

Eric Wilson



July 2010

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

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

SUPPORTING DOCUMENTS 3

①

28 August 2006 24 May 2007

Keith Thomas McLaughlin and Norma Ada McLaughlin

Phillip Leslie McLaughlin

Deep Creek Park Pty Ltd

Australia Pacific Airports (Melbourne) Pty Ltd

The Commonwealth of Australia

Settlement and Release Deed

Ref: AJH/6636398

C:\Documents and Settings\tania\Local Settings\Temporary Internet Files\OLK51\3937944v13 Deed of settlement and release.doc

© Corrs Chambers Westgarth

Contents

1	Interpretation	2
1.1	Definitions	2
1.2	Construction	3
1.3	Headings	4
2	Section 173	4
2.1	Section 173	4
2.2	Contract	4
3	Agreement to be registered	4
3.1	Council must register	4
3.2	Owner to do all things necessary	5
3.3	Successors of the Owner	5
4	Term of the Agreement	5
4.1	When this agreement starts	5
4.2	When this agreement ends	5
5	Western Avenue	5
5.1	Roadworks	5
5.2	Drainage	7
5.3	Filling of Land	7
6	Mortgagee's consent	8
7	Notices	8
7.1	General	8
7.2	How to give a communication	8
7.3	Particulars for delivery of notices	8
7.4	Communications by post	9
7.5	Communications by fax	9
7.6	After hours communications	9
7.7	Process service	9
8	General	9
8.1	Duty	9
8.2	Legal costs	9
8.3	GST	10
8.4	Land Registry	10
8.5	Obligation to run with the Land	10
8.6	Amendment	10
8.7	Waiver and exercise of rights	10
8.8	Rights cumulative	11
8.9	Consents	11
8.10	Further steps	11
8.11	Governing law and jurisdiction	11
8.12	Severability	11

8.13 Liability	12
8.14 Counterparts	12
8.15 Relationship of parties	12
8.16 Arbitration	12

Annexure - Mortgagee's Consent	14
---------------------------------------	-----------

Attachment A - Development Plan	15
--	-----------

Attachment B - Drainage Easement	16
---	-----------

Attachment C - Easement	19
--------------------------------	-----------

3

3

Retrospective Permit Application means the application for a planning permit made by the McLaughlins to the Council referred to in Background paragraph K.

Road Standards means:

- (a) VicRoads – Road Design Guidelines – PART 2 – Horizontal and Vertical Geometry, PART 3 – Cross Section Elements, PART 5 – Interchanges, and PART 7 – Drainage;
- (b) VicRoads – Traffic Engineering Manual – Volumes 1 and 2; and
- (c) Austroads – Guide to Traffic Engineering Practice – Part 5 Intersections at Grade; and
- (d) any relevant Council Road Standards.

Roadworks means the works required to upgrade and reconstruct the road on the Western Avenue Extension as referred to and generally described in the Development Plan and section 173 agreement dated 18 September 1997.

Section 173 Agreement means an agreement made under section 173 of the Act which is consistent with the draft agreement contained in Attachment B.

Supreme Court Proceedings means the proceedings commenced by the McLaughlins referred to in Background paragraph B.

Tribunal means the Victorian Civil and Administrative Tribunal.

Western Avenue Extension means that part of the Commonwealth Land comprised in Certificates of Title Volume 8390 Folio 476, Volume 8869 Folio 264, and Volume 8869 Folio 263 comprising approximately 3 acres 2 rods and 8 and six tenths perches which is subject to the Easement.

Water Act Proceedings means the Tribunal proceedings commenced by Melbourne Airport referred to in Background paragraph G.

Western Avenue Proceedings means:

- (a) the Development Plan Proceedings;
- (b) the Enforcement Proceedings;
- (c) the Water Act Proceedings; and
- (d) the Retrospective Permit Application.

1.2 Construction

Unless expressed to the contrary, in this deed:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) "includes" means includes, without limitation;

- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it; and
- (f) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) any legislation or subordinate legislation includes any corresponding later legislation or subordinate legislation; and
 - (iii) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
- (g) "\$" or "dollars" is a reference to Australian currency;
- (h) time is of the essence.

2 Warranty

- (a) Each party warrants in favour of the others that it has relied on its own enquiries and has not entered into this deed in reliance on or as a result of any representation, promise, statement, conduct or inducement made by or on behalf of another party otherwise than as set out in this deed.
- (b) Each party acknowledges and admits the truth of the background facts and matters set forth in Background paragraphs A, B, C and the Background.
- (c) Melbourne Airport, the McLaughlins, Phillip McLaughlin and Deep Creek acknowledge and admit the truth that the background facts and matters set forth in Background paragraphs D-K (both inclusive) and M.

3 Agreement to bind successors in title

The McLaughlins agree that they enter into this deed on their own behalf and on behalf of:

- (a) any associate of the McLaughlins (or either of them) within the meaning of sections 10 to 17 (inclusive) of the Corporations Act 2001;
 - (b) (i) any related entity of any body corporate of which either of the McLaughlins are, have been or become directors or officers, and
 - (ii) any relative of the McLaughlins
- as defined in section 9 of the Corporations Act 2001; and
- (c) all of their successors in title to the McLaughlins' Land.

4 McLaughlins acknowledge no rights over Quarry Road

The McLaughlins, Phillip McLaughlin and Deep Creek expressly acknowledge and agree that except for the McLaughlins' right of access over Western Avenue Extension:

- (a) they do not have, and will not in the future claim or attempt to exercise or facilitate directly or indirectly any other person to claim or ~~exercise~~ exercise, any rights to pass through or over any part of the Commonwealth Land (including Quarry Road and any Commonwealth Land in the vicinity of Quarry Road) whether for the purpose of accessing any part of the McLaughlins' Land or otherwise; and
- (b) without limiting paragraph (a), any right title or interest the McLaughlins, Phillip McLaughlin or Deep Creek may have had or asserted over or with respect to Quarry Road or any other part of the Commonwealth Land (which are denied by Melbourne Airport and the Commonwealth) is hereby extinguished.

