM), which was copied to you, requested that APAM provide substantial reasons why the Commonwealth should not grant an easement across the Melbourne Airport site to allow for the proposed water main extension to your land.

APAM's reply letter to the Department indicates concerns about the impacts of some of your development activities on Melbourne Airport land, in particular concerns that excess fill on your land is resulting in stormwater discharge onto airport land and into the airport's stormwater discharge system, with the possibility of stormwater discharge contamination.

Furthermore APAM has provided advice from Hume City Council that Council has requested that you submit a geotechnical investigation of your land before it proceeds with any further consideration of your Development Plan, and that the matter of the water supply to your land should only be addressed once the Development Plan has been approved.

In light of the advice from APAM and Council, the Department considers it would be inappropriate for the Commonwealth to grant the proposed easement before Council has approved your Development Plan. When the Plan is approved, an easement for the proposed water main extension could be granted, subject to the conditions that you pay the costs associated with the grant of the easement and construction of the water main; and that you enter into an agreement providing that you indemnify the Commonwealth and APAM against any possible damages resulting from the construction and operation of the water main.

I would appreciate you notifying me when you have obtained Council's approval of your Development Plan for the site. The Department will then make arrangements with APAM for the preparation of an agreement covering conditions of the grant of the easement.

I look forward to working with you and APAM to achieve an expedient settlement of this matter.

I have briefed the Minister for Transport and Regional Services on this matter, and am sending a copy of this letter to APAM.

Yours sincerely

Christine Dacey
A/g Assistant Secretary
Airport Planning and Regulation

9 July 2002

APPENDIX KTM 10

Keith and Norma McLaughlin
1 Priorswood Way
Sunbury 3429
Phone 9338 8011
Fax 9330 2411

26 March 2010

Dominique Mayo,
Associate to Deputy President Hack,
Administrative Appeals Tribunal
Brisbane
By Fax (07) 3361 3001

Dear Madam,

RE: McLaughlin v Minister for Infrastructure, Transport, Regional Development and Local Government ATA 2009/54

SUBMISSION ON LAW RELATING TO OUR INTERESTS AND RIGHTS

> *"...I think that, if a highway were taken by the Crown which was the only means of access to alienated land, it might well be said that there was a way of necessity over the land, and that there was an obligation imposed upon the Constructing Authority to construct another road in place of the road resumed. But such a case is very unlikely to arise. It is almost inconceivable that the Government would take a highway which was the only means of access."*
>
> Chief Justice Griffith CJ, the first Chief Justice of Australia,
> *in Chief Commissioner for Railways & Tramways (NSW) v Attorney-General (NSW)*
> [1909] HCA 75; (1909) 9 CLR 547, paragraph 8.

This submission relates the law regarding to our interests and rights as set out in our letter to the Deputy Registrar dated of 8 February 2010, that was written in accordance with the order of Deputy President McDonald. The effect of the law is to preserve the access to our land as (or as though) enjoyed over an access road to the public highway known as Bulla Road, as existing prior to the vesting in the Commonwealth of the land comprising the greater part of the land belonging to our predecessor in title.

After the initial submission of the Minister about the proposed variation to the 2008 Melbourne airport master plan (which we believe is inadequate), we were encouraged to present the facts of our case first, and then address the points of dispute later. In the event, there was only a little time left to do the latter; and the Tribunal has allowed us 7 days for this submission. Of course we are not lawyers and what is written here should be taken to be in addition to or in the alternative to our Quarry Road easement case before the Supreme Court.

The law as referred to below is relied upon as relating to our rights and interests; the facts giving rise to our rights and interests have been described in our other written submissions. Submissions relating to the general law over the airport and law on easement construction rights, have already been provided by us to the Tribunal (Exhibits 30 & 31); and we include those submissions as part of these submissions on law.

1. Preliminary

1.1 Compulsorily acquired land under section 10 *Lands Acquisition Act 1955-57 (Cth)*

The certified Commonwealth title introduced by the Joined Party in Exhibit 24 (and relied on to allege no access rights to the North from our land exist) is a consolidated title formed by compulsory acquisition in 1961[1]. This encompasses the greater part of land belonging to our predecessor in title (Mrs. Smith) which the Commonwealth (after agreement) acquired by compulsory process, and part of Bulla Road simply taken from the State of Victoria. We assume the compulsory acquisition steps were followed according to the legislative provisions then in force, in section 10 (1),(2),(3) and (4) of the *Lands Acquisition Act 1955* : We know the Minister caused to be published in the *Gazette* notice of the authorisation by the Governor-General and in the notice he declared that the land was acquired for the public purpose approved by the Governor-General. Thus by subsection 10 (4):

> *"Upon publication of the notice in the Gazette,* ***the land to which the notice applies*** *is, by force of this Act –*
> *(a) vested in the Commonwealth; and*
> *(b) freed and discharged from all interests, trusts, restrictions dedications, reservations, obligations, contracts, licences, charges and rates,*
> *to the intent that the legal estate in the land and all rights and powers incident to that legal estate or conferred by this Act are vested in the Commonwealth."*

The subject matter of subsection (4) is "*the land to which the notice applies*" and in this acquisition refers to that greater part of land belonging to our predecessor in title (Mrs. Smith) which the Commonwealth consolidated in to one title by compulsory process. This provision could not and does not effect any extinguishment of any interests belonging to the fee simple title for the remainder of the land of our predecessor in title (which the Commonwealth had not acquired).

Therefore, the Commonwealth appears to have obtained radical title over Bulla Road and the greater part of our predecessor in title's land, including the land's direct frontage to Bulla Road. However the extinguishment provided in subsection 10 (4)(b) relates only to the land to which the (*Gazette*) notice applies. There remains the legal issue of any interests belonging to the fee simple title for the remainder of the land of our predecessor in title (which the Commonwealth had not acquired), insofar as these are rights of access, or give rise to such rights or interests. (See "Obligation to restore access" section below for more information as to the law.).

1.2 Acquisition by agreement – the (zig-zag) land under s7 *Lands Acquisition Act 1955/57 (Cth)*

Due to an apparent Commonwealth surveyors' mistake, part of Mrs. Smith's land purchased by the Commonwealth was not transferred into the Commonwealth's consolidated 1961 title. This was subsequently transferred to the Commonwealth under a separate title in 1963[2] instead. This "zig zag land" abutting our land is marked on the Joined Party's Exhibit 4 photograph. Section 7 (2) of the *Lands Acquisition Act 1955/57* (Cth) states:

> *"The Minister may authorise the acquisition by the Commonwealth of land by agreement, for a public purpose approved by him ..."*

---

1 As per item 10(4) of the advice of Deputy Crown Solicitor D.D. Bell to Chief Property Officer dated 30 August 1960 found in Exhibit 7. The actual notice appears in the Commonwealth of Australia Gazette, No. 70, dated 7 September 1961. (8067/61).

2 See the Commonwealth's consolidated title in Exhibit 24

In any Commonwealth Act, unless the contrary intention appears, "Land" according to section 22(1)(c) of the *Acts Interpretations Act 1901* means:

> *"**Land** shall include messuages tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein"*

The 'zig-zag' land does not appear to have been subject to any consolidation of title or compulsory acquisition thereafter[3]. Therefore we say this piece keeps alive the undertaking(s) given by the Commonwealth to Mrs. Smith, if section 10 *Lands Acquisition Act 1955/57* (Cth), referred to above, does not. (See "Standard of Proof" section below for more information.) In this regard, the agreement between the Commonwealth and Mrs. Smith on its face reserves the access[4] to her remaining parcel of land identified as "our Quarry leasehold" whose Quarry Entrance Road remainder runs over our land and continues to be used to this day. Our point in this proceeding is, that it cannot be said that the access to our land being a subdivision of the land remaining in Mrs. Smith's title, was acquired under that agreement as part of the purchase price of 165,000 Pounds for the 286 acres taken by the Commonwealth for the purpose of building the Tullamarine 'jet-port'.

> *"I accept the offer of one hundred and sixty five thousand pounds (165,000) for an unencumbered estate in fee simple of the area of approximately two hundred and eighty six acres (286) referred to in your notice to treat dated 30 March 1960 subject to the fact..."*

The 30 June 1960 agreement clearly states the money only compensated for the land taken by the Commonwealth and nothing else. Thus as we shall show, the only access to our land today, appurtenant to our land's title (regardless of the Commonwealth's title), is over the airport site, causing the above considerations to fall squarely within the ambit of the 2008 Melbourne airport master plan.

1.3 Conduct-limiting function of airport master plans

Due to the conflict-reducing and compatibility ensuring purposes of a master plan within the airport site and areas surrounding the airport (*Airports Act 1996* sections 81(3)(aa), 70(2)(d), 81(a)(b) and 81(4)), the five-year *force* of a master plan (see *Airports Act 1996* sections 77 & 83(1)) may constrain the conduct of the airport lessee; as Dowset J said in *Brisbane Airport Corp v Wright* (paragraphs 37-38 under tab 4 of the Minister's authorities provided for the jurisdiction hearing):

> *"A master plan does not authorise any development in the absence of a major development plan or building approval, although it may close off some options during its currency, at least in the absence of an approved variation...*
>
> *...In the above observations, I have dealt only with the position where the attack upon a master plan is based upon "noise issues". A proper construction of Div 3 of Pt 5, especially ss 71 and 81, may arguably permit other persons to seek review on other bases."*

Dowset J's restrictive principle concerning the conduct of the airport lessee company applies especially to our access because the *Airports Act 1996* provides for surface access to be altered (see section 71(2)(c)) without reference to the usual State compensation laws[5] for losses caused by severance or disturbance. These have been curtailed under section 112 of that Federal Act. This

---

[3] See the Commonwealth's separate title to this land as provided by the Joined Party in Exhibit 24.

