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Archerfield Airport Chamber of Commerce Inc and Minister for Infrastructure and Regional Development and Anor [2014] AATA 238 (24 April 2014)

Last Updated: 24 April 2014

[\[2014\] AATA 238](#)

Division **GENERAL ADMINISTRATIVE DIVISION**
File Number **2012/3556**
Re **Archerfield Airport Chamber of Commerce Inc**
 APPLICANT
And **Minister for Infrastructure and Regional Development**
 RESPONDENT
And **Archerfield Airport Corporation Pty Ltd**
 JOINED PARTY

DECISION

Tribunal **Deputy President PE Hack SC**
Date **24 April 2014**
Place **Brisbane**

The matter will be listed for a directions hearing for the purpose of making directions to give effect to these reasons and for the making of directions to bring the matter on for hearing.

.....[Sgd].....
Deputy President PE Hack SC

CATCHWORDS

PRACTICE AND PROCEDURE - admissibility of evidence - whether evidence of equitable interests relevant - whether "interest" within the meaning of the legislation - whether evidence of Australian Noise Exposure Forecast relevant.

LEGISLATION

[Airports Act 1996](#) (Cth) ss [5](#), [22\(2\)-\(3\)](#), [68](#), [70\(2\)](#), [71](#), [81\(3\)-\(4\)](#)

[Airports \(Transitional\) Act 1996](#) (Cth) ss [26\(2\)-\(3\)](#)

[Airport Regulations 1997](#) (Cth) regs [5.01A](#), [5.02](#)

CASES

Re McLaughlin & Minister Infrastructure, Transport, Regional Development and Local Government [\[2010\] AATA 266](#)

REASONS FOR DECISION

Deputy President PE Hack SC

24 April 2014

Introduction

1. The *Airports Act 1996* (Cth) (the Act) requires that airports have a master plan, prepared and approved by the relevant Commonwealth Minister in accordance with the Act. This case concerns the master plan for the Archerfield Airport, Brisbane's major general aviation airport located some 10 km southwest of the Brisbane Central Business District. On 24 May 2012 the Hon Anthony Albanese MP, then the Minister for Infrastructure and Transport, approved the 2011-2031 draft master plan for the Archerfield Airport submitted for his consideration by the Joined Party in the proceedings, Archerfield Airport Corporation Pty Ltd.
2. Archerfield Airport Chamber of Commerce Inc is a not for profit body that represents the interests of entities that lease space at the Airport from the Joined Party. On 17 August 2012 it lodged an application in the Tribunal seeking a review of the Minister's decision to approve the draft master plan. That decision was reviewable by virtue of [s 242](#) (1) of the Act.
3. The parties have lodged and served the evidence on which they propose to rely at hearing however both the Respondent and the Joined Party have raised objections to some of the evidence that the Applicant would seek to lead at the hearing. Because of the extent of the material to which objection is taken and because of its impact on the length of the hearing I made directions to facilitate the determination of the issue of admissibility in advance of the hearing. It is, of course, trite that the Tribunal is not bound by the rules of evidence but that does not mean that opposing parties are bound to respond to, and the Tribunal bound to consider and deal with, evidence that has, and can have, no bearing on the issues to be decided in the proceedings. Thus it was convenient and necessary to determine those questions in advance of the hearing.
4. I have come to the conclusion, for the reasons that follow, that the Applicant should not be permitted to rely on evidence that seeks to establish that there are "equitable" interests in the land on which the Airport is operated. These interests, it is contended, have not been taken into account by the Minister when approving the draft master plan. Further, the applicant will not be permitted to rely upon evidence regarding the Australian Noise Exposure Forecast. The evidence in each of these categories is entirely irrelevant and simply invites attention to false issues.

