

July 2010

**Senate Standing Committee
Legal and Constitutional Affairs
Parliament House
Canberra**

Dear honourable members of the Senate Committee,

**DENIAL OF ACCESS TO COMMONWEALTH
COMPENSATION SCHEMES:
RECOMMENDATIONS & CASE STUDY**

I write on behalf of Keith and Norma McLaughlin, both 73, who have effectively been locked out of the Commonwealth's compensation schemes due to the outsourcing of Commonwealth responsibilities under the Airports Act 1996.

Their story showcases the weaknesses of the present system and how the Commonwealth's fair dealing and just terms obligations to the Australian people can be undermined and thwarted. But this problem can be addressed by a scheme assisting natural persons and small entities, if the Commonwealth or a Commonwealth Contractor fails to address meritorious claims according to the decision of an independent Tribunal.

RECOMMENDATIONS:

Based on the case study below, the Parliament of the Commonwealth should enact a "Compensation and Restoration Act" which:

1. Establishes or vests in an independent Tribunal powers to:
 - a) hear complaints against the Commonwealth or its Contractors to make findings and where appropriate, offer settlements of compensation or restoration;
 - b) act administratively to allow any unsettled matters or parts of matters be decided by a court or "appealed" to a court;
 - c) decide the Commonwealth's obligations in a matter and order they be carried into effect by Commonwealth administration by whomever performs it at Commonwealth expense;
 - d) be free of costs for natural persons and small entities;
 - e) be an open tribunal of record, with powers to obtain information and call witnesses.

And the "Compensation and Restoration Act" should further:

2. Conveniently set out federal statutory public rights, such as those found in State Acts¹ relating to law, human rights and equity, without limiting the Tribunal to those;
3. Provide discretion for the Tribunal to arbitrate matters in which the Commonwealth is alleged to have caused (wholly, in part, directly or indirectly) unconscionable, inequitable or oppressive outcomes or outcomes creating unfair hardship;
4. Empower the Tribunal in complex matters or to avoid unfairness, to fund the representation of or obtain expert opinion for natural persons or small entities;
5. Provide full and adequate funding to natural persons or small entities in the event of an "appeal" by the Commonwealth or a Commonwealth Contractor against a decision made by the Tribunal, or to otherwise enforce the Tribunal's decisions if necessary;
6. Provide full Commonwealth funding of settlements concerning Commonwealth Contractors, leaving it entirely to the Commonwealth to recover from its Contractors any debt so created;
7. Mandate communication of prescribed information about the Tribunal to any person making, or in the circumstances who should make, a formal claim or serious complaint against the Commonwealth or a Commonwealth Contractor;
8. Provide a mechanism for additional categories of complaint or remedy to be created in enabling clauses of other legislation.

CASE STUDY: ACCESS TO THE COMMONWEALTH DENIED

INTRODUCTION:

In 1982 Keith and Norma McLaughlin and some of their children took over the management of 38 acres of land located next to Melbourne Airport, and finalised that land's purchase in 1987. Their land is effectively landlocked by a Commonwealth place, because of the disposition of the Moonee Ponds creek to the East and the Commonwealth's 1960 acquisition of the airport site from Mrs. Smith, their predecessor in title. This means the only access to their land is over the airport site² itself.

This came about because during the airport's construction, the Commonwealth

1 e.g. provisions similar in effect to the Planning and Environment Act 1987 (Vic) section 98; Road Management Act 2004 (Vic) section 127; Transfer of Land Act 1958 (Vic) section 56; Crown Proceedings Act 1958 (Vic) sections 23 & 25; Wrongs Act 1958 (Vic) sections 14B, 14C, 16, 24AC, 26, 33, 84 & Parts x, xi; Human Rights and Responsibilities Act 2004 (Vic), Imperial Acts Application Act 1980 (Vic)

2 The McLaughlin's land is known as "Melbourne Airport Trade Park" - see the hatched area in the street directory map on page 1 of Supporting Documents 1.

built a terminal and runway over Bulla Road, which was a State main road, to which Mrs. Smith's land had direct frontage. (See plan on page 2 of Supporting Documents 1) Additionally, the construction of the Tullamarine Freeway authorised by the Commonwealth, also contributed to the severance of the remaining Bulla Road access provided to the balance of Mrs. Smith's land, including what is today the McLaughlins' land. However, Mrs. Smith was not paid any compensation for this severance from the State main road on Commonwealth land.

