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TRANSCRIPT OF PROCEEDINGS

O/N 106351

ADMINISTRATIVE

APPEALS TRIBUNAL

JUSTICE G.K. DOWNES, President DEPUTY PRESIDENT G.L. McDONALD

No. 2009/0054

McLAUGHLIN and ANOTHER

and

MINISTER FOR INFRASTRUCTURE, TRANSPORT, REGIONAL DEVELOPMENT AND LOCAL GOVERNMENT

MELBOURNE

10.04 AM, TUESDAY, 12 MAY 2009

MR McLAUGHLIN appears in person MR DONAGHUE appears for the 1st respondent MR FINANZIO appears for Australia Pacific Airports (Melbourne) HIS HONOUR: Can we have the appearances, please?

MR DONAGHUE: May it please the tribunal, I appear for the first respondent, the Minister for Infrastructure. My name is Donaghue.

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HIS HONOUR: Yes, Mr Donaghue.

MR FINANZIO: May it please your Honour, my name is Finanzio and I appear for the joined party, Australia Pacific Airports (Melbourne).

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HIS HONOUR: Yes, Mr Finanzio.

MR FINANZIO: Thank you.

15 HIS HONOUR: Now - yes?

MR WILSON: Your Honour, my name is Wilson, and I'm helping Mr McLaughlin

HIS HONOUR: Right. You're not legally qualified?

MR WILSON: No, sir, I'm just a friend.

HIS HONOUR: Okay. So you're just here to assist?

25 MR WILSON: That's it, sir.

HIS HONOUR: All right. Well, would it be a convenient way to deal with the matter to hear first from the Minister and then to hear what Mr McLaughlin wishes to say in reply? Is that a convenient way of dealing with the matter? I think, Mr

- 30 Donaghue, that would be a convenient way to go. I have to say, I'd like to start off -I've tried my best to understand what we're talking about, including on my trip in from the airport yesterday, but I'm not fully aware of what we're talking about and some of the documents that I've had access to are, to my mind, confusing.
- 35 MR DONAGHUE: Yes.

HIS HONOUR: The other thing is that I haven't seen anything which actually sets out the terms of the easement. It seems to be described on the certificate of title as a carriageway but I haven't seen anything that actually says what its terms are.

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MR DONAGHUE: No. Well, I may not be in a position to help the tribunal with the detail of the easement but I can, hopefully, shed some light on all of that. I should say to the tribunal that I had proposed to come to the facts some time later because of the way we structure our submissions but in light of what the tribunal said I might - - -

45 I might

HIS HONOUR: Well, I think we - - -

MR DONAGHUE: I might go to - - -

HIS HONOUR: --- need to know the facts ---

5 MR DONAGHUE: Yes.

HIS HONOUR: --- first because - I mean, I have to say, Mr Donaghue, that I might have been calling on you first in any event because isn't the position here that the applicants have an interest in land, namely, the dominant tenement - --

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MR DONAGHUE: Yes.

HIS HONOUR: --- of part of the actual airport site? They're not 10 kilometres away worrying about noise. They're not even 100 yards away. They actually own

- 15 an interest in the land which, on one view and I notice this is in one of the submissions that Mr McLaughlin filed which, on one view, is a superior interest to a leasehold interest. There's a full interest in part of the land.
- MR DONAGHUE: Indeed, and an interest that we say can't be affected or taken away and isn't affected - for that reason, isn't affected or taken away by the master plan.

HIS HONOUR: But that's not the question that we're dealing with here. The question is whether they have got a sufficient interest to complain. Once we get into what their complaint is that's going past the jurisdiction issue, isn't it?

MR DONAGHUE: Well, the question is whether they have an interest that is affected by the Minister's decision to approve the master plan.

30 HIS HONOUR: Or that might be affected.

MR DONAGHUE: But if their interest is superior - - -

HIS HONOUR: But how can we know whether it's affected or not without going into the merits?

MR DONAGHUE: Well, you can know - - -

HIS HONOUR: You can't at the same time as you're arguing jurisdiction say, can
you, well - "But when you look at the plan this doesn't trouble them. They might have an interest but their interest isn't affected," because the moment you say that you're going to the merits, aren't you?