5 Withdrawal of Caveat and disposal of Supreme Court Proceedings

- (a) The McLaughlins agree to promptly withdraw the Caveat and not to reodge any caveat claiming the same or any similar interest in the Commonwealth Land on any grounds relating to or arising out of the allegations made in the Supreme Court Proceedings.
- (b) The McLaughlins agree to promptly file a notice of discontinuance of the Supreme Court Proceedings or apply to the Court to make the Orders or such other orders to substantially the same effect to terminate the Supreme Court Proceedings.
- (c) Melbourne Airport and the Commonwealth consent to the filing of a notice of discontinuance of the Supreme Court Proceedings and consent to the Orders.
- (d) The parties agree to do everything reasonably necessary to facilitate the discontinuance of the Supreme Court Proceedings or to ensure the Court promptly makes the Orders or other orders to substantially the same effect.

6 Disposal of the Western Avenue Proceedings

6.1 Development Plan Proceedings

- (a) Melbourne Airport consents to the Tribunal making orders directing the Council to approve the Development Plan as the development plan for the purposes of schedule 10 to clause 43.04 of the Planning Scheme.

- (b) The McLaughlins agree to must carry out the Roadworks
 - (i) to the standards described in the Road Standards;
 - (ii) in accordance with the requirements of and to the satisfaction of, the Council;
 - (iii) in accordance with the requirements of Melbourne Airport for construction works and the entry of contractors onto Airport land from time to time; and
 - (iv) to the reasonable satisfaction of Melbourne Airport.

- (c) The McLaughlins must:
 - (i) carry out the Roadworks at their cost;
 - (ii) reimburse Melbourne Airport and the Commonwealth on demand for any costs or levies assessed by the Council against Melbourne Airport and/or the Commonwealth in respect of the Roadworks;
 - (iii) not commence any new use or development of the McLaughlins' Land prior to completion of the Roadworks in accordance with paragraph 6.1(b);
 - (iv) indemnify Council, Melbourne Airport and the Commonwealth from and against all claims relating to or arising out of the Roadworks;
 - (v) indemnify and keep indemnified Council, Melbourne Airport and the Commonwealth in respect of all claims relating to or arising out of the use of Western Avenue Extension by any person (other than those persons permitted by the Easement) until such time as Western Avenue Extension is declared a public highway or it vests in or is transferred to the Council;
 - (vi) not commence or continue carrying out the Roadworks unless Insurance is in place and evidence thereof has been provided to the reasonable satisfaction of Council, Melbourne Airport and the Commonwealth;
 - (vii) at all times maintain Insurance until such time as Western Avenue Extension is declared a public highway or it vests in or is transferred to the Council, and provide evidence thereof promptly on request by Melbourne Airport or the Commonwealth; and
 - (viii) at all times until such time as Western Avenue Extension is declared a public highway or it vests in or is transferred to the Council, maintain the road on the Western Avenue Extension at their cost and to the reasonable satisfaction of Council, Melbourne Airport and the Commonwealth.

(d) The McLaughlins:

- (i) acknowledge that Council, Melbourne Airport and the Commonwealth have no obligation to build or maintain the Roadworks;
- (ii) ~~acknowledge~~ acknowledge that there is no obligation on the Council, Melbourne Airport or the Commonwealth to have Western Avenue Extension declared a public highway or to vest it in or transfer it to the Council but the McLaughlins consent to and agree to facilitate any such declaration, vesting or transfer if called upon to do so ;
- (iii) acknowledge that their rights to use Western Avenue Extension derive from the Easement and that they have no greater rights in relation to Western Avenue Extension than as described in or created by the Easement;
- (iv) acknowledge that any use and development of the McLaughlins' Land for a commercial car park requires a planning permit under clause 33.03 of the Planning Scheme and agree not to use or develop the McLaughlins' Land for that purpose without having first obtained a planning permit; and
- (v) agree to give Melbourne Airport written notice of any application to use or develop the McLaughlins' Land for a commercial car park within 7 days after any such application is lodged with the Council.

Dr ~~The Melbourne Airport~~

(e) The Melbourne Airport agrees that the McLaughlins may locate a watermain (but no other services) to service the McLaughlin's Land within 2.6 metres of the boundary between Western Avenue Extension and the Land comprised in Certificates of Title Volume 8875 Folio 056 and Volume 9275 Folio 998 (owned or formerly owned by Brambles Holdings Limited).

6.2 Water Act Proceedings

- (a) The McLaughlins agree to ~~must~~ must:
 - (i) grant the Drainage Easement;
 - (ii) carry out the Drainage Works; and
 - (iii) not commence any new use or development of the McLaughlins Land prior to the grant and registration of the Drainage Easement and completion of the Drainage Works.
- (b) The McLaughlins agree to ~~must~~ maintain at their cost the Drainage Easement and Drainage Works in good working order and condition.
- (c) Melbourne Airport agrees to withdraw the Water Act Proceedings.
- (d) The McLaughlins agree to consent to the withdrawal of the Water Act Proceedings.

72

- (e) The parties (other than the Commonwealth) agree to do everything reasonably necessary to ensure that the Water Act Proceedings are promptly withdrawn.

