VERSION FOR GENERAL RELEASE

SUBMISSION BY THE FEDERAL AIRPORTS CORPORATION TO THE NATIONAL COMPETITION COUNCIL

APPLICATIONS BY AUSTRALIAN CARGO TERMINAL OPERATORS PTY LTD FOR DECLARATION OF AIRPORT SERVICES

Melbourne Airport

14 February 1997

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EXECUTIVE SUMMARY

The Federal Airports Corporation (the "FAC") submits that the NCC should recommend that the "services" the subject of the Applications not be declared. There are 4 distinct grounds for this:

1. *The NCC cannot be satisfied of all of the criteria set out in section 44G of Part IIIA of the Trade Practices Act 1974 (the "TPA").*

2. *Even if the NCC could be satisfied of all of the criteria in section 44G, it should, in the exercise of its residual discretion in section 44G, recommend that the "services" not be declared.*

3. *The particular "services" which ACTO seeks to have declared are not within the scope of Part IIIA of the TPA.*

4. *In any event, on a proper construction of Part IIIA, it does not apply to the FAC or its activities.*

The FAC submits that each of these grounds is of equal force. The order in which this submission deals with each ground does not reflect their relative merits.

1. The Criteria in Section 44G of Part IIIA of the TPA

In respect of the criteria in subsection 44G(2), there is a clear onus upon the NCC to satisfy itself that, as a very minimum, all of the criteria are met. If there is any doubt in the NCC's mind as to its satisfaction of any one of the listed criteria, the NCC cannot recommend that the services be declared. The onus is not upon the FAC to satisfy the NCC either way.

The FAC submits that the NCC cannot satisfy itself in respect of the following subsection 44(G)(2) criteria for the following reasons:

Criterion (a) - Access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service

- Declaration of the services has the potential to undermine the strategy which the FAC is in the process of implementing; a process which will itself significantly enhance competition in the freight industry at MA.

The FAC supports the principles of competition policy as evidenced by its approach to such issues as the entry of third party carriers into the domestic aviation industry and international airline facilitation. The FAC recognises that for historical reasons largely, as well as a lack of investors, the competition aspects of the international freight operations on MA are poor.

The FAC commenced action to rectify this situation well before the ACTO Applications. However, for reasons detailed in section 4, the FAC has only recently been able to attract a new operator to provide real competition to the incumbent CTOs.

The FAC is now involved in advanced negotiations with **- confidential material deleted -** a significant, independent overseas freight operator who wishes to establish on-airport operations at Melbourne Airport ("MA"). By the end of this year, **- confidential material deleted -** will be in place at MA providing considerable competition to the existing players. For the FAC, the negotiations with **- confidential material deleted -** represent the first stage of a process of enhancing competition at MA in a meaningful and long term sustainable manner. For the reasons set out below a recommendation to declare by the NCC at this critical point in time has the real potential to undermine this important process.

The FAC is not vertically integrated. The FAC is a completely independent owner, operator and manager without a direct or indirect financial interest in the identity or number of persons to whom access is provided in a downstream activity.

The FAC's current negotiations with **- confidential material deleted -** to become a new on-airport CTO provider at MA is indicative of the FAC's support of the principles of competition policy. The FAC is being pro-active in facilitating the entry of independent third party operators. The nature of the investment, and factors such as its scale, its timing, the strong position of the vertically integrated incumbents means that any serious enhancement of competition at MA has to be a gradual, carefully planned and managed process and one which is carried out in a manner consistent with the overall management plan for MA. The introduction of **- confidential material deleted -** will provide the airlines (forming part of the contestable market) and other users with real choice. It is hoped that the entry of **- confidential material deleted -**, if successful, will send a positive signal to other potential entrants.

The specific reason why the FAC is negotiating with **- confidential material deleted -** is to introduce a quality competitor to MA and thus to enhance competition and choice in the CTO industry. The FAC's mission statement confirms the importance of freight to MA. It is:

> "to be one of the world's leading airport companies, and to fully realise Melbourne Airport's potential as an international gateway for passengers and freight".

- The steps which the FAC is taking at MA through the introduction of **- confidential material deleted -** is a long term strategy which will entail lasting structural reform.

  Because of the available land at MA, the FAC has the ability to promote the most efficient form of CTO operations possible, without the land constraints which exist at Kingsford Smith Airport.

  It is the FAC's view, following consultation with industry, and based on its own knowledge, experience and overseas evidence, that on-airport CTO facilities are preferable (primarily for efficiency reasons) to off-airport facilities. In addition, there are major safety and operational problems associated with a "hole in the wall" operation, particularly as proposed by ACTO. It is clearly a sub-optimal system which is evidenced by the scarcity of such arrangements throughout Australia and overseas.

  Further, the FAC anticipates, both as a result of recent experience and following discussions with **- confidential material deleted -** , that the uncontrolled entry of ("quick fix") new operators to the CTO and ramp handling industries will be likely to deter quality new operators from investing in efficient on-airport CTO facilities and therefore prevent the introduction of a new, competitive, viable and independent CTO and ramp operator at MA.

  From a competition perspective, the FAC intends to foster competition through the introduction of new independent operators who can offer service comparable and competitive with that provided by the current large vertically integrated operators. If new entry is characterised by early failure and exit, it may discourage further entry or indeed even the threat of new entry - thereby entrenching the present market structure.

  In particular given the following factors, any new operator needs the opportunity to grow and establish itself as a sustainable and effective competitor:

  - the entrenched positions of Qantas and Ansett and the history of the duopoly at Sydney and Melbourne airports;
  - the amount of airfreight Qantas and Ansett control through their airlines and associated airlines - which effectively means that the contestable market may be relatively limited;
  - the start up and other costs involved in establishing new operations;
  - all the other advantages which Qantas and Ansett enjoy by virtue of their entrenched positions such as existing contracts, equipment, facilities location, lease rates, lease periods and manpower;
  - the fact that most carriers fly to more than one port and often prefer the same service provider at these ports;

- the fact that an airline may enter into a comprehensive agreement that covers passenger, ramp and freight services and so may not consider alternate service providers for individual elements.

The declaration process has the very real potential to undermine the progress which the FAC has made to date in introducing real competition to MA.

A recommendation to declare by the NCC may prevent the emergence of a real alternative to the current CTO and ramp operators. The services described in the Applications offer neither the quality of service, nor the volume of service which will result in anything but a marginal impact upon competition. At the same time, it is possible the very existence of such marginal (quick fix) operations will discourage the investment required for the entry of a strong, viable and effective competitor at the airport.

Although the FAC has not had an opportunity to thoroughly review the Industry Commission's Submission to the NCC on the National Access Regime, it particularly notes the Commission's caution that a broadly applied mandatory access regime could have the perverse effect of reducing competitive pressures.

- By virtue of the "staging" process implemented by the NCC, the NCC has made it difficult to assess whether access (or increased access) to the FAC "service" would promote competition. ACTO itself has acknowledged that use of the Qantas and Ansett facilities, is an alternative to the Applications. That is, in economic terms, they are substitutes.

  By virtue of the staging process adopted by the NCC it is difficult to envisage how the NCC could satisfy itself that accepting ACTO's applications in so far as they relate exclusively to the FAC, would enhance competition. That is, if access to the known substitutes could be immediate, more cost effective, more efficient, and have a greater positive impact on competition, it would follow that, in a comparative sense, a declaration in respect of FAC services would not enhance overall competition.

Criterion (b) - it would be uneconomical for anyone to develop another facility to provide the service. Under s44F(4) the NCC must also consider whether it would be economical for anyone to develop another facility that could provide part of the service.

- If the service is defined as access to the airport in order to operate as a CTO operator (either on or off-airport), then the NCC cannot be satisfied that it would be uneconomical for anyone to develop another facility to provide the service. Qantas, Ansett and Australian air Express currently operate facilities through which ACTO could gain effective access to the airport. If there are "substitute" facilities, then the alleged "natural

monopoly" position held by the FAC in relation to its facilities which must exist for this criterion to be satisfied is not present.

ACTO itself has acknowledged in the separate applications in respect of the Qantas and Ansett facilities that use of these facilities is an alternative to the Applications. However, by virtue of the "staging" process implemented by the NCC, the NCC has made it difficult to satisfy itself that there are not economic alternatives to the services the subject of the Applications.

In Section 9 the FAC sets out reasons why the "services" are not within the scope of Part IIIA of the TPA. However, the services provided by Qantas and Ansett from their existing facilities do attract the operation of Part IIIA.

- If the NCC is of the view that the "service" is necessarily tied to the "facilities" in question, that is certain non-defined areas on the airport including the apron, part of the apron or a piece of undeveloped land adjacent to the apron, then it follows that it would not be uneconomical for aprons and other hardstand areas to be duplicated as occurs from time to time.

Criterion (c) - the facility is of national significance, having regard to:

(i) the size of the facility;

(ii) the importance of the facility to constitutional trade or commerce;

(iii) the importance of the facility to the national economy.

The FAC accepts that MA is of national significance.

However, the FAC does not accept that the "facility" in question is the airport as such. If the relevant "facility" refers to undefined parts of the hard stand, freight apron and areas to provide storage, it is difficult to see how the NCC could be satisfied that these are of national significance. The Applicant's focus on the volume and value of tourism and trade activities as a basis for satisfying the national significance criterion is misdirected. What needs to be established is that access or increased access as envisaged by ACTO to the undefined parts of the apron, hard stand etc is of national significance.

Criterion (d) - access to the service can be provided without undue risk to human health or safety

The airside of a busy international airport such as MA is an inherently dangerous environment where the consequences of an accident involving jet aircraft (particularly if refuelling), other airport vehicles, passengers and airport personnel can be enormous. This is reflected in the size of FAC's catastrophe insurance coverage in this area which is in the order of $1.5 billion.

Accordingly, the control of airside activity is treated as a very serious issue by the FAC and it has instituted detailed measures through its by-law making power to control access and manage and reduce the risk of accidents. A principal feature of its airside control is to minimise traffic and congestion as much as possible.

In this regard, the Applications raise a number of serious safety concerns. These relate primarily to the increased carriage of trucks and personnel onto the airport, the apron and up to or near aircraft and the potential for already constrained space to be congested by the storage of freight and equipment on land designed for specific airport uses other than storage.

- **"Hole in the Wall" Operations** - The airside of MA is a security restricted area because of its proximity to aircraft handling and operations. The carriage of additional trucks and personnel onto this area and onto the apron raises safety concerns for the FAC.

  A major issue is lack of available space on the international passenger and freight aprons and adjacent areas to facilitate the types of operations required airside by the hole in the wall type of operations. There are already space constraints on the apron and none could be set aside for exclusive loading or unloading at a hole-in-the-wall "leased" site.

- **Ramp Handling** - The introduction of additional ramp handlers will significantly increase the level of traffic on the airside roads and around the aprons. This has the potential to create management and safety problems particularly around the passenger apron (see Section 8.6).

- **Direct Truck Loading** - ACTO's proposal to run trucks directly to the deck loaders of freighters raises additional safety concerns. The area around the aircraft is cramped and safety of personnel and aircraft is a constant concern. Aircraft and freight handling equipment (such as dollies) is specifically designed to have smaller turning circles due to the confined space in which they work. Trucks have larger turning circles making direct aircraft access impractical. The manoeuvring of trucks at the rear and in between the aircraft creates safety problems (see Section 8.6).

Access pursuant to ACTO's proposal (specifically its request for a "hole in the wall") represents a serious compromise from a safety perspective. This is one reason why those operations are not common at significant airports overseas.

The NCC cannot be satisfied that access to the service can be provided without undue risk to human health or safety.

Criterion (f) - access (or increased access) to the service would not be contrary to the public interest (and other discretionary factors not listed in subsection 44g(2))

- The Applications may, if successful, take away from the FAC its ability to manage the airport, the scope and nature of activities conducted on airport land and its ability to implement its reforms. This is undesirable from a public interest perspective and is contrary to legislative intention as disclosed in the *Federal Airports Corporations Act* 1986 (the "**FAC Act**").

  Managing Melbourne airport is a complex and sophisticated exercise requiring the balancing of a multitude of different uses and potentially conflicting interests.

  Because of the high risk nature of aviation activities, managing an airport involves operating within a highly regulated environment and complying with rigorous technical and operational safety and security standards. It involves both managing a large commercial asset to produce a financial return at the same time as managing a significant piece of public infrastructure in accordance with community and environmental standards. Design, construction and placement of airport infrastructure such as runways, taxiways, aprons, hangars, terminals and the supporting road network is a unique, specialised and capital intensive exercise.

  More than any other piece of infrastructure facility, an airport and specific operations carried out on or adjacent to an airport demand a heightened degree of management skills, balancing of competing considerations and knowledge of the dynamics and interrelationship of users and operators. This is reflected in the range of statutory functions and powers of the FAC and in the range of considerations the FAC must take into account when exercising those powers. It is also evident in the detailed planning, management and regulatory framework established by the Airports Act which will govern the airport environment post-privatisation. The FAC was specifically established by Government under the FAC Act as a specialist airport operator and has the necessary expertise, skill, personnel, resources and experience to carry out this role. It has carried out the complex planning exercise for the airport through the production of the Melbourne International Airport Master Plan for the ultimate development of the airport with an interim 30 year planning horizon to the year 2025. This plan is continually updated to take account of the changes to the operating environment.

  On our view of the Applications, ACTO is not seeking access to a service at all. Rather, it is seeking to tell the FAC what type of service should be provided with no regard to the other considerations that the FAC must take into account. It cannot be in the public interest for there to be a declaration relating to a "freight specific" activity attaching to an important and limited multi use facility. The enhancement of competition at MA needs to be carefully planned and managed and must be carried out in a manner consistent with the overall management plan for MA. The FAC, not ACTO or any other person in

the freight industry should be the person allowed to dictate the nature of the services which are provided from MA.

- Part IIIA was primarily designed to deal with vertically integrated operators who use their power in one market to disadvantage the competitive position of their competitors in another market. The FAC is not in such a position. The FAC is an independent body established by Commonwealth legislation for the purpose of managing the airport. In 1986, when the FAC was established, it inherited the two airline policy of the Department of Transport and Communications and the associated long leases which had been granted to Ansett, Australian air Express and Qantas in respect of their cargo terminal facilities. Since this time and well before the introduction of Part IIIA, the FAC, in the context of the complex exercise of managing the airport, has taken positive steps to enhance competition at MA despite the lingering uncompetitive environment resulting from 40 years of the two airline policy (refer section 2.4). The FAC has for example facilitated third party entry to the domestic aviation industry and introduced competitive tender processes for the selection of concessionaires, lease of sites and awarding of contracts in relation to construction and other matters.

- The FAC's proposed facilitation of new entry achieves international best practice. The FAC's position and the body of these submissions are directly supported by a recent directive of the European Council dealing with the "liberalisation" of ground handling activities at international European airports.