[4] Se letter dated from Chief Property Officer to Cleary Ross and Doherty date 22 June 1960 in Exhibit 7; and letter dated 30 June 1960 signed by Mrs. Smith and addressed to the Chief Property Officer in Exhibit 7.

[5] For example, see sections 40-41 of the Lands Compensation Act 1986 (Vic)

means the onus is on the Minister to carefully construe the protections contained in the Act to ensure compatibility, reduce conflict and preserve any interests we may have relating to the airport site. Such meticulous interpretation of these protections is required so as not to exceed the Commonwealth's power, as mandated by section 15A of the *Acts Interpretation Act 1901*:

> "*15A. Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.*"

Thus the power to alter surface access conferred by the *Airports Act 1996* but yet without any provision for just terms compensation for severance or disturbance of access within that Act, necessitates the strict application of compatibility and conflict reduction under the master plan required by sections 81(3)(aa), 70(2)(d), 81(a)(b) and 81(4). As that Act presently stands, to do otherwise would risk going beyond the power, as we say the Minister has done by approving a plan showing our land as landlocked, or if he approved of our northern route being shown as discontinued and gated in the proposed amendments (see sections 2 and 3 for the law on this).

Furthermore, the *Airports Act 1996* must never be construed in a protectionist way to favour the Commonwealth's lessee over other airport-related land in relation to the use or development of the airport the site. The master plan must not hinder but encourage the creation of near-terminal facilities on our competing land. This is because the freedom of trade, commerce and intercourse among that States, as laid down in *Cole v Whitfield* (1988) 165 CLR 360 at 408-409, necessarily attaches to the airport (as described shortly). In view of this, the Minister's contention that the Melbourne airport master plan is "APAM's vision", and that references in section 71 of the *Airports Act 1996* to "the airport lessee company's... development, assessment, intentions and plans" can displace those of others outside the airport site, cannot be correct. In view of section 15A of the *Acts Interpretations Act 1901* quoted above, section 71 should be read to merely mean that the airport lessee company has an obligation to include such content in a master plan, while sections 81(3)(aa), 70(2)(d), 81(a)(b) and 81(4)) should be read up to ensure the constitutional freedom of all users of the airport remains in tact in relation to our land in the area immediately surrounding the airport. We say this because the joint judgement of six justices in *Betfair Pty Limited v Western Australia* [2008] HCA 11 (27 March 2008) quoted approvingly the US approach, that this freedom protects "the free market forces" associated with interstate trade, commerce and intercourse. To stay within the power, the Minister must therefore administer the approval of any master plan, or his refusal to approve any master plan, in a fair and even-handed way, which as we shall show may not always be according to "APAM's vision.

For the above reasons, the conflict-reducing and compatibility ensuring purposes of a master plan within the airport site and areas surrounding the airport are statutory proxies for the Constitutional obligations of the Commonwealth. The Minister must enforce these sections with strong-willed rigour, since the validity of the entire legislative scheme depends on his diligent oversight of a master plan's prescribed purposes under the *Airports Act 1996*.

1.4 **Airport lessee's limited property rights always subject to the Trade Practices law**

Regarding the use of the airport site, the impositions and requirements of the *Trade Practices Act 1974* cannot be said to derogate from the grant of the Commonwealth to its lessee, since this grant was made under section 13 of the *Airports Act 1996*. Such a grant does not by implication limit the operation of the *Trade Practices Act 1974* over the airport site, by virtue of a saving clause in section 248(1) of the *Airports Act 1996*. Thus the full application of the *Trade Practices Act 1974* cannot be said to acquire any of the lessee's real property interests in the Airport Site. At the end of

the day, the master plan means business, as Dowset J said in *Brisbane Airport Corp v Wright* (paragraph 28 under tab 4 of the Minister's authorities provided for the jurisdiction hearing)

> "*A master plan is part of a business plan for an existing airport. It is not a town planning document.*"

Our standing and legitimate interests in relation to the master plan ensuring compatibility with our land located in an area immediately surrounding the airport, therefore also extends to commercial concerns as competitors – such as Gummow J said, as was referred to in *Queensland Investment Corporation v Minister For Transport and Regional Services* at paragraph 78 (under tab 5 in the Respondent's authorities provided for the jurisdiction hearing.). Therefore the required compatibility not only relates to land zoning aspects, but equally to surface access mentioned under section 71(2)(c) as well as the future needs of civil aviation users of the airport, and other users of the airport, under 71(2)(b) of the *Airports Act 1996*. The requirements of the *Trade Practices Act 1974* therefore have precedence over the Joined Party's property rights created under section 13 of the *Airports Act 1996*. This means fair trade principles should be given due regard in relation to the master plan's necessary provision of access for our land.

1.5 Master plans must not effect a restraint of trade

The master plan is subject to the *Trade Practices Act 1974* as stipulated by section 248 of the *Airports Act 1996*. The *Trade Practices Act 1974* incorporates concepts of equity and fair dealing such as the:

a) law of the States as to conscionability, since our land's access is in effect in our competitors' own jurisdiction;
b) general prevention of restraints of trade and access to markets formerly dealt with under equity and common law

In addition, any master plan authorising the blocking of access in the terminal precinct[6] from competing land, risks placing a discriminatory and protectionist burden on interstate trade through reduction of airport facility competition, which should be absolutely free (see s92 of the *Constitution*). Therefore the preferable decision would be to refuse to approve any master plan which contemplates the isolation of our competing land zoned for 'Industrial 3' airport-related use, so near the terminal (about 350 metres), by causing people to leave the airport site in the opposite direction to re-access the airport via a 7-kilometre hike. This type of restriction was mentioned in *Cole v Witfield* [1988] HCA 18; (1988) 165 CLR 360; (1988) 78 ALR 42; (1988) 62 ALJR 303 (2 May 1988) at paragraph 28:

> "*... there may be different and perhaps more drastic ways of interfering with freedom, as by restriction or partial or complete prohibition of passing into or out of the State.*"

The discontinuation of our Northerly access plus a locked gate and no trespassing sign (by authority of the Secretary to the Department no less) achieves such a drastic interference with the freedom. This is because page 7 of the 2008 Melbourne airport master plan in the second last paragraph states: "Through the plans outlined here we aim to enhance our position as the gateway to Victoria..."; likewise the first paragraph on page 13 states the airport is "the major gateway to the State of Victoria and Southern Australia". In relation to the master plan being "APAM's Vision" as the Minister contends, the decision in *Cole v Witfield* at the end of 33 states:

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[6] See "terminal area" reference in first paragraph of page 4 of Country Roads Board Inter Office Memo dated 17 March 1964 (Exhibit 18) in view of Bulla Road "point of access" substituted to Northern Interchange in letter from Country Roads Board dated 1 March 1966 in Exhibit 6; and the area's light pink "Aviation Support" zoning in figure 1.1 of the 2008 Master Plan (Exhibit 2) located above the terminal buildings. These all indicate the area of access is in the terminal precinct.

> "... *s.92 will obviously operate to preclude discriminatory burdens being imposed upon inter-State trade or commerce by Commonwealth laws enacted pursuant to other general heads of legislative power (e.g., trading corporations).*"

However even if the offending discontinued access and locked gate was not located in the terminal precinct[7], the above principles as to restriction of movement also apply in relation to the *Trade Practices Act 1974* as discussed later. Moreover, the six justices in *Betfair* (mentioned above - HCA 11 (27 March 2008)) also referred to the *National Competition Policy Agreement* between the Commonwealth and the States at paragraph 16:

> Elements of that policy include as a "guiding principle" that legislation should not restrict competition, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs and that the objectives of the legislation "can only be achieved by restricting competition"

It is therefore against public policy for the Minister to use powers entrusted to him under such legislation to approve a master plan which restricts competition, when other options are available. Moreover, unless the *Airports Act 1996* expressly over-rides federal common law, the minister must not, in effect, grant the airport lessee company a near-terminal monopoly (*Darcy v Allin* (1601) as quoted in paras 103-105 by Finkelstein JJ in *Bristol-Myers Squibb Co v F H Faulding & Co Ltd* [2000] FCA 316 (22 March 2000)) by arbitrarily denying our land reasonable airport access for its airport-related zoning, and according to the 1992 Melbourne Airport Land Use Study[8] cited three times in the 2008 master plan.

1.6 Standard of proof

The events of the Commonwealth's dealings (including undertakings and performances) in relation to access to the remaining land of our predecessor in title, as disclosed from the Commonwealth's own archives, should be taken on the balance of probabilities: if the Chief Property Officer told the Deputy Crown Solicitor that the purchase of Mrs. Smith's land was subject to an undertaking to the vendor[9], then contrary to what the Joined Party says, that is what happened in the balance of probabilities. This is particularly so as maintained access was later asserted by Mrs. Smith's solicitor in 1963[10], then acknowledged by the Department of the Interior in 1965[11] before the roads of restoration were built. This maintenance obligation was referred to again by the Tax Office in 1971[12] after the service road to Western Avenue was built, and was recited yet again by the Tax Office in 1974 [13], years after the easement to the South had been granted in exchange for other additional land[14]. Therefore "on the balance of probabilities" the late submission by the Joined Party that the undertaking (for the Commonwealth by its Chief Property Officer) might have never been given cannot be sustained; and in result at the very least, the access to our land was not included in the acquisition price paid by the Commonwealth.

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[7] See the point 6 above

[8] The joined party advises us it has sent an entire copy of this Study to the Tribunal.

[9] See letter from Chief Property Officer to Deputy Crown Solicitor dated 24 August 1960 in Exhibit 7.

[10] See paragraph 3 in letter from Cleary Ross and Doherty on behalf of our predecessor in title (Mrs. Smith) dated 13 December 1963 in Exhibit 16.

[11] See item 3 in the file note of property officer A. Munro dated 13/7/1965 in Exhibit 6, page 15.