6.3 Enforcement Proceedings

- (a) Melbourne Airport agrees to withdraw the Enforcement Proceedings.
- (b) The McLaughlins agree to consent to the withdrawal of the Enforcement Proceedings.
- (c) The parties (other than the Commonwealth) agree to do everything reasonably necessary to ensure that the Enforcement Proceedings are promptly withdrawn.

6.4 Retrospective Permit Application

- (a) The McLaughlins agree ~~to~~ not to import any fill material onto the McLaughlins' Land unless and until the Retrospective Permit Application is granted and then only in conformity with such permit.
- (b) The McLaughlins agree that must:
 - (i) limit the amount of any fill material deposited on McLaughlins' Land shall be limited to ~~and~~ which must not exceed and which must be in conformity with the finished contour levels shown on the plan accompanying the Retrospective Planning Application, a copy of which plan is attached as Attachment E;
 - (ii) the McLaughlins must keep proper records of all fill material deposited on the McLaughlins' Land; and
 - (iii) the McLaughlins must produce those records and allow monitoring of those records and the fill during the life of the permit on request by the Council from time to time.
- (c) The McLaughlins agree to must vary the Retrospective Permit Application to include in any permit to be issued pursuant to the Retrospective Permit Application conditions to the effect set out in paragraph (b).
- (d) So long as the Retrospective Planning Permit Application is not varied other than as described in paragraph (c) and any such permit issued pursuant to the Retrospective Planning Permit Application includes the conditions described in paragraph (c), Melbourne Airport agrees to must not object to the granting of a permit pursuant to the Retrospective Permit Application.
- (e) The McLaughlins agree to must:
 - (i) comply with the terms of any planning permit issued pursuant to the Retrospective Planning Application;
 - (ii) construct on the McLaughlins' Land and maintain a cut off drain of the sort described in the drainage and erosion management plan submitted with the Retrospective Planning Application



inside the boundary between the Commonwealth Land and the McLaughlins' Land; and

- (iii) not commence any new use of the McLaughlins' Land prior to completion of such works.

6.5 Stormwater Discharge

Subject to the McLaughlins compliance with clauses 6.2(a) and (b) Melbourne Airport acknowledges that it will not make any complaint against or seek any remedy against the McLaughlins under the Water Act for any alleged interference with the flow of water across the McLaughlins' Land in the vicinity of the 450 mm diameter drain to be constructed in accordance with the Drainage Works, if such 450 mm diameter drain is of insufficient capacity to discharge stormwater from the Commonwealth Land.

7 Acknowledgments

7.1 By the McLaughlins, Phillip McLaughlin and Deep Creek

The McLaughlins, Phillip McLaughlin and Deep Creek expressly acknowledge and accept that, by executing this deed, Melbourne Airport and the Commonwealth:

- (a) do not concede that McLaughlins Land is not contaminated;
- (b) do not consent in any way to the development or use of the McLaughlins' Land as a car park and will request notification from Council of any application made for any such use or development of the McLaughlins' Land;
- (c) object to the use of the words 'Melbourne Airport' in connection with the McLaughlins' Land or any business conducted on or operating from the McLaughlins' Land; and
- (d) expressly reserves their rights in respect of each of the above matters.

7.2 By all parties

The parties acknowledge that the title boundaries of the McLaughlins' Land and the Commonwealth Land are as set out and described in the relevant certificates of title and plans of subdivision.

8 Section 173 Agreement

- (a) The parties (other than the Commonwealth) agree to enter into the Section 173 Agreement with the Council.
- (b) The McLaughlins must not commence any new use or development of the McLaughlins' Land prior to the registration of the Section 173 Agreement.

9 Releases and indemnities

In consideration of the terms of this deed:

- (a) the McLaughlins, Phillip McLaughlin and Deep Creek release and discharge Melbourne Airport and its directors, officers, employees or agents from all claims which they have or which but for this deed could, would or might at any time hereafter have or have had against Melbourne Airport and each of Melbourne Airport's directors, officers, employees or agents relating to or arising out of the matters alleged in the Supreme Court Proceedings and must keep Melbourne Airport indemnified against any loss or damage arising from any such claims;
- (b) the McLaughlins, Phillip McLaughlin and Deep Creek release and discharge the Commonwealth and its officers, employees or agents from all claims which they have or which but for this deed could, would or might at any time hereafter have or have had against the Commonwealth and each of the Commonwealth's officers, employees or agents relating to or arising out of matters alleged in the Supreme Court Proceedings and must keep the Commonwealth indemnified against any loss or damage arising from any such claims; and
- (c) Melbourne Airport releases and discharges the McLaughlins and their employees or agents from all claims which it has or which but for this deed could, would or might at any time hereafter have or have had against the McLaughlins and each of the McLaughlin's directors, officers, employees or agents relating to or arising out of the matters alleged in the Supreme Court Proceedings (expressly excluding the matters acknowledged in clause 7) and must keep the McLaughlins indemnified against any loss or damage arising from any such claims.

10 Bar to further proceedings

This deed may be pleaded as a full and complete defence by any of the parties to any proceedings or claims arising out of the facts, matters and circumstances referred to in the Supreme Court Proceedings.

