SUBMISSION TO THE

NATIONAL COMPETITION COUNCIL

REGARDING

ACTO

APPLICATIONS FOR RECOMMENDATION UNDER

SECTION 44F OF PART IIIA OF THE TRADE PRACTICES ACT 1974

BY

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1. INTRODUCTION

Australian Airport Services Pty Ltd (**AAS**) is one of the bidders for Phase 1 Airports to be leased under the *Airports Act 1996*. The Shareholders of AAS are:

- Lend Lease Pty Ltd;
- Brambles Pty Ltd; and
- Aer Rianta.

As a potential Airport Lessee Company (**ALC**) under the *Airports Act 1996*, including in relation to Melbourne Airport, AAS is directly interested in, and concerned by, the application made by Australian Cargo Terminal Operators Pty Ltd (**ACTO**) under section 44F of Part IIIA of the *Trade Practices Act 1974*.

This submission is made by AAS in response to the invitation of the National Competition Council (**NCC**) on 20 December 1996.

2. THE ACTO APPLICATIONS

AAS has been provided with:

(a) a copy of the ACTO application; and

(b) a copy of the NCC Issues Paper, *Australian Cargo Terminal Operators Pty Ltd Application for Declaration of Airport Services*.

This submission is in response to both of these documents.

ACTO appears to have made six separate applications under section 44F, seeking the recommendation of the NCC to have the following 'services' declared under Part IIIA:

(a) use of the freight apron and hard stand to be able to load and unload international aircraft;

(b) use of an area within the airport perimeter to store the equipment required to load and unload international aircraft and to transfer the freight to and

from trucks to and from the equipment used to load and unload international aircraft; and

(c) the use of an area within the airport perimeter to construct a cargo terminal;

at Sydney and Melbourne International Airports.

The Issues Paper states at page 2 that these services are provided through facilities owned by the Federal Airports Corporation (FAC), Qantas and Ansett.

In preparing this submission AAS has confined its comments to those matters in relation to which it has knowledge or expertise.

3. DO THE ACTO APPLICATIONS SEEK THE DECLARATION OF A "SERVICE"?

For the NCC to have the jurisdiction to entertain the ACTO applications, and to assess whether the statutory criteria in section 44G in Part IIIA are satisfied, it must be satisfied that what is sought by ACTO is the declaration of a "service" within the meaning of section 44B of Part IIIA.

As amplified below, AAS does not believe that land is a "service" within the scope of the access regime under Part IIIA.

Section 44B defines service to mean:

"a service provided by means of a facility and includes:

(a) *the use of an infrastructure facility such as a road or railway line;*

(b) *handling or transporting things, goods or services;*

(c) *a communications service or similar service but does not include:*

(d) *the supply of goods; or*

(e) *the use of intellectual property; or*

(f) *the use of a production process;*

except to the extent that it is an integral but subsidiary part of the service.

In the case of each Application ACTO is seeking access to land for the purposes of:

- operating equipment;
- storing and parking equipment; and
- constructing a cargo terminal.

That is, ACTO is not seeking to be supplied with a "service" by means of a "facility" within the meaning of section 44B but with bare land space.

AAS endorses the analysis of these terms contained in the NCC paper, *Draft Guide to Part IIIA of the Trade Practices Act 1974*, August 1996 which at pages 16 and 17 states:

> *"The examples of facilities in sub-section (a) suggest that Part IIIA is intended to apply to services provided by significant infrastructure facilities. The meaning of "facility" includes plant, equipment, installation and establishment.... and*
>
> *It is the 'service' provided through the infrastructure that can be declared, and not the infrastructure itself."*

Applying this analysis to the ACTO applications, it is clear that:

(a) ACTO seeks access to the use of land located within the airport perimeter;

(b) land, per se, is not a "facility" although fixtures constructed upon land, such as railways, aircraft landing and takeoff runways, terminals etc may be "facilities"; and

(c) the use of undeveloped land for the purposes of using and storing equipment or the construction of a cargo terminal is not a "service" within the meaning of section 44B.

AAS submits that the conclusion that the use of land is not a "service provided by means of a facility" is beyond question given the plain meaning of the words. While there are, to date, no Australian judicial precedents on the meaning of these

terms guidance can be obtained from precedents in the United States of America which has had an "essential facilities" doctrine based on section 1 of the *Sherman Act* ever since the 1912 US Supreme Court case, *United States v Terminal Railroad Association of St Louis*, 224 US 383.