MR DONAGHUE: In my submission not, and I'll need to - - -

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HIS HONOUR: Well, we'll need - - -

MR DONAGHUE: I'll need to develop that.

HIS HONOUR: So I've - - -

5 MR DONAGHUE: Yes. No, I hear what the tribunal says, but - - -

HIS HONOUR: I'm sorry to hit you between the eyes at one minute past 10.

MR DONAGHUE: Can I start with the facts then, and there have been a number of maps filed with the tribunal. I'm hoping that you both have copies of those. The first map I would like to take you to is a Melway - coloured Melway's map. It looks like that.

HIS HONOUR: Yes, I've got that.

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MR DONAGHUE: And if you look at that map in reference D4 - - -

HIS HONOUR: The land is the land that's hatched, is it?

20 MR DONAGHUE: Yes, that's right. The trade park land that's hatched.

HIS HONOUR: Well, then, how - what my first query is, how does that relate to the - what looks to me - and we would describe in New South Wales terms as a deposited plan which is KTM1 to Mr McLaughlin's affidavit or statement and the

25 certificate of title which is KTM2 which, I guess, is more that the land that we're here concerned with but I don't - -

MR DONAGHUE: Yes. I understand that to be the case.

30 HIS HONOUR: Yes.

MR DONAGHUE: Well, the - as I look at KTM1 and the Melway's map, there doesn't appear to be any significant disconformity between them except perhaps for the addition at the bottom of the area marked in KTM1 of a roadway coming out and it's not disputed.

HIS HONOUR: Well, is that - I mean, is that - roughly speaking, the thing marked 1 on KTM1 seems to bear some similarity - - -

40 MR DONAGHUE: Yes.

HIS HONOUR: --- but not an identity to the rough cross-hatched area and you can even see that in an aerial photograph which comes from one of these commercial mapping ---

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MR DONAGHUE: Indeed.

HIS HONOUR: - - - Internet sites.

MR DONAGHUE: Does the tribunal also have this map? This is perhaps - - -

5 HIS HONOUR: Well, I don't.

MR DONAGHUE: - - - the most precise document.

HIS HONOUR: No, I don't - we don't have that, but just - - -

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MR DONAGHUE: I'll hand up my copy of that.

HIS HONOUR: --- going back to KTM1. At KTM1 there is a sort of corridor, if you like, from the southernmost corner of the land going to Western Avenue and ---

15 and - -

MR DONAGHUE: Yes.

HIS HONOUR: --- maybe it's a corridor, maybe it's not, going to the north of the northernmost point. Now, are either of those the easement we're talking about?

MR DONAGHUE: No. No. If the tribunal looks at the last map I've just handed up, that same corridor at the southern edge of the McLaughlin's property is marked - - -

25

HIS HONOUR: Yes.

MR DONAGHUE: --- and you can see running along the bottom of the area marked as the Cleanaway land a dotted purple line with airport boundary marked.

30

HIS HONOUR: Yes.

MR DONAGHUE: And there is also red writing along the same line, Western Avenue easement. The easement we are talking about runs - - -

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HIS HONOUR: Oh, right.

MR DONAGHUE: --- along what is called the Western Avenue extension and it runs ---

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HIS HONOUR: So is Western Avenue not a fully made public road but, in fact, the easement at this point?

MR DONAGHUE: The land is - perhaps the best way to take the tribunal to this is
 to take you to an exhibit to Mr Ablett's affidavit which was probably on behalf of the
 Minister on 11 February and Mr Ablett exhibits a decision of VCAT - - -

HIS HONOUR: Yes.

MR DONAGHUE: --- and the VCAT decision describes in detail the matters that the tribunal is now asking about.

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HIS HONOUR: Right.

MR DONAGHUE: So DA2 at paragraph 12 on page 12 of 19 under the heading, Road Access.

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HIS HONOUR: Yes.

MR DONAGHUE: So you can see at paragraph 12 there's a discussion of the -version 16 is the version - the then version of the development plan that VCAT were considering:

Irregularly shaped land has been subdivided. Access to it is unusual. Although the land is privately owned access is via an extension at the western end of Western Avenue. The western terminus of Western Avenue as a public road is at the intersection of Victoria Street.