11 Adequacy of remedies

The McLaughlins, Phillip McLaughlin and Deep Creek agree that:

- (a) the covenants and acknowledgements in favour of Melbourne Airport set out in clauses 4, 6.1(c)(iii), 6.1(c)(vi), 6.1(c)(vii), 6.1(d)(iv), 6.2(a)(iii), 6.4(a), 6.4(b)(i), 6.4(e)(iii) and 8(b) are essential terms without which Melbourne Airport would not have entered into this deed;
- (b) if the McLaughlins, Phillip McLaughlin and/or Deep Creek breach one or more of the essential terms described in paragraph (a), damages are not an adequate remedy and the McLaughlins, Phillip McLaughlin

and Deep Creek agree and consent to Melbourne Airport obtaining injunctive relief in respect of that breach; and

(c) the covenants and acknowledgements in favour of the Commonwealth set out in clauses 4 and 5(a) are essential terms without which the Commonwealth would not have entered into this deed;

(d) if the McLaughlins, Phillip McLaughlin and/or Deep Creek breach one or more of the essential terms described in paragraph (c), damages are not an adequate remedy and the McLaughlins, Phillip McLaughlin and Deep Creek agree and consent to the Commonwealth obtaining injunctive relief in respect of that breach; and

(e) without limiting any other rights or remedies of Melbourne Airport or the Commonwealth, that from if at any time between the commencement of the Roadworks, and such time as the Western Avenue Extension is declared a public highway or it vests in or is transferred to the Council

- (i) the McLaughlins do not comply with clause 6.1(c)(vii) relating to insurance;
- (ii) the McLaughlins do not comply with clause 6.1(c)(viii) relating to road maintenance; or
- (iii) in the reasonable opinion of Melbourne Airport or the Commonwealth any hazard exists to any user of the Western Avenue Extension or surrounding lands

Melbourne Airport and the Commonwealth are entitled to restrict access to Western Avenue Extension in their several sole discretion until they are reasonably satisfied that the non-compliance has been remedied or the hazard removed as the case may be. So long as the McLaughlins' Land is owned by the McLaughlins, Melbourne Airport and the Commonwealth agree that their rights arising under clause 11(e)(i) and (ii) will only be exercised upon reasonable notice to the McLaughlins to their address set out herein. [Best Hooper require the addition of the following: "For the purposes of this clause, reasonable notice means not less than 14 days."]

12 Costs of Western Avenue Proceedings

Each party will bear its own costs in respect of the Supreme Court Proceedings and the Western Avenue Proceedings and their disposal.

13 General

13.1 Legal costs of this deed

Each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this deed.

13.2 Amendment

This deed may only be varied or replaced by a document duly executed by the parties.

13.3 Waiver and exercise of rights

- (a) A single or partial exercise or waiver by a party of a right relating to this deed does not prevent any other exercise of that right or the exercise of any other right.
- (b) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

13.4 Rights cumulative

Except as expressly stated otherwise in this deed, the rights of a party under this deed are cumulative and are in addition to any other rights of that party.

13.5 Consents

Except as expressly stated otherwise in this deed, a party may conditionally or unconditionally give or withhold any consent to be given under this deed and is not obliged to give its reasons for doing so.

13.6 Further steps

Each party must promptly do whatever any other party reasonably requires of it to give effect to this deed and to perform its obligations under it.

13.7 Governing law and jurisdiction

- (a) This deed is governed by and is to be construed in accordance with the laws applicable in Victoria.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

13.8 Liability

An obligation of two or more persons binds them separately and together.

13.9 Counterparts

This deed may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

13.10 Entire understanding

- (a) This deed contains the entire understanding between the parties as to the subject matter of this deed.
- (b) All previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this

deed are merged in and superseded by this deed and are of no effect. No party is liable to any other party in respect of those matters.

- (c) No oral explanation or information provided by any party to another:
 - (i) affects the meaning or interpretation of this deed; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the parties

Executed as a deed.

Signed sealed and delivered by Keith Thomas McLaughlin in the presence of:

Witness

Name of Witness (print)

Signed sealed and delivered by Norma Ada McLaughlin in the presence of:

Witness

Name of Witness (print)

Signed sealed and delivered by Phillip Leslie McLaughlin in the presence of:

Witness

Name of Witness (print)

Executed by Deep Creek Pty Ltd by
its duly appointed officer in the
presence of:

.....
Witness

.....
Officer

.....
Name of Witness (print)

.....
Name of Officer (print)

Signed sealed and delivered for and)
on behalf of Australia Pacific Airports)
(Melbourne) Pty Ltd by its duly)
authorised delegate in the presence of:)

.....
Authorised Delegate

.....
Witness

.....
Name of Witness (print)

Executed by The Commonwealth of
Australia in the presence of:

.....
Witness

.....
Name of Witness (print)

14

Draft No 23
23⁵ May 2007

Hume City Council

Keith Thomas and Norma Ada McLaughlin

Australia Pacific Airports (Melbourne) Pty Ltd

**Section 173
Agreement - Lot 1,
Western Avenue,
Tullamarine**

15

Date

Parties

Hume City Council of 1079 Pascoe Vale Road, Broadmeadows, Victoria
(Council)

Keith Thomas McLaughlin and Norma Ada McLaughlin of [redacted]
Victoria (Owner)

Australia Pacific Airports (Melbourne) Pty Ltd ACN 076 999 114 of [redacted] Airport
Management, Level 2, International Airport, Melbourne Airport, Victoria
(Melbourne Airport)

Background

- A The Owner is the registered proprietor of the Land which is subject to the Planning Scheme.
- B The Council is the Responsible Authority for the Planning Scheme pursuant to the Act.
- C Melbourne Airport is the operator of Melbourne Airport and the lessee of the Commonwealth Land.
- D Access to the Land is via Western Avenue and the Western Avenue Extension.
- E The Land is subject to the Development Plan.
- F The use and development of the Land requires the upgrading of Western Avenue and the Western Avenue Extension and the installation of a water main in the Western Avenue Extension.
- G Past filling of the Land has created drainage problems on the Commonwealth Land.
- H The parties have agreed to enter into this agreement to:
 - (a) provide for the upgrading of Western Avenue and the Western Avenue Extension;
 - (b) ensure the appropriate long-term management of drainage of the Commonwealth Land;
 - (c) regulate the importation of fill and the monitoring of the fill on the Land; and
 - (d) achieve and advance the objectives of planning in Victoria and the objectives of the Planning Scheme in respect of the Land.
- I The Land is subject to the Mortgage.