The legislation

5. The Act regulates airports in Australia in a variety of ways. The focus of these proceedings is on Part 5 of the Act. It applies to Archerfield Airport by a combination of s 68 of the Act and reg 5.01A of the *Airport Regulations 1997* (Cth) (the Regulations) and deals with land use, planning and building controls. Division 3 of Part 5 deals with airport master plans. For each airport there must be a final master plan,^[1] that is, a draft master plan that has been approved by the Minister.^[2] A master plan has a "planning period" of 20 years^[3] but remains in force for five years or until a fresh plan comes into force.^[4] The purposes of a final master plan are set out in s 70(2) of the Act in these terms:

(2) The purposes of a final master plan for an airport are:

(a) to establish the strategic direction for efficient and economic development at the airport over the planning period of the plan; and

(b) to provide for the development of additional uses of the airport site; and

(c) to indicate to the public the intended uses of the airport site; and

(d) to reduce potential conflicts between uses of the airport site, and to ensure that uses of the airport site are compatible with the areas surrounding the airport; and

(e) to ensure that all operations at the airport are undertaken in accordance with relevant environmental legislation and standards; and

(f) to establish a framework for assessing compliance at the airport with relevant environmental legislation and standards; and

(g) to promote the continual improvement of environmental management at the airport.

6. Archerfield Airport is, in the language of the Act, an "other than joint-user airport", hence the draft or final plan is required by s 71(2) of the Act to specify,

- (a) the airportlessee company's development objectives for the airport; and*
- (b) the airportlessee company's assessment of the future needs of civil aviation users of the airport, and other users of the airport, for services and facilities relating to the airport; and*
- (c) the airportlessee company's intentions for land use and related development of the airport site, where the uses and developments embrace airside, landside, surface access and land planning/zoning aspects; and*
- (d) an Australian Noise Exposure Forecast (in accordance with regulations, if any, made for the purpose of this paragraph) for the areas surrounding the airport; and*
- (da) flight paths (in accordance with regulations, if any, made for the purpose of this paragraph) at the airport; and*
- (e) the airportlessee company's plans, developed following consultations with the airlines that use the airport and local government bodies in the vicinity of the airport, for managing aircraft noise intrusion in areas forecast to be subject to exposure above the significant ANEF levels; and*
- (f) the airportlessee company's assessment of environmental issues that might reasonably be expected to be associated with the implementation of the plan; and*
- (g) the airportlessee company's plans for dealing with the environmental issues mentioned in paragraph (f) (including plans for ameliorating or preventing environmental impacts); and*
- (ga) in relation to the first 5 years of the master plan—a plan for a ground transport system on the landside of the airport that details:*
 - (i) a road network plan; and*
 - (ii) the facilities for moving people (employees, passengers and other airport users) and freight at the airport; and*
 - (iii) the linkages between those facilities, the road network and public transport system at the airport and the road network and public transport system outside the airport; and*
 - (iv) the arrangements for working with the State or local authorities or other bodies responsible for the road network and the public transport system; and*
 - (v) the capacity of the ground transport system at the airport to support operations and other activities at the airport; and*
 - (vi) the likely effect of the proposed developments in the master plan on the ground transport system and traffic flows at, and surrounding, the airport; and*
- (gb) in relation to the first 5 years of the master plan—detailed information on the proposed developments in the master plan that are to be used for:*
 - (i) commercial, community, office or retail purposes; or*
 - (ii) for any other purpose that is not related to airport services; and*
- (gc) in relation to the first 5 years of the master plan—the likely effect of the proposed developments in the master plan on:*
 - (i) employment levels at the airport; and*
 - (ii) the local and regional economy and community, including an analysis of how the proposed developments fit within the planning schemes for commercial and retail development in the area that is adjacent to the airport; and*
- (h) an environment strategy that details:*
 - (i) the airportlessee company's objectives for the environmental management of the airport; and*
 - (ii) the areas (if any) within the airport site which the airportlessee company, in consultation with State and Federal conservation bodies, identifies as environmentally significant; and*
 - (iii) the sources of environmental impact associated with airport operations; and*
 - (iv) the studies, reviews and monitoring to be carried out by the airportlessee company in connection with the environmental impact associated with airport operations; and*
 - (v) the time frames for completion of those studies and reviews and for reporting on that monitoring; and*
 - (vi) the specific measures to be carried out by the airportlessee company for the*