Instead, access to the balance of Mrs. Smith's property, including what is now the McLaughlins land, was restored by the State government on Commonwealth land, by constructing Quarry Road to the North-West leading to the airport and Sunbury Road, and after that, a South-Easterly service road to Western Avenue³. But because the McLaughlins live in Sunbury, they mainly used the land's North-Western access near the airport.

Normally, roads of airport access are the responsibility of the State in which the airport is located. Therefore in 1959, the Commonwealth agreed to transfer to the State free of charge the land over which the State built the replacement roads for Bulla Road. This was supposed to be in exchange for the stretch of Bulla Road which the Commonwealth took to build the airport upon⁴. Under state law, the replacement main road (the Tullamarine Freeway) would then vest in VicRoads (then the Country Roads Board), while service roads would vest in the applicable local governments as public roads. However, the Commonwealth defaulted by reneging on its deal with the State⁵, and in 1997 by leasing all that land to a private company under the Airports Act instead, including the Freeway and the roads of access to the McLaughlin's land⁶.

As a result of the Commonwealth's taking of Bulla Road and its replacement roads built by the State, the McLaughlins predecessor in title, Mrs. Smith, had her direct frontage to a fully maintained State Main Road simply taken away, and was given no legal access to the balance of her land in return⁷. This was despite at least two assurances from the Commonwealth that her interests would be protected⁸.

So ten years after the original acquisition of her property, as an elderly woman

3 See contract of sale extract showing the McLaughlins' North-West access to Sunbury Road recognised by the Shire of Bulla and South-East access to Western Avenue recognised by the Victorian Ministry for Planning and Environment on pages 4 & 5 of Supporting Documents 1. See also land valuer's report of J. H. Curnow & Son describing this access to the land as a "special feature" on page 7 of Supporting Documents 1.

4 See VicRoads inter-office memo on page 8 of Supporting Documents 1 and last paragraph in VicRoads inter-office memo on page 13 of Supporting Documents 1.

5 See on page 14 of Supporting Documents 1: Letter from Commonwealth Minister of Transport to Victorian Minister of Roads and Ports directing the Victorian Government to negotiate with APAM for the freeway land because of the Airports Act 1996.

6 See descriptions in the transcript of ATA 2009/0054 12.5.09 (enclosed with this submission) at line 26 on page 26 to line 14 on page 27, line 12 on page 66 to line 20 on page 70.

7 See memo from Commonwealth property officer detailing his meeting with Mrs. Smith on pages 20 & 21 of Supporting Documents 1.

8 See copy of letter of assurance from the Commonwealth Minister to Mrs. Smith's solicitors on page 1 of Supporting Documents 2, and the Commonwealth's record of telephone conversation between the Property Officer and Mr. Smith on page 2 of Supporting Documents 2.

struggling to subdivide the southerly portion of her remaining land, Mrs. Smith went cap in hand to the Commonwealth⁹ to get some form of legal access put onto her property's title. Not missing the opportunity to solve some of its own problems, the Commonwealth required her to give up more land from her northerly portion, before finally granting an easement in a South-Easterly direction only¹⁰.

Among other things, the Commonwealth informed Mrs. Smith it required the extra land from her to benefit a proposed car park for TAA, the Commonwealth's domestic airline. The result of these land dealings was that the McLaughlin's land enjoyed physical access as restored by the State in both directions, to the North-West and South-East, but the Commonwealth had only assured this access for title purposes in one direction only - away from the airport and away from Sunbury. This was even though the Bulla Road replacement roads ran in both directions.

MELBOURNE AIRPORT PRIVATISATION:

In 1997, ten years after the McLaughlins had finalised the purchase of their land, the Commonwealth privatised the airport next door. It would now be managed for profit. The airport management company, Australia Pacific Airports (Melbourne) Pty Ltd (APAM), is effectively majority owned by AMP and other private companies own the rest¹¹. Included in the lease is the purported right to destroy airport roads¹². APAM paid the Commonwealth 1.4 billion dollars for the airport lease and set about making money from the airport for its shareholders, although intercourse among the States is supposed to be absolutely free¹³.