Agreed terms

1 Interpretation

1.1 Definitions

In this agreement:

Act means the *Planning and Environment Act 1987 (Vic)*.

Commonwealth means The Commonwealth of Australia, represented by the Department of Transport and Regional Services.

Commonwealth Land means the land constituting Melbourne Airport, the Airport Site of Melbourne (Tullamarine) Airport for the purposes of the Airports Act 1996 and includes the land comprised in Certificates of Title Volume 8390 Folio 476, Volume 8466 Folio 277, Volume 8869 Folio 264, Volume 8869 Folio 263 and Volume 8677 Folio 659.

Council means the Hume City Council and its successors.

Development Plan means the development plan contained in **Attachment A.**

Drainage Easement means a drainage easement burdening the Land and benefiting part or all of the Commonwealth Land generally in accordance with the draft creation of easement contained in **Attachment B.**

Drainage Works means the construction of drainage in accordance with John Randles and Associates Pty Ltd drainage plan reference number 445029/drawing numbers C1-C4 consisting of:

- (a) underground drainage from the Tullamarine freeway to Moonee Ponds creek via sedimentation pond;
- (b) a 450mm diameter pipe including a pit draining Airport land and connecting to the drain between Tullamarine freeway and Moonee Ponds Creek; and
- (c) an open swale drain running above the underground drain from pit 2 to pit 9

Easement means the easement created by instrument registered number D991658, a copy of which is contained in **Attachment C.**

Insurance means public liability insurance

- (a) for an amount of not less than \$10,000,000;
- (b) for the several benefit of the Owner, Council, Melbourne Airport and the Commonwealth as insured parties;
- (c) covering all risks in relation to or in connection with the Roadworks and use of Western Avenue Extension by any person; and
- (d) with an insurer and in a form which is to the reasonable satisfaction of Council, Melbourne Airport and the Commonwealth.

Land means the land known as Lot 1, Western Avenue, Tullamarine being the land comprised in certificate of title volume 8875 folio 055 and any reference to the land in this agreement includes any lot created by the subdivision of the land or any part of it.

Mortgage means registered mortgage AE393754S to Permanent Trustee Australia Limited dated 2 June 2006 and subsequently varied and transferred.

Parties means the parties referred to on page one of this deed.

Planning Scheme means the Hume Planning Scheme as amended from time to time.

Retrospective Permit Application means the application for planning permit dated 19 March 2004 made by the Owner to the Council for filling of the Land.

Road Standards means:

- (a) VicRoads – Road Design Guidelines – PART 2 – Horizontal and Vertical Geometry, PART 3 – Cross Section Elements, PART 5 – Interchanges and PART 7 – Drainage;
- (b) VicRoads – Traffic Engineering Manual – Volumes 1 and 2;
- (c) Austroads – Guide to Traffic Engineering Practice – Part 5 Intersections at Grade; and
- (d) any relevant Council Road Standards.

Roadworks means the works required to upgrade and reconstruct the road on the Western Avenue Extension as referred to and generally described in the Development Plan and Section 173 dated 18 September 1997.

Western Avenue Extension means that part of the Commonwealth Land comprised in Certificates of Title Volume 8390 Folio 476, Volume 8869 Folio 264, and Volume 8869 Folio 263 comprising approximately 3 acres 2 roods and 8 and six tenths perches which is subject to the Easement.

1.2 Construction

Unless expressed to the contrary, in this agreement:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) "includes" means includes without limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- (f) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;

- (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
- (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
- (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
- (v) a right includes a benefit, remedy, discretion or power;
- (vi) time is to local time in Melbourne;
- (vii) "\$" or "dollars" is a reference to Australian currency;
- (viii) this or any other document includes the agreement as novated, varied or replaced and despite any change in the identity of the parties;
- (ix) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmissions;
- (x) this agreement includes all schedules and annexures to it; and
- (xi) a clause, schedule or annexure is a reference to a clause, schedule or annexure, as the case may be, of this agreement;
- (g) each promise by the Owner in this agreement is a covenant;
- (h) if the date on or by which any act must be done under this agreement is not a Business Day, the act must be done on or by the next Business Day; and
- (i) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded.

1.3 Headings

Headings do not affect the interpretation of this agreement.

2 Section 173

2.1 Section 173

To the extent permitted, this agreement is made under section 173 of the Act.

2.2 Contract

This agreement takes effect as an agreement between the parties in addition to being an agreement under section 173 of the Act.

3 Agreement to be registered

3.1 Council must register

The Council must ensure that the Registrar of Titles registers this agreement under section 181 of the Act as soon as possible.

3.2 Owner to do all things necessary

At the Council's request, the Owner must do all things reasonably required by the Council to ensure this agreement is registered.

3.3 Successors of the Owner

Until the registration of this agreement, the Owner must ensure that the Owner's successors in title or any person taking an interest in the property:

- (a) give effect to this agreement;
- (b) ensure their successors in title give effect to this agreement; and
- (c) execute a deed agreeing to be bound by this agreement.

4 Term of the Agreement

4.1 When this agreement starts

This agreement will start on the date of this agreement.

4.2 When this agreement ends

- (a) Subject to the provisions of the Act, this agreement ends when the Owner has complied with its obligations under this agreement or earlier by mutual agreement between the parties;
- (b) The Council must notify the Registrar of Titles of the ending of this agreement as required under section 183 of the Act.