purposes of preventing, controlling or reducing the environmental impact associated with airport operations; and
(vii) the time frames for completion of those specific measures; and
(viii) details of the consultations undertaken in preparing the strategy (including the outcome of the consultations); and
(ix) any other matters that are prescribed in the regulations; and
(j) such other matters (if any) as are specified in the regulations.
Paragraphs (a) to (h) do not, by implication, limit paragraph (j).

7. Subsections (4) and (5) of s 71 of the Act are also relevant. They provide:

Matters provided by regulations

(4) The regulations may provide that the objectives, assessments, proposals, forecasts and other matters covered by subsection (2) or (3) may relate to one or more of the following:

(a) the whole of the planning period of the plan;

(b) one or more specified 5 year periods that are included in the planning period of the plan;

(c) subject to any specified conditions, a specified period that is longer than the planning period of the plan.

*Note: **Planning period** is defined by section 72.*

(5) The regulations may provide that, in specifying a particular objective, assessment, proposal, forecast or other matter covered by subsection (2) or (3), a draft or final master plan must address such things as are specified in the regulations.

8. Further matters are specified in reg 5.02 of the Regulations in this way:

(1) For paragraphs 71 (2) (j) and (3) (j) of the Act, the following matters are specified:

(a) any change to the OLS or PANSOPS surfaces for the airport concerned that is likely to result if development proceeds in accordance with the master plan;

(b) for an area of an airport where a change of use of a kind described in subregulation 6.07 (2) of the [Airports \(Environment Protection\) Regulations 1997](#) is proposed:

(i) the contents of the report of any examination of the area carried out under [regulation 6.09](#) of those Regulations; and

(ii) the airportlessee company's plans for dealing with any soil pollution referred to in the report.

(2) For section 71 of the Act, an airport master plan must, in relation to the landside part of the airport, where possible, describe proposals for land use and related planning, zoning or development in an amount of detail equivalent to that required by, and using terminology (including definitions) consistent with that applying in, land use planning, zoning and development legislation in force in the State or Territory in which the airport is located.

(3) For subsection 71 (5) of the Act, a draft or final master plan must:

(a) address any obligation that has passed to the relevant airportlessee company under subsection 22 (2) of the Act or subsection 26 (2) of the Transitional Act; and

(b) address any interest to which the relevant airport lease is subject under subsection 22 (3) of the Act, or subsection 26 (3) of the Transitional Act.

(4) In subregulation (1):

***OLS and PANSOPS surface** have the same meanings as in the [Airports \(Protection of Airspace\) Regulations](#).*

9. The term "interest" is defined in s 5 of the Act in this way:

***interest**, in relation to an airport lease, means a right or interest, whether legal or equitable, in the airport lease, by whatever term called, and includes an option to acquire such a right or interest in the airport lease, but to avoid doubt, does not include, and is taken never to have included:*

(a) a sublease; or

- (b) a licence; or
- (c) an easement or other incorporeal hereditament; or
- (d) a restrictive covenant.

For completeness it needs to be noted that s 22(2) of the Act provides for obligations and benefits of the Commonwealth under the earlier lease from the Commonwealth to pass to the airport-lessee company. Subsection 22(3) of the Act notes that an airport lease (such as that granted to the Joined Party) was granted "subject to all other existing interest in the land concerned." [Subsections 26\(2\)](#) and (3) of the [Airports \(Transitional\) Act 1996](#) (Cth) (the Transitional Act) are to the same effect.