[12] See ATO valuation report dated 22 June 1971 in Exhibit 6.

[13] See second ATO valuation report dated 16 August 1974 in Exhibit 6.

[14] See reference to "small portion of their land" in paragraph 4 of property Officer Spreitzer's file note dated 24/7/70 in Exhibit 16, paragraph 2 in a letter from letter from Mrs Smith to the Chief Property Officer dated 7 August 1970 in Exhibit 16, and the face of the instrument dated 4 March 1971 and the end wedge of land in Exhibit 24.

1.7 Application of *contra preferendum* to our case

As the Tribunal pointed out, unless our predecessor in title made an agreement with the Commonwealth, her land would have been compulsorily acquired anyway. This means the bargaining positions were never equal. Moreover, upon seeing the way the deal was shaping up with her solicitor (see the enclosed letter dated 13 April 1960 with the Minister's permission), the Commonwealth decided to bypass her legal representative and treat directly with Mrs. Smith herself. Therefore in view of the 30 April 1960 letter, it is now more likely than not to say that the unsigned carbon copy of Mrs. Smith's letter on the Commonwealth's file indicates her acceptance was, in the balance of probabilities, drafted beforehand by the Commonwealth.

Even if the matters in the above paragraph were not the case, the later creation of a second agreement by the Commonwealth according to the first agreement, cannot be construed to cancel any earlier undertaking as to access. The Joined Party admits the second agreement does not mention access, making the second agreement somewhat irrelevant to the matters before the Tribunal. (But since it has been introduced, we merely point out the Quarry operator could only enjoy its licenced access provided Mrs. Smith enjoyed her continuing right of unrestricted access[15], which the Commonwealth thereby consented to also, meaning the documents don't support the Joined Party's case at all.) Moreover, at the time of the second agreement, Mrs. Smith's land on which her house stood had already settled upon the Commonwealth[16] and her future accommodation, farm income and valued items fixed to that land were under the Commonwealth's control[17]. Therefore she was in no position to bargain the terms of the second agreement, so the absence of any mention of access should be interpreted against the Commonwealth that the previous arrangement stood.

This is consistent with the contra preferendum rule and with the Deputy Crown Solicitor's[18] direct observation that the second agreement was *part* of the overall settlement[19] (i.e. not *the* overall settlement). It is also consistent with the second agreement itself which points out that other documents were in effect which needed over-riding in relation to certain items, without specifying access as one of them. Thus the rule of contra preferendum applies against the Commonwealth so that access cannot be construed to have been extinguished by any acquisition agreement.

It is also evident by the letter of 13 December 1963 (Exhibit 16) from Cleary Ross and Doherty, that our predecessor in title did not approve of the Commonwealth's authorisation for the State of Victoria to in any way to compromise her access to the North. That is they held there was a basis to assert the right and the required roads were then actually built at great public expense. To say 50 years later that no undertaking was given is therefore highly inconsistent with the conduct of the parties at the time.

1.8 Airports Act 1996 in a Commonwealth Place

As shown in our law notes of Exhibit 30, the laws of the relevant State always applied to Commonwealth places according to their tenor unless a Commonwealth law applied. We have shown in evidence that the matter of access to airports was considered a State responsibility[20] and

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15 See items 5(i), 5(g) and 3(c) of the Indenture dated 18 March 1957 in Exhibit 7.

16 See item 6 of advice from the Deputy Crown Solicitor dated 10 October 1960 to the Chief Property Officer in Exhibit 7..

17 See items 5th paragraph of the Chief Property Officer's letter to Mrs. Smith dated 17 August 1960 in Exhibit 7.

18 D. Bell was the Deputy Crown Solicitor himself who had formerly been the Commonwealth's Crown Solicitor: See paragraph 3 of the farewell of Mater Charles Wheelar at:
http://www.vicbar.com.au/webdata/VicBarNewsFiles/132%20Farewell%20Master%20Wheeler.pdf
Therefore as we stated at the hearing, we are entitled to rely on his advice.

19 See item 1 of advice from the Deputy Crown Solicitor dated 10 October 1960 to the Chief Property Officer in Exhibit 7.

20 See items 5-6 in letter from Civil Aviation to the Secretary of the Country Roads Board dated 22 May 1959 in Exhibit 6, page 9; item 6 & 8 in letter from Civil Aviation to the Chairman of the Victorian Country Roads Board dated 19/4/1960 in Exhibit 6, page

that VicRoads negotiated the demarcation line of the State's responsibility with the Commonwealth[21]. However sections 98 & 99 of the *Airports Act 1996* made all roads on the airport site subject to building controls, which are subject to the master plan. This means it is vital that a master plan records access obligations with crystal-clear fidelity, to avoid any acquisition of property.

1.9 Constitutional guarantee of the Commonwealth constitution s51(xxxi) in relation to the easement D991658

The question of whether or not the imposition of building approvals and fees by the Commonwealth aught to be addressed in the master plan as being a mere formality (so as to reduce conflict between airport site uses) turns on two questions:

a) Whether or not the maintenance of the road is a Commonwealth obligation anyway, in which case the matter does not arise (unless the Commonwealth defaults); and

b) Whether or not the imposition of fees and approvals modifies the normal exercise of the rights created by the Commonwealth's grant of this easement, particularly as the grant is of a " ... full and free right and liberty ...", (as further described in our notes of Exhibit 31).

1.10 Highest legal opinion

The question of restoration of access to our land in the mid 1960's was settled by a report from the Commonwealth to State officials. Point three on the last two pages reads of the Country Road's Board documentation in Exhibit 18 reads:

> *"Mr. Brown [Chief Property Officer] of Dept. of Interior states that they obtained their highest legal opinion that access had not been extinguished and this being the case it is I believe up to us to provide alternative access."*

That is why the State funded such an expensive interchange to replace the previous Bulla Road "point of access"[22]. (See "Obligation to restore access" section below for more information as to the law regarding this.).

1.11 Major Development Plans are no substitute

The above matters in relation to our land's access cannot rightly be left to the major development plan process as the Minister contends, since the Minister's criteria for consideration of MDPs are not as broad, and since they assume a proper master plan is already in place (see section 94(5) of the *Airports Act 1996*). The Tribunal has already determined this is not the case at the present time. Nor can it be said or assumed that the lower or different interests, or higher obligations of the Commonwealth, sought to be addressed in the master plan, can or will be addressed in our Supreme Court case. Therefore proper consideration of these other interests is required by the Minister. The Minister, believing in error that we had no standing, simply has not done what he is required to do before giving approval to the master plan.

13; and file note of property officer A. Munro dated 13/7/1965 in Exhibit 6, pages 15-16; and "Statement of Position of Commonwealth Department", Country Roads Board Inter Office Memo dated 17 March 1964 (Exhibit 18).

[21] See item 5 of Inter-Office Memo of Vic Roads dated 18 April 1997 in Exhibit 6.

[22] Our land's Bulla Road "point of access" was substituted to Northern Interchange as indicated in a letter from Country Roads Board dated 1 March 1966 in Exhibit 6

2. Obligation to restore access

2.1 Had the Commonwealth or the State of Victoria elected to pay compensation for any loss of access to the remaining land held by our predecessor in title, then the following from pages 376-377 of the *Principles and Practice of Valuation* by J.F.N. Murray (Commonwealth Institute of Valuers 1968) would have applied (and still do) in relation to the fully maintained State Main Road[23] at that relevant time:

> *" Any interference with the access previously enjoyed should be compared with the best access obtainable after the acquisition. Length of access, gradients, awkward turns, construction difficulties and costs should be taken into account."*

Instead of this, the State of Victoria, as authorized by the Commonwealth, elected to restore access under the requirements of common law, rather than pay compensation[24].

The following principles and cases relate to our Application:

2.2 At common law an owner of land adjoining a highway has a right to free and uninterrupted access to the highway from any point on the land contiguous with the highway and from the highway to any point on the land contiguous therewith.

> *Walsh v Erwin* [1952] VLR 361 at 362; [1952] ALR 650 at 651
> *Owen v O'Connor* [1964] NSWR 1312 ; (1963) LGRA 159 at 180; [1963] SR (NSW) 1051 at 1061-2; (1963) 80 WN (NSW) 1535 at 1542
> *Shellharbour Municipal Council v Rivoli Pty Ltd* (1989) 16 NSWLR 104 at 108; 68 LGRA 231 at 235 NSW SC Court of Appeal;
> *Eggar v Commissioner of Main Roads* [1979] QdR 501 at 502
> *Kenthurst Investments Pty Ltd v Wyong Shire Council* (1964) 10 LGRA 307 at 312;
> *Maritime Services Board of New South Wales v Leichhardt Municipal Council* (1972) 26 LGRA 42 at 45
> *Folland v Stevens* (1915) SALR 25 at 34.

and see also *Marshall v Blackpool Corporation* [1935] AC 16 at 32 per Lord Atkin:

> *" ... the owner of land adjoining a highway has a right of access to the highway from any part of his premises ... The rights of the public to pass along the highway are subject to this right of access... " cited by Shellharbour above.*

> *Willis v Campbell* (1856) 2 Legge 932 at 936 and Westbrook v Hobart Corporation (1887) 8 ALT 136

and in the Federal Court of Australia

> *Henrick Fourmile v Selpam Pty Ltd & Queensland* (includes addendum 16 February 1998) [1998] FCA 67 (14 February 1998) per Burchett, Drummond and Cooper JJ

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[23] Bulla Road was a state main road: See item 4 in letter from the Department of Civil Aviation dated 22 May 1959 to the Secretary of the Country Roads Board in Exhibit 6, page 9. See also paragraph 2 of item 2.3 in the Victorian Road Construction Authority Inter-Office Memo dated 15 September 1983; in Exhibit 6 page 4..