5 Western Avenue

5.1 Roadworks

- (a) The Owner must carry out the Roadworks:
 - (i) to the standards described in the Road Standards;
 - (ii) in accordance with the requirements of, and to the satisfaction of, the Council;
 - (iii) in accordance with the requirements of Melbourne Airport for construction works and the entry of contractors onto Airport land from time to time; and
 - (iv) to the reasonable satisfaction of Melbourne Airport.
- (b) The Owner must:
 - (i) carry out the Roadworks at its cost;

- (ii) reimburse Melbourne Airport and the Commonwealth on demand for any costs or levies assessed by the Council against Melbourne Airport and/or the Commonwealth in respect of the Roadworks;
- (iii) not commence any new use or development of the Land prior to completion of the Roadworks in accordance with clause 5.1(a);
- (iv) indemnify Council, Melbourne Airport and the Commonwealth from and against all claims relating to or arising out of the Roadworks;
- (v) indemnify and keep indemnified Council, Melbourne Airport and the Commonwealth in respect of all claims relating to or arising out the use of Western Avenue Extension by any person (other than those persons permitted by the Easement) until such time as Western Avenue Extension is declared a public highway or it vests in or is transferred to the Council;
- (vi) not commence or continue carrying out the Roadworks unless Insurance is in place and evidence thereof has been provided to the reasonable satisfaction of Council, Melbourne Airport and the Commonwealth;
- (vii) at all times maintain Insurance until such time as Western Avenue Extension is declared a public highway or it vests in or is transferred to the Council, and provide evidence thereof promptly on request by Council, Melbourne Airport or the Commonwealth; and
- (viii) at all times until such time as Western Avenue Extension is declared a public highway or it vests in or is transferred to the Council, maintain the road on the Western Avenue Extension at their cost and to the reasonable satisfaction of Council, Melbourne Airport and the Commonwealth.

(c) The Owner:

- (i) acknowledges that Council, Melbourne Airport and the Commonwealth have no obligation to build or maintain the Roadworks;
- (ii) acknowledges that there is no obligation on Council, Melbourne Airport or the Commonwealth to have Western Avenue Extension declared a public highway or to vest it in or transfer it to the Council, but the Owner consents to and agrees to facilitate any such declaration, vesting or transfer if called upon to do so;
- (iii) acknowledges that its rights to use Western Avenue Extension derive from the Easement and that it has no greater rights in relation to Western Avenue Extension than as described in or created by the Easement;

- (iv) acknowledges that any use and development of the Land for a commercial car park requires a planning permit under clause 33.03 of the Planning Scheme and agrees not to use or develop the Land for that purpose without having first obtained a planning permit; and
- (v) agrees to give Melbourne Airport written notice of any application to use or develop the Land for a commercial car park within 7 days after any such application is lodged with the Council.

(d) The Owner may locate a water main (but no other services) to service the Land within 2.6 metres of the boundary between Western Avenue Extension and the land comprised in Certificates of Title Volume 8875 Folio 056 and Volume 9275 Folio 998 (owned or formerly owned by Brambles Holdings Limited).

5.2 Drainage

- (a) The Owner must:
 - (i) grant the Drainage Easement;
 - (ii) carry out the Drainage Works; and
 - (iii) not commence any new use or development of the Land prior to the grant and registration of the Drainage Easement and completion of the Drainage Works.
- (b) The Owner must maintain at its cost the Drainage Easement and Drainage Works in good working order and condition.

5.3 Filling of Land

- (a) The Owner must not import any fill material onto the Land unless and until the Retrospective Permit Application is granted and then only in conformity with such permit.
- (b) The Owner must:
 - (i) limit the amount of any fill material deposited on the Land ~~and not exceed and which must not exceed and which must be~~ in conformity with the finished contour levels shown on the plan accompanying the Retrospective Planning Application.;
 - (ii) keep proper records of all fill material deposited on the Land; and
 - (iii) produce those records and allow monitoring of those records and the fill during the life of the permit on request by the Council from time to time.
- (c) The Owner must vary the Retrospective Permit Application to include in any permit to be issued pursuant to the Retrospective Permit Application conditions to the effect set out in **paragraph (b)**.
- (d) So long as the Retrospective Planning Permit Application is not varied other than as described in **paragraph (c)** and any such permit issued pursuant to the Retrospective Planning Permit Application includes the

ek

conditions described in paragraph (c), Melbourne Airport must not object to the granting of a permit pursuant to the Retrospective Permit Application.

- (e) The Owner must:
 - (i) comply with the terms of any planning permit issued pursuant to the Retrospective Permit Application;
 - (ii) construct on the Land and maintain a cut off drain of the sort described in the drainage and erosion management plan submitted with the Retrospective Permit Application inside the boundary between the Commonwealth Land and the Land; and
 - (iii) not commence any new use of the Land prior to completion of such works.

6 Mortgagee's consent

At its own cost, the Owner must obtain the consent of the mortgagee under the Mortgage or any caveator to this agreement and the Drainage Easement.

7 Notices

7.1 General

A notice, demand, certification, process or other communication relating to this agreement must be in writing in English and may be given by an agent of the sender.

7.2 How to give a communication

In addition to any other lawful means, a communication may be given by being:

- (a) personally delivered;
- (b) left at the party's current address for notices;
- (c) sent to the party's current address for notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or
- (d) sent by fax to the party's current fax number for notices.

7.3 Particulars for delivery of notices

- (a) The particulars for delivery of notices are:

Council

Address: PO Box 119, Dallas, Victoria, 3047
 Fax: 9309 0109
 Attention: Planning Department

Owner

Address:

Attention: Mr and Mrs McLaughlin

Melbourne Airport

Address: Locked Bag 16, Gladstone Park, Victoria 3043

Fax: (03) 9297 1613

Attention: General Counsel

- (b) Each party may change its particulars for delivery of notices by notice to each other party.