10. The Act requires an airport-lessee company (and the Joined Party answers that description) to prepare a draft master plan and submit it to the Minister for approval before the expiry of the old master plan.^[5] There is a process of consultation required with State and local authorities and a requirement that public comment be sought on the draft master plan.^[6] Once the airport-lessee company gives the Minister the draft master plan the Minister must either approve the plan or refuse to approve the plan^[7] but if the Minister believes, on reasonable grounds, that there is not enough material to make a decision that Minister may request the airport-lessee company to provide specified material relevant to making the decision.^[8]

11. The matters to which the Minister must have regard in deciding whether to approve the plan are described in s 81(3) of the Act in this way:

- (3) In deciding whether to approve the plan, the Minister must have regard to the following matters:*
 - (aa) the extent to which the plan achieves the purposes of a final master plan (see subsection 70(2));*
 - (a) the extent to which carrying out the plan would meet present and future requirements of civil aviation users of the airport, and other users of the airport, for services and facilities relating to the airport concerned;*
 - (b) the effect that carrying out the plan would be likely to have on the use of land:*
 - (i) within the airport site concerned; and*
 - (ii) in areas surrounding the airport;*
 - (c) the consultations undertaken in preparing the plan (including the outcome of the consultations);*
 - (d) the views of the Civil Aviation Safety Authority and Airservices Australia, in so far as they relate to safety aspects and operational aspects of the plan.*

Section 81(4) provides that s 81(3) of the Act does not, by implication, limit the matters to which the Minister may have regard.

12. It is also important to note that Division 4 of Part 5 of the Act deals with major development plans. Such plans are required for every major development at an airport. The term "major development" is defined as including, relevantly for present purposes, altering a runway in any way that significantly changes flight paths or the patterns or levels of aircraft noise. A major development plan is required to be consistent with the airport's final master plan.^[9]

The controversial evidence

13. It is necessary, at the outset, to record some matters of uncontroversial history. The Commonwealth remains the registered proprietor of the land on which the Airport is operated; the Joined Party is the lessee of that land pursuant to a lease granted in 1998 for a term of 50 years. Prior to the grant of that lease the Federal Airports Corporation operated the Airport on behalf of the Commonwealth. At a time when that entity managed the Airport, leases over part of the land were granted to a number of tenants including, relevantly, the Scout Association of Queensland and a company called Sailco Pty Ltd.

14. Those leases appear to have been lawfully determined, and determined some time ago, however the Applicant seeks to advance a case that these and other former lessees have an "interest" in the Airport land that was required by reg 5.02 of the Regulations to be addressed by the draft master plan. Numerous statements, including statements of former officials and of a former Minister, are relied upon to make out that case. The absence of pleadings makes it difficult to discern precisely

how the argument is to be advanced. The Minister's submissions summarise the case apparently put in this way, ^[10]

The Applicant appears to contend (although it is not at all clear) that:

(a) there existed fixed-term leases of the airport land between the predecessors to the [Joined Party] and the Scouts and other entities;

(b) there were "representations" given by the predecessors to the [Joined Party] to the effect that those leases would be "continuously" renewed without limitation (apparently, it is alleged, in perpetuity);

(c) these "representations" are said to have been oral representations reflected in the department's policy documentation;

(d) these "representations" gave rise to or created one or more of the following:

(i) a "collateral contract" in the form of a "contractual right of the Scouts or others to new leases of airport land";

(ii) an equitable estoppel or interest in land; and/or

(iii) a right to sue for misleading and deceptive conduct.

The Applicant's submissions in response do not take issue with this characterisation of the Applicant's case.