- The Applications are untimely. MA is currently in the middle of the privatisation process. This process is expected to be completed by June 1997 at the latest. The privatisation process has a number of implications for the immediate Applications;

  - the NCC has recognised that it has an obligation to inform the provider of the services in question that the Applications have been received and to consult with and receive submissions from that provider. If the services in question are declared, by the time any dispute arises, there will be a new "provider" at MA. This provider will not have been notified of the Applications for declaration and more importantly will not have had the opportunity to make submissions to the NCC as the "provider" of the "services". This is clearly undesirable and presumably not intended by Part IIIA. The NCC is in effect, asking the FAC to make submissions on behalf of the future operator;

  - there is a strong argument to the effect that any declaration made will not have any legal effect in relation to any entity to which a lease is granted by the Commonwealth in accordance with the Airports Act;

- alternately, declaring the "services" in question just prior to the new operator taking over, will have the effect of preventing the new operator from entering into access undertakings in relation to the "services". This is contrary to the legislative intention as manifested in the *Airports Act* 1996;

- by the time the Minister makes a decision on declaration, the freight landscape at MA will have altered dramatically compared to that existing at the time of the NCC consideration and recommendation.

• For these reasons, if any of the "services" are declared at MA such declaration should either:

- be deferred for a period of three years to allow competition generated by the new freight terminal and new airport leasing company to take effect; or

- be deferred for one year from the date the new operator takes over the lease.

In our view, the above reasons provide a compelling case for the NCC to satisfy itself that access to the services is not in the public interest.

2. **The NCC's residual discretion in Section 44G**

The criteria set out in s44G(2) are merely the minimum criteria which must be met before a recommendation can be made. The legislation indicates that the NCC has a residual discretion under section 44G to refuse to declare the services.

The decision to recommend a declaration is extremely important and it should not be exercised in circumstances where there is clear evidence that the operator in question is seeking to achieve the outcomes that are encouraged by the Part IIIA regime. That is, the NCC should take the opportunity to encourage the FAC to pursue its initiatives by declining to recommend a declaration.

3. **The particular "services" which ACTO seeks to have declared are not within the scope of Part IIIA of the TPA**

If the ACTO applications are seeking declaration of "services" which consist of the exercise of regulatory powers, that is clearly not authorised by Part IIIA.

Even as restated in the NCC Issues Paper, the Applications go beyond the kinds of services which can be validly declared under Part IIIA because "services" is limited to a service provided by means of an *existing* facility.

The current ACTO application contemplates changes of use of areas in the airports with consequent changes in the character of the areas-

- one "service" contemplates the bringing into existence of a new facility consisting of a storage area;

- another "service" contemplates the bringing into existence of a new facility consisting of a cargo terminal.

Those uses involve changes of use of areas to create new facilities and go well beyond what is authorised by the legislation.

4. **In any event, on a proper construction of Part IIIA, it does not apply to the FAC or its activities**

Under the *Federal Airports Corporation Act* 1986, the FAC is the land use planning and development approval authority for Federal airports.

When considering whether or not declaring the services under the Applications would promote competition or be in the public interest, the NCC should take into account that a s44V determination made in relation to any such declared "services" cannot override FAC's obligations under the FAC Act to consider and form its own view of the desirability of allowing any activity subject to the determination.

It is arguable that there is no scope whatsoever for the operation of Part IIIA in relation to FAC's carrying out of its functions under the FAC Act.

It is probably not open to the NCC to make a declaration of services provided by the FAC in accordance with the FAC Act at all.

1. INTRODUCTION

This submission should be read independently of the FAC submission in respect of Kingsford Smith Airport. There are some fundamental and obvious differences between the airports, most notably in terms of their immediate futures and available land. Accordingly, the approaches which have been adopted at the respective airports to the issues of CTO and ground handling services differ slightly. Nevertheless, the concepts which underpin the respective submissions are consistent. At both airports, the FAC is adopting significant measures to introduce competition into international freight operations.

This submission commences with a brief background to the FAC in Section 2, outlining its establishment, its roles, functions and powers.

Section 3 outlines other relevant controls applying to the FAC.

In Section 4, the CTO and ramp handling industries are briefly examined. Following this discussion, the history and present position regarding the provision of these services at MA is outlined.

Section 5 outlines the task involved in managing and planning at airports generally and then focuses on the management of CTO and ramp handling at MA specifically.

After several years of detailed examination of the level of competition of ground handling activities at European airports, the European Commission recently issued an important and relevant directive. This is outlined in Section 6.

In Section 7, the Applications are examined.

Section 8 examines whether the relevant criteria in s44G are satisfied.

In section 9 we raise a number of issues regarding the application of Part IIIA to the types of "services" in question.

Finally, Section 10 outlines the reasons why Part IIIA does not apply to the FAC.

2. THE FEDERAL AIRPORTS CORPORATION

2.1 Background

The FAC is a Government Business Enterprise (GBE) which owns and operates Australia's primary and major secondary airports. The FAC was established on 13 June 1986 by the FAC Act.

At its inception the Government set social, financial, management and efficiency objectives for the FAC. Before the FAC commenced operations, responsibility for developing and managing Australia's airports was with the Commonwealth Department of Transport and Communications and was funded from the national budget. Part of the reason for the transfer of airports to the FAC was that this was seen as the best way to provide for efficient management, without compromising other important objectives such as safety.

The FAC was originally responsible for 17 primary and major secondary airports, which it acquired from the Government for $1.1 billion on 1 January 1988. Another six airports were acquired in 1989, including Canberra, Darwin and Coolangatta. One of the original 17 airports, Cambridge airport in Tasmania, was subsequently sold but under the terms of the sale will continue to operate as an airport until at least the year 2004.

Since the Government announced its intention to privatise FAC airports, the FAC has been responsible for assisting in the transfer of responsibility for its airports and ensuring that the Commonwealth can obtain an appropriate return through sound commercial management up to the time of privatisation.

2.2 Functions and Powers

The FAC's functions and powers are set out in the FAC Act.

The FAC is expected to manage its airports consistently with Government policy and international obligations, and in accordance with the FAC Act. The FAC's primary functions include managing its airports in an efficient way while promoting safety to the highest possible degree.

The FAC is responsible for the management of both aeronautical facilities and non-aeronautical commercial activities related to property leasing and the generation of trading revenues through the development and management of retail concessions and shops.

The Minister for Transport and the Minister for Finance have substantial powers and responsibilities under the FAC Act to approve or direct the actions of the FAC, and the FAC has related responsibilities to inform the Minister of various matters. The main Ministerial powers relate to the financial obligations of the FAC and the FAC's obligation to provide to the Minister a

Corporate Plan setting out, amongst other things, financial targets for the FAC's operations.

The broad functions of the FAC are set out in Part 2 of the FAC Act and are:

- to operate Federal Airports and to co-operate with the Department of Defence in the operation of joint defence/civil aviation-airports;
- to establish airports at Federal Airport Development Sites; and
- to provide airport consultancy services in Australia and internationally.

Under section 7 of the FAC Act the FAC is obliged to take a range of matters into consideration in the performance of its functions. The FAC must endeavour to perform its functions in a manner which takes account of the policies of the Commonwealth Government, is in accordance with sound commercial practice, and ensures the safety of persons using airports. The FAC must also consider environmental protection and the need to be a "good neighbour" to local communities.

Section 8 of the FAC Act sets out the functions of the FAC including:

- reviewing the use and capacity of existing Federal Airports;
- extending or altering Federal Airports;
- carrying out commercial activities in relation to Federal Airports;
- providing facilities and services including airport security at Federal Airports;
- disposing of or otherwise dealing with land which was previously part of a Federal Airport;
- carrying out activities to protect the environment associated with the operation and use of aircraft; and
- providing assistance to the Department of Transport and Airservices Australia.

Pursuant to the powers granted under the FAC Act, the Board of the FAC has made a number of by-laws covering areas such as the regulation of trading at airports, the use and operations of Federal Airports, building and engineering works on Federal Airports and the security of Federal Airports.

The FAC's Corporate Plan is required to contain a statement of objectives for the financial year and an outline of the strategies and policies that the Board intends to adopt in order to achieve the objectives.

2.3 Safety and Security

The FAC has important obligations in respect of the safety of persons using its airports and airport security. Entry to and movement in Federal airports is regulated by the FAC, the Department of Transport and CASA through the FAC Act, the *Air Navigation Act* and the *Civil Aviation Act* respectively. Some relevant extracts are contained in Attachment 1. The Air Navigation Regulations and the Civil Aviation Regulations also make specific provision for safety and security, including the safety and security of international cargo under the Air Navigation Regulations.

The FAC has also made provision in its By-Laws for the maintenance of public safety and order at Federal airports or Federal airport development sites, as envisaged in section 72(1)(g) of the FAC Act. Parts IVD and IVG of the By-Laws deal with airside security and public order. The FAC also provides for airside safety in the Airside Vehicle Control Handbook, a copy of which is at Attachment 2.

2.4 Relevant History

The two airline policy which had been in place for some 40 years dramatically influenced the environment on the airports which the FAC inherited. Although the two airline policy ceased in 1990, the effects are still felt today. In particular, Qantas and Ansett dominate the domestic/interstate jet traffic almost exclusively and similarly dominate passenger handling at the international terminal, ground handling and freight handling services throughout the airport again almost exclusively. As a result of this dominance and the policy of the FAC's predecessor, the Department of Transport (formerly the Department of Aviation) to grant long term leases to tenants, the FAC found many of the "businesses" on airport dominated by the domestic airlines. The size of the domestic airlines and the breadth of their aviation businesses are daunting to a new entrant.

Regardless, the FAC has still proven itself to be pro-competitive by facilitating the entry of new entrant airlines to the domestic aviation industry (eg Compass, Southern Cross, Aussie Airlines), introducing competitive tender processes for the selection of concessionaires, lease of sites, and awarding of contracts in relation to construction projects, maintenance projects and other matters throughout its comparatively short history.

2.5 Future

The process of privatisation of FAC airports has already commenced, and it is intended that the FAC will eventually cease to have responsibility for its airports. The FAC is now required, under amendments to the FAC Act, to assist the Commonwealth with the implementation of the privatisation process, including the implementation of the *Airports Act* 1996, and of the *Airports (Transitional) Act* 1996, and the leasing and transfer of responsibility for airports.

The *Airports (Transitional) Act* 1996 makes transitional arrangements for the privatisation process. The Act provides for the transfer of airport land and other airport assets from the FAC to the Commonwealth, which can then lease the airport as envisaged under the *Airports Act* 1996. Employees, assets, contracts and liabilities of the FAC can be transferred to the airport-lessee company.

At present, MA is in the process of privatisation and it is envisaged that, by the middle of 1997 at the latest, MA will no longer be managed by the FAC. KSA is intended to be leased with second the Sydney Airport to one airport-lessee company at a later date.

3. OTHER RELEVANT CONTROLS

The FAC is accountable to Parliament indirectly through the Minister for Transport and Regional Development and directly through various Parliamentary Committees. Additionally, it takes account of Government directions and policy. The FAC is subject to and affected by a broad range of legislation such as:

- Administrative decisions and conduct of the FAC are subject to judicial review under the *Administrative Decisions (Judicial Review) Act* 1977.
- The FAC is also subject to scrutiny by the Ombudsman by virtue of the *Ombudsman Act* 1976.
- The FAC is subject to the requirements of the *Freedom of Information Act* 1982, except in relation to certain documents.
- Some parts of the TPA generally applies to the FAC.
- The *Prices Surveillance Act* 1983 applies to the supply by the FAC of aeronautical goods and services.
- Public works proposed to be undertaken by the FAC are subject to review by the Parliamentary Standing Committee on Public Works under the *Public Works Committee Act* 1969.
- The FAC's prescribed auditor is the Commonwealth Auditor-General, and it is audited at least once annually in accordance with section 54C of the FAC Act.
- Part VIA of the FAC Act provides for the FAC's liability to pay income tax under the *Income Tax Assessment Act* 1936.
- The Joint Committee of Public Accounts consists of members appointed by both Houses of Parliament and was established and operates under the *Public Accounts Committee Act* 1951. The JCPA's functions include the examination of the financial affairs of Commonwealth authorities including the FAC.
- *Environmental Protection (Impact of Proposals) Act* 1974 and the administrative procedures thereunder.
- *Australian Heritage Commission Act* 1975.

4. CTO AND GROUND HANDLING SERVICES AT MELBOURNE AIRPORT

4.1 Background

"Airside" and "Landside"/ "On-Airport" and "Off-Airport"

"Airside" refers to the area inside the security fence at an airport and includes airport runways, taxiways and aprons. This is land in the immediate vicinity of aircraft handling and operations and accordingly, access to this area is restricted. "Landside" refers to all other areas at the airport.

Passenger terminals and "on-airport" cargo terminals (as to which see below) straddle the airside and landside areas of the airport. For example, passengers arriving at MA on a flight will be airside when the aircraft touches down, they will then move through the passenger terminal and exit the terminal landside.

The Freight Process

The export freight process usually involves a number of basic steps.

Firstly, the producer/customer engages a freight forwarder to collect the freight from its premises.

Freight forwarders work as agents for the producer/customer. They gather various loads of freight, and build them up to pallets ready for transit.

The freight forwarder then contracts with an airline in order to arrange for space on an aircraft for the freight. The airline advises the freight forwarder which CTO will handle the freight for that flight. The freight forwarder then raises an Airway bill (an international standard form document). This will include a description of the goods, their value, the sender and receiver and the weight of the freight. The freight is then transported to the cargo terminal by the freight forwarder.

The freight forwarder's truck will pull up landside at the cargo terminal and unload the freight. The CTO operator will match the goods received with those itemised on the Airway bill. Once in the cargo terminal, the freight is available for Customs and quarantine inspection. The airlines impose a two hour cut-off time for delivery at the CTO prior to aircraft departure in order to allow sufficient time for the necessary clearance and loading to take place.

Effectively, what the CTO does is provide the airline with a consolidation service. The CTO takes responsibility for the freight when it enters the cargo terminal. Contractually, its clients are the airlines, not the forwarders or senders (although customers can lodge directly with the CTO). The CTO collects freight potentially from a number of different freight forwarders, consolidates this freight, builds it up if necessary (some freight will simply be transported as "loose freight") into a full load unit load device ("UDL"), raises a master Airway bill and then presents to the airline a totally made up single load for that flight which has been prepared and weighed. The CTO will advise

"load control" (who is theoretically a separate ground handler at the airport but under the present system is either Qantas or Ansett) of the weight of the freight and "load control" devise a load sequence that will "trim" the aircraft (the "trim" refers to the placement of freight and baggage in an aircraft needed in order to ensure an evenly balanced aircraft). The CTO takes responsibility for the total weight of the freight. The CTO then compiles a manifest for the airline.

The CTO advises Customs and AQIS that a flight has been prepared for departure.

Once the freight has been cleared for departure, it is passed to the ramp operator. A ramp operator performs one of the range of ground handling functions by transporting the freight between the freight terminal and the aircraft via trolleys (called "dollies"), where the next function of loading is undertaken also by a ramp operator using deck loaders. Freight moves through to the "airside" side of the cargo terminal out onto dollies and onto the apron. The freight is transported to the aircraft where it is loaded into the aircraft, usually by a main deck loader, or "MDL" (for pure freighters) or lower deck loader, or "LDL" (for passenger aircraft).