The contract¹⁴ between the Commonwealth and Australian Pacific Airport Melbourne (APAM) is a 50 year lease with an additional 49 year option, granted under section 13 of the Airports Act. Clause 4 of that lease indemnifies the Commonwealth from any wrongdoing by APAM and allows the Commonwealth to make APAM fight and pay for any Commonwealth legal trouble in that regard. Day-to-day running of the airport site¹⁵ is thus outsourced to that private organisation, using master plans created according to that company's vision¹⁶ for a safe and profitable airport. Although the airport lessee's master plan is reviewed by the Minister for Transport every five years, once approved, Commonwealth regulations force everyone else to fit into the airport

9 See paragraph 10 of the evidence of Property Officer on page 16 Supporting Documents 1, See memo from Commonwealth property officer concerning his meeting with Mrs. Smith on pages 20 and 21 Supporting Documents 1

10 see D991658 Easement instrument created by the Commonwealth Solicitor on page 3 of Supporting Documents 2, See memo from Commonwealth property officer concerning his meeting with Mrs. Smith on pages 20 and 21 of Supporting Documents 1

11 See Melbourne Airport web site's shareholder printout on page 4 of Supporting Documents 2.

12 See the definition of 'Structures' above clause 2.2 and clause 3.1(b)(ii) in the Melbourne Airport Lease on page 8 of Supporting Documents 2.

13 See *Cole v Whitfield* [1988] HCA 18 at paras 13, 28.

14 See extract of the Melbourne Airport Lease on page 5 of Supporting Documents 2

15 See for example, the transcript of ATA 2009/0054 12.5.09 (enclosed with this submission) at lines 38-45 on page 37.

16 See for example, the transcript of ATA 2009/0054 12.5.09 (enclosed with this submission) at line 45 on page 18 to line 7 on page 19, lines 27 on page 18 to line 12 on page 23.

company's business plan¹⁷. In theory, the only exception to this rule is if one has an interest in the airport land, such as the McLaughlins' access rights¹⁸.

However, when the Commonwealth 'sold' the airport to APAM (notwithstanding the land it owes the State), the Commonwealth's disclosure documents didn't tell APAM about the restoration of access to the McLaughlin's land via Quarry Road. They also didn't reveal that both Quarry Road to the North-West and the service road to Western Avenue to the South-East, were built to replace a fully maintained state main road¹⁹, and that APAM might be expected to take the ongoing maintenance responsibility²⁰ for that government road. The obligations the Commonwealth disclosed to APAM concerning Mrs Smith's former land, seem only to have been the registered easement to the South-East on the Commonwealth's title and the existence of a State government water main²¹.

SURPRISE AIRPORT SEVERANCE:

In 1998 APAM published its preliminary draft master plan. This plan failed to show the service road to Western Avenue, or the McLaughlin's South-Easterly easement this service road runs on. However, at least one map in the preliminary draft which APAM made available to the public, included the McLaughlin's Quarry road access to the airport and Sunbury Road. But for their part, the McLaughlin's didn't know about the draft at that time, because the Airports Act does not require notification of any changes to the airport's surface access no matter who it might affect²² (see recommendation 7 above). Then in the final master plan, approved by the Minister just before Christmas, all maps showed the McLaughlin's Quarry Road access as being cut short.

The McLaughlins were given no warning in February 1999, when APAM sent bull dozers to excavate a section of Quarry Road adjoining their land located about 350 meters from the terminal. In response, the McLaughlins parked a van over their boundary in the way of the oncoming machines. APAM responded by calling out its security guards.

For a while, there was a Mexican stand off between the company's men and the McLaughlins. Finally, APAM called the State police, who not believing the McLaughlins version of events, sided with APAM by threatening them with arrest. After the dust settled, APAM built a high cyclone fence across the road, capped it with barbed wire, and later posted a "no trespassing sign" in the name of the Commonwealth Departmental Secretary. The resulting impassable one metre ditch and fence remain to this day, denying the McLaughlins' land

17 See for example, the transcript of ATA 2009/0054 12.5.09 (enclosed with this submission) at line 35 on page 21 to line 11 on page 22, where master plans may cause blight by contemplating the acquisition of property by the Commonwealth up to twenty years hence as part of the airport lessee's business plans.

18 See Airports Act 1996, Part 5, section 22(3) and sub-regulation 5.02(3)(b) of the Airports Regulations 1997

19 See letter from Mrs Smith's solicitors to the Chief Property Officer on page 13 of Supporting Documents 2.

20 See paragraph 15 of the evidence of Property Officer on page 17 of Supporting Documents 1

21 See extract of the Real Property Update Report for Melbourne Airport on pages 13-14 of Supporting Documents 2.

22 See discussion in the transcript of ATA 2009/0054 12.5.09 (enclosed with this submission) at line line 39 on page 34 to line 24 on page 35, where Counsel for the Minister unsuccessfully argued that because notice of a decision isn't required for anyone else but APAM, no one else but APAM has rights of review.

both direct passage to the terminal and to their home in Sunbury. This is presently the subject of Supreme Court proceedings.