[24] See item (c) in letter from the Department of Civil Aviation dated 22 May 1959 to the Secretary of the Country Roads Board in Exhibit 6, page 10.

2.3 The right of access to the highway is a private right of the owner of adjoining land to pass from the land onto the highway or vice versa at the level at which the highway was dedicated to the public.

South Australian Co v Corporation of the City of Port Adelaide (1914) SALR 16 at 82;
Walsh v Erwin [1952] VLR 361 at 362; [1952] ALR 650 at 651
Owen v O'Connor [1964] NSWR 1312 ; (1963) LGRA 159 at 180; [1963] SR (NSW) 1051 at 1061-2; (1963) 80 WN (NSW) 1535 at 1542
Shellharbour Municipal Council v Rivoli Pty Ltd (1989) 16 NSWLR 104 at 109; 68 LGRA 231 at 235 NSW SC Court of Appeal

2.4 The right of access to the highway is a private property right.

Walsh v Erwin [1952] VLR 361 at 362; [1952] ALR 650 at 651
Owen v O'Connor [1964] NSWR 1312 ; (1963) LGRA 159 at 179; [1963] SR (NSW) 1051 at 1061; (1963) 80 WN (NSW) 1535 at 1542
Shellharbour Municipal Council v Rivoli Pty Ltd (1989) 16 NSWLR 104 at 109; 68 LGRA 231 at 235 NSW SC Court of Appeal
Tanner v Minister for Education and Training (2002) 119 LGERA 321; [2002] NSWLEC 40; BC200201328 at [102];

and in the Federal Court of Australia:

Henrick Fourmile v Selpam Pty Ltd & Queensland (includes addendum 16 February 1998) [1998] FCA 67 (14 February 1998) per Burchett, Drummond and Cooper JJ:

> " ... *The owner from time to time of land abutting a road has private rights which attach as incidents which pass with ownership of the land. They are rights in addition to that person's right as a member of the public to use the road and are different to the public rights of user.*"

2.5 That decision of the Federal Court of Australia is confirmation this right of access to the highway attaches as an incident of title to the land which runs with the succession of title, and is not a mere personal right of an individual owner.

This private right of access to a highway is to be distinguished from the public right of every member of the public, including the owner of the adjoining land, to pass and repass along a highway.

Shellharbour Municipal Council v Rivoli Pty Ltd (1989) 16 NSWLR 104 at 109; 68 LGRA 231 at 235 NSW SC Court of Appeal
Folland v Stevens (1915) SALR 25 at 34.
South Australian Co v Corporation of the City of Port Adelaide (1914) SALR 16 at 82
With South Australian Co as confirming
Chaplin & Co v Westminster Corporation [1901] 2 Ch 329 at 334-335; [1901] WN 131 per Buckley J:
Walsh v Erwin [1952] VLR 361 at 362; [1952] ALR 650 at 651
Fuller v McLeod [1981] 1 NSWLR 390 at 399
Toronto Transportation Commission v Swansea Village Corporation [1935] SCR 455 at 457; [1935] 3 DLR 619 at 620

and see also *Shellharbour* , there regarding as authoritative the statement by Page Wood VC in *Attorney-General v Thames Conservators* (1862) 1 H & M at 32-32; 71 ER 1 at 15:

> " ... *Independently of the authorities, it appears to me quite clear, that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the land.*"

and

> *Tanner v Minister for Education and Training* (2002) 119 LGERA 321; [2002] NSWLEC 40; BC200201328 at [102];

2.6 Consequently road frontage is a valuable common law right

> *Twist v Randwick Municipal Corporation* (1976) 51 ALJR 193
> *White v Ryde Municipal Council* [1977] 2 NSWLR 909

2.7 The private right of access to a highway exists whether there is actual use or access is physically impossible.

> *Maritime Services Board of New South Wales v Leichhardt Municipal Council* (1972) 26 LGRA 42 at 45

2.8 Also, once a road has been properly brought into legal existence it is irrelevant that is in whole or in part rough, difficult to traverse on foot or by vehicle or even impassable.

> *Permanent Trustee Co of New South Wales Limited v Council for the Municipality of Campbelltown* (1960) 105 CLR 401 at 415-16, 420; [1961] ALR 164; (1960) 34 ALJR 255;
> *Everingham v Council of the Municipality of Penrith* (1916) 16 SR (NSW) 238; 34 WN (NSW) 51; 3 LGR (NSW) 74 at 78
> *Lawson v Weston* (1850) 1 Legge 666 at 670
> *Henrick Fourmile v Selpam Pty Ltd & Queensland* (includes addendum 16 February 1998) [1998] FCA 67; (1998) 80 FCR 151; 152 ALR 294; BC9800178

2.9 The right of access is not limited to points where there is physical access by gates.

> *Bowden v Corporation of the Town of MurrayBridge* [1936] SASR 451 at 457

2.10 It is irrelevant that access is or may be available from the land to another public road.

> *Eggar v Commissioner of Main Roads* [1979] QdR 501 at 505
> *Tanner v Minister for Education and Training* (2002) 119 LGERA 321; [2002] NSWLEC 40; BC200201328 at [102];

2.11 An owner of land adjoining a highway is entitled to the removal of any obstructions which interfere with the common law right of access to and from that land.

> *Shellharbour Municipal Council v Rivoli Pty Ltd* (1989) 16 NSWLR 104 at 109; 68 LGRA 231 at 235 NSW SC Court of Appeal

2.12 A landowner's common law right of access may be denied only by express statutory authority.

Bartzios v Leichhardt Municipal Council [1978] 1 NSWLR 7 at 11; (1978) 37 LGRA 439 at 443;
Maritime Services Board of New South Wales v Leichhardt Municipal Council (1972) 26 LGRA 42 at 48 SC (NSW);
D'Arcy v Municipal Council of Inverell (1925) 25 SR (NSW) 102 at 107; 42 WN (NSW) 20 at 21; 7 LGR (NSW) 63 at 66-7

2.13 Although the Crown may alter a road, it is in the same position as when carrying out other government works and it is not empowered to carry out works which interfere with private rights such as the right of access without statutory authority.

Miller v McKeon (1905) 3 CLR 50 at 59; 11 ALR 489 at 491-2 per Griffiths CJ;
Folland v Stevens (1915) SALR 25 at 35;

2.14 Alteration of the level of a highway (i.e. the addition of separating land on the vertical plane) to the detriment of an adjoining owner without statutory authority is wrongful and actionable.

Folland v Stevens (1915) SALR 25 at 35;
King v Mayor, etc of Kew (1884) 10 VLR (L) 183; 6 ALT 54;
Adams v Mayor, etc, Brunswick (1894) 20 VLR 455; 16 ALT 66, SC (VIC)

2.15 An injunction will be available for wrongful interference with a private right of access to land adjoining a highway.

Kenthurst Investments Pty Ltd v Wyong Shire Council (1964) 10 LGRA 307 at 312;

2.16 Substantial interference with a private right of access to a highway may be actionable without proof of special damages:

Walsh v Erwin [1952] VLR 361 at 362; [1952] ALR 650 at 652
Owen v O'Connor [1964] NSWR 1312 ; (1963) LGRA 159 at 179; [1963] SR (NSW) 1051 at 1061; (1963) 80 WN (NSW) 1535.

2.17 Authorisation of interference with, or denial of, a private right of access to highway must be by legislation, and a statutory power which may interfere consequentially with the right of access to a highway must not be exercised for a purpose other than that for which the power was conferred.

Investments Pty Ltd v Wyong Shire Council (1964) 10 LGRA 307 at 312;
Wegner v Cmr of Highways (1981) SASR 595

2.18 Where there are two methods for exercising a statutory power, one causing interference with the right of access and one not, the latter must be adopted.

Bowden v Corporation of the Town of MurrayBridge [1936] SASR 451 at 457
Thompson v Randwick Municipal Council (1944) 44 SR (NSW) 455; 61 WN (NSW) 253; 15 LGR (NSW) 149

2.19 A further common law rule is 'once a highway always a highway' and if a highway is dedicated at all it is dedicated in perpetuity.

> *Everingham v Council of the Municipality of Penrith* (1916) 16 SR (NSW) 238; 34 WN (NSW) 51; 3 LGR (NSW) 74 at 77
> *Holcombe v Municipality of Newcastle* (1884) 5 LR (NSW) Eq 87 at 92; 1 WN (NSW) 27

2.10 A highway may be extinguished by amongst other means (a) physical destruction or (b) legislation

> *Boultwood v Paignton Urban District Council* (1909) 92 JP 98
> *Everingham v Council of the Municipality of Penrith* (1916) 16 SR (NSW) 238; 34 WN (NSW) 51; 3 LGR (NSW) 74 at 78

And when by legislation then by express terms of legislation, not by implication

> *Holcombe v Municipality of Newcastle* (1884) 5 LR (NSW) Eq 87 at 94; 1 WN (NSW) 27
> *Tanner v Minister for Education and Training* (2002) 119 LGERA 321; [2002] NSWLEC 40; BC200201328 at [54];

2.11 The compulsory acquisition of land which is a public road (i.e. Bulla Road was so acquired – see item 1.1 above) extinguishes the right of way of the public and its status as a public road

> *Chief Commissioner for Railways and Tramways (NSW) v A-G (NSW)* (1909) CLR 547; 10 SR (NSW) 479; 26 WN (NSW) 179

This is a different right from the right of access to a highway held by an owner of land adjoining a highway (see above authorities).

2.12 When compulsory acquisition of a highway (i.e. Bulla Road– see item 1.1 above) may deny the only means of access to land adjoining a highway then it appears that there will be a way of necessity over the land acquired.