For import freight, the process is reversed, with the exception that the airline is contracted by the overseas freight forwarder. The freight is unloaded from the aircraft, transported to the CTO, processed as landed and cleared by Customs and AQIS and then made available for pick up by the Australian freight forwarder. The CTO holds the freight in bond prior to clearance by Customs and AQIS. Duty will be paid prior to clearance, which normally takes place at the freight forwarder's premises.

Nowadays the airway bill process is largely electronic. Freight forwarders, CTOs and Customs all access the "cargo automation system". For inbound/outbound freight, this automation creates efficiency as Customs can pre-clear most freight and notify the CTO accordingly through the system of freight requiring customs screening.

Importantly, freight may need to be warehoused by the CTO prior to pick up by the freight forwarder or delivery to the aircraft.

"On-Airport" versus an "Off-Airport" CTO

The difference between on-airport and off-airport CTOs (operating through an on-airport "by-pass" warehouse) is illustrated diagrammatically in Attachment 3.

All CTOs in Australia, with very limited and special exceptions are on-airport CTOs. In fact, for reasons set out below, most notably for reasons of efficiency, most CTOs worldwide are located on-airport. In a submission from the Department of Transport and Regional Development to the recent House of Representatives *Standing Committee on Communications, Transport and*

Microeconomic Reform (the "Air Freight Review Inquiry"), information was provided relating to seven major foreign airports. From all these airports, only one of the six CTOs operating at Heathrow airport was an off-airport CTO. We understand this was only because there was no available land on-airport. The other six major foreign airports only had on-airport CTO's.

An off-airport CTO could operate in a variety of different ways, however conceptually, the general feature of the off-airport CTO is that freight is not built up or broken down at a warehouse on the airport but instead "by-passes" this stage until off the airport at a warehouse. In the FAC's view, an off-airport CTO, if introduced, should operate through an on-airport by-pass warehouse, where goods can be processed and landed, but with no build up or break down and a substantially reduced warehousing component. Attachment 4 offers a schematic representation of such a by-pass warehouse operation.

For import freight, the off-airport CTO would receive from the on-airport by-pass operation those units that are pre-cleared from its client airline by Customs. Although the FAC is not aware of the views of Customs on this issue, it is the FAC's view that where goods required checking for Customs purposes, they could be held in the by-pass for inspection and then released to the off-airport CTO. For export freight, the off-airport CTO would prepare all export freight for dispatch to the by-pass facility on-airport for lodgement and paperwork.

Inefficiencies associated with an off-airport CTO

There are a number of inefficiencies associated with any off-airport system, importantly:

- **Double Handling** - double handling is introduced into the freight chain as freight travels from the on-airport by-pass warehouse to the off-airport CTO and then from the off-airport CTO to the forwarder, rather than directly from the on-airport CTO to the forwarder. The double handling of goods in turn generates more documentation and increases the element of risk (for example in terms of security or damage to goods) associated with the transport of goods;

- **Time and Distance** - the greater proximity to the airport of an on-airport CTO provides many advantages, one of which for example is the minimisation of travel distances to tranship freight internally. Currently a portion of the international freight arriving at MA stops in Australia on its way to another country (for example South East Asia). This freight is currently stored at an on-airport CTO while waiting to be flown on another flight out of the country. The CTO is responsible for storing this transhipped freight, preparing a manifest for the next flight and advising Customs. Management of transhipped freight by an off-airport CTO presents real logistical difficulties.

Time is particularly important for freight which is transhipped. Taking into account the 2 hour cut-offs imposed by airlines, if for example there is a 7 hour stop-off at MA, there is considerable margin for error, not to mention inefficiency, where the freight needs to be stored off-airport. If the stop over is for a lesser period, it may be impossible (and quite ludicrous) to store freight off-airport.

- **Multiple visits for freight forwarders** - it is estimated that approximately 60-70% of airport CTO visits by freight forwarders are multiple (ie to more than one CTO). Having CTO's on-airport therefore substantially reduces the travel and time for the forwarding industry in lodging and retrieving freight;

- **Interfaces** - generally, accommodating all freight functions in the same geographical location streamlines the infrastructure required for transport access to and from the trading and forwarding community and the interfaces required for on-airport transit freight;

- **Positive Externalities** - there are positive externalities associated with having all operators located within close proximity of each other - the airlines, Customs, freight forwarders, AQIS, and the FAC. These positive externalities are difficult to measure but they clearly exist. This is why airports around the world adopt "Freight City" concepts. For example, operations are easier to police, monitor, check and audit, the closer proximity avoids problems of "force majeure" and enables operators to ensure activities are carried out efficiently. Further, potential problems or bottlenecks can be more readily identified and corrected. Conversely, there are negative externalities which are difficult to measure associated with geographically dispersing the freight associated operations.

ACTO itself states in M3 in relation to off-airport CTO services that:

> Whilst these alternatives are viable <u>they suffer from being seen by the freight forwarding and client airline market as inferior to on-airport services</u>." (our emphasis)

Attachment 5 is a copy of an internal memorandum written by Kent Donaldson, in his capacity as Manager Freight, Melbourne Airport which identifies the advantages associated with an on-airport facility. As the NCC is aware, Kent Donaldson is now a director of the applicant.

Attachment 6 is a copy of a paper prepared in respect of Los Angeles Airport which outlines some advantages associated with an on-airport CTO.

<u>"Hole in the Wall" Operations</u>

A "hole in the wall" type of CTO operation involves an off-airport CTO who accesses the airside of the airport simply through a gate on the airport rather than through a by-pass warehouse (described above). As described in the Applications, trucks would pass through a gate on the security fence and

unload freight on or near the apron or directly to the aircraft. There are a number of reasons why the FAC generally does not wish to pursue "hole in the wall" type operations at any of its airports:

- The major difficulty associated with operating a "hole in the wall" rather than a by-pass warehouse is the lack of management control by the FAC over the flow of freight to and from airside. For example, if an aircraft is unloaded to the apron and the off-airport CTO has not arranged for transport to take this freight landside, there is no place for the freight to be stored and it must remain on the apron. Logistically, where there are many operators and thousands of tonnes moving through the airport the control exercised by a by-pass warehouse is considered essential.

  The apron is very valuable infrastructure for the FAC and it was not built to carry out the function of storing freight, and loading freight on and off trucks. An apron is specifically designed to handle and service aircraft. The build up of freight on the apron creates real congestion problems for the airport and has the potential to obstruct traffic (both aircraft and land-based vehicles). Other problems may arise from time to time, for example, in the past, the FAC has encountered difficulties with equipment and freight being blown across the airport and onto live runways raising the risk of serious incidents occurring.

- A by-pass warehouse provides a secure place for Customs to inspect cargo whenever needed. A "hole in the wall" operation does not provide a similar secure facility. Attachment 7 is a letter from ACTO to the FAC dated 19 August 1996 where it is stated:

  > "Because ACS will allow freight to be transported to our terminal prior to being cleared we will not need any other storage facilities or contingency plans. Nonetheless the site described above will provide space for freight to be stored should the need arise for unforeseen reasons. If this occurs our plan will be to cover the freight with tarpaulins and supervise its security until the freight can be transported off-airport." (emphasis ours)

  The FAC anticipates that Customs will occasionally target freight that it will not want transported off-airport prior to inspection. The FAC anticipates that ACTO's proposed arrangements in this regard will be less desirable from a security perspective.

- The airside of a busy international airport such as MA is an inherently dangerous environment where the consequences of an accident involving jet aircraft (particularly if refuelling), other airport vehicles, passengers and airport personnel can be enormous. This is reflected in the size of FAC's catastrophe insurance cover in this area which is in the order of $1.5 billion.

  Accordingly, the control of airside activity is treated as a very serious issue by the FAC and it has instituted detailed measures through its by-

law making power to manage and reduce the risk of accidents. A principal feature of its airside control is to minimise traffic and congestion as much as possible. Hole-in-the-wall operations would increase vehicular traffic airside.

- The airside area of MA is a security restricted area which requires a Departmentally approved access control system at the manned access point. It would be unrealistic for the FAC to escort and accompany every off-airport CTO vehicle driver/operator so current Aviation Security Identification cards, Airside Driving Authorities and Airside Vehicle Permits would need to be held for airside operations. Issuing these permits, monitoring and enforcing the use of such permits for every operation would be an additional burden. Even with the current operators on the southern apron concerns exist in the area of vehicle access, person access, storage of goods for extended periods, storage of equipment, cleanliness, occupational health and safety, and aircraft parking.

- A major issue is lack of available space on the international passenger and freight aprons and adjacent areas to facilitate the types of operations required airside by the hole in the wall type of operations. There are already space constraints on the apron and none could be set aside for loading or unloading trucks and for holding trucks which are waiting to be unloaded.

- Recent attempts at KSA to carry out apron edge transfers of freight from MDL via a hoist to trucks experienced considerable difficulties. Further, the time to complete the transfer creates turn-around time constraints.

Direct Loading Between Trucks and Freighters

One of ACTO's proposals is that trucks be allowed to load directly to the deck loaders of freight aircraft. The FAC anticipates that there would be very significant difficulties associated with this type of operation:

- It is necessary for CTOs to sequence their containers correctly for aircraft load balance. This creates significant difficulties where trucks are being loaded directly to the aircraft. Space is not available on the apron to re-sequence trucks and loads (re-sequencing is frequently required in order to arrive at the correct "trim" for the aircraft). There is not space airside or landside where a fleet of trucks would be able to wait in order for the ramp loadmaster to determine when and in what order each truck is to be required.

- ACTO's proposal to run trucks directly to the deck loaders of freighter raises serious safety concerns. Attachment 8 is a drawing taken from the Airports Council International Apron Safety Handbook showing the servicing arrangements for a passenger B747 aircraft. Although some of the equipment is not required for pure freighter aircraft, the area around

the aircraft is particularly cramped, and safety of personnel and aircraft is a constant concern. This is exacerbated by the minimum separation between aircraft as shown in Attachment 9. The operators may have only limited airside experience due to the low frequency of their access.

- Aircraft and freight handling equipment (such as dollies) is specifically designed to be low to the ground and to have small turning circles due to the confined space in which they work. Trucks are higher and have larger turning circles making direct aircraft access impractical. In particular, the manoeuvring of trucks at the rear and in between the aircraft creates safety problems. It is pertinent to note that Martinair Holland, a dedicated freight carrier, would not allow ACTO to carry out this type of operation at KSA.

- There are potential problems relating to clearance heights underwing of the aircraft which are compounded where there is congestion around the aircraft during the loading/unloading process.

Ramp and Ground Handling

The term "Ground Handling Services " ("GHS") is used by IATA to describe the full suite of support services required to operate a passenger and freight airline. GHS include services such as ramp, aircraft servicing, flight operations and CTOs. "Ramp Handling" includes the process whereby freight is moved to and from the aircraft to the CTO (primarily the transport by dollies and the loading and unloading of the aircraft). The ramp handlers contract directly with the airlines. There are two types of ramp activity, one to dedicated freighters and one to passenger aircraft.

A key structural characteristic of the GHS industry is the general desire of any client airline to buy all or most services from a single supplier. This is referred to as a comprehensive agreement and often involves the use of a master contract between the buyer and the supplier to subcontract services to independent or local suppliers.

The need for comprehensive agreements reflects the need to integrate the full range of ground handling services and the desire of client airlines to minimise local management and subcontract as much of the local management task to a firm with greater local management depth. It tends to represent a barrier to new suppliers as they must either raise the full range of services to be competitive or must trade through one of the existing suppliers in order to gain a foothold in the market.

Customs and AQIS.

The *Customs Act 1901 Cth* requires that all imported goods are "screened" for barrier control purposes before being transported to a bonded warehouse, and that duty payable, be paid before imported goods are "taken out of bond".

Customs may inspect freight while in the cargo terminal, where pallets can be broken up and then rebuilt before transit.

The Australian Quarantine Inspection Service (AQIS) may also inspect the freight while at the CTO, if a quarantine entry has been issued. AQIS works alongside Customs, if the goods are subject to quarantine.

Integrators.

Integrators are independent express freight systems that manage and own the resources needed to move packages and documents worldwide. They provide the onground pick up and delivery fleets, processing facilities and air linehaul. The integrators cover all functions relating to physical lodgement and clearance and Customs within their own infrastructure. The main players are DHL, Federal Express, UPS and TNT.

4.2 The Current Position

(a) Melbourne Airport

In 1995/96, MA handled 90,000 tonnes of international import freight and 97,000 tonnes of export freight, providing an annual total of 187,000 tonnes or approximately 3,600 tonnes per week of air freight handled. The forecast growth for MA is expected to be in the range of 5.2 to 7.0% per annum with projections to 2015/16 at between 520,000 and 730,000 tonnes. It is envisaged that this growth will be predominantly met by the space on the international passenger system.

MA handles 26% of the national volume of international freight with approximately 182 international passenger and freighter arrivals weekly. This includes an average 14 scheduled pure freighter flights per week or 8% of the total number of movements.

One of the keys to the importance of MA as the primary air freight hub for Victoria, is the amount of passenger aircraft freight capacity available throughout the year. The passenger system accounts for approximately 80% of the volumes handled through MA.

(b) Existing Operators

There are currently three freight handling (CTO) and two major ramp operators servicing MA. The three CTO operators are Qantas, Ansett and Australian air Express ("AaE"). AaE is jointly owned by Qantas and Australia Post, however, it is believed that Qantas enjoys a controlling interest. The two major ramp operators are Ansett and Qantas. A small operator, South Pacific Airmotive, handles Merpati Nusantara of Indonesia who use an Airbus 310. **- confidential material deleted -**

While the FAC possesses confidential information relating to the amount of freight handled by the respective operators at MA and their

respective percentage market shares, that information has been provided to the FAC by the operators and absent their consent, cannot be disclosed.

It is sufficient to note that Qantas is by far the major stakeholder in freight at MA with the largest share.

It is likely that the emergence of the Ansett/Air NZ partnership will see Ansett's position in the market change dramatically with Air NZ being the next biggest carrier of air freight through Melbourne, next to Qantas. Air NZ (who are currently handled by Qantas), in their own right account for a significant amount of freight.

The current square meterage of warehouse and office being utilised by CTOs is 11,100m^2 square metres. Under the direct control of Qantas is 7,000m^2 square metres (63% of the available processing capacity of the International airport).

In addition to the three CTO operators at MA, the integrators (see above) manage their own resources required to move primarily express packages and documents through MA. All integrators with services to and from Australia have an element of dependence on the current airline passenger network to supplement their own network.

It emerges from the above figures that much of the international freight carried through CTO's in Melbourne may not be "contestable" (as much as 50%) - ie it is freight which is carried by the current operators and their related companies (Qantas, Ansett, British Airways, Air New Zealand).

(c) **Competition at Melbourne Airport**

The FAC recognises that the current situation whereby the two resident airlines Qantas and Ansett provide the majority of ramp functions and Qantas, Ansett and a consortium of Qantas and Australia Post provide the CTO functions is not a fully competitive framework.

The configuration at MA, whereby the service to the independent airlines relies significantly on the two vertically integrated Australian airlines, is not providing the drive and focus for much needed reinvestment let alone an acceptable level of service.