15. The submissions of the Minister draw attention to the considerable legal obstacles that confront the Applicant in seeking to demonstrate that case. In that regard it is notable that there appear not to be any proceedings on foot whereby former lessees seek to establish any interest by the conventional means of an action in a court. But those matters may be put aside. There are, in my view, two fundamental reasons why the Applicant ought not be permitted to propound this case.
16. The first is that, however claimed interest is asserted, it is not capable of answering the description of "interest" as that term is used in reg 5.02 of the Regulations nor could it conceivably found an obligation that bound the Joined Party. That regulation preserves obligations that passed to the airport-lessee company under s 22(2) of the Act (or the equivalent in the Transitional Act) and interests to which the airport lease is subject under s 22(3) of the Act (or its equivalent under the Transitional Act). Reference to those subsections, whether in the Act or in the Transitional Act, makes it plain that the obligation or interest had to exist at the time of creation of the airport lease. As I understand the case the Applicant would advance, the claimed interests (or obligations) arose only after the commencement of the airport lease to the Joined Party; at commencement there was then the lease in registrable form and resort to equitable interests was unnecessary.
17. Moreover it is quite artificial to regard "interest" in reg 5.02 as extending to a claim of the nature being made here. The putative claimants have not sought to be joined as parties to the proceedings nor, I would have thought, could they be joined given that they have no interest affected by the decision. They are not asserting the claimed interest in the forum in which such claims may be made, the courts of the State. And if they were, it would be an impertinence for this Tribunal to seek to determine such questions in advance of proceedings in a court. Proceedings in this Tribunal to determine whether the Minister made the preferable decision are an inelegant vehicle to decide issues of equitable interests, *a fortiori*, where the putative claimants are not parties to the proceedings nor asserting the interest in the proper forum for doing so.
18. In *Re McLaughlin & Minister Infrastructure, Transport, Regional Development and Local Government* ^[11] I concluded that the Act required a draft master plan to address "undoubted interests". I remain of the view. It cannot be the task of the Minister (or the Tribunal on a review of the Minister's decision) to determine whether claimed equitable interests exist or not. Equally it cannot be the task of the Joined Party to investigate such claims and make reference to them in a draft master plan.
19. In the result, I hold that evidence going only to establish equitable interests is irrelevant to the issues properly raised in the proceedings. I will not permit that evidence to be given. The evidence to which objection is taken is listed in Exhibit 3 on this application. I expect that the parties will confer and agree which evidence falls only into that category. Where it is at least arguable that evidence goes to another purpose, for example to provide a relevant historical background, that evidence may be led but only for that other purpose.
20. The other area of evidence concerns the Australian Noise Exposure Forecast (ANEF). The draft master plan specified an ANEF for the areas surrounding the Airport. It was endorsed by Airservices

Australia in August 2010 in accordance with the appropriate Ministerial determination. The Applicant seeks to lead evidence that attacks the quality of that forecast. The Minister and the Joined Party object to that evidence. It is, they contend, irrelevant.

21. I agree. The Minister was not required to make a qualitative judgement about the ANEF; the task of the Minister (and the Tribunal) was to be satisfied that the draft master plan specified an ANEF. It did. That seems to me to be the end of the matter. If the Joined Party does seek to alter the runway alignment in the future, as the draft master plan contemplates, it will be required to produce a major development plan. Questions of noise impact will fall to be considered at that stage of development.

22. I propose to publish these reasons and invite the parties to agree on directions that will give effect to the conclusions I have reached. The matter will be listed for a directions hearing for the purpose of making directions to bring the matter on for hearing.

I certify that the preceding 22
(twenty -two) paragraphs are a
true copy of the reasons for the
decision herein of Deputy
President PE Hack SC

.....[Sgd].....

Associate

Dated 24 April 2014

Date of hearing

16 April 2014

Solicitors for the Applicant

Van Zyl Lawyers

Solicitors for the Respondent

Ashurst

Joined Party

In person

[1] See s 70(1), *Airports Act*.

[2] See s 83, *Airports Act*.

[3] See s 72, *Airports Act*.

[4] See s 77, *Airports Act*.

[5] See s 76, *Airports Act*.

[6] See s 79, *Airports Act*.

[7] See s 81(2), *Airports Act*.

[8] See s 80A(2), *Airports Act*.

[9] See s 91(1A)(b), *Airports Act*.

[10] Exhibit 1, paragraph 2.69. Footnotes within the document have been omitted.

[11] [2010] AATA 266 at [37].