Just pausing there, you can see Victoria Street on that large map at the - - -

HIS HONOUR: Yes.

25

MR DONAGHUE: - - - right-hand corner.

HIS HONOUR: Yes.

30 MR DONAGHUE: So from there -some distance for the east of the land under consideration:

Western Avenue at its eastern end commences with a T intersection at Mickleham Road -

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now, the tribunal can see that on the Melway map - - -

HIS HONOUR: Yes.

40 MR DONAGHUE:

--- a short distance north of the Tullamarine Freeway. From there it follows a curving path generally to the west through the intersection with Wright Street to terminate at Victoria Street. At or about Victoria Street the path further to the west is blocked by a gate and sign indicating that it is private property

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beyond that point.

It's Commonwealth land beyond that point, however, the constructed roadway continues beyond the gate to connect the McLaughlin's land and the McLaughlin's land constitutes an easement over the continuation of the road. Now, in the paragraphs that follow they describe the condition of Western Avenue, so it's a wide well paragraph 13:

5 well - paragraph 13:

It's a wide well constructed road from Mickleham Road to Wright Street. It deteriorates between Wright Street and Victoria Street.

10 And then in paragraph 15:

Beyond the gate the existing carriageway can be seen to be in a notably worse condition than the Wright Street to Victoria Street section. The surfaces are very poorly maintained and in quite poor, uneven and rough condition.

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HIS HONOUR: Yes. I'm afraid we can't see - I mean, not all these streets that you're describing are identifiable on the map you've given us. Victoria Street or some - well, Victoria Street is.

20 MR DONAGHUE: Sorry. You need to move between the Melway and the other map, so if the tribunal looks at the Melway map at the right-hand edge of that map going - - -

HIS HONOUR: Well, I think it would be very convenient if, while we're not looking at this decision you read it, but not at a hundred miles an hour.

MR DONAGHUE: Yes.

HIS HONOUR: Read it slowly so we can follow it on these two - - -

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25

MR DONAGHUE: All right.

HIS HONOUR: - - - maps.

35 MR DONAGHUE: If it please the tribunal.

MR WILSON: If it please the tribunal, I have a map which may be helpful. It's the actual surveyor's thing of the easement. You can see Victoria Street at the end.

40 HIS HONOUR: Have you seen this, Mr Donaghue?

MR DONAGHUE: I haven't, no. All right. I'm content to accept that.

HIS HONOUR: Yes, all right. Well, it will be convenient for us to have that.

45

MR DONAGHUE: I think it will be easier to follow what I'm saying now by reference to the two maps.

HIS HONOUR: You don't have a second copy of this colour map, do you?

MR DONAGHUE: I will hand it up.

5 HIS HONOUR: Well, I don't want to deprive you of one.

MR DONAGHUE: I think I have a photocopy of it in my own materials.

HIS HONOUR: All right. And we will get a photocopy made of this one that has just been handed.

MR DONAGHUE: I have a copy I can work off, so I'm content.

HIS HONOUR: Okay.

MR DONAGHUE: Now - so if I could take the tribunal back perhaps more slowly to - - -

HIS HONOUR: Yes.

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MR DONAGHUE: --- where I was in exhibit DA2 of page 12.

HIS HONOUR: Yes.

- 25 MR DONAGHUE: In paragraph 12. So the land, being the crosshatch land, is privately owned but access to it is unusual. Access is via the extension of the western end of Western Avenue. The western terminus of Western Avenue as a public road is at the intersection with Victoria Street. So perhaps if the tribunal looks for now at the Melway map.
- 30

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HIS HONOUR: Yes.

MR DONAGHUE: You can see in column F, I think, six boxes down, the intersection between Victoria Street going up the right-hand side of the clean-away area and a brown road, which is the Western Avenue road. So at that intersection is - - -

HIS HONOUR: Well, except I haven't got a colour version of this. I've just got black and white, I'm afraid.

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MR DONAGHUE: Well, can the tribunal see the - - -

HIS HONOUR: Well, I can see Victoria Street.