As a result, the McLaughlins since 1999 have been unable to start a near-terminal competitive airport parking business on their land, as intended for the stockpile of bitumen still on their land today. According to the Victorian Civil and Administrative Tribunal, the McLaughlins development plan, even when relying only on their easement to the South-East, could not be approved, primarily because of the disrepair of the airport road²³.

A major stumbling block for the McLaughlins developing their land was that prior an AAT decision against the Minister in 2009²⁴, APAM claimed the McLaughlins needed its approval for the McLaughlins to exercise their carriageway easement road building rights; and APAM made it clear such consent was not, and would not be given, unless the McLaughlins entered into an agreement with them²⁵. According to documents in the McLaughlins possession²⁶, APAM desires control over the access to the McLaughlins potentially competing land. The McLaughlins have consistently refused, counter-claiming that a road built by the Government to replace a state main road²⁷ ought to be maintained by the Government on an ongoing basis. But the Commonwealth has not been forthcoming in addressing this issue properly.

DENIAL OF ACCESS TO COMMONWEALTH SCHEMES

When the McLaughlins petitioned the Commonwealth for relief from what they see as oppressive behaviour by its airport lessee (see recommendation 3), there was no need for the Commonwealth to consider compensation or grant them an easement. It had after all, its indemnity from APAM. The following quotes from Departmental papers and letters to the McLaughlins detail this substitution of good government for commercial indemnity. In a minute prepared by the Assistant Secretary of Airports Planning²⁸ which was for some reason passed on to Hume City Council, the Commonwealth concluded:

The Airport Lease transfers all liability arising from actions by a third party to the Lessee (APAM)...

This person [Keith McLaughlin] is vexatious and it is suggested that it would be best for the Minister to remain at arms length from this issue,

23 See *McLaughlin v Hume CC* [2009] VCAT 2009 (30 September 2009) at paragraph 4, see also *See McLaughlin v Hume CC* [2008] VCAT 1766 (25 August 2008) at paragraphs 15, 24, 35-37.

24 See *McLaughlin and Minister for Infrastructure, Transport, Regional Development and Local Government and Australia Pacific Airports (Melbourne) Pty Ltd (Party Joined)* [2009] AATA 562 (31 July 2009) at paragraphs 1, 8 & 14.

25 See *McLaughlin v Hume CC* [2008] VCAT 1766 (25 August 2008) at paragraphs 20-24

26 See all of item 5 in the letter from APAM to Hume CC on pages 18-19 of Supporting Documents 2, APAM's proposal to withdraw a planning objection in exchange for easement rights on pages 22 to 26 of Supporting Documents 2, items 6.1 and 11(e) of a draft Deed of Settlement and Release on page 6 & 10 of Supporting Documents 3, item 5 in a draft "173" agreement Hume City Council gave to the Commonwealth's and APAM's solicitor's Corrs Chambers Westgarth (see copyright notice on cover) to draft for linking to our property's title on page 19-21 of Supporting Documents 3.

27 See VicRoads inter-office memo on page 8 of Supporting Documents 1 and last paragraph in VicRoads inter-office memo on page 13 of Supporting Documents 1..

28 See page 28-29 of Supporting Documents 3 obtained by FOI.

and the reply be signed by the Chief of Staff.

...It is unlikely that APAM and Mr. McLaughlin can resolve the matter by compromise, as APAM believe it is against their own commercial interest to grant a right of way to Mr. McLaughlin...

...If the Commonwealth should intervene and grant Mr. McLaughlin right of way for Quarry Road, this would involve the alienation of APAM. Nor is there reason for the Commonwealth to defend the action to not grant right of way as primary defendant.

To minimise Commonwealth involvement in the court system and to prevent the possibility of setting a precedent that would encourage third parties at other airports to invoke Commonwealth assistance, the response indicates this is a commercial matter for resolution between Mr. McLaughlin and APAM. Should Mr. McLaughlin decide to recommence court proceedings, the Commonwealth can invoke its indemnities with APAM. The Department proposes to write to APAM indicating that it will fall to APAM to respond to any challenge that Mr. McLaughlin presents.