It appears clear to the FAC that the current ramp operators and CTOs have a priority focus (with the exception of AaE, although they are controlled by Qantas) on their own direct cargo and passenger business and treat the third party handling, as a means of delivering higher utilisation of their facilities, equipment and human resources, not as a primary market. It is this very scenario that created the need for reforms such as those presently being implemented by the FAC at MA.

Both Qantas and Ansett are in competition for the carriage of airfreight with other non aligned airlines and this can impact on the level of service an airline may receive in the CTO or ramp handling function. The potential for non-resident airlines to be competitively disadvantaged is very high and there is anecdotal evidence that it is occurring.

There are currently significant inefficiencies in the handling processes and systems. In particular, the recovery of import freight is slow with long delays experienced.

Increase in throughput could be achieved if the existing freight terminals were operated more efficiently (but this is a matter over which the FAC presently has no control).

The FAC recognises that it needs to introduce a truly competitive choice in services for non-resident airlines and freighter operators for both ramp operations and CTOs. Non resident airlines operating through MA need to have a choice of service providers to ensure continually improving performance, without the possibility of competitive disadvantage.

(d) **The Recent History of Ramp and CTO services at Melbourne Airport**

Calls for Expressions of Interest

The FAC Freight Development Strategy, developed several years ago, was a strategy for increasing land utilisation for freight handling purposes. The strategy called for the introduction of new freight handling operators to invest in the provision of new services in competition and in concert with current operators. This investment would serve to increase the quality and efficiency of freight handling at MA.

In November 1992, the FAC invited Registrations of Interest from potential cargo handling operators and property developers to participate in a range of new businesses. The official call for Registration of Interest is attached (Attachment 10) and outlines the nature of the proposed development in more detail.

Melbourne Airport allocated an area of land for the Cargo Community Initiatives Program within which Air Cargo Centres would be developed. This development would include a range of specific and unique business opportunities relating to cargo handling and facilities "on-airport". Property developers were encouraged to consider participating in development of sites and facilities and cargo handling operators were asked to consider establishing new services.

In carrying out this process, the FAC's cargo handling objectives were to:

(i) attract new and existing "off-airport" operators (for example, freight forwarders) onto FAC land by providing a competitive advantage for those who took up the offer;

(ii) stimulate the provisions of a wider range of specialist cargo handling services by enabling service providers to gain access to "on-airport" premises;

(iii) improve the efficiency of the air cargo ground handling industry and to support the aviation industry and Australia's economy at large by increasing the capacity of facilities and by providing a wider range of cargo handling services.

There were over 70 responses to that invitation from a range of organisations including investors, developers, operators, suppliers and others.

The FAC decided to appoint a consortium to carry out a feasibility study for the first stage of development . The feasibility study would examine a whole range of issues, such as new business enterprises for exporters and importers, infrastructure, and implementation of world best practice to increase material flow of freight import and export at the Airport.

The FAC appointed the consortium of CRI, Lend Lease and International Aviation Terminals Canada (the "**Consortium**") as preferred developer in May 1993. The FAC and the Consortium investigated the technical, commercial and market conditions to determine the level of demand for a Freight City.

The conclusion reached was that a large freight development of several buildings could not be supported at that time because the achievable rental return could not support the building development.

Following this unsuccessful process, the FAC decided to proceed to consider individual targeted proposals for specific developments on a case by case basis.

The FAC received little interest from potential CTO or ground handling operators following the exit of the Consortium.

- confidential material deleted -

- confidential material deleted -

In September 1994 **- confidential material deleted -** approached the FAC regarding the development of an independent freight handling facility. **- confidential material deleted -** The two companies would form a joint venture to undertake these operations in Melbourne. **confidential material deleted -** later opted not to be involved in this project and to instead concentrate on its core activities.

To the FAC, **- confidential material deleted -** represents an opportunity to provide a cargo terminal service at Melbourne Airport that achieves world standard practices. This is in line with the airport's mission statement:

> "To be one of the world's leading companies, and to fully realise Melbourne Airport's potential as an international gateway for passengers and freight".

The FAC anticipates that an independent operator such as **- confidential material deleted -** whose core business includes freight handling, with direct airside access will be well placed to solve the current problems. A financially strong and independent operator such as **- confidential material deleted -** whose core business includes extensive worldwide airfreight handling and distribution activities is an ideal partner for the airport to assist in developing the airport's role as an international gateway and hub for freight.

- confidential material deleted -

5. MANAGEMENT AND PLANNING AT MA

5.1 Airport Planning Generally

Managing Sydney and Melbourne airports is a complex and sophisticated exercise requiring the balancing of a multitude of different uses and potentially conflicting interests.

Because of the high risk nature of aviation activities, managing an airport involves operating within a highly regulated environment and complying with rigorous technical and operational safety and security standards. It involves both managing a large commercial asset to produce a financial return at the same time as managing a significant piece of public infrastructure in accordance with community and environmental standards. Design, construction and placement of airport infrastructure such as runways, taxiways, aprons, hangars, terminals and the supporting road network is a unique, specialised and capital intensive exercise.

More than any other piece of infrastructure facility, an airport and specific operations carried out on or adjacent to an airport demand a heightened degree of management skills, balancing of competing considerations and knowledge of the dynamics and interrelationship of users and operators. This is reflected in the range of statutory functions and powers of the FAC and in the range of considerations the FAC must take into account when exercising those powers. It is also evident in the detailed planning, management and regulatory framework established by the Airports Act which will govern the airport environment post-privatisation. The FAC was specifically established by Government under the FAC Act as a specialist airport operator and has the necessary expertise, skill, personnel, resources and experience to carry out this role. It has carried out the complex planning exercise for the airport through the production of the Melbourne International Airport Master Plan for the ultimate development of the airport with an interim 30 year planning horizon to the year 2025. This Master plan is continually updated to take account of the changes to the operating environment (see Attachment 16 which contains extracts from the latest draft). MA is continuing to develop specific implementation plans for elements of the airports including freight and passenger terminals.

In the airport context, the planning process requires integration of the range of aeronautical and non-aeronautical facilities that comprise a modern airport. These include: runways; aprons; taxiways; airfield lighting; airside roads and lighting; aircraft parking and maintenance areas; airline support service areas; aerobridges; airside buses; departure lounges; holding lounges; immigration service areas; Customs service areas; nose-in guidance; visual navigation aids; management of water, sewerage systems; electrical distribution system and fuel supply; telecommunications network; quarantine service areas; public address systems; closed circuit surveillance systems; lifts; escalators; moving walkways; public amenities; baggage pickup; handling; reclaim; public areas in terminals;

landside road and lighting; security systems; covered walkways; and flight information display systems; retail trading concessional such as duty free shops, food and beverage outlets, and car rental companies.

The planning process includes planning for growth in flight numbers, passenger numbers and freight tonnage. The airport planning process is necessarily fluid and must respond to advancement in technology and changes in government policy and the regulatory environment. Because of these industry dynamics, there is ongoing work to fine-tune individual components of the MA masterplan with the objective of achieving the most appropriate operational, commercial, financial and environmental balance.

Examples of changing policies and issues that must be addressed by flexible planning are the increase of Australian carriers able to operate international services; the introduction of the single aviation market; changes in Customs, visa arrangements and quarantine facilities; the potential removal of the distinction between international and domestic terminals; introduction of new entrant airlines requiring terminal access and access to cargo management facilities; the introduction of new larger aircraft with increased wing span or longer fuselage; the impact of rescheduling or re-routing or changed passenger behaviour.

5.2 CTO and Ramp Handling at Melbourne Airport

The FAC has developed a master plan for the airport that covers the full range of proposed activities including aircraft operations, passenger and freight terminal operations, car parking and commercial development. This process was undertaken together with the Victorian Government and in consultation with stakeholders in the airport culminating in an endorsement of the airport development strategy in December 1990. It also encompassed identifying the impact of the airport on adjacent land and undertaking the necessary steps to protect the long term operating viability of the airport.

The masterplan for the airport did provide for the next major freight development to occur in an area relatively remote from the existing freight and passenger terminal complex. This plan was discussed with the freight industry who gave feedback that the proposed site would impose some operational and financial burdens on them due to it being remote. The FAC then reviewed its plan and amended it to include an area adjacent to the existing freight terminals that could be available for 30 years allowing viable development. This amended site was included in the Expressions of Interest for Freight Development called in late 1992 (see Attachment 10).

As noted above, the FAC publicly invited expressions of interest in development of Freight City in November 1992. The objective was to achieve a viable commercial development in pursuit of the FAC objectives to improve the freight operations at MA through the introduction of new operators onto the airport. The FAC sought the involvement of other parties because it did not have the capital to invest in all the facilities desired.

As discussed above, a preferred developer was selected from the expressions of interest process and this group worked with the FAC to identify a viable project. After significant effort by all parties spanning more than 12 months it was determined that a viable project could not be initiated at the time. The FAC changed its role from that of leasing the site to that of developer in order to promote the development of freight facilities because it identified that it was the only party that would take a long term view of the industry on-airport and invest in its future.

In its pursuit of additional operators the FAC has been seeking to introduce long term viable competition provided by an experienced independent operator. The operator also needs to be committed to the development of MA as a freight hub and focus on development of additional freighter services to benefit the airport, their own business and the industry generally.

Since it took over operation of MA in 1988 the FAC has sought to improve all airport facilities including freight. Despite several attempts to initiate freight facility development there has been little success until recently through **- confidential material deleted -** . Advice of the new MA freight terminal project was presented at a meeting of freight forwarders, CTOs, airlines and government agencies in August 1996.

What Type of CTO services?

Because of the available land at MA, the FAC has the advantage of being able to promote the most efficient CTO operations possible, without the land constraints which exist at Kingsford Smith Airport.

The FAC has taken the position, because of the many advantages of the on-airport CTO concept and the availability of land at the airport, that it should as a priority support the introduction of independent on-airport CTOs to MA. It has based this decision upon overseas experience, feedback from the industry and its own knowledge and experience, and feedback from potential operators such as **- confidential material deleted -** . For the reasons set out in this submission above, the FAC does not intend to pursue any "quick fix" "hole in the wall" type operations at MA.

Introducing a Viable Competitor to MA

The difficulty encountered in achieving investment in development and operation of a new freight terminal has been demonstrated through the efforts of a number of parties over the years, not just the FAC. A new operator faces the difficulty of establishing a viable business dominated by a few operators with substantial existing networks. The new operator will be forced to deal with:

- the entrenched positions of Qantas and Ansett and the history of the duopoly at Sydney and Melbourne airports;[1]
- the amount of airfreight Qantas and Ansett control through their airlines and associated airlines (Air New Zealand and British Airways);
- the start up and other costs involved in establishing new operations[2];
- all the other advantages which Qantas and Ansett enjoy by virtue of their entrenched positions such as their existing contracts, equipment, facilities location, lease rates, lease periods and manpower[3];
- the fact that most carriers fly to more than one port and often prefer the same service provider at these ports;
- the fact that an airline may enter into a comprehensive agreement that covers passenger, ramp and freight services and so may not consider alternate service providers for individual elements.

In light of the above, in order to achieve sustainable quality competition, to facilitate the investment required for a quality on-airport operator to survive, to ensure the initial return required to justify the investment required and thus to improve service and price, in the FAC's view, competition at MA needs to be carefully fostered in the interest of the industry and Melbourne based business.

The FAC seeks to promote competition through the introduction and establishment of a vigorous competitor. In doing so, it is conscious of the significant challenge to short term survival. The introduction of multiple operators with artificially deflated cost structures would impact on the market share new operators will be able to capture from the existing operators and therefore the viability of the individual operators would be at risk.

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1 The FAC notes that in its application ACTO states "Part of the reason it has been difficult to attract and establish such an operator has been the competitive advantages that the established operators enjoy. They have preferential locations, extremely advantageous economies of scale, long paid for facilities, preferential lease rates from the FAC, reciprocal agreements with client airlines and comprehensive services which make it extremely difficult for a new operator to penetrate the market".

2 The FAC notes that in the Qantas and Ansett applications ACTO states that it "has not as yet established Ramp handling capability because the investment to do so is very large and space may not be available in the short term to enable the establishment of such a service on Sydney and Melbourne airports (page 2).

3 Although the FAC does not necessarily agree entirely with the view of the applicant, it notes that in the Qantas and Ansett applications ACTO states "the nature of comprehensive ground handling agreements' between international carriers and Qantas and Ansett is that Qantas and Ansett provide a broad range of mission critical services to these airlines and in doing so as exclusive suppliers they have a degree of client control that ACTO may not be able to overcome."

The FAC holds real concerns that unless given some period of support, in terms of certainty, a potential new on-airport CTO such as **- confidential material deleted -** may simply not make the investment required. In these circumstances, rather than promoting competition, the declaration of the services in question may undermine the emergence of a real long term competitor or competitors to Qantas and Ansett's on-airport CTOs and result in an in-efficient alternative.

We refer to Section 6 and the European experience which also directly supports the outcomes which will flow from the FAC's approach.

The Future Management of the Airport - Post Privatisation

The bidding process in respect of MA is currently underway. The FAC is not in a position to know what the new operator's plans are for the future management of the airport.

6. THE EUROPEAN EXPERIENCE

6.1 EC Directive

The European Council (the "**EC**") recently adopted an important Directive (the "**Directive**") (Attachment 17) which is intended to liberalise ground handling services at all Community airports where annual traffic exceeds two million passenger movements or 50,000 tonnes of freight. The services targeted by the Directive range from the handling of air freight to passenger services to sorting areas and runway operations.

The Directive sets out numerous situations in which Member States should be permitted to limit the number of service providers for certain categories of airport service and even to reserve one of several categories of services to a single provider.

There are clear parallels between the matters addressed in the Directive and the issues currently facing the FAC such as:

- the need for an airport to be managed by an independent body;
- the need for competition to be introduced gradually and in accordance with a management plan for the airport;
- the need to limit the number of operations in certain circumstances on the grounds of safety, security, capacity and land constraints.

The FAC supports the recently adopted EC Directive and submits that its key initiatives are entirely consistent with the FAC's competition reforms.

6.2 The EC Directive - Details

The Directive applies to "Ground Handling Services" and this is defined to include both "freight handling" and "ramp handling".

The EC acknowledges that the opening up of access to the "ground handling market" would help reduce the operating costs of airline companies and improve the quality of service provided to airport users. The Council acknowledges generally that

- free access to the ground handling market must be introduced gradually and be adapted to the requirements of the sector;
- for certain categories of ground handling services, access to the market and self-handling may come up against safety, security, capacity and available-space constraints and it is therefore necessary to be able to limit the number of authorised suppliers of such categories of ground handling services;

- if the number of suppliers of ground handling services is limited effective competition will require that at least one of the suppliers should ultimately be independent of both the managing body of the airport and the dominant carrier;

- if airports are to function properly they must be able to reserve for themselves the management of certain infrastructure which for technical reasons as well as for reasons of profitability or environmental impact are difficult to divide or duplicate (though the centralised management of such infrastructures should not constitute an obstacle to use by suppliers of ground handling services);

- to enable airports to fulfil their infrastructure management functions and to guarantee safety and security on the airport premises as well as to protect the environment and the social regulations in force, Member States must be able to make the supply of ground-handling services subject to approval (such approval must be objective, transparent and non-discriminatory);

- Member States must retain the power to lay down and enforce the necessary rules for the proper functioning of the airport infrastructure (those rules must relate to the intended objective and must not in practice reduce market access or the freedom to self-handle below a certain level and must comply with the principles of objectivity, transparency and non-discrimination);

More specifically, the Directive states in Article 6.2 that:

> "Member States may limit the number of suppliers authorised to provide the following categories of ground handling services:
>
> - baggage handling;
> - ramp handling;
> - fuel and oil handling;
> - freight and mail handling as regards the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft.
>
> They may not, however, limit this number to fewer than two for each category of ground handling service."