> ***Chief Commissioner for Railways and Tramways (NSW) v A-G (NSW)* (1909) CLR 547 at 557; 10 SR (NSW) 479; 26 WN (NSW) 179 per Griffiths CJ**

Griffiths CJ stated in the eighth paragraph:

> ***"I think that, if a highway were taken by the Crown which was the only means of access to alienated land, it might well be said that there was a way of necessity over the land, and that there was an obligation imposed upon the Constructing Authority to construct another road in place of the road resumed. But such a case is very unlikely to arise. It is almost inconceivable that the Government would take a highway which was the only means of access."***

This authoritative view of Chief Justice Griffiths CJ was recorded in the very early days of the Commonwealth, and requires a *"way of necessity"* (but not necessarily an easement or the Quarry Road route) to be shown in the Melbourne airport master plan today. This should be the shortest practicable route to the Entrance Road located on our land and designed by those

having relevant professional skills, which by now is trite law. The restoration of access was and must continue to be a fully maintained heavy duty sealed bitumen roadway running from the Entrance Road on our land in a North-Westerly and South-Easterly direction, to replace Bulla Road, because of the matters set out in point 1 of our letter to the Tribunal of 8 February 2010, and also item 3 below.

2.13 Bayview Quarries and its successor Albion Reid were at all times mere licensees and could only claim access against the Commonwealth through Mrs. Smith. That is why the express terms of her agreement dated 30 June 1960 (irrespective of who drafted it) reserved those rights in accordance with the Commonwealth's common law obligations cited above. Her Quarry-related income depended on this as did her grazing business both of which were known to the Commonwealth at the time. As may be seen from the earliest citation dates in the above decisions respective to each of the principles related above:

(a) all of these principles were established authority as at the time when the Country Roads Board reported that highest legal opinion in the Commonwealth had determined that the "*...access had not been extinguished.*" and that "its up to us to provide alternative access"[25], and

(b) subsequent case law in Australia has continued to affirm the authority of these principles.

2.14 The Deputy Crown Solicitor's advice given to the Department of the Interior that the only way to undo the Commonwealth's obligation would be by an express deed of surrender[26] (which Mrs. Smith could not and did not give in view of her obligations and income), was in accord with the principles above (and this advice is now part of the Commonwealth archival record of actions taken by the executive arm of government). We should be allowed to rely on that advice as representing the true legal principles that applied at the time title to Bulla Road was vested in the Commonwealth, and during the time since then. Furthermore, we should be allowed to rely on that advice as showing the Commonwealth has been aware from the very start of the true principles. Moreover the actions of the Commonwealth and the Victorian agencies affirm the existence of the above-mentioned obligations to our land, in the building of expensive infrastructure to service our land.

2.15 The actions of the Commonwealth which effected a consolidation into one (airport) land title of the former title to Bulla Road and which authorised the Country Roads Board of Victoria to destroy the access to Bulla Road[27] interfered with the right of access to the highway Bulla Road held by our predecessor in title. This right of access attached to the remaining land of our predecessor in title and had continued until then because our predecessor in title never consented upon any basis whatsoever, nor at any time whensoever, to give up that common law right to the Commonwealth, nor was compensated for it[28]. Until the said actions by the Commonwealth the said right of access to the highway Bulla Road had subsisted over various routes from the remaining land of our predecessor in title and these routes effected a continuation of, that is a nondisturbance of, the common law property right of access held by our predecessor in title.

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[25] See point 3 on the last two pages of 1964 Country Roads Board documentation in Exhibit 18

[26] See handwritten note of A. Munro recoding Deputy Crown Solicitor's advice dated 16 August 1960 in Exhibit 7; and paragraph 3 of the Chief Property Officer's letter to Mrs. Smith dated 17 August 1960 in Exhibit 7.

[27] See "Statement of Position of Commonwealth Department", Country Roads Board Inter Office Memo dated 17 March 1964 (Exhibit 18)

[28] See items 5-6 in letter from Civil Aviation to the Secretary of the Country Roads Board dated 22 May 1959 in Exhibit 6, page 9; item 6 & 8 in letter from Civil Aviation to the Chairman of the Victorian Country Roads Board dated 19/4/1960 in Exhibit 6, page 13; and file note of property officer A. Munro dated 13/7/1965 in Exhibit 6.

2.16 Despite the Commonwealth's interference with the right of access to the highway Bulla Road, the common law right of access to the highway Bulla Road howsoever configured at the present time continues as an incident of the title we hold.

2.17 The principles referred to above have been affirmed as having always been the common law in the Australian cases: see *Halsbury's Laws of Australia* (1998) Vol 14 Butterworths [225-585 onwards]

2.18 The authority then and the continuing authority of these principles also means that the actions of the executive arm of government bringing about the Commonwealth's interference with the right of access to the highway Bulla Road were wrongful at the time and continue in effect in that wrongfulness as against title to the affected land which we hold now. The 2008 Melbourne airport master plan must therefore fully recognise our interests as the first step in undoing that wrong.

3. Continuation of access under Airports Act 1996 master plans

3.1 In reply to our submission, the Joined Party asserted the words "and appurtenant thereto" when said to be correctly construed, attached a right of way solely to our land (and to parts thereof) but did not allow invitees to our land to go on to access any lands adjoining our land. This was despite our land being used in recent times to access quarry holes on the adjoining land of Parks Victoria across the creek (the Joined Party has written a letter to us trying to interfere with this); and that this use was specified as a use of the access to our land at the time of the airport land acquisitions[29].

3.2 If the above paragraph is true, the easement of carriageway does not and never did encompass all the rights required to access the quarry across the creek; for which our land has been used by us in recent times to help us profit from the filling of the airspace in those holes. In this situation, both the air space and our claimed access to it (via a permanent access point[30] in the freeway to the North-West and a road constructed for that purpose to the South-East) are property. (See *RTA v Collex Pty Limited* [2009] NSWCA 101 in the affirmative, and *Roads Corporation v Love* [2010] VSC 32 (23 February 2010) in the negative; the latter case unlike ours, not having access constructed for quarry activities.)

3.3 Because of the property matters set out in the above two paragraphs, the correct view is the acquisition of quarry airspace and our traditional access to it is to be avoided by addressing this particular Airports Act section 22(3) interest in the 2008 master plan. This means access in a North-Westerly and South-Easterly direction is required[31] to be shown under the Airports Regulations 5.02(3)(b). Alternatively, it is the preferable view that the traditional access to our land in a North-Westerly and South Easterly direction, including to and from adjoining lands, be expressed to reduce the potential conflict between the uses of the airport site and the areas surrounding the airport. This is especially so in view of the Joined Party's above-mentioned conduct in trying to deny such access. However, the right of access held by our predecessor in title and passed on to us[32] is not only for quarry purposes, but a continuing unrestricted right of access[33] and that the above

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[29] See reference to "adjoining land" in item 1 of letter from Cleary Ross & Doherty dated 7July 1959 in Exhibit 7.
[30] See Country Roads Board Right of Way Access Authorization Plan on pages 20-22 of Exhibit 6.
31 See Letter from Cleary Ross and Doherty on behalf of Mrs. Smith dated 13 December 1963 in Exhibit 16
[32] See Property Law Act (Vic), Transfer of Land Act (Vic) and sale of land documents in Exhibit 12.
33 See items 5(i), 5(g) and 3(c) of the Indenture dated 18 March 1957 in Exhibit 7.

access was provided to replace a fully maintained State main road[34].

3.4 As to the future use of the access in view of our land's rezoning and the 1992 Land Use Study, section xxx of the Trade Practices Act 1974 reads:

> (1) *A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:*
> *(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
> *(b) preventing the entry of a person into that or any other market; or*
> *(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.*

The Joined Party is taking advantage of its market power by damaging of our land's access thereby limiting the airport-relatedness of our land's intended use. Since according to Dowsett J an airport master plan is not a town planning document but a business plan[35], the Minister must not approve any such plan incorporating restrictive trade practices. On the contrary, the master plan aught to affirm access to ensure healthy competition in near-terminal aviation facilities.

If it would have been unconscionable to damage our property's access in 1965 it is still so (if not more so) in 2010, with our competing land's access being in our competitors' jurisdiction. This is because the access is still being used for its original purposes and the airport master plan already references the 1992 study identifying our land as suitable for airport-related use. Moreover, we purchased the property with its historical access in tact and the easement to the South-East, although registered on the Commonwealth's title, was and never has been registered on our title[36]. We did not even know of the easement's existence until the '90s, and it is and was no substitute for the original access taken by the Commonwealth. So in essence, to deny our land's access in a North-Westerly and South-Easterly direction, corresponding to Bulla Road, would be unconscionable. This means on its face, section 51AA of the *Trade Practices Act 1974* would cast doubt on the Minister's approval of the master plan in either its proposed or current form.

3.5 Finally, we refer the Tribunal back to the ancient common law as described in *Burma Oil*. As stated in our reply dated 14 March 2010 (Exhibit 15) to the Minister's contentions, if the Crown damages land for the public good then it is obliged to restore it. This basic Tenant of our civilisation is similar to what Kirby JJ said in the majority of *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38; (1997) 190 CLR 513:

> " ... *the prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilized legal systems. Historically, its roots may be traced as far back as the Magna Carta 1215, Art 52 of which provided:*
> *'To any man whom we have deprived or dispossed of lands, castles, liberties or rights, without the lawful judgment of his equals, we will at once restore these'* ".

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34 Bulla Road was a state main road: See item 4 in letter from the Department of Civil Aviation dated 22 May 1959 to the Secretary of the Country Roads Board in Exhibit 6, page 9. See also paragraph 2 of item 2.3 in the Victorian Road Construction Authority Inter-Office Memo dated 15 September 1983; in Exhibit 6 page 4.