7.4 Communications by post

Subject to clause 7.6, a communication is given if posted:

- (a) within Australia to an Australian address, three Business Days after posting; or
- (b) in any other case, ten Business Days after posting

7.5 Communications by fax

Subject to clause 7.6, a communication is given if sent by fax, when the sender's fax machine produces a report that the fax was sent in full to the addressee. That report is conclusive evidence that the addressee received the fax in full at the time indicated on that report.

7.6 After hours communications

If a communication is given:

- (a) after 5:00 pm in the place of receipt; or
- (b) on a day which is a Saturday, Sunday or bank or public holiday in the place of receipt,

it is taken as having been given at 9.00 am on the next day which is not a Saturday, Sunday or bank or public holiday in that place.

7.7 Process service

Any process or other document relating to litigation, administrative or arbitral proceedings relating to this agreement may be served by any method contemplated by this clause 7 or in accordance with any applicable law.

8 General

8.1 Duty

The Owner as between the parties is liable for and must pay all duty (including any fine or penalty except where it arises from default by the other party) on or relating to this agreement.

8.2 Legal costs

- (a) The Owner must immediately on demand pay to the Council the Council's costs and expenses (as between Solicitor and own client) relating to this

Agreement (including, but without limiting the generality of the preceding words, anything done before or after this Agreement and enforcement of any obligation imposed on the Owner under it). To the extent that any of those costs and expenses are legal professional costs, the Council may have them assessed by the Law Institute of Victoria Costs Service, if the Owner and the Council cannot agree on them and, if that happens, the Council and the Owner are bound by the amount of the assessment (with any fee for obtaining the assessment being paid for equally by the Council and the Owner). The Council's legal costs for work done prior to one month after the registration of this Agreement at the Land Titles Office must be assessed on the same basis that the Council pays its lawyers (i.e. \$300 per hour (based on units of 6 minutes) including GST) with the intent that the reimbursement pursuant to this clause equals the total of the legal costs and expenses incurred by the Council.

- (b) Except as expressly stated otherwise in this agreement, each party must pay its own legal and other costs and expenses of performing its obligations under this agreement.

8.3 GST

The Owner must pay any GST payable in respect to this Agreement or anything done in relation to it and must indemnify the Council against any such GST.

8.4 Land Registry

No Plan of Subdivision of the Land or any part of it or Instrument of Transfer of the Land or any part of it or mortgage or caveat relating to it or Plan of Consolidation affecting the Land may be lodged at the Land Registry for registration or approval until this Section 173 Agreement and the Section 181 Memorandum have been lodged by or on behalf of the Council and entered on the Certificate of Title to the Land.

8.5 Obligation to run with the Land

An obligation imposed on the Owner takes effect as a covenant which is annexed to and runs at law and equity with the Land and binds the Owner, its successors, assigns and transferees, and the registered proprietor for the time being of the whole or any part of the Land.

8.6 Amendment

Subject to the provisions of the Act, this agreement may only be varied or replaced by a document executed by the parties and by otherwise complying with any requirements of the Act.

8.7 Waiver and exercise of rights

- (a) A single or partial exercise or waiver by a party of a right relating to this agreement does not prevent any other exercise of that right or the exercise of any other right.
- (b) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

8.8 Rights cumulative

Except as expressly stated otherwise in this agreement, the rights of a party under this agreement are cumulative and are in addition to any other rights of that party.

8.9 Consents

Except as expressly stated otherwise in this agreement, a party may conditionally or unconditionally give or withhold any consent to be given under this agreement and is not obliged to give its reasons for doing so.

8.10 Further steps

Each party must promptly do whatever any other party reasonably requires of it to give effect to this agreement and to perform its obligations under it.

8.11 Governing law and jurisdiction

- (a) Subject to paragraph (c), This agreement is governed by and is to be construed in accordance with the laws applicable in Victoria.
- (b) Subject to paragraph (c), Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.
- (c) The parties agree that Melbourne Airport does not submit to the jurisdiction of the Act in respect of any part or all of the Commonwealth Land. [Gary Testro for the Council has reserved his position on these proposed changes]

8.12 Severability

- (a) Subject to clause 8.12(b), if a provision of this document is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this document.
- (b) **Clause 8.12(a)** does not apply if severing the provision:
 - (i) materially alters the:
 - (A) scope and nature of this document; or
 - (B) the relative commercial or financial positions of the parties; or
 - (ii) would be contrary to public policy.

8.13 Liability

An obligation of two or more persons binds them separately and together.

8.14 Counterparts

This agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

8.15 Relationship of parties

This agreement is not intended to create a partnership, joint venture or agency relationship between the parties.

8.16 Arbitration

In the event of any dispute arising out of or in conjunction with this agreement, a party may refer the dispute to the Victorian Civil and Administrative Tribunal. If (and only if) the Victorian Civil and Administrative Tribunal has no jurisdiction to hear and determine that dispute then a party may refer such dispute to arbitration pursuant to the *Commercial Arbitration Act 1984 (Vic)*.

3

3

Executed as a deed

The common seal of Hume City Council is affixed in the presence of:)))

.....
Chief Executive Officer

.....
Print name

.....
Councillor

.....
Print name

Signed sealed and delivered by Keith Thomas McLaughlin in the presence of:)))

.....
Witness

.....
Name of Witness (print)

Signed sealed and delivered by Norma Ada McLaughlin in the presence of:)))

.....
Witness

.....
Name of Witness (print)

Signed sealed and delivered for and on behalf of Australia Pacific Airports (Melbourne) Pty Ltd by its duly authorised delegate in the presence of:)))

.....
Authorised delegate

.....
Witness

.....
Name of witness (print)



Minute

Our Reference: H98/529

**MR PETER LANGHORNE
CHIEF OF STAFF
PROPOSED RESPONSE TO MR McLAUGHLIN (Minrep2001020871)**

ACTION SOUGHT: That you sign the enclosed response to Mr McLaughlin's latest correspondence dated 23 February 2001.