Article 6.3 continues:

> "Moreover, as from 1 January 2001 at least one of the authorised suppliers may not be directly or indirectly controlled by:
>
> - the managing body of the airport;

- any airport user who has carried more than 25% of the passengers or freight recorded at the airport during the year preceding that in which those suppliers were selected;

- a body controlling or controlled directly or indirectly by that managing body or any such user."

Article 6.4 provides:

> "Where pursuant to paragraph 2 they restrict the number of authorised suppliers, Member States may not prevent an airport user, whatever part of the airport is allocated to him, from having, in respect of each category of ground handling service subject to restriction, an effective choice between at least two suppliers of ground handling services..."

In Article 8.1 of the Directive, it is stated that:

> "Notwithstanding the Application of Articles 6 and 7, Member States may reserve for the managing body of the airport or for another body the management of the centralised infrastructures used for the supply of ground handling services whose complexity, cost or environmental impact does not allow of division or duplication..."

In Article 9.1 it is stated:

> "Where at an airport, specific constraints of available space or capacity, arising in particular from congestion and area utilisation rate, make it impossible to open up the market and/or implement self handling to the degree provided for in this Directive, the Member State in question may decide:
>
> (a) to limit the number of suppliers for one or more categories of ground handling services other than those referred to in Article 6(2) in all or part of the airport;
>
> (b) to reserve to a single supplier one or more of the categories of ground handling services referred to in Article 6(2)."

6.3 EC Consultation Paper

Also attached (Attachment 18) is an EC Consultation Paper presented by the Commission in December 1993 entitled "Ground handling services".

At paragraph 7 it is stated:

"7. In addition, the supply of ground handling services is subject to a number of constraints, chief among which are the following:

> Available capacity and space in airports: This constraint essentially concerns the space available in terminals and ramp areas, which may be inadequate for the personnel and technical equipment required to supply the services concerned. Lack of space can also affect the infrastructures needed to supply services such as passenger check in desks, or the central area for sorting and dispatching baggage to terminals.
>
> Security and safety: This is a constraint imposed by the need for identity checks on persons with access to areas that are closed to the public and sensitive from the standpoint of airport security (the security aspect), and the need to

coordinate and supervise all operations so as to prevent accidents (the safety aspect). The latter aspect is partly linked to the problem of lack of space referred to above.

Technical feasibility: The provision of some handling services means that suppliers must have access to certain equipment and certain infrastructures. Constraints caused by technical feasibility may thus affect the supply of particular services. These constraints are not related to problems of capacity, but they may be aggravated by a lack of space. The need to coordinate or indeed centralise certain functions may constitute a major constraint, in particular as regards the utilisation of facilities and infrastructures.

Investment costs: In some cases, the only way of alleviating or removing the constraints caused by lack of capacity and space and by the need for coordination is through considerable investment, on the part of both the service supplier and the airport itself. This fact may in certain cases militate against liberalisation of certain services in the short term, or make it necessary to restrict its extent.

The question of the necessity for an airport to guarantee a minimum transfer time might also be examined in particular cases.

It is essential to take account of all these constraints to ensure that the ground handling services provided in airports are efficient. Such constraints can have a significant impact on the overall capacity of airports, which can in turn restrict the scope for opening up these services to competition.

The constraints do not affect all types of services to the same degree. They may also differ from one airport to another, and occasionally from one terminal to another within the same airport."

At paragraph 11 it is stated:

"11. the optimum degree to which the various services should be opened up to competition can be determined by reference to a number of criteria.

(1) Contact with passengers

Some services are in more immediate contact with passengers themselves and influence the image of an airline in the eyes of the travelling public. These are, principally:

- passenger handling;
- baggage handling;
- catering; and
- cleaning.

These are services where there may be the strongest arguments for opening up the market completely, since it is essential for airlines to be able to control the quality of the service and, in order to do this, to have as much freedom as possible in choosing their supplier.

(2) Technical complexity and cost of investment

Some services, such as ground administration and supervision, do not require considerable investment by the supplier nor are they very technical in character. Others, however, do fall into this category, eg. fuelling and aircraft maintenance.

In the case of very technical or capital-intensive services, few candidates will probably respond to market liberalisation moves. Complete liberalisation is therefore less necessary.

(3) Capacity and space available

At many airports the capacity of the installations, especially terminals, may limit the number of service suppliers that can be accommodated in practice. There are two aspects to this difficulty:

- virtually all handling services may be affected since the supplier's physical presence at the airport will almost always be necessary, at least intermittently; the only exceptions seem to be ground administration and supervision and flight operations and crew administration, which require very little space;

- the degree of difficultly may differ completely from one airport to another and even from one terminal to another.

On the basis of the information available to the Commission it is hard at present to judge what the real impact is in each case.

Another major problem associated with this constraint is the investment which opening up the market may require of the airport itself, and not just of the service suppliers. While it is reasonable that a supplier should bear the costs of providing services at an airport, it is less obvious that airports should be forced to undertake the sometimes considerable investment that accommodating new suppliers might require. Service suppliers could therefore be invited to contribute in some way to the financing of such investment, eg. through the rents, charges and fees, etc. which they are asked to pay in return for access to the infrastructure.

(4) Safety and security

In certain cases, safety and security requirements may also limit the number of suppliers of certain services that can be accommodated. This is particularly so in the case of:

- services which involve direct access by staff to the aircraft or to sensitive areas, such as catering, cleaning or aircraft maintenance;

- services involving the movement of vehicles in mixed areas where aircraft are also present, eg. ramp services or fuelling.

Strictly speaking, this means only that the airport should have the power to check the identity of persons having access to the aircraft and to sensitive areas, and to make sure that staff and vehicles comply with the necessary traffic and coordination rules. This does not seem automatically incompatible with opening up the market, provided that increasing the number of suppliers does not make it

impossible in practice to carry out such checks and coordination measures. It will therefore be necessary to find a compromise which will achieve the highest degree of liberalisation compatible with maintaining the level of safety and security necessary.

At paragraph 12, it is stated:

"These considerations suggest that the best candidate for complete liberalisation is a service:

- which is close to the passenger;
- which involves little cost and is technically straightforward;
- where security and safety constraints are not prominent, and
- which is not likely to be affected by a lack of space or capacity.

The ideal example is passenger handling.

Conversely, the worst candidate for complete liberalisation is a service:

- where there is no contact with passengers;
- which is technically complex or involves a high level of investment;
- where there are acute problems of safety or security, and
- where available capacity or space is likely to be limited.

A typical example would be fuelling or ramp services.

At paragraph 13, the EC outlines what is one of its chief concerns:

"At present, the managing bodies of several airports are also suppliers of ground handling services, under various arrangements which range from a straightforward monopoly to a holding in a specialist company. Competition between suppliers can be distorted by this duality of roles".

As has been previously noted, the FAC is not vertically integrated.

At paragraph 13(5) it is stated that:

"13(5) There are principles which ought to govern any requirements imposed on service suppliers by the airport. Whether or not the market is fully open to competition, the airport authority or corporation, as the body managing and regulating the airport, must be entitled to take the measures necessary for efficient management and for security and safety. It must be able to require service suppliers at the airport to comply with the rules and conditions it considers appropriate for these purposes. But such measures should comply with the same principles as those listed in point (3)."

7. THE APPLICATIONS

7.1 The ACTO Proposals

Physical Activities

It is crucial that the NCC understand physically the operations which ACTO is proposing to establish. The proposed ACTO operations encompass a number of different possibilities:

(a) First, ACTO is proposing an off-airport CTO with a number of possible ground handling configurations:

(i) trucks entering and exiting the airport through a "hole in the wall", coming onto the airport freight apron and loading and unloading pure freighter aircraft directly from and to the MDL;

(ii) trucks entering and exiting the airport through a "hole in the wall", to an area (either on or near the apron) where freight is loaded and unloaded onto and off the trucks by a hoist. The freight is towed on dollies between the MDL and LDL (both freighter and passenger aircraft) and the hoist;

(iii) trucks entering and exiting the airport through a "hole in the wall", to and from an area on the apron where the freight is loaded onto and unloaded from the trucks by a fork lift truck. The freight is towed on dollies between the MDL and LDL (both freighter and passenger aircraft) and the forklift;

(iv) towing freight on dollies between the MDL and LDL and the by-pass roller bed of Qantas, Ansett or AaE.

(b) An On-Airport CTO

In all of the above scenarios, ACTO wants permission to carry out ramp activities (the operation of the MDL and LDL, associated tugs, airstairs and dollie/barrow towing equipment on the freight and passenger apron) and the towing of dollies if necessary.

The "Services"

The "services" sought to be declared are discussed in more detail below.

(a) S1 and M1

The "services" sought to be declared in S1 and M1 are summarised in the Issues Paper as "use of the freight apron and hard stand to be able to load and unload international aircraft".

These services are said to be necessary in order for ACTO to gain access to international aircraft for the purpose of aircraft loading and unloading and/or gain access to freight that has been unloaded from an international aircraft (or to deliver freight to be loaded onto international aircraft). ACTO seeks access to the passenger and freight apron areas and international aircraft parking bays in a number of different ways:

- to operate equipment required to load and unload wide bodied aircraft such as main deck loaders and lower deck loaders and the associated tugs, air stairs and dollies/barrow towing equipment on the freight and passenger apron.

- direct truck access to main deck loaders serving freighter aircraft.

- direct truck access to dollies located on the freight apron or passenger apron and used to transport freight to/from passenger and freighter aircraft.

(b) S2 and M2

The services sought to be declared in S2 and M2 are summarised in the Issues Paper as "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".

ACTO needs access to this space also to maintain its equipment.

(c) S3 and M3

The services sought to be declared in S3 and M3 are summarised in the Issues Paper as "use of an area within the airport perimeter to construct a cargo terminal". ACTO will use this land to construct and operate an International Cargo Terminal and provide other kinds of ground handling services on Sydney and Melbourne international airports. According to ACTO, the land required needs to be in the region of 6,000 to 10,000 square metres to provide sufficient areas for the building itself and needs to have airside/landside access and equipment storage. This land would need to have airside access and access to perimeter road so that freight on dollies can be towed to/from client airline aircraft.

7.2 Inaccuracies in the Applications

There are a number of assertions which ACTO makes in the Applications which need to be addressed directly:

- *ACTO claims that it currently provides international CTO services to international airlines (M1p1).*

However, the FAC is not aware of any services being provided by ACTO to anyone at MA.

- *ACTO claims that the operations which it proposes are common practice on the airports today under the purview of Qantas and Ansett and are common practice on overseas airports (M1p2).*

  ACTO claims that the fact that ACTO has conducted the proposed operation safely in Sydney in the past few weeks and the fact that this kind of operation is common overseas indicates that safety is not an issue...There is no significant difference between the catering truck traffic that is high volume and uses off-airport facilities (Cathay and Caterair)...In both Sydney and Melbourne, the FAC has allowed a high degree of on-airport truck loading for many years. While we understand that this has not been done in a formal way the degree of traffic has been high and necessary and safety not a key issue. Because CTO warehouse congestion causes unitised (by-pass) freight to be more easily loaded directly onto trucks these operations have been permitted by the CTOs on apron space and the FAC appears to have turned a blind eye. If the FAC were to force the discontinuation of this kind of operation Ansett in particular would be thrown into chaos. (M1p12)

  The FAC is not aware of <u>any</u> evidence that the practices proposed by ACTO is common practice on overseas airports and indeed no evidence has been provided by ACTO to support this assertion. As outlined earlier, in submissions by the Department of Transport and Regional Development to the Air Freight Inquiry, information was provided relating to seven major foreign airports from which only one of the six CTOs operating at Heathrow airport was an off-airport CTO.

  Currently, access to airside is granted to vehicles picking up or delivering cargo that cannot be handled across the load dock of the Ansett, Qantas or AaE CTOs - for example live stock, over height or overweight cargo, full container loads, or cargo that requires special handling. The movement of full container loads onto the apron in this fashion is undesirable from the FAC's point of view and the FAC is seeking to redress this problem.

  The FAC's position in this regard is stated in a letter from the general Manager, MA to Customs dated 12 March 1996 (Attachment 19). This letter addressed some inaccuracies contained in an earlier letter from Kent Donaldson in his capacity as Manager, Freight, FAC Melbourne to the Australian Customs Service in which Mr Donaldson purported to outline to Customs the FAC's position with respect to the desirability of certain CTO facilities (Attachment 20). This letter was dated 20 December 1995. Attachment 21 is a letter in reply from Customs dated 16 February 1996 in which Customs queried Mr Donaldson's letter and raised for the FAC's attention a potential conflict of interest on the part of Mr Donaldson. Attachment 22 is a company search of GSA Pty

Limited. Mr Donaldson was appointed a director of this company in September 1995 - two months before authoring the letter on behalf of the FAC to Customs. The letter which is self explanatory asserts that it is FAC's policy to allow the type of activities proposed by GSA Pty Limited. Mr Donaldson's letter was in fact not authorised by the FAC and was not an accurate view of the FAC's position on these issues.

Attachment 23 is a recently produced "operation safety policy for apron operations at Melbourne International Airport". The FAC is working with the current CTOs to improve their method of operation and congestion on the freight apron. To this end the FAC is attempting to increase the efficiency of the current CTOs and indeed the introduction of the new operator is one of the primary measures taken to achieve this objective.

There is no direct loading between trucks and loaders to aircraft on MA. We refer to the difficulties of such operations outlined in Section 4 above. Where a truck does come onto the apron the freight is off-loaded to the apron or dollies. The FAC stresses that this practice is limited to when the freight cannot be put through the CTOs buildings.

Managing airside access is a matter of balancing priorities for the FAC. The FAC is continually looking to reduce congestion airside and the associated safety and operational problems. There are particular reasons why catering trucks carry out airport truck loading. These are:

- catering trucks are designed specifically to carry out this type of operation. These trucks have elevation mechanisms similar to those of a deck loader and have other design characteristics which enable this type of operation to be operationally more achievable;

- far fewer catering trucks would be required to interface with any one aircraft than trucks loading freight;

- historically, catering trucks have required immediate access to aircraft due to the nature of their goods.