35 Ibid 1.4

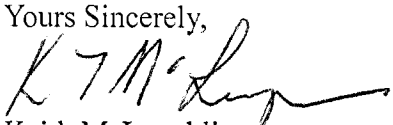
36 See our title documents supplied by the Joined party in Exhibit 24

In summary:

- Our predecessor in title, Mrs. Smith had a common law right as an owner of land adjoining a highway to access the highway known as Bulla Road;
- This right ran with her land and was never acquired by the Commonwealth;
- The Commonwealth authorised the State of Victoria to disturb that access without Mrs. Smith's consent and an obligation of restoration of access arose as a result;
- Roads of restoration were therefore built which were supposed to be handed over to the State as part of the agreement with the Commonwealth.
- However, the Commonwealth leased the roads on the Commonwealth's title to APAM instead, making APAM solely responsible for such roads.
- Therefore the responsibility for the maintenance of that access, in both a North-Westerly and South-Easterly direction from our land, remains with the Commonwealth as has been the case since the 1960's.
- We have an interest in access to the present day replacement highway which was constructed in lieu of that part of a highway formerly known as Bulla Road which was consolidated into the Commonwealth's title over the airport lands.
- This right of access is held by us by virtue of our succession in title to rights attached to our land
- This interest must be addressed in the 2008 Melbourne airport master plan, and additionally;
- The best interests of civil aviation in Australia require that our land's access be preserved as it was, for healthy competition to exist relating to airport facilities, and furthermore;
- It would be unconscionable for the Commonwealth to do otherwise.

Finally, we draw to the Tribunal's attention that directly relevant testimony concerning the ongoing maintenance responsibility of the Commonwealth has been tendered by affidavit into the Supreme Court by the Commonwealth and the Joined Party. However, while the Joined Party has tendered evidence from the Supreme Court into this proceeding, the AGS on behalf of the Minister has refused to release that particular document to the Tribunal. We believe the Tribunal should be allowed to read this affidavit so as to understand what the Minister knows to be true concerning the ongoing maintenance obligation of the Commonwealth and from where the Commonwealth says that obligation arose.

Yours Sincerely,



Keith McLaughlin

CC: AAT Senior Registrar, Melbourne
AGS.
Corrs Chambers Westgarth

Enclosures:

1. Letter from Cleary Ross and Doherty for Mrs. Smith dated 13 April 1960

Keith & Norma McLaughlin
1 Priorswood Way
Sunbury 3429
Phone 9338 8011
Fax 9330 2411

8 February 2010

Deputy Registrar
Administrative Appeals Tribunal
Melbourne
By Fax (03) 9282 8480

Dear Sir/Madam,

RE: McLaughlin v Minister for Infrastructure, Transport, Regional Development and Local Government **ATA 2009/54**

This statement identifies our presently claimed interests before the AAT in the Minister's decision to approve the 2008 Melbourne airport master plan, under s81 of the Airports Act 1996. We are not lawyers so we rely on the substance and character of our claims rather than the use of exact legal expressions. And for the purposes of administrative review, the claims below are tendered additional to or in the alternative to our Quarry Road case in the Supreme Court; where the establishment of different and additional rights (easement(s) and/or declared route(s) and/or licence(s)) will be argued for on somewhat different grounds, such as contracts with the Commonwealth and long user rights since 1966 -- issues we have not brought before the Tribunal. The following makes this distinction abundantly clear:

1) We claim *existing* Airports Act Section 22(3) interests in the Melbourne airport land, including:

   a) The right to enjoy fully-maintained, two-way, heavy-duty sealed bitumen service road access, connecting to the access road located on our land:
      - in a south easterly direction to Western Avenue; and
      - in a north westerly direction to the airport/Sunbury Road freeway entrance;

      both being the Commonwealth's duty and/or assumed responsibility to provide on an ongoing basis.

      We claim these interests because:

      i) **Our land's predecessor in title, Mrs. W Smith, enjoyed an inalienable right of direct frontage to Bulla Road (subsequently acquired by the Commonwealth) which was and is a State main Road maintained by the Victorian Country Roads Board now Vic Roads.**

      ii) In 1957 Mrs Smith licenced a portion of her land to a quarry company, including for the construction of an access road on her land which used her inalienable right of direct frontage to Bulla Road as its outlet.

      iii) The access road on her land was also under a profit-a-prede agreement, whereby Mrs. Smith received quarry royalties as the Landowner. She could also use the licenced area to graze livestock or allow others to do so. Therefore the 99-year agreement made in 1957 provided for cattle grills to be installed in the access road on her land for this purpose.

iv) In about 1960 the Commonwealth acquired all of Mrs. Smith's direct frontage to Bulla Road and a portion of her access road, however physical access was not disturbed for some years.

v) **In the mid 1960's the Commonwealth created runway and terminal works over Bulla Road, the State Main Road, and authorised the Victorian Country Roads Board to build a limited access freeway bypassing the airport, which would sever Mrs. Smith's access road.**

vi) The Commonwealth proposed to give Mrs. Smith an easement to Western Avenue, but her solicitors wrote rejecting that offer outright on these terms:

> *"Our client states that she requires, and considers the only practical solution, a direct outlet in a south easterly and north westerly direction outside the licensed area from the point marked "A" in Red. Our client further instructs that such outlet should have a construction suitable for the carriage over the same a minimum of 3000 tons of material daily and that maintenance of such outlet should be the responsibility of the Commonwealth."*

Thus our predecessor in title claimed (inter-alia) a fully serviced road in both directions, to the North-West and to the South-East.

vii) Mrs. Smith's licensee (the quarry company) reconstructed and bitumenised Mrs Smith's old farm road then on the Commonwealth's land, to connect Mrs. Smith's access road on her land to the freeway to the North-West under construction. The Commonwealth approved of this.

viii) To avoid the acquisition of her property (Mrs. Smith's access) the Commonwealth and the Victorian Country Roads Board ultimately collaborated to:

(1) Create a permanent freeway opening to the Bulla-Lancefiled-Sunbury Road (also connecting the airport). The Country Roads Board further built a new road with curbs and channels to connect the linking road built by Mrs. Smith's licencee (the quarry company) to join up with Mrs. Smith's access road located on her land, which route became known as "Quarry Road" running in a north westerly direction; and

(2) They later created a fully constructed bitumen service road, which became known as the Western Avenue Extension, running in a south easterly direction to Western Avenue.

ix) In 1979 the quarry company surrendered its part of the profit-a-prende to Mrs. Smith.

x) From 1982-87 we managed Mrs. Smith's land including by grazing livestock, starting to fill it and cleaning it up. We used both:

(1) The Quarry Road freeway accesses in a north westerly direction, including to the airport and the Bulla-Lancefield-Sunbury Road (we live in Sunbury); and

(2) The service road in a south easterly direction to Western Avenue.

xi) In 1987 we finalized the purchase of Mrs. Smith's land. Certificates from State authorities in land's sale documents state our land is:

(1) "Sunbury Road Tullamarine Pt Lot 1 LP91468" (which is in a north westerly direction); and

(2) "Lot 1 (Part), LP 91468 Western Avenue Shire of Bulla" (which is in a south easterly direction).

xii) Our rate notice describes our land as "Located off, Sunbury Road, Melbourne Airport Vic 3045".

Because of the above matters, the Commonwealth therefore retains its responsibility to provide and maintain the replacement road access it created with the Country Roads Board in view of its uncompensated acquisition of Bull Road access to the land.

xiii) Furthermore, the Commonwealth agreed (on just terms) its acquisition of Bulla Road would be without cost if it handed back to the State, those roads built for restitution and/or restoration of access for that State main road, but has refused to do so despite repeated requests from Victoria. Instead, it leased that land to APAM, with such lease stating it is the lessee's responsibility to maintain and develop all airport roads. Therefore, the responsibility for maintaining those roads, such as the access outlets from our land, remains with the Commonwealth and APAM.

By reason of the above settlements between the State, Commonwealth and our predecessor in title, we are entitled to fully-maintained, two-way, heavy-duty sealed bitumen service road access, to (a) Western Avenue and (b) the airport/Sunbury Road freeway entrance; but the 2008 Melbourne airport master plan portrays our land as landlocked.

b) By reason of the above we also claim an interest in Sunbury Road and Centre Road as the north westerly replacement route for Bulla Road.

c) We also claim an easement of carriageway over the airport land D991658 ~~granted by the Commonwealth in exchange for additional land acquired by the~~ Commonwealth from Mrs. Smith in **1971** should also be acknowledged.

d) Victorian Caveat V981182R, being notice of the Quarry Road dispute not part of these proceedings before the AAT.

2) As airport neighbors and those dependant on the airport site's own access, we also claim interests in the Minister's decision based on the master plan's function of:

(i) ensuring that uses of the airport site are compatible with the areas surrounding the airport (s70(1)(d), 81(2)(aa), 81(3)(b)(ii)) and/or

(ii) for the master plan to provide for the development of additional uses of the airport site 71(b)(3),

to promote the sound development of civil aviation in Australia (s3(a)). In this regard, our land is about 350 meters away from the terminal building. Therefore:

a) The master plan three times cites the Melbourne Airport Land Use Study 1992, which was co-funded by the FAC. This urged the access issues concerning our land (the "Attwood land") and the airport/Sunbury Road freeway to be addressed so our land's potential can be realized. Moreover, our land is known as "Lot 1 Sunbury Road Tullamarine" and our Rate Notice reads "Located off, Sunbury Road, Melbourne Airport". Therefore depicting our land as being cut off from Sunbury Road creates incompatibility with our

area surrounding the airport.

b) It is necessary from time to time for our land to provide access to adjoining property for the purpose of filling quarry holes on State Government land, as required under a 1957 permit to use land. APAM contends our easement does not allow this type of access. Therefore without prejudice to our easement rights, we say fully-maintained, two-way, heavy-duty sealed bitumen service road access is still required to be provided as a Government Road as per (1)(a) above for this ongoing quarry purpose. (This existed before the easement to Western Avenue was created.) Unless the master plan addresses this, compatibility with the areas surrounding the airport accessible through our land will not be ensured, since our land can only be accessed through the airport site.

c) Even if all the above regarding service road provision did not relate to any existing interest in the airport land, it would alternatively be unconscionable for the Minister to derogate areas surrounding the airport using Commonwealth acquisitions otherwise than on just terms, such as the uncompensated portion of the Bulla-Lancefield-Sunbury Road. For this reason, refusing to approve the master plan because it doesn't fully address item (1)(a) above, is not only the correct decision, but for conscience sake, also the preferable decision.

d) Our land has been zoned since 1998 for airport-related uses as negotiated with APAM. This should be acknowledged in the master plan. Furthermore, the proposed extension to APAC drive relies on a freeway connection which was approved in 2004 on condition of an optional freeway connection for our side of the airport site too. (See our application staying the Apac Drive Major Development Plan for details.) This was to better service our area surrounding the airport (including other people's land), as our land is zoned for airport-related uses. The option was also included to help ease congestion at the corner of Western Avenue and Mickleham Road.