What public servant would decide to pay compensation from his or her own Departmental budget (a very brave decision at the best of times) when he or she can invoke a commercial indemnity to put a private company between the Department and all the fires? (See recommendation 6 above.) So, when the Commonwealth contracts out the business of peace, order and good government, using a deep pocketed contractor, litigation becomes a cheap and easy way for the Commonwealth to deal with people, with no risk of loss. The resulting letter from the Minister's Chief of Staff sent to the McLaughlins²⁹ stated:

"I recognise that you believe the Commonwealth should be responsible for this matter. However APAM have exclusive right to possession of the airport site under the lease agreement, and have responsibility for dealing with matters such as these. I suggest you negotiate directly with APAM to achieve a resolution to this issue. The Department of Transport and Regional Services will be informing APAM of the concerns raised in your recent correspondence."

More recently, the McLaughlins complained to the Minister they were unable to meaningfully engage with the Commonwealth, except through solicitors who also acted for their competitor APAM. In a letter dated 27 April 2010³⁰, the Acting General Manager of Airports replied to the McLaughlins concerns on behalf of the Minister:

In view of the fact the Supreme Court proceedings are current the Department is unable to comment... As noted in the Department's letter

²⁹ See page 29A of Supporting Documents 3.

³⁰ See page 30 of Supporting Documents 3.

to you of 29 January 2009 in relation to your suggestion that there is a conflict of interest because Australia Pacific Airports (Melbourne) Pty Ltd (APAM) and the Commonwealth are represented by Corrs Chambers Westgarth, we are advised there is no conflict of interest. APAM is conducting the defence of this matter on its own and the Commonwealth's behalf... As also noted in the Department's January 2009 letter, you are encouraged to work with APAM to resolve your concerns.

As noted above, the Commonwealth understands that it is "unlikely that APAM and Mr. McLaughlin can resolve the matter by compromise, as APAM believe it is against their own commercial interest". However clause 1.2 of the Melbourne Airport lease reads³¹:

Reservation of Lessor's rights

The [Commonwealth as] Lessor reserves to itself: (b) provided it is not inconsistent with the development of the airport site in accordance with a Master Plan, the right to grant any easements over or rights of access or rights of way on, over, under, through or across the airport site for (ii) the provision of transport or other services to the public.

The master plan showed no structure hindering the restoration of access where quarry road access had been cut. Therefore what could have otherwise been resolved with compensation or a grace payment or restoration or property rights to both the McLaughlins and the State, through a Departmental administrative action (see recommendations 1(a) and 1(c)), has become the subject of a ruinous court battle between a very small and a very large business; the also on behalf of the Commonwealth of Australia. As a result, the McLaughlins have lost their life savings and have become greatly indebted.

The McLaughlin's situation became so difficult that "on the balance of convenience", the Supreme Court of Victoria adjourned the McLaughlin's case without fixing a date, and only fixed a date (August 2010) after APAM undertook to lend the McLaughlins money on reasonable terms to sue it and the Commonwealth. This was only possible because the McLaughlins were able to provide their land as security to their competitors. Unless they agreed, the McLaughlins in their 70's would have been forced to appear unrepresented in a complex trial, while the Commonwealth through APAM had retained a QC, a barrister, and a big city law firm. (See recommendations 1(d), 4 and 5 above).

What could be the Commonwealth's and APAM's defence? Among other things, it is said that State laws protecting people's property don't apply to them (see recommendations 2 and 8 above); that the just terms agreement the Commonwealth made with Mrs. Smith not to disturb access and to assure it upon any alteration³² did not run with the land and has expired, or only applied in a South-Easterly direction; that the McLaughlins have no rights to use a

31 See page 7 of Supporting Documents 2.

32 See page 31 of Supporting Documents 3.

road built for their own land over 40 years ago as part restoration of access to a state main road (see recommendation 3 above). Whether legally correct or not, each one of these propositions must offend the conscience of every right-thinking Australian.

The Supreme Court will decide (see recommendation 1(b) above). However, the McLaughlin's case demonstrates the need for a better way for natural persons and small entities to obtain just terms and fairness from the Commonwealth and its Contractors (see recommendation 1(e)), whether or not they have legally enforceable rights (see recommendation 3).

I therefore commend to the Senate the recommendations above as coming from the university of hard knocks. The mere existence of a well-funded Tribunal to oversee Commonwealth fairness and just terms will itself cause those charged with being fair and just to take greater care when performing their duties.

Yours sincerely,

Eric Wilson
July 2010