- *ACTO claims that as a ramp operator it will occupy space on-airport and to a minor extent this space will be incremental. It claims that international aircraft service requires a finite amount of equipment and facilities per aircraft and the extent to this which amount is increased by multiple suppliers is small at the margin (M1p12).*

In the FAC's view, as a ramp operator for passenger aircraft, ACTO will require a significant amount of equipment that will require parking and manoeuvring including as a minimum, ground power, a main and lower deck container loader, steps for crews, dollies (minimum of 38) and tugs. The fact that ACTO is expecting to service a B747 load of freight will have a significant impact in terms of equipment space, truck

parking and queuing. Logistically, ACTO will need to move the freight from the aircraft to trucks and then reload the aircraft. The freight aircraft owner will not want to stay on the ground longer than is necessary. To carry out this operation effectively, in order to minimise the time, ACTO will have to use a significant area airside.

- *ACTO claims that Qantas and Ansett as ramp and CTO service suppliers frequently (daily in high volumes) load and unload trucks on-airport because this is the most efficient way for them to service certain clients (M2p4).*

  The FAC reiterates its position that this type of activity only occurs where freight cannot be put through an existing CTO facility. This is not a position which the FAC is encouraging and in fact it is taking measures (including the introduction of **- confidential material deleted -**) in which to alleviate this unsatisfactory position.

- *ACTO claims that in Melbourne the FAC has denied ACTO the right to perform in this way and has refused to lease space to ACTO despite having negotiated an agreement to do so (and then declining to complete the lease agreement) (M1p5).*

  This statement is inaccurate. As is discussed above, following a meeting with ACTO, it was ACTO which sought to confirm in writing that a lease offer (verbal) had been made. This was not the case and in fact the FAC was of the belief (as discussed above) that ACTO was going to use the Ansett Air Freight facilities. The FAC responded along these lines to ACTO.

- *ACTO claims that in both Melbourne and Sydney the FAC has provided no advice to industry at large which would indicate that expressions of interest had been sought or commitments made. While ACTO is aware of parties who have expressed interest the FAC has not indicated its directions or criteria (M1p9).*

  The FAC has been to the industry in respect of MA and has not been able to achieve a positive result in terms of freight terminal development (as discussed above). The FAC has consequently been left with the need to invest in a terminal itself. In the case of MA it has given advice of the development to a gathering of local freight industry representatives in August 1996.

- *ACTO claims that in Melbourne there is no question of apron space availability. It claims that there is ample apron space to accommodate ACTO and in fact possibly a number of further suppliers (M1p12).*

  There is no apron space to accommodate ACTO at Melbourne. Instead the FAC is creating sites with airside/landside interface for an on-airport CTO.

- *ACTO claim that it has established all of the other requirements to provide CTO services including Australian Customs Service and Quarantine Inspection Service agreement, provisioning of trucks and equipping of warehouses, development of the associated information systems and cargo handling procedures. In doing so, ACTO has made considerable investments and designed a process which is new to Australia albeit commonly used and well proven around the world (M1p3).*

  The FAC is not convinced that ACTO has made such an investment. Attachment 24 is a company search recently carried out on ACTO which indicates that ACTO was registered on 28 May 1996 and has issued 100 shares with a face value per share of $1. The FAC also repeats what it has stated earlier that the process described by ACTO is not commonly used and well proven around the world.

- *ACTO claims that the fact that ACTO operations will cause freight to be moved off-airport quickly has the effect of making space available more quickly than would otherwise be the case and during the truck loading and unloading period the degree of incremental space used is insignificant. ACTO claims that the matter is primarily one of logistics and organisation rather than open space availability. Further, ACTO claims that the recommended approach of allowing CTO direct access to MDLs will reduce on-airport traffic because dollies will not be required to tow the freight to the on-airport CTOs (M1p13).*

  In the FAC's view whether the ACTO solution would move freight off the airport more quickly is debatable. It is likely that congestion will result on the apron. In any case these operations would not enable the customer to get its cargo more quickly as the same processing will be required to take place at the off-airport CTO facility. ACTO's analysis is simplistic - it assumes that operations are carried out perfectly with no delays or interruptions. Without sophisticated integration of equipment, airlines, CTO's and the dynamic schedules of the respective parties (for example, delays to airline services) the type of timing referred to by ACTO is not possible let alone guaranteed. It takes no account of the complex and competing demands at the airport and merely represents ACTO's idiosyncratic and self interested perspective of the optimal needs of the industry.

8. SECTION 44G CRITERIA

8.1 General - the Statutory Framework

Two critical points need to be highlighted. Firstly, the onus falls entirely on the NCC to satisfy itself of the matters raised by Part IIIA. The applicant bears no onus, nor does the owner or operator of the facility. Secondly, this is a positive onus. That is, the NCC must be satisfied that all the criteria are met. If there is any doubt as to the satisfaction of any one criterion, the NCC must make a decision to recommend that the services not be declared.

Under subsection 44F(3) the NCC may recommend that the service not be declared if it thinks that the application was not made in good faith. Further, under subsection 44F(4) the NCC must consider whether it would be economical for anyone to develop another facility that could provide part of the service.

Both subsection 44F(3) and (4) contain the proviso:

> "This subsection does not limit the grounds on which the Council may decide to recommend that the service [be declared or] not be declared"
>
> (the words in square brackets appear only in ss 44F(4))

These words indicate that, while the NCC must take into account the matters in subsection 44F(3) before recommending that a service be declared, the NCC may take into account other factors it considers relevant in deciding whether or not to recommend that a service be declared.

In note 5 of the NCC's Issues Paper, it is stated that:

> "under s44G(2), the Council must be satisfied that all of the relevant criteria are met before it can recommend declaration of a service. Provided they are, the Council intends to recommend declaration."

This statement by the NCC, if given effect to, could lead the NCC into committing an error of law. The criteria set out in s44G(2) are merely the minimum criteria which must be met before a recommendation can be made. The NCC should not fetter its residual discretion to not recommend based upon any other factor that may be relevant. Indeed, in the Explanatory Memorandum to the Competition Policy Reform Bill 1995 it is stated (at paragraph 180):

> "In considering the application the Council must consider the matters set out in section 44G before recommending that the service be declared. If the Council is satisfied of all of the matters set out in subsection 44G(2), it has a discretion whether or not to recommend that the service be declared" (our emphasis).

Other Matters

The NCC states at page 16 of the Issues Paper that:

> "Infrastructure operators who seek to deny access on safety grounds must bear the onus in demonstrating to the Council that access to the service would compromise the safety of the infrastructure service."

Indeed in the Draft Guide it is stated (at page 27):

> "Where an infrastructure operator wants access denied on safety grounds, the Council considers that the operator should bear the onus of demonstrating that access to the service would compromise the safety of the infrastructure service."

If the NCC proceeds along the lines set out above, it will clearly commit an error of law. The introductory words to s44G(2) read:

> "The Council cannot recommend that a service is declared unless it is satisfied of all of the following matters:...."

Plainly there is a positive onus upon the NCC to satisfy itself that access can be provided without undue risk to human health or safety. The legal significance of the positive onus falling on the NCC is that its starting point must be that "it needs to be convinced" that a recommendation to declare should be made. The NCC's documents referred to above, at least in so far as they refer to safety issues, indicate a misunderstanding of its role.

8.2 Preliminary Comment

In the explanatory material (see Attachment 25) which accompanied the draft legislative package preceding the Competition Policy Reform Bill, a paragraph appeared under the heading "Why is an access regime needed?":

> "An essential facility is a transportation or other system which exhibits a high degree of natural monopoly; that is, a competitor could not duplicate it economically. A natural monopoly becomes an essential facility when it occupies a strategic position in an industry such that access to it is required for a business to compete effectively in a market upstream or downstream from the facility. Possible examples of such facilities are electricity transmission lines, gas pipelines, water pipelines, railways, airports, telecommunication channels and sea ports. Such facilities can be owned by private or public sector organisations.
>
> When the owner of an essential facility also competes in upstream or downstream markets, there could be an incentive to inhibit access to competitors in those markets, particularly where the owner is able to price discriminate between customers in those markets. Thus, the owner of electricity transmission lines that also competed in the electricity generation market could restrict access to its transmission lines to prevent or limit competition in the generation market. If the owner also competed in a retail electricity market then it could restrict competition in, and deter entry into, markets both upstream and downstream from the facility."

This extract raises three preliminary points in respect of the current application;

Airports

The above extract identifies an "airport" as a possible example of an "essential facility". The legislation was subsequently amended to provide for the declaration of "services" rather than facilities predominantly for the reason that a facility can be used to provide a number of different services, some of which may be "essential" and some of which may not.

Although the present applications are in respect of "airports", ACTO is not seeking access to the basic services for which an airport is constructed, ie services which enable the operation of aircraft (ie, landing, taking off, navigation, processing passengers and cargo).

The FAC

Unlike the example given in the above quote, the FAC does not compete in an upstream or downstream market. The FAC has no incentive to inhibit access to competitors in those markets, nor has it done so. As indicated above, the FAC inherited the "two airline policy" and it has been working to address the competition issues, within the parameters of its overall management responsibilities and subject to the limited interest shown by new entrants, since airline deregulation.

Duplication

ACTO's application insofar as it relates to the FAC must fail because, as ACTO expressly acknowledges, the "services" sought from the FAC could also be provided by Qantas and Ansett. That is, there is no "natural monopoly" that cannot be duplicated. Indeed, the so-called "natural monopoly" has been triplicated.

8.3 **Criterion (a) - access to the service would promote competition**

The NCC must be satisfied that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service. The reference to "would" indicates that it is insufficient for the NCC to be satisfied that access "might" promote competition.

The Effect of a Declaration

If access to the apron and on-airport land does not in itself allow ACTO to provide CTO services, then access to the services in question will not of itself promote competition.

NCC should take into account the limited effect that a s44v determination could have when considering whether declaring the "service" would promote competition and whether it is in the public interest to go through an extensive and expensive process of considering whether or not to recommend declaration of a service.

It is clear that a s44V determination made in relation to the "services" which are at the centre of the current application, could only be of very limited effect.

For example, a s44V determination which authorised a "third party" to set up buildings or which purported to require FAC to "allow" such activity or to modify facilities at Federal airports could not override the requirements for any of the licences/approvals etc required under Customs, aviation safety (eg obstacle limitation) or aviation security regimes or under the development and building approval requirements of the Federal Airports Corporation By-laws.

In particular any such determination could not override:[4]

- the requirements on FAC under the *Environment Protection (Impact of Proposals) Act 1974* Administrative Procedures;
- FAC's obligations under the FAC Act to consider and form its own view of the desirability of such an alteration and whether to allow such activity;
- the obligations on the Chief Executive Officer under the Federal Airports Corporation By-laws to consider and form his own view on whether to give the development and building approvals required under the By-laws.

Promoting Competition

- Declaration of the services has the potential to undermine the strategy which the FAC is in the process of implementing; a process which will itself significantly enhance competition in the freight industry at MA.

  The FAC supports the principles of competition policy as evidenced by its approach to such issues as the entry of third party carriers into the domestic aviation industry and international airline facilitation. The FAC recognises that for historical reasons largely, as well as a lack of investors, the competition aspects of the international freight operations on MA are poor.

  The FAC commenced action to rectify this situation well before the ACTO Applications. However, for reasons detailed in section 5, the FAC has only recently been able to attract a new operator to provide real long term competition to the incumbent CTOs.

  The FAC is now involved in advanced negotiations with the **confidential material deleted -** Group, a significant, independent overseas freight operator who wishes to establish on-airport operations

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4 Compare *HREOC v Mount Isa Mines* (1993) 118 ALR 80.

at MA. By the end of this year, **- confidential material deleted -** will be in place at MA providing considerable competition to the existing players. For the FAC, the negotiations with **- confidential material deleted -** represent the first stage of a process of enhancing competition at MA in a meaningful and long term sustainable manner. For the reasons set out below a recommendation to declare by the NCC at this critical point in time has the real potential to undermine this important process.

The FAC is not vertically integrated. The FAC is a completely independent owner, operator and manager without a direct or indirect financial interest in the identity or number of persons to whom access is provided in a downstream activity. The FAC will earn (or can through alternative revenue arrangements) a similar return from a number of different CTO and ramp configuration regardless of the identities or number of the operators. ACTO itself acknowledges this position.[5] Indeed ACTO points out that:

> "The FAC could earn a far higher return by applying levies to providers of services on-airport and to the extent the FAC earns more it becomes more valuable as an asset. The FAC has the right to apply such access fees so long as they do so in an equitable way among all organisations granted airport access.".

The FAC has the express legislative function of ensuring safety and efficiency at the airport and managing activities carried out on MA so as to make MA a leading international airport.

The FAC's current negotiations with **- confidential material deleted -** to become a new on-airport CTO provider at MA is indicative of the FAC's support of the principles of competition policy. The FAC is being pro-active in facilitating the entry of independent third party operators. The nature of the investment, and factors such as its scale, its timing, the strong position of the vertically integrated incumbents means that any serious enhancement of competition at MA has to be a gradual, carefully planned and managed process and one which is carried out in a manner consistent with the overall management plan for MA. The introduction of **- confidential material deleted -** will provide the airlines (forming part of the contestable market) and other users with real choice. It is hoped that the entry of **- confidential material deleted -** , if successful, will send a positive signal to other potential entrants.

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5 For example in M2p1 ACTO states:

> "In enabling airport access the FAC will experience no incremental costs and can if it chooses request access fees (so long as all airport users pay similar access fees). Access fees are the most efficient way for the FAC to earn a return on its assets because the use of access fess allows the airport to delegate infrastructure development to the private sector while still enjoying a significant revenue stream."

- The steps which the FAC is taking at MA through the introduction of **confidential material deleted -** is a long term strategy which will entail lasting structural reform.

Because of the available land at MA, the FAC has the ability to promote the most efficient CTO operations possible, without the land constraints which exist at Kingsford Smith Airport.

It is the FAC's view, following consultation with industry, and based on its own knowledge, experience and overseas evidence, that on-airport CTO facilities are preferable (primarily for efficiency reasons) to off-airport facilities. In addition, there are major safety and operational problems associated with the "quick fix" "hole in the wall" operation proposed by ACTO. It is clearly a sub-optimal system which is evidenced by the scarcity of such arrangements throughout Australia and overseas.

Further, the FAC anticipates, both as a result of recent experience and following discussions with **- confidential material deleted -** , that the uncontrolled entry of new operators to the CTO and ramp handling industries will be likely to deter quality new operators from investing in efficient on-airport CTO facilities and therefore prevent the introduction of a new, competitive, viable and independent CTO and ramp operator at MA. Because of the market imperfections, uncontrolled entry actually results in a less competitive environment in the medium to long term.

From a competition perspective, the FAC intends to foster competition through the introduction of a new independent operator who can offer a service comparable and competitive with that provided by the current large vertically integrated operators. Otherwise, if new entry is characterised by early failure and exit, it may discourage further entry or indeed even the threat of entry - thereby entrenching the present market structure.

The declaration process has the very real potential to undermine the progress which the FAC has made to date in introducing real competition to MA.

The services described in the Applications offer neither the quality of service, nor the volume of service which will result in anything but a marginal impact upon competition. At the same time, it is possible the very existence of such marginal (quick fix) operations will discourage the investment required for the entry of a strong, viable and effective competitor at the airport.

At page 5 of the Draft Guide, it is stated that:

> "Competition generates substantial public benefits. It forces businesses to offer people 'more for less', by improving quality and/or lowering prices. It also forces them to adapt quickly to new technologies and changes in what consumers want."