   However, the master plan does not show this optional connection, which we have informed APAM we wish to exercise, because surface access has not been properly addressed. Instead, the master plan makes reference to a ground transport plan. This ground transport plan does show airport access in the areas surrounding the airport near our land, but is an unlawful substitute, because it escapes the required public notice, minister's approval and if necessary, review by the AAT under the Airports Act 1996. It also does not have the force of a master plan for us to rely on. The master plan's alternative transport connections map is at such a small scale – showing most of Victoria – that the public has been given little indication of the surface access of the airport site itself. This should include both the roads on the site, and the roads over the land surrounding the airport, such as the optional freeway connection in the APAC Drive extension arranged to benefit our land and others'.

e) Because our land is in an area surrounding the airport, its zoning also has relevance in establishing the strategic direction for efficient and economic development at the airport, through healthy competition with the airport lessee. Therefore terminal precinct access should not be gated from our land (as it is today) by the Commonwealth and APAM, but be absolutely free for airport-related uses.

If that is not constitutionally correct, then the preferable view is the Minister should be guided by the National Competition Policy agreement between the States and the Commonwealth; so that terminal precinct access for our land should not be discriminated against to provide an exclusive terminal precinct access in favour of the Commonwealth's lessee's land. Such non-preferential treatment is required to promote the sound development of civil aviation at Melbourne Airport, as a transport hub for Southern Australia.

Finally, we note the purposes of the master plan are established under section 70(2) of the Airports Act 1996. However, these are not properly reflected in the Purposes item in 2.3 of the plan, nor in the development objectives on page 29. Had they been so, our interests as outlined above, might not have been improperly omitted from the 2008 Melbourne airport master plan to portray our land as landlocked.

Yours faithfully,

Keith McLaughlin

PS. Of course none of the above mandates Quarry Road access. Indeed, other routes to the airport/Sunbury Road freeway connection a may achieve similarly suitable access at greater convenience for all concerned. So to be especially clear, we simply say the Minister must not approve any master plan which shows no airport and Sunbury Road access to and from our land at all, nor a plan which fails to acknowledge the responsibility to provide fully maintained heavy-duty bitumen road access to our land.

APPENDIX KTM 11

Keith & Norma McLaughlin
1 Priorswood Way
Sunbury 3429
Phone 9338 8011
Fax 9330 2411

18 June 2010

To the personal attention of
Mr. Anthony Albanese
Minister of Infrastructure, Transport,
Regional Development & Local Government
and Leader of the House of Representatives
Parliament House
Canberra
By fax (02) 6273 4126

Dear Minister Albanese,

Re: Minor variation to the 2008 Melbourne airport master plan

Thank you for your letter of 4 June. Further to that, we enclose plans of Hume City Council's proposed E-14 with a blow-up of the route near the airport. This directly conflicts with APAM's APAC Drive proposal contained in the draft minor variation you have been asked to approve.

While we do not necessarily endorse Hume's proposal (it impinges on our carriageway easement and may not be their latest design), in principle the drawing shows that if you approve the draft "minor" variation, about 300 acres of potentially competing land to the airport land would most likely be cut off. We also enclose the 2004 plans sent to us by Hume on behalf of APAM as another example of what is needed. Therefore approval of the draft minor variation in its present form could be a very controversial decision indeed.

A real solution to this problem should be worked out between all the public and private stakeholders, rather than using your name and your office to railroad changes through using a "minor" variation, without the proper consultations.

Regards,

K J McLaughlin.

Keith McLaughlin.

AITKEN BOULEVARD (E14) ALIGNMENT

HUME CITY COUNCIL

Prepared by the Transit City & Urban Design
August 2008

VICTORIA ST
MELROSE
DU
FO

Our File: 303760
Enquiries: Rates Office
Telephone: 9205 2688

HUME CITY COUNCIL

1079 PASCOE VALE ROAD
BROADMEADOWS
VICTORIA 3047

Postal Address:
PO BOX 119
DALLAS 3047

Telephone: 03 9205 2200
Facsimile: 03 9309 0109
www.hume.vic.gov.au

Wednesday 29 September 2004

K T MCLAUGHLIN & N A MCLAUGHLIN
1-3 PRIORSWOOD WAY
SUNBURY VIC 3429

Dear Ratepayer

Re Western Avenue / Tullamarine Freeway

Melbourne Airport is proposing to construct a new entry road into the Airport from the western side of the Tullamarine Freeway, followed at some later time with a new exit road.

The Airport wishes to advise landowners adjoining the Freeway of these proposals and have approached Hume Council for the necessary address details. Council is unable to provide such details due to privacy restrictions but has agreed to forward the Airport's letter to you (see enclosed).

Any questions or comments on the road proposals should be addressed to the Melbourne Airport contacts listed in their letter.

Yours sincerely

Don Pratt
Revenue Administrator

MELBOURNE AIRPORT

AIRPORT MANAGEMENT
LEVEL 2
INTERNATIONAL TERMINAL
MELBOURNE AIRPORT

LOCKED BAG 16
GLADSTONE PARK
VICTORIA 3043 AUSTRALIA

TEL: (61 3) 9297 1600
FAX: (61 3) 9297 1886

www.melbourne-airport.com.au

27 September, 2004

Dear Resident/Landowner

Tullamarine Freeway Connection

Melbourne Airport is proposing to construct a new Airport Entry Road on the west side of the Tullamarine Freeway.

The Entry Road is intended to:

- provide secondary access to the main terminal for emergency vehicles during times of traffic congestion; and
- provide direct access for Airport–bound taxis to the taxi holding area.

The Airport is also considering construction of a new Airport Exit Road on the east side of the Freeway in due course in the vicinity of your property.

Both the Entry Road and the Exit Road will relieve congestion around the Airport terminal area from freight vehicles, long-term car park patrons and Airport employee vehicles.

A concept layout for those roads is shown on the attached Drawing No C006.
Both VicRoads and Hume City Council have endorsed the concept layout plans and we are about to commence the detailed design for the Entry Road project. We hope that construction will commence before Christmas this year.

The timing of the Exit Road project will depend on traffic demand and the proposed up-grade of the Calder-Tullamarine Freeway interchange.

Both projects will be contained within the boundary of the Airport and accordingly the Airport does not expect that you will be inconvenienced during construction. Construction is to be funded entirely by the Airport.

On the concept layout plan there is dotted a connection between the Exit Road and Western Avenue. This has been shown at the request of VicRoads and Hume City Council to demonstrate that a connection is physically possible, but at this stage there has been no negotiation concerning the use of or payment for such a connection.

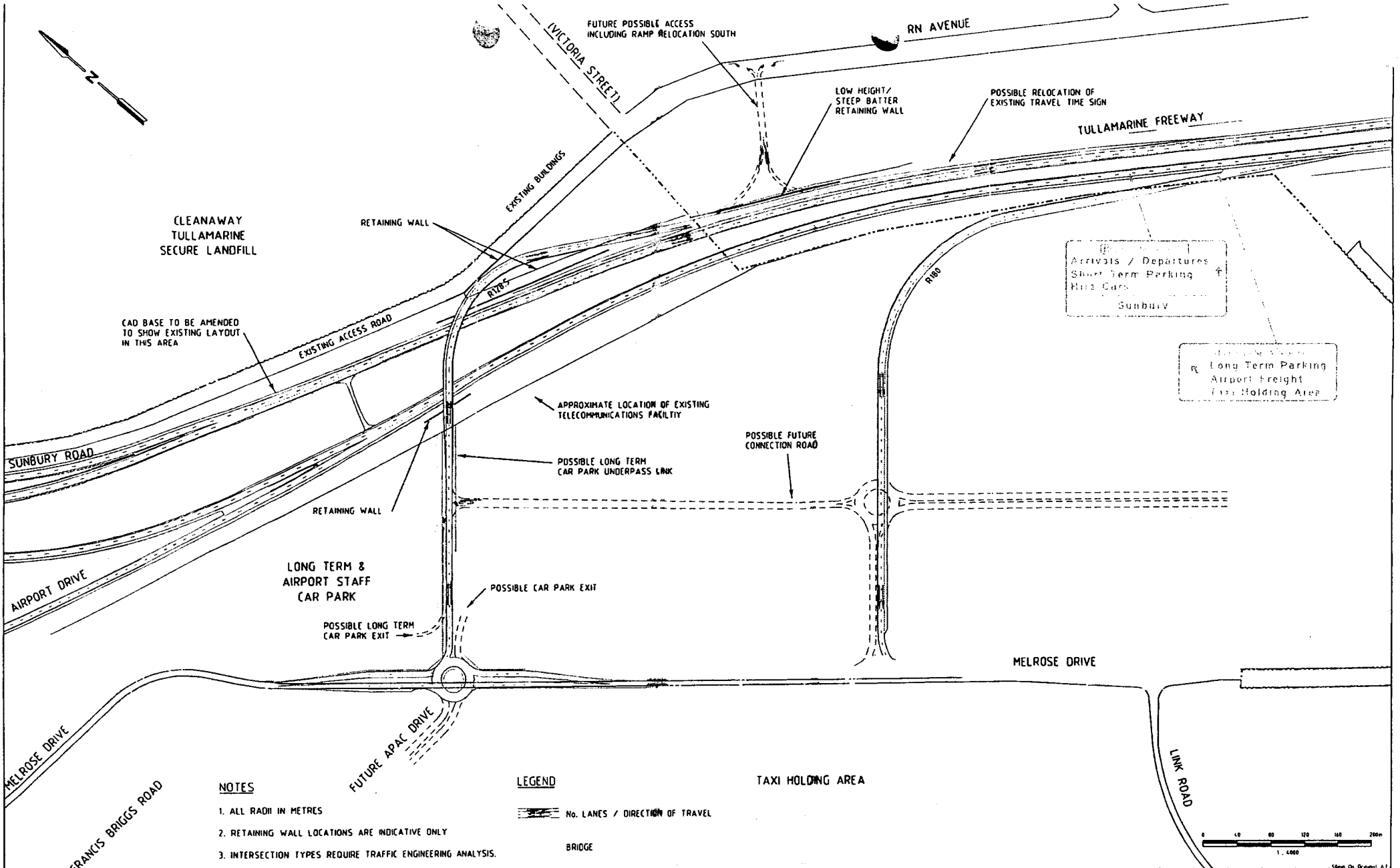
If you have any questions or comments please contact me on 92971348, or my Planning Manager, Bob Jones on 9297 1060.