PRIORITY: High, this response was delayed while we checked the legal position with AGS.

ISSUE

Mr McLaughlin requests the Commonwealth to secure right of way for his property adjacent to Melbourne Airport via Quarry Road, and prevent Australia Pacific Airports Management Pty Ltd (APAM) from obstructing access to Quarry Road.

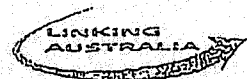
BACKGROUND

* This is an ongoing issue, with letters being received from Mr McLaughlin throughout 1999 and 2000. To date, our responses have indicated that there is not sufficient evidence to prove Mr McLaughlin's permanent and unrestricted access to Quarry Road, and the Commonwealth has indicated it will not be involved directly in this commercial matter. The Airport Lease transfers all liability arising from actions by a third party to the Lessee (APAM). Mr McLaughlin did issue a writ on both the Commonwealth and APAM on 11 January 2000 claiming free and unrestricted access to his land via Quarry Road. As one year has elapsed since the lodging of this writ, this writ can no longer be served.

COMMENT

This person is vexatious and it is suggested that it would be best for the Minister to maintain at arms length from this issue, and that the reply be signed by the Chief of Staff.

The most viable line of response is to maintain the stance that has been expressed in previous replies. The matter is essentially a commercial one between APAM and Mr McLaughlin. It is unlikely that APAM and Mr McLaughlin can resolve the matter by compromise, as APAM believe it is against their own commercial interests to grant right of way to Mr McLaughlin, while Mr McLaughlin is insisting on continuous and unrestricted right of way over Quarry Road to be granted gratis. If the Commonwealth should intervene and grant Mr McLaughlin right of



(J) 13 (29)

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 that this is a commercial matter for resolution between APAM and Mr McLaughlin. 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.

RECOMMENDATION

That you sign the draft reply to Mr McLaughlin (Attachment A).



Assistant Secretary
Airports Planning
22 March 2001

Contact Officer: _____
Telephone: _____

AGREED/NOT AGREED

CHIEF OF STAFF
/ /



Office of the Deputy Prime Minister
and Minister for Transport and Regional Services
Leader National Party of Australia

178
291

26 MAR 2001

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

Dear Mr McLaughlin

Thank you for your letter of 23 February 2001 to the Minister of Transport and Regional Services, the Hon John Anderson MP, concerning the issue of your permanent right of way via Quarry Road to Melbourne Airport, and your response to earlier correspondence provided by the former Principal Adviser, Mr Stephen Oxley. The Minister has asked me to respond on his behalf.

As you have been made aware in earlier correspondence, the Commonwealth is no longer the operator of Melbourne Airport, as this airport was leased to Australia Pacific Airports Management Pty Ltd (APAM) in July 1997. The Commonwealth's role is now limited to regulation of the airport site and airport activities, with no provision for direct involvement in commercial matters. As the issue of access to your property via Quarry Road is essentially a commercial one, you should approach APAM to settle this matter.

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 that 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.

Yours sincerely

Peter Langhorne
Chief of Staff



Centenary of Federation

Parliament House, Canberra ACT 2600 Tel: (02) 6277 7680 Fax: (02) 6273 4126
Email: john.anderson.mp@aph.gov.au

30



Australian Government

Department of Infrastructure, Transport,
Regional Development and Local Government

Received 3-5-2010

Mr Keith McLaughlin

Dear Mr McLaughlin

Thank you for your letter dated 11 March 2010 to the Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, about the conduct of the Supreme Court proceedings in regard to access from your land to the Melbourne Airport terminal precinct via Quarry Road. The Minister has asked me to reply on his behalf.

In view of the fact that the Supreme Court proceedings are current the Department is unable to comment.

As noted in the Department's letter 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. The Australian Government Solicitor maintains a watching brief for the Commonwealth. The arrangement complies with the Commonwealth guidelines for managing the Commonwealth's involvement in such matters.

In regard to the loan offer you have received from APAM in relation to the Supreme Court proceedings, the Commonwealth is not a party to this loan offer and the nature and terms of this loan are matters between you and APAM.

As also noted in the Department's January 2009 letter, you are encouraged to work with APAM to resolve your concerns.

Yours sincerely

Gary Walker
A/g General Manager
Airports
Aviation and Airports

27 April 2010

31

17
47

"Glendewar",
Bulla Road,
TULLAMARINE.

30th June, 1960.

Chief Property Officer,
Department of Interior.

Dear Sir,

I accept the offer of one hundred and sixty five thousand pounds (£165000) for an unencumbered estate in fee simple of the area of approximately two hundred and eighty six (286) acres referred to in your notice to treat dated 30th March 1960 subject to the fact that access to our Quarry leasehold not being disturbed and alternate access being assured upon any alteration to present arrangements and any disturbance or loss to Bayview Quarries Pty. Ltd. arising from or attributable to Commonwealth activities should be made a matter for direct action between the Commonwealth and the Company.

It is desired to exempt from the sale and retain ownership of the following items:-

- 2 fire screens, 1 Metal Door, 1 Marble fire place surround, light fittings, carpets, curtains, 1 studio and
- 1 sheep shower.

Yours sincerely,

[Redacted signature area]

SEARCHED
SERIALIZED
INDEXED
FILED