- By virtue of the "staging" process implemented by the NCC, the NCC has made it difficult to assess whether access or increased access to the FAC "service" would promote competition.

  ACTO itself has acknowledged that use of the Qantas and Ansett facilities, which have significant excess capacity (Qantas in particular) is an alternative to the Applications. That is, in economic terms, they are substitutes.

  Because of the staging process, it is difficult to envisage how the NCC could satisfy itself that accepting ACTO's applications, in so far as they relate exclusively to the FAC, would enhance competition. That is, if access to the known substitutes could be immediate, more cost effective, more efficient, etc, it would follow that, in a comparative sense, a declaration of FAC services would not enhance overall competition.

  The FAC submits that the NCC should allow the FAC to proceed with its initiatives at MA, including the introduction of **- confidential material deleted -** as an independent operator. At this stage, declaration of the services has the real potential to undermine the strategy which the FAC is implementing.

8.4 Criterion (b) - uneconomical for anyone to develop another facility

The NCC must be satisfied that it would be uneconomical for anyone to develop another facility to provide the service. Under section 44F(4) the NCC must also consider whether it would be economical for anyone to develop another facility that could provide part of the service.

The "services" in question here can be described generally as the use of a facility in order to operate a CTO, either on or off-airport. In ACTO's Applications it is stated that (M2p12):

> "There are a number of ways access might be provided. In parallel declaration Applications ACTO has described these alternatives. The alternative methods of truck loading and unloading are all directed towards enabling ACTO trucks to be loaded and unloaded with freight from international flights...
>
> ...(d) Transfer of freight over the roller bed of an existing CTO. This configuration would see freight on dollies positioned to access the roller beds of Qantas or Ansett..."

and later:

> "Among these alternatives, only (d) eliminates the need for ACTO to have apron access and the associated space for operations."

Indeed, as the NCC is aware, in a separate but related Application ACTO seeks access to Qantas and Ansett ramp and cargo handling services at Sydney and Melbourne international airports. In particular, the service which ACTO seeks to have declared is the Qantas and Ansett aircraft loading and unloading

function (ramp handling) which is required to enable ACTO truck loading and unloading at these airports and or access to their roller bed systems.

In this separate Application, ACTO outlines three ways that ACTO can offer CTO services to international carriers:

> "1. Access to the Qantas and Ansett Roller Beds would enable ACTO to pick up freight that has been transported to these Roller Beds by the Qantas and Ansett Ramp function. ACTO trucks would position at the Qantas or Ansett truck loading docks and retrieve or deliver freight to their Ramp function in this way.
>
> 2. Direct access to dollies loaded with freight from freighter or passenger aircraft by the Qantas or Ansett Ramp function would achieve the same result and would enable ACTO to avoid the congestion present in the on-airport warehouses operated by Qantas and Ansett and where the roller beds of the two operators are located.
>
> 3. Direct access to the MDL used by Qantas and Ansett to load and unload freighter aircraft."

ACTO states in respect of S1-S3 that "this Application for declaration pursues an alternative and an associated access that would enable ACTO to provide CTO services to international carriers by establishing its own on-airport facilities".

- If the service is defined as access to the airport in order to operate as a CTO operator (either on or off-airport), then the NCC cannot be satisfied that it would be uneconomical for anyone to develop another facility to provide the service. Qantas, Ansett and Australian air Express currently operate facilities through which ACTO could gain effective access to the airport. Indeed it is the FAC's understanding that ACTO has been involved in discussions with these operators in order to gain such access. If there are "substitute" facilities, then the alleged "natural monopoly" position held by the FAC in relation to its facilities which must exist for this criterion to be satisfied is not present.

  ACTO itself has acknowledged in the separate applications in respect of the Qantas and Ansett facilities that use of these facilities is an alternative to the Applications. However, by virtue of the "staging" process implemented by the NCC, the NCC has made it difficult to satisfy itself that there are not economic alternatives to the services the subject of the Applications.

  In Section 9 below the FAC sets out reasons why the "services" are not within the scope of Part IIIA of the TPA. However, the services provided by Qantas and Ansett from their existing facilities do attract the operation of Part IIIA.

- If the NCC is of the view that the "service" is necessarily tied to the "facilities" in question, that is certain non-defined areas on the airport including the apron, part of the apron or a piece of undeveloped land

adjacent to the apron, then it follows that it would not be uneconomical for aprons and other hardstand areas to be duplicated as occurs from time to time.

In summary, the NCC cannot be satisfied that it would be uneconomical for anyone to develop another facility to provide the service. Alternately, the NCC should be satisfied that it would be economical for someone to develop another facility that could provide part of the service.

8.5 Criterion (c) - national significance

The NCC must be satisfied that the facility is of national significance having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce (trade or commerce between States or Territories or international trade or commerce); or

(iii) the importance of the facility to the national economy.

The FAC accepts that MA is of national significance.

However, the FAC does not accept that the "facility" in question is the airport as such. If the relevant "facility" refers to undefined parts of the hard stand, freight apron and areas to provide storage, it is difficult to see how the NCC could be satisfied that these are of national significance. The Applicant's focus on the volume and value of tourism and trade activities as a basis for satisfying the national significance criterion is misdirected. What needs to be established is that access or increased access as envisaged by ACTO to the undefined parts of the apron, hard stand etc is of national significance.

8.6 Criterion (d) - risk to human health and safety

The NCC must be satisfied that access to the service can be provided without undue risk to human health or safety.

The airside of a busy international airport such as MA is an inherently dangerous environment where the consequences of an accident involving jet aircraft (particularly if refuelling), other airport vehicles, passengers and airport personnel can be enormous. This is reflected in the size of FAC's catastrophe insurance coverage in this area which is in the order of $1.5 billion.

Accordingly, the control of airside activity is treated as a very serious issue by the FAC and it has instituted detailed measures through its by-law making power to control access and manage and reduce the risk of accidents. A principal feature of its airside control is to minimise traffic and congestion as much as possible.

In this regard, the Applications raise a number of serious safety concerns. These relate primarily to the increased carriage of trucks and personnel onto the airport, the apron and up to or near aircraft and the potential for already constrained space to be congested by the storage of freight and equipment on land designed for specific airport uses other than storage.

- **"Hole in the Wall" Operations** - The airside of MA is a security restricted area because of its proximity to aircraft handling and operations. The carriage of additional trucks and personnel onto this area and onto the apron raises safety concerns for the FAC.

  A major issue is lack of available space on the international passenger and freight aprons and adjacent areas to facilitate the types of operations required airside by the hole in the wall type of operations. There are already space constraints on the apron and none could be set aside for exclusive loading or unloading at a hole-in-the-wall "leased" site.

- **Ramp Handling** - The introduction of additional ramp handlers will significantly increase the level of traffic on the airside roads and around the aprons. This has the potential to create management and safety problems particularly around the passenger apron.

- **Direct Truck Loading** - ACTO's proposal to run trucks directly to the deck loaders of freighters raises additional safety concerns. The area around the aircraft is cramped and safety of personnel and aircraft is a constant concern. Aircraft and freight handling equipment (such as dollies) is specifically designed to be lower to the ground and to have smaller turning circles due to the confined space in which they work. Trucks are higher have larger turning circles making direct aircraft access impractical. The manoeuvring of trucks at the rear and in between the aircraft creates safety problems.

Access pursuant to ACTO's proposal (specifically its request for a "hole in the wall") represents a serious compromise from a safety perspective. This is one reason why those operations are not common at significant airports overseas.

The NCC cannot be satisfied that access to the service can be provided without undue risk to human health or safety.

8.7 Criterion (f) - public interest and other factors

- The Applications may, if successful, take away from the FAC its ability to manage the airport, the scope and nature of activities conducted on airport land and its ability to implement its reforms.

  This is undesirable from a public interest perspective and is contrary to legislative intention as disclosed in the *Federal Airports Corporations Act* 1986 (the "**FAC Act**").

Managing Melbourne airport is a complex and sophisticated exercise requiring the balancing of a multitude of different uses and potentially conflicting interests.

Because of the high risk nature of aviation activities managing an airport involves operating within a highly regulated environment and complying with rigorous technical and operational safety and security standards. It involves both managing a large commercial asset to produce a financial return at the same time as managing a significant piece of public infrastructure in accordance with community and environmental standards. Design, construction and placement of airport infrastructure such as runways, taxiways, aprons, hangars, terminals and the supporting road network is a unique, specialised and capital intensive exercise.

More than any other piece of infrastructure facility, an airport and specific operations carried out on or adjacent to an airport demand a heightened degree of management skills, balancing of competing considerations and knowledge of the dynamics and interrelationship of users and operators. This is reflected in the range of statutory functions and powers of the FAC and in the range of considerations the FAC must take into account when exercising those powers. It is also evident in the detailed planning, management and regulatory framework established by the Airports Act which will govern the airport environment post-privatisation. The FAC was specifically established by Government under the FAC Act as a specialist airport operator and has the necessary expertise, skill, personnel, resources and experience to carry out this role. It has carried out the complex planning exercise for the airport through the production of the Melbourne International Airport Master Plan (Attachment 16) which has a 30 year planning horizon and is continually updated to take account of the changes to the operating environment.

On our view of the Applications, ACTO is not seeking access to a service at all. Rather, it is seeking to tell the FAC what type of service should be provided with no regard to the other considerations that the FAC must take into account. It cannot be in the public interest for there to be a declaration relating to a "freight specific" activity attaching to an important and limited multi use facility. The enhancement of competition at KSA needs to be carefully planned and managed and must be carried out in a manner consistent with the overall management plan for MA. The FAC, <u>not</u> ACTO or any other person in the freight industry should be the person allowed to dictate the nature of the services which are provided from Melbourne airport.

- <u>Part IIIA was primarily designed to deal with vertically integrated operators who use their power in one market to disadvantage the competitive position of their competitors in another market</u>.

The FAC is not in such a position. The FAC is an independent body established by Commonwealth legislation for the purpose of managing the airport. In 1986, when the FAC was established, it inherited the two airline policy of the Department of Transport and Communications and the associated long leases which had been granted to Ansett, Australian air Express and Qantas in respect of their cargo terminal facilities. Since this time and well before the introduction of Part IIIA, the FAC, in the context of the complex exercise of managing the airport, has taken positive steps to enhance competition at MA despite the lingering uncompetitive environment resulting from 40 years of the two airline policy. The FAC has for example facilitated third party entry to the domestic aviation industry, introducing competitive tender processes for the selection of concessionaires, lease of sites and awarding of contracts in relation to construction and other matters.

- The FAC's proposed facilitation of new entry achieves international best practice.

The FAC's position and the body of these submissions are directly supported by a recent directive of the European Council dealing with the "liberalisation" of ground handling activities at international airports.

- The Applications are untimely.

MA is currently in the middle of the privatisation process. This process is expected to be completed by June 1997 at the latest. The privatisation process has a number of implications for the immediate Applications;

- there is a strong argument to the effect that any declaration made will not have any legal effect in relation to any entity to which a lease is granted by the Commonwealth in accordance with the *Airports Act 1996*;

- alternatively, the NCC has recognised that it has an obligation to inform the provider of the services in question that the Applications have been received and to consult with and receive submissions from that provider. If the services in question are declared, by the time any dispute arises, there will be a new "provider" at MA. This provider will not have been notified of the Applications for declaration and more importantly will not have had the opportunity to make submissions to the NCC as the "provider" of the "services". This is clearly undesirable and presumably not intended by Part IIIA. The NCC is in effect, asking the FAC to make submissions on behalf of the future operator;

- declaring the "services" in question just prior to the new operator taking over, will have the effect of preventing the new operator from entering into access undertakings in relation to the

"services". This is contrary to the legislative intention as manifested in the *Airports Act* 1996.

Part 13 of the *Airports Act* 1996 provides a mechanism by which, 12 months following the entry of the new operator to MA, each "airport service" is deemed to be a declared service for the purpose of Part IIIA of the TPA. As discussed above, an "airport service" means a service provided at a core regulated airport, where the service:

> "(a) is necessary for the purposes of operating and/or maintaining civil aviation services at the airport; and
>
> (b) is provided by means of significant facilities at the airport, being facilities that cannot be economically duplicated;
>
> and includes the use of those facilities for those purposes."

The 12 month period is allowed in order to provide the new operator the opportunity in which to submit an access undertaking. The Minister for Transport and Regional Development, Mr Sharpe stated in the second reading speech that:

> "Airport operators will have to satisfy the ACCC on how they intend to provide access for civil aviation operations, or be deemed a "declared facility" for the purposes of these services. It is the government's intention to maximise the opportunity for commercial negotiation to solve access issues, but the ACCC may take an arbitration role if negotiation is unsuccessful." (Hansard, Thursday 23 May 1996, p1308)

It is not clear whether this provision will cover the "services" the subject of the Applications. Regardless of whether it does or not, this legislation indicates an intention on the part of the legislature that the new operators of the airport be given an opportunity to come to an agreement with any person seeking access;

- by the time the Minister makes a decision on declaration, the freight landscape at MA will have altered dramatically compared to that existing at the time of the NCC consideration and recommendation.

- for these reasons, if any of the "services" are declared at MA such declaration should either:

  - be deferred for a period of three years to allow competition generated by the new freight terminal and new airport leasing company to take effect; or

  - be deferred for one year from the date the new operator takes over the lease.

In our view, the above reasons provide a compelling case for the NCC to satisfy itself that access to the services is not in the public interest.

8.8 The NCC's residual discretion in Section 44G

The criteria set out in s44G(2) are merely the minimum criteria which must be met before a recommendation can be made. The legislation indicates that the NCC has a residual discretion under section 44G to refuse to declare the services.

The decision to recommend a declaration is extremely important and it should not be exercised in circumstances where there is clear evidence that the operator in question is seeking to achieve the outcomes that are encouraged by the Part IIIA regime. That is, the NCC should take the opportunity to encourage the FAC to pursue its initiatives by declining to recommend a declaration.

8.9 Can the new operator be bound by a declaration?

FAC has previously submitted to the NCC that it should delay consideration of the application in relation to Melbourne Airport at least until the successful bidder for the lease for the Airport is identified and is able to participate in the process.

FAC continues to press that submission.

FAC now raises a new consideration which should be taken into account by the NCC - either as a public interest factor or as a residual discretion factor or simply as an operation of law. That is, it seems to the FAC that there is a strong argument to the effect that any declaration made in relation to "service" provided by FAC in exercise of its powers as owner and operator of Melbourne Airport in accordance with the *Federal Airports Corporation Act 1986* will not have any legal effect in relation to any entity to which a lease is granted by the Commonwealth in accordance with the *Airports Act 1996*.

The argument is as follows -

It is clear that under the terms of Part IIIA there can be more than one provider in relation to one *facility* - see the definition of provider:

> "provider", in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service;

However, Part IIIA assumes that there can only be one provider for each "service" declared.

The legal basis on which an entity "provides" a service is inextricably linked with the "service". For example, the power in s44V to make a determination requiring "the provider to provide access to the service" must mean requiring

the provider to exercise its legal rights to make the use of the service by the third party lawful.