The "essential facilities" doctrine cases relate to access to physical infrastructure or discrete services (see *Otter Tail Power Co v US*, 366 (1973) (electrical transmission lines); *Silver v New York Stock Exchange*, 373 US 341 (1963) (direct telephone access to stock exchange for instantaneous communications); *US v Standard Oil Co*, 363 F Supp 1331 (1973) (fuel storage facilities); and *Consolidated Gas Co of Florida v City Gas Co of Florida* 665 F. Supp. 1493 (1989) (gas pipeline). There is no reported case which supports the proposition that bare land is an essential facility.

4. THE STATUTORY CRITERIA

In the event that the NCC, contrary to the above submission, determines that the ACTO applications do relate to a "service" provided by means of a facility, the NCC is required to satisfy itself that all the statutory criteria specified in section 44G of Part IIIA are satisfied.

4.1 Would access promote competition in at least one market other than the market for the service?

In assessing the ACTO applications against this criteria, the NCC must assess the likely balance or state of competition in the relevant market both before and after ACTO would have access to the services sought to be declared.

The term "market" is defined in section 4E of the *Trade Practices Act 1974* as "a market in Australia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services."

The determination of the relevant market for the purposes of section 44G(2)(a) requires market definition as conventionally undertaken under the *Trade Practices Act 1974*.

Product or service substitutability is the basis for market definition under the Act. (*The QCMA Ltd v Definance Holdings Ltd* (1976) ATPR 40-012). Assessing

substitutability must be undertaken on both the demand and supply side of transactions. Products or services are considered to be substitutable with each other if, as a result of a small but significant non-transitory increase in prices would result in the substitution of the product or service in question with other products or services. Where substitution is likely between products and services they are within the same market. This is referred to as the "price elevation test" or the small but significant non-transitory increase in price (SSNIP) test.

In the present case the relevant market is the market in which ACTO would supply cargo terminal operations (CTOs) and ramp services to international airlines.

ACTO has identified the relevant markets to be the market for CTO and ramp services to international airlines.

AAS doubts that there are separate markets for ramp services and CTO services. AAS submits that these are merely separate service components in the market for airline freight handling.

The supply side substitutability between freight handling services for international air transport and national or regional air transport is such that these services are within the same market. This is because a small but significant non-transitory price increase between the supply of international freight handling services on the one hand and national or regional freight handling services on the other hand would result in supply-side substitution between the services. That is, the relevant market is the market for air freight handling services.

If this is the case then, on the basis of the information supplied in the ACTO applications, the current suppliers in this market include:

(i) Ansett;

(ii) Qantas;

(iii) Australian Airlines Express; and

(iv) ACTO.

The fact that ACTO may currently suffer from certain logistical disadvantages by operating from an off-airport site does not mean it is not currently a competitor within the relevant market.

Given that ACTO already competes in the relevant market, the relevant question for the NCC is whether the provision of access to ACTO of the proposed declared services will "promote" the degree of competition that already exists. The heart of ACTO's complaint appears to be that, while it competes with Qantas, Ansett and Australian Air Express in the provision of airline freight handling services, Ansett and Qantas enjoy some strategic and competitive advantages because of their incumbency at the airport. However, the competitive or strategic advantages that may accrue to incumbents in various markets does not amount to the control of essential facilities, nor to the anti-competitive of such control, that Part IIIA is designed to prevent.

As the Hilmer Report states at page 251:

> *"Clearly access to the facility should be essential, rather than merely convenient."*

The access to land currently owned by the FAC and sought by ACTO is not essential to its competition with Ansett and Qantas but would merely be convenient. Similarly, access to the land would not "promote" competition by materially altering the competitive dynamics in the market but would merely assist an existing competitor in overcoming certain advantages enjoyed by its competitors due to their incumbency. As the NCC *Draft Guide* states at page 19, for access to promote competition, it must deliver more than a trivial increase in competition. That is not the case in relation to ACTO's applications.

In determining the necessary degree to which competition would be enhanced by the provision of access to a facility the NCC should have regard to the legislative purpose and public policy considerations which gave rise to the adoption of Part IIIA. Again the Hilmer Report is instructive:

> *"The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment."* (p248)

Further, the Second Reading Speech to the Competition Policy Reform Bill 1995 makes it clear that Part IIIA is modelled on the US essential facilities doctrine:

"The Bill inserts a new Part into the Trade Practices Act, to establish a legal regime to facilitate third parties obtaining access to the services of certain essential facilities of national significance." (p7)

As explained above, the access to land sought by ACTO is not "essential" to ensure a competitive air freight handling market.

4.2 That access to the service is not already the subject of an effective access regime

In relation to Melbourne Airport, once the airport is leased under the *Airport Act 1996*, an effective access regime will be in place in so far as Division 2 of Part 13 of that Act makes specific provision for the application of Part IIIA of the *Trade Practices Act 1974* to that airport.