45 MR DONAGHUE: Yes. And the Western Avenue?

HIS HONOUR: Yes. Well - - -

MR DONAGHUE: The Western Avenue - - -

HIS HONOUR: I know where Western Avenue is, because I've got this because - from the coloured larger map you've given me.

5

MR DONAGHUE: Yes. Western Avenue - - -

HIS HONOUR: I think - I mean, can we just - maybe you can shortcut all this. On this colour map appear the words "Western Avenue easement."

10

MR DONAGHUE: Yes.

HIS HONOUR: And they are bounded by a purple dotted line and a blue line. That seems consistent with what I think we've now been given, which is a plan of the

15 easement itself. And at the moment I would proceed on the basis that the airport land is everything in the - assuming this aerial photograph is orientated north/south - - -

MR DONAGHUE: Yes, which it is.

20 HIS HONOUR: --- it's everything in the southern part of the - or southern and, I suppose, western part of the aerial photograph up to the dotted purple line.

MR DONAGHUE: That's correct.

25 HIS HONOUR: So that means that the Western Avenue easement is on the Commonwealth land, although it happens to run along its boundary.

MR DONAGHUE: Precisely.

30 HIS HONOUR: Now, the only thing I've not been clear of is whether the easement goes the whole way to Victoria Street and it seems that it does from this document that's just been handed to us.

MR DONAGHUE: Indeed, and from the tribunal.

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HIS HONOUR: And from that it means that the blue line I was referring to is then only a rough approximation of the easement, because the easement doesn't fan out at its eastern end as this would suggest.

40 MR DONAGHUE: No. It follows the road.

HIS HONOUR: So you just continue on the blue line, if you like, at the same distance from the dotted line until you get to Victoria Street.

45 MR DONAGHUE: Well, I have, in fact, understood that blue line to be the freeway reserve area.

HIS HONOUR: Okay.

MR DONAGHUE: That blue line is marking the freeway reserve, not the easement.

5 HIS HONOUR: Yes. It's what's below the blue line that's relevant, not what's above it.

MR DONAGHUE: Well, in fact, it's what's below the purple line that's relevant.

10 HIS HONOUR: Yes.

MR DONAGHUE: The airport boundary - - -

HIS HONOUR: Yes.

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MR DONAGHUE: But I should make clear at the outset that we accept that Mr McLaughlin's land proper is precisely adjacent to the airport.

HIS HONOUR: Yes.

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MR DONAGHUE: And we accept that his easement access to that land runs along - runs over Commonwealth land. Neither of those things is disputed.

HIS HONOUR: Oddly enough, this rather suggests that other parts of the
McLaughlin land proper to which they have the fee simple, I suppose, is also part of the airport land, because the airport boundary is drawn to the east of the line on this plan showing the McLaughlin land.

MR DONAGHUE: Yes.

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HIS HONOUR: But, I mean, this is not - this may be a rough approximation.

MR DONAGHUE: This map was produced, as I understand it, by APAM and I'm not able to help the tribunal with that. I don't understand the McLaughlins to claim - - -

35 claim - -

HIS HONOUR: Maybe the airport boundary purple dotted line should be - when it covers the western side of the McLaughlin land it should be slightly further to the west.

40

MR DONAGHUE: On the line. I think that's the position.

HIS HONOUR: Right. Now, I've seen somewhere about some northern access.

45 MR DONAGHUE: Yes.

HIS HONOUR: What's that?

MR DONAGHUE: That is - about the - on the colour map, the large colour map, you go up from the southerly access point where the Western Avenue meets.

HIS HONOUR: Yes.

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MR DONAGHUE: A small distance, a few centimetres. You can see Quarry Road marked or Quarry Road gate.

HIS HONOUR: Quarry entrance road gate.

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MR DONAGHUE: Yes. And there's a mark in red writing "Quarry Road." There is a dispute between McLaughlins and others about whether they also have an easement right of access to their property along Quarry Road. That dispute is the subject of ongoing litigation in the Supreme Court. The litigation was

15 commenced - - -

HIS HONOUR: But that would also require them to have an easement right of carriageway or some other right of way over Commonwealth land - - -

20 MR DONAGHUE: Indeed.

HIS HONOUR: --- subject to the lease to the airport operator.