At present the Federal Airports Corporation is the owner and operator of Melbourne Airport. As owner of the Airport and in accordance with s9 of the *Federal Airports Corporation Act 1986*, FAC has capacity as owner to grant leases, licences or other authority for activities to occur on its property - albeit subject to a range of legislative controls relevant to the Airport.

When Melbourne Airport is brought under the regime provided for in the *Airports Act 1996*, the Commonwealth will be the owner and the successful bidder will be the operator with both the Commonwealth and the lessee subject to a number of legislative controls and constraints under the *Airports Act 1996*.

If a declaration is made in relation to services provided by FAC as owner and operator, would that then operate in relation to the Commonwealth as owner or the lessee as operator?

Neither the Commonwealth nor the lessee will be in a legal position corresponding to that previously occupied by the FAC.

In that sense, neither of them will be able to provide what the FAC can provide.

The *Airports Transitional Provisions Act* 1996 does not contain any provision which addresses the situation and which gives a Part IIIA declaration any status or continuity.

Accordingly, it would be strongly arguable that any declaration made in relation to FAC would not be of any effect in relation to the Commonwealth or the airport lessee.

That argument indicates that there is a substantial risk that any work done by the NCC and by the parties involved in considering whether or not to make a declaration in relation to services provided by FAC at Melbourne Airport will be of no effect and will be wasted.

This adds to the powerful policy reasons why the NCC should delay any recommendation in relation to MA.

9. THE APPLICABILITY OF PART IIIA TO THE "SERVICES'

The Applications seek declaration of some "services" which are not "services" within the meaning of Part IIIA

The FAC submits that some of the services which are the subject of the ACTO Applications are not "services" within the meaning of Part IIIA and cannot validly be made the subject of a services declaration.

The statutory definition of "service"

Section 44B of the *Trade Practices Act 1974* includes the following definitions:

> "In this Part, unless the contrary intention appears:
>
> ...
>
> "provider", in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service;
>
> ...
>
> "service" means 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 such as goods or people;
>
> (c) a communications service or similar service; but does not include:
>
> ..."

The meaning of "provided" in the definition of "service" corresponds to the meaning of "provider" - see *Acts Interpretation Act 1901,* 18A.

The "services" which are subject to the Applications

The ACTO Applications identify the "services" which it seeks to have declared in the following terms:

> "The FAC service we seek to have declared is the FAC's control of access to the freight apron or hard stand and the passenger aircraft apron for the purpose of providing Ramp services to these carriers and to enable ACTO truck loading and unloading.
>
> ...
>
> The FAC also has land which can be used for the purpose of constructing facilities required to house the services of on-airport services suppliers.
>
> In supervising apron operations the FAC has a regime for providing "airport security passes" and "on-airport drivers licenses". Through these permissions the FAC controls

> which persons and organisations have airport access and therefore which organisations have permission to bring equipment onto the airport and to ensure that airport operations are safe for passengers and airport employees. ... ACTO is merely seeking permission to operate in a way comparable to and compatible with the way Qantas and Ansett are permitted to operate by the FAC.
>
> ...
>
> ACTO is willing and able to construct a cargo terminal on-airport land should the FAC be able and willing to make such land available for that purpose."

The regulatory background

In general terms there are a number of regulatory controls relevant to activities at Federal airports which would have to be considered, taken into account and - where applicable - complied with, before ACTO or any other entity could lawfully commence any of activities of the kind contemplated.

Customs Act 1901

Federal Airports Corporation By-Laws:

Part II - Regulation of Trading at Federal Airports

Part IVC - Regulation of Building and Engineering Works on Federal Airports

Part IVD - Regulations for the Security of Federal Airports

Regulations 15H.1 - 15H.7 - airside vehicle controls.

Civil Aviation Regulations especially 89A, 89C, 89H, 89I, 89K, 89L, 89O, 89P, 89W and 294.

Air Navigation Act 1920 especially Part 3 Aviation Security

Air Navigation Regulations 1947 especially Regulations 297, 297L, 297M, 309A, 309D, 309E and 316.

Environment Protection (Impact of Proposals) Act 1974 Administrative Procedures

To the extent that these regulatory provisions give any person or entity - whether the FAC and its personnel or other entities or persons - powers which must be exercised before the activities contemplated could lawfully commence, it is not open to the NCC to declare that the exercise of such powers is a "service" which can be made the subject of a declaration under Part IIIA.

The ACTO Applications seems to contemplate a declaration of "services" consisting of the *exercise* of regulatory powers to allow it to operate.

Such a declaration is clearly not authorised by Part IIIA. The NCC has restated the "services" which it understands to be the subject of the application in terms set out below which are closer to the statutory definition of "service".

The FAC infers from this that the NCC accepts that it cannot validly declare "services" consisting of the exercise of regulatory powers.

Accordingly, the FAC will not make further submission on that point unless the NCC indicates that it sees some doubt on this point.

The "services" - NCC restatement

In its December 1996 issues paper the NCC has interpreted the ACTO application as being an application for the following services:

Sydney

1. use of the freight apron and hard stand to be able to load and unload international aircraft (S1);

2. 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 (S2); and

3. use of an area within the airport perimeter to construct a cargo terminal (S3).

Melbourne

1. use of the freight apron and hard stand to be able to load and unload international aircraft (M1);

2. 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 an from trucks to and from the equipment used to load and unload international aircraft (M2); and

3. use of an area within the airport perimeter to construct a cargo terminal (M3).

This restatement reflects the language of the s44B definition of "service" to the extent that it refers to "use" of areas.

As restated by the NCC, "service" 1 appears to be within the definition of "service".

However, the FAC submits that even as restated by NCC, "services" 2 and 3 are not within the s44B definition because they each involve a change in use of existing areas of the airports.

The FAC submits that the definition of "service" in s44B is limited to declaring existing or intended uses of facilities and does not extend to hypothetical uses or uses which involve changes in use and in particular, the definition does not

extend to declaring a "service" which involves bringing into existence a "facility" which does not exist.

These limitations are inherent in the definition of "service" - " a service provided *by means of a facility* ... ".

The inherent limitations in the definition of "service"

There is nothing in the legislative history to Part IIIA to indicate that it is intended to be able to declare a service which consists of a new use structure or area.

It cannot have been intended that a declaration could be made of a "service" consisting of use of a wharf area as a helicopter landing place where the wharf had not been designed to be so used and had not been so used.

It cannot have been intended that a declaration could be made of a "service" consisting of use of a road area for storage of freight containers.

The three paragraphs of the definition of "service" are all governed by the introductory formula "service provided *by means of a facility*".

The FAC submits that intended or actual use is an inherent part of the meaning of "facility" which is a key part of the definition of "service". It cannot be contemplated that a "service" could be declared where the "use" declared would involve a change in the character of a facility from being one kind of facility to being another kind of facility - or to convert a thing which is not a facility at all into a facility.

This is confirmed by the s44B definition of "provider" set out above which also focuses on "the facility". Sections such as s44F assume that the provider can be identified before a declaration is made by reference to the provider's relationship with the facility. That assumes that the facility already exists.

A "wharf" or a "road" cannot be identified as being such a facility without reference to the purpose for which the structure or long flat strip of ground is used or is intended to be used.

The definition of "service" in s44B gives three specific examples of "services". None of them suggest any intention to allow the declaration of a service in relation to a "facility" other than a pre-existing facility.

The current ACTO Applications - even as restated in the NCC Issues Paper - contemplates changes of use of areas in the Airports with consequent changes in the character of the areas -

> service 2 - contemplates the bringing into existence of a new facility consisting of a storage area -

service 3 contemplates the bringing into existence of a new facility consisting of a cargo terminal.

That involves change of use of an area to create a new facility and goes well beyond what is authorised by the legislation in the definition of "service".

By way of contrast - it may well be that a declaration of a service consisting of "use of an existing terminal *as a terminal*" would be within the concept of "service" under s44B. But such a declaration would be dealing with use of an existing facility for its intended or actual use.

The NCC cannot validly declare "services" 2 or "services" 3.

10. RELATIONSHIP BETWEEN PART IIIA OF THE TPA AND THE FAC ACT

The *Federal Airports Corporation Act 1986*

The *Federal Airports Corporation Act 1986* vests in the Federal Airports Corporation the function of operating Federal airports (s6(a)).

The operation of Federal airports requires long term planning and coordination of multiple activities and alternative uses - some of which are aviation related and some of which are not - and all competing for limited land within the airports.

The legislature has recognised the complexity of the land management, planning and coordination issues at Federal airports by the terms of the FAC Act - see for example, the range of matters which are expressly identified as being topics of possible by-laws under s72(1). (The *Airports Act 1996* confirms the complexity of the land management issues at such Airports by providing for detailed planning and other controls for airports.)

The FAC's function of operating airports extends to (s8(1)) which contains inter alia:

(a) reviewing the use and capacity of existing Federal airports, determining the necessity or desirability of extending or otherwise altering Federal airports and carrying out necessary or desirable extensions to, or alterations of, Federal airports;

(b) carrying on commercial activities at, or in relation to, Federal airports (including carrying on such activities in co-operation, or as joint ventures, with other persons);

...

(c) providing, or arranging for the provision of, facilities and services at, or in relation to, Federal airports;

Under the FAC Act, the FAC is the land use planning and development approval authority for Federal airports.[6]

Part IIIA does not override other legislation

Part IIIA of the TPA does not override or modify other legislation.

In particular, Part IIIA does not override or modify Commonwealth legislation which regulates activities at Federal airports.

For example, it is clear that a determination made under s44v of Part IIIA could not override provisions of the *Customs Act 1901*, the Civil Aviation Regulations, the Air Navigation Regulations or the Administrative

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6 *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453, 468.

Procedures made under the *Environment Protection (Impact of Proposals) Act 1974*, the *Federal Airports Corporation Act 1986* or any provisions of the Federal Airports Corporation By-laws.

The background to the enactment of Part IIIA indicates that Part IIIA was not intended to override any existing legislation.

On the contrary, the Competition Principles Agreement contemplated that there would be a systematic review of existing legislation to bring it into conformity with competition principles. See Competition Principles Agreement sub-clauses 5(2) and (3):

"(2) Subject to subclause (3), each Party is free to determine its own agenda for the reform of legislation that restricts competition.

(3) Subject to subclause (4) each Party will develop a timetable by June 1996 for the review, and where appropriate, reform of all existing legislation that restricts competition by the year 2000.

The Commonwealth timetable for review of legislation

The Commonwealth has published its timetable for its legislation review - see "Commonwealth Competitive Neutrality Policy Statement" and "Commonwealth Legislation Review Schedule" which were both released in June 1996.

The Commonwealth approach to review of the *Federal Airports Corporation Act 1986*

In its March 1995 report "The Growth and Revenue Implications of Hilmer and Related Reforms" the Industry Commission stated in its Chapter dealing with the FAC:

> For Commonwealth GBEs, it is not always possible to distinguish between the effects of Hilmer reforms and other government reforms that proceed independently of Hilmer. This is particularly true when considering the effect of Hilmer reform on the Federal Airports Corporation where the Commonwealth's recent policy decisions [to privatise through leases] have, to some extent anticipated the discipline of the proposed Hilmer reforms. (at 164)
>
> ...
>
> Increasing competition between airports will move all airports towards best practice and result in large labour and capital productivity improvements, which lower the total operating costs of the FAC (at 175).

There is also a brief reference to the FAC at page 25 of the Government's 1996 Policy Statement document. Footnote 24 states:

> "The ownership and operation of FAC is being considered in its sale process".

This background explains why there has not been amendment of the FAC Act and why no general review is scheduled - the expectation is that to the extent that the framework of the FAC Act is inconsistent with competition principles, that will be cured by the privatisation process over time moving airports from operation under the *Federal Airports Corporation Act 1986* to operation under the *Airports Act 1996*.

It is to be noted that the Airports Act contains express reference to Part IIIA and expressly deals with aspects of its operation in relation to airports subject to this Act. No such provisions have been introduced to the FAC Act.

Accordingly, FAC must continue to operate those Federal airports which remain under the FAC Act in accordance with that Act.

Limited scope for operation of Part IIIA in relation to operation of Federal airports by FAC under the FAC Act

It is clear that a s44v determination made in relation to the "services" which are at the centre of the current application, could only be of very limited effect.

For example, a s44v determination which authorised a "third party" to set up buildings or which purported to require FAC to "allow" such activity or to modify facilities at Federal airports could not override the requirements for any of the licences/approvals etc required under Customs, aviation safety (eg obstacle limitation) or aviation security regimes or under the development and building approval requirements of the Federal Airports Corporation By-laws.

In particular any such determination could not override:[7]

> the requirements on FAC under the *Environment Protection (Impact of Proposals) Act 1974* Administrative Procedures;
>
> FAC's obligations under the FAC Act to consider and form its own view of the desirability of such an alteration and whether to allow such activity;
>
> the obligations on the Chief Executive Officer under the Federal Airports Corporation By-laws to consider and form his own view on whether to give the development and building approvals required under the By-laws.

NCC should take into account the limited effect that a s44v determination could have when considering whether declaring the "service" would promote competition and whether it is in the public interest to go through an extensive

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7 Compare *HREOC v Mount Isa Mines* (1993) 118 ALR 80.

and expensive process of considering whether or not to recommend declaration of a service.

It is arguable that, given the terms of the *Federal Airports Corporation Act 1986* there is no scope whatsoever for the operation of Part IIIA in relation to FAC's carrying out of its functions under the FAC Act. It is probably not open to the NCC to make a declaration of services provided by the FAC in accordance with the FAC Act at all.

This is not to say that there is no scope for the operation of Part IIIA in relation to facilities within Federal airports - it may well be for example that Part IIIA can apply to services provided by entities other than FAC such as lessees. However, even at that level any s44v determination made in relation to such services provided by lessees could not override FAC's legislative powers and responsibilities in relation to Federal airports.

Thus, for example, if a determination required a lessee to alter an existing terminal to allow access to a third party, that alteration could only go ahead if the necessary approvals were obtained under the Federal Airports Corporation By-laws. Before such approvals could be granted, there would have to be compliance with the *Environment Protection (Impact of Proposals) Act 1974* Administrative Procedures.

FAC takes the Competition Principles and the policy of Part IIIA into account

Even though FAC is not bound by Part IIIA and cannot "delegate" to the NCC or the ACCC or anyone else its responsibility to operate Federal airports in accordance with the FAC Act,[8] the FAC Act itself provides:

> 7. (2) The Corporation shall endeavour to perform its functions in a manner that:
>
> (a) is in accordance with the policies of the Commonwealth Government;
>
> ...
>
> (3) Subsection (2) shall not be read as limiting:
>
> (a) any other provisions of this Act;
>
> ...

The policies of the Government are, in part, expressed in the Competition Principles Agreement.

Within the framework of the FAC Act as a whole (which is not limited by s7(2)), FAC is endeavouring to ensure that it is carrying out its functions in

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8 See *HREOC v Mount Isa Mines* (1993) 118 ALR 80, 106-107 "It must never delegate its function to another body charged with a different function".

accordance with those policies in relation to international freight at MA by developing a strategy to ensure that there is an improvement in long term viable competition.