Section 192 of the *Airports Act 1996* states that:

> "(1) as soon as practicable after the end of the designated period for a core regulated airport, the Minister must, by notice in the Gazette, determine that subsection (2) applies to the airport.
>
> (2) If a determination is in force under subsection (1) in relation to an airport, then each airport service in relation to the airport is a declared service for the purposes of Part IIIA of the *Trade Practices Act 1974*....."

Subsection (5) provides that the designated period in relation to a core regulated airport, means the 12 month period beginning at whichever of the following times is applicable:

> (a) If, at any time, an airport lease for the airport was granted under section 21 of the *Airports (Transitional) Act 1996* to a company - the sale time for that company....;
>
> (b) If, at any time, an airport lease for the airport was granted under section 72 of the *Airports (Transitional) Act 1996* - the time of the grant of that lease.

The effect of these provisions is that the Minister *cannot* make a determination, the effect of which is to declare the airport services under Part IIIA, before the expiry

of 12 months from the sale or lease of the airport under the *Airports (Transitional) Act 1996.*

The legislative intent is that the airport services at the leased airports are to be declared under Part IIIA of the *Trade Practices Act 1974* but not within 12 months of the sale or lease of the airport.

Consequently, the *Airports Act* 1996 does provide for an effective access regime. The fact that the regime under that Act does not operate for a 12 month period does not derogate from the effectiveness of that regime.

Further, the existence of the regime established by section 192 of the *Airports Act* 1996 raises a real question as to the NCC's jurisdiction to entertain the ACTO applications.

The NCC should not, and arguably cannot, subvert the legislative intent behind section 192 by recommending to the Minister (Treasurer) the declaration of the services sought by ACTO under section 44F of Part IIIA of the *Trade Practices Act 1974.*

5. COMPENSATION FOR ACQUISITION OF PROPERTY

Section 44ZZN of Part IIIA provides that if:

(a) a determination would result in an acquisition of property; and

(b) the determination would not be valid, apart from this section, because a particular person has not been sufficiently compensated

the Commonwealth must pay to that person a reasonable amount of compensation.

Section 44ZZN was inserted into Part IIIA to ensure the constitutional validity of the Part. Section 51(xxxi) of the Australian Constitution provides that any Commonwealth law that provides for the acquisition of property in the absence of the payment of just compensation is invalid. The acquisition of land is an acquisition of property for the purposes of section 51(xxxi) (see the High Court decision in *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 LLR 328).

Further, a law which provides for the acquisition of land without just compensation is invalid whether or not the acquisition is the Commonwealth or some other party (see the High Court decision in *P J Magennis Pty Ltd v The Commonwealth* (1949 80 CLR 382).

The *Land Acquisition Act 1989* makes exhaustive provision for the acquisition of land by the Commonwealth. Section 17 of that Act defines the interests that constitute an acquisition of an interest in land. Those interests include:

- a legal or equitable estate or interest in land; and
- any other right, charge, power or privilege over, or in connection with land or an interest in land.

In the present case, ACTO seeks a declaration by the Commonwealth Minister the effect of which would be to give it the right to occupy land including exclusively by the construction of a cargo terminal. The use and storage of freight handling equipment and the construction of a cargo terminal would have the effect of alienating the land in question from the owner, being the FAC or the ALC in the case of Melbourne Airport.

AAS submits that the rights to use land sought by ACTO would constitute an acquisition of property within the meaning of section 44ZZN of Part IIIA and section 51 (xxxi) of the Constitution.

The *Land Acquisition Act 1989* also provides guidance on the question of what are "just" terms for the purposes of the constitutional requirement. Section 55(2) of that Act provides that the owner of the land in question is entitled to: the market value of the interest in the land; any reduction in the market value of any other interest in land held by the person that is caused by the severance by the acquisition of the acquired interest from the other interest; and any loss, injury or damage suffered, or expense reasonably incurred by the person as a direct consequence of the acquisition. "Market value" is defined in section 56 of the Act as the "amount that would have been paid for the interest if it has been sold at the time by a willing but not anxious seller to a willing but not anxious buyer".

AAS notes that ACTO has not indicated in its applications the price it is willing to pay for the interests it seeks. If the "services" sought by ACTO were to be declared under Part IIIA, either as a consequence of the present applications or under section 192 of the *Airports Act 1996*, the owner(s) of Melbourne and Sydney

international airports would be entitled to be paid "just compensation" for any land that is alienated. That compensation would have to be paid by ACTO or the Commonwealth.