MR DONAGHUE: Yes. If they have an easement then it will prevail over the lease.

HIS HONOUR: So there's no access up at the northern end. Presumably the land around the northern and eastern side of the land is all private land, not Commonwealth land.

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MR DONAGHUE: That's correct, as I understand it.

HIS HONOUR: Right.

35 MR DONAGHUE: Melbourne Water, I think, owns some of it. But the only access point at present is along the Western Avenue extension.

HIS HONOUR: Is the Western Avenue easement. And frankly, for today's purposes, whether or not they had a Quarry Road easement would really just leave them in the same position.

MR DONAGHUE: It doesn't seem to improve their position, as I understand it.

HIS HONOUR: Yes. It doesn't improve it, nor negate it.

45

40

MR DONAGHUE: No, indeed. So from our perspective the tribunal should proceed to examine the jurisdictional question on the footing that the McLaughlins

own land next to the airport site and that their access to that land is obtained via an existing easement over the airport site to the property.

HIS HONOUR: Yes.

MR DONAGHUE: And the question is, do those facts, those two facts, mean that they are persons whose interests are affected by the decision of the Minister to approve the master plan.

10 HIS HONOUR: Right.

MR DONAGHUE: Now, can I - I seek to invite the tribunal to analyse that question in two ways.

15 HIS HONOUR: I'm just - sorry to interrupt you again - there is one further matter that I - I mean, it may not matter if you make a relevant concession, and I suspect from the way you're dealing with the matter you probably will - that the easement is a full right of carriageway which would effectively - could be effectively turned into access of the same kind as there would be if Reserve Road was a public road.

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MR DONAGHUE: I don't think I can make that concession in quite those terms. Can I ask the tribunal to - - -

HIS HONOUR: Well, the question, I suppose, is whether it would support full commercial activity on the site, including vehicles driving to be parked in a parking area, if that was the use of the site.

MR DONAGHUE: Well, there has been litigation about that question, as I understand it, between the McLaughlins and APAM about what kind of right they

- 30 would have to improve the access road. And, indeed, there have been before the McLaughlins - I will develop this a little later - but before the McLaughlins are allowed - are able to use - to develop their land at all there would need to be a development plan approved in relation to it and planning permits issued. And as a condition of - there is currently no development plan and the VCAT decision that I
- 35 just took the tribunal to was the latest decision in which VCAT refused to approve a development plan. The16th version, I think, of the development plan.

Part of the dispute there was that the McLaughlins had, at version 15 of the development plan, agreed that they would undertake certain upgrade works along

- 40 that extension at their cost; that they would improve the paving and gutters and footpaths and matters of that kind. There was then a disagreement about that, such that council, having been prepared to consent to the development plan when that undertaking had been made, were no longer prepared to consent to it when the undertaking was withdrawn and VCAT then decided not to approve the development
- 45 plan. So there's a history there about how that road can be upgraded and who has to pay for it. My client - -

HIS HONOUR: Well, that might make - I mean, can you give us a copy - a full copy of the easement?

MR WILSON: May it please, your Honour, in KTM10 - I'm hoping that in your copy of KTM10 there is the terms of the easement and I will wait for my turn to reply to some of the things that have been said.

MR DONAGHUE: The detail of what I have just said to the tribunal is taken from the VCAT decision at DA2.

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HIS HONOUR: So KTM10 is the easement. Is that agreed, Mr Donaghue?

MR DONAGHUE: I think the short answer is yes. This affidavit has not been sworn. Why it hasn't been sworn is not clear.

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HIS HONOUR: Yes.

MR DONAGHUE: It should be sworn, but - - -

20 HIS HONOUR: Well, I don't think we're going to be fussed about that.

MR DONAGHUE: No, but - well, my only source of knowledge about this is what the McLaughlin claims about it, but I have no reason to believe that that's not what it purports to be.