Yours sincerely

Christine Carter
General Manager Environment Strategy and Planning

G:\ES&P\Planning\New Airport entry & exit roads\Letter to neighbours.doc

VICTORIA UNIVERSITY
MELBOURNE AIRPORT CHAIR IN MARKETING
Investing in Australia's Business Future



P2	DIRECTION OF TRAVEL ARROWS SHOWN LARGER	LR	17.2.04
P1	PRELIMINARY ISSUE	LH	12.2.04

MELBOURNE AIRPORT

Status: PRELIMINARY

Client: AUSTRALIAN PACIFIC AIRPORTS MELBOURNE AIRPORT

Project: PROPOSED LINKAGE ROADS - MELBOURNE AIRPORT AND FREEWAY

Title: CONCEPT PLAN

Scale: AS SHOWN @ A3 | Datum: AMG/AHD

Hyder

HYDER CONSULTING PTY LTD
Level 16 31 Queen Street
Melbourne Vic 3000
ACN 104 485 289
Tel +61 (0) 1 8672 1000
Fax +61 (0) 3 8672 1111

Project Code: VC01520_2 | Drawing No: C006 | Issue: P2

APPENDIX KTM 12

Keith McLaughlin
Melbourne Airport Trade Park
1 Priorswood Way
Sunbury 3429

8 July 2008, 14:30, Hume Council Offices
Talking points with Domenic Isola, Chief Executive Officer, Hume City Council

Unreasonable delays

1. Development plan lodged in March 1999
2. 16 versions produced, most others sorted out in less than 5
3. 19 pages of text because of Hume and APAM, most others less than 6.
4. Council delayed VCAT hearing in 2003 pending APAM's illegal fill case brought by APAM, now to be heard 5 years later on 24 July 2008.
5. Council now opposes our development plan on two grounds:
    a. Hume wants to dictate the road works on airport land, contrary to section 112 of the Airports Act 1996 and its own legal advice that it cannot do this without Commonwealth approval, which it knows has been withheld. Council's standards for the road is above the Australian/Vic Roads standards mandated in the Melbourne Airport Master Plan and regulations pursuant to the Airports Act 1996.
    b. It appears Hume opposes our use of the land for "industry and car parking associated with the airport" contrary to the Greenvale/Attwod strategy plan and Melbourne Airport Overlay and our L14 Rezoning which specifies "for airport related uses".

Discriminatory conduct

- For some reason, we have not received a reply from Hume's barrister concerning points 5(a) above. The last we heard he referred the matter to Council's Michael Sharp.
- For some reason, the 173 agreement which is supposed to be between us and Hume was sent to us by email from Corrs Chambers Westgarth, acting for our competitor APAM objecting to our development plan. It contains clauses imposing costs upon us which have nothing to do with Hume since the Commonwealth refused to allow our service road to become a public road. These clauses relieve APAM of its obligations under its lease with the Commonwealth. The 173 agreement carries Corrs' copyright notice. Does Corrs Act for Hume or does Hume act for APAM or both?

Consequences

1. As a result of the above, 350-400 jobs have been lost to Hume for over 9 years, whereas Werribee, Casey and Knox bend over backwards to encourage such developments.
2. As a result of the above, rate payers are funding expensive and complex litigation from 2003 onwards.
3. Expensive airport parking against the public interest – more expensive than

JFK or Heathrow – see Age report.

Request

1. An assurance Council will no longer be biased against us in favour of one if its largest or one of its largest rate payers.
2. Expeditious treatment of future applications similar to how other Councils operate.

APPENDIX KTM 13

Copy

Keith and Norma McLaughlin
Melbourne Airport Trade Park
1 Priorswood Way
Sunbury 3429
Phone/Fax 03 9744 1662

Thursday, 14 July 2008

Domenic Isola,
Chief Executive Officer
Hume City Council
PO Box 119 Dallas 3047

By Fax: 9309 0109

Dear Mr Isola,

Thank you for the opportunity to meet with you last Tuesday.

As promised, enclosed is a copy of the agreed standards between our engineer John Randles and your Mr. Sunil Bhalla after a site inspection in 1999. Here is a list of the attachments we provided with our talking points we handed out at the meeting:

- Newspaper article about airport car parking
- Newspaper article about airport employment
- Section 112 of the Airports Act 1996
- Pages 3, 10, 13 & 15 of APAM's airport lease related to building and maintaining roads
- Advice dated 2 February 1998 from my solicitor Comito & Co
- Email from Michael Sharp to Martyn Thompson dated 8 November 2002
- Photograph of our land in relation to the Airport
- Letter faxed from DOTARS dated 20 May 2003
- Email from Gary Testro to John Cicero dated 16 October 2003
- Schedule 10 to the Development Plan Overlay
- Cover of draft no. 5 of section 173 agreement copyright Corrs Chambers Westgarth

We note Michael Sharp said he authorized Corrs Chambers Westgarth to draw up a new 173 agreement with us and for our competitors APAM to be party to it.

We would be glad to receive a copy of David Keenan's notes of the meeting.

Thanking you for your consideration,

Keith McLaughlin
Confirmation by mail

APPENDIX KTM 14

APPENDIX KTM 15

Rec'd 10/8/2010

Australian Government

Department of Infrastructure, Transport, Regional Development and Local Government

File Reference: 04680-2010

Mr and Mrs Keith and Norma McLaughlin
1 Priorswood Way
SUNBURY VIC 3429

Dear Mr and Mrs McLaughlin

Thank you for your letter dated 25 June 2010 to the Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, concerning your application for a building approval under the Airports (Building Control) Regulations 1996 (the Regulations). The Minister has asked me to respond to your letter.

Where an application for building approval is made by a person other than the relevant airport lessee company (ALC), the Regulations provide that the application may not be granted by the airport building controller unless the ALC has given consent. In this case, Australia Pacific Airports (Melbourne) (APAM) is the ALC. However, the ALC may not withhold consent where to do so would be inconsistent with an obligation to which the ALC is subject by virtue of an interest to which s.22(3) of the *Airports Act 1996* applies. Registered easement D991658 is such an interest.

However, the Regulations also require that an application for building approval include certain documents, specified in reg. 2.05, to enable the ALC to consider the matter, including whether the application is such as to enliven any obligation of the ALC under a s.22(3) interest.

I am informed that you have not provided these documents to APAM. Accordingly, APAM has neither granted nor refused consent.

I reiterate that it is the Australian Government's view that, to the extent the Act and Regulations apply in relation to the exercise of rights under the easement, no acquisition of property, as that concept has been explained by the High Court, is affected.

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I encourage you to provide the documents specified in reg. 2.05 in relation to your proposed building works to APAM, to enable the matter to proceed.

Yours sincerely

Karen Gosling
General Manager
Airports Branch

4 August 2010

APPENDIX KTM 16

refer Eric.

Our File: HCC05/462-05
Enquiries: Michael Sharp
Telephone 9205 2374

HUME CITY COUNCIL

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Monday 27 April 2009

Keith McLaughlin
Deep Creek Park Pty Ltd
9 Garden Drive
TULLAMARINE 3043

Dear Mr McLaughlin

RE: WESTERN AVENUE DEVELOPMENT PLAN

I refer to your letter of 20 April 2009 to Mr David Keenan providing a copy Version 15 of the Western Avenue Development Plan.

As you have indicated, Council has previously indicated its satisfaction with Version 15 of the Development Plan. However, Council is now obliged to consider the discussion and findings of the Tribunal in relation to its consideration of Version 16 in August 2008.

In particular, the Tribunal (not Council) determined at paragraphs 35 – 37 of its decision that the agreement of APAM and/or the Commonwealth on the treatment of access arrangements across the carriage way easement is required before the Development Plan can be approved.

Once this agreement is achieved, Council will then be able to consider a new Development Plan application based on Version 15.

I look forward to your advice on this issue so that the Development Plan can proceed.

Yours faithfully

MICHAEL SHARP
MANAGER STRATEGIC PLANNING

cc : David Keenan – Director City Sustainability Hume City Council.

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