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HIS HONOUR: Yes. So it's a full right of carriageway of a conventional kind, and it doesn't contain any specific provisions relating to maintenance of the carriageway, from which, if my memory of the law is correct, the law would imply that it's the obligation of the owner of the dominant tenement, i.e. Mr McLaughlin, to maintain

30 the right of carriageway, and he would have an implied right to do whatever is necessary to achieve that purpose.

MR DONAGHUE: I agree with that, with respect, and if I could ask - Mr McLaughlin was directed by the Deputy President at a directions hearing a few

35 weeks ago to file a letter that he'd referred to, and that was filed under a letter from the McLaughlins of 17 April.

HIS HONOUR: Yes.

40 MR DONAGHUE: It's a letter from the Commonwealth Department of Infrastructure and Transport, dated 12 March. Does the tribunal have a copy of that?

HIS HONOUR: Yes.

45 MR DONAGHUE: That letter reflects the terms of the concession, if you like that I can make as their rights, and it's consistent with what the tribunal just put to me.

HIS HONOUR: Right.

MR DONAGHUE: If you look at the bottom of page 1 of the letter:

- 5 Under the common law in relation to easements, neither Aiken or the Commonwealth owes any obligation to the owner of the dominant tenement, in this case you, to build or maintain a road to allow use of the easement, nor at common law are obliged to build or maintain a road - - -
- 10 HIS HONOUR: Yes. Well, that seemed more or less what I was just saying.

MR DONAGHUE: Indeed. So I - that's my client's position in relation to their rights.

15 HIS HONOUR: Yes.

MR DONAGHUE: And we - I should make clear that because those are common law rights that attach to the easement, they are property rights. They are existing property rights the McLaughlins have, and unless there is a clear legislative grant of

- 20 power to interfere with them, and in the Commonwealth context that would have to be subject to constitutional considerations, they prevail over planning considerations or other steps that might be taken under this Act. So while we accept that they have the property right, we don't accept it immediately follows from the property right that that gives you an interest in the decision that, by definition, is subject to the
- 25 property right. If the property right can't be impacted upon in any way by a ministerial or administrative decision, then, in my submission, it can't -

HIS HONOUR: Well, that sounds to me like a summary dismissal application, not like a jurisdiction argument, though, Mr Donaghue. I mean, could I just inquire

- 30 whether the parties have considered what Mr Donaghue seems to be asking for is some endorsement of a recognition of his rights on this master plan. Has anybody thought of whether that might make life easy for everyone, if somebody wrote that all of this, subject to such rights as they've got, pursuant to their right of carriageway on the master plan, and we could all go home.
- 35

MR DONAGHUE: From the perspective of my client, he had two options and two options only. He didn't prepare the master plan; he didn't address it's - -

HIS HONOUR: I'm not sure that I agree with that. I mean, the way this - we're
living in a real world here, Mr Donaghue. What he would have said is, "Look, I'm not very impressed by this plan, but if you make the following changes I might be," and if APAM refused to make any changes, then it would suffer the consequences, but, you know - - -

45 MR DONAGHUE: Well, if the Minister - - -

HIS HONOUR: --- the likely result would be that some accommodation might be reached. So in the real world, this is a - what it doesn't give the Minister, and doesn't give to the extent to which the tribunal has jurisdiction, is a full, so to speak, merits review.

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MR DONAGHUE: Precisely.

HIS HONOUR: We can't substitute, nor could the Minister substitute his plan or an amendment to the plan.

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MR DONAGHUE: Yes, or a different page to - - -

HIS HONOUR: The most he can do is say you've got it wrong. Go back and have another go.

15

MR DONAGHUE: And it may well be that the Minister couldn't properly have taken the view that APAM had got it wrong - - -

HIS HONOUR: Yes.

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MR DONAGHUE: --- given the breadth of this document and the many topics it deals with, because of an absence of reference to a property right.

HIS HONOUR: Yes. Well, that's - but, I mean, that - we're now getting to a point
which is a bit of a cross over between the jurisdictional issue and the merits issue.
But anyhow, we're going to come to that.

MR DONAGHUE: That is so. But the primary basis upon which - I said I was going to put my submissions in two ways, and the primary basis upon which I am going to put them doesn't require the tribunal to worry about any of this material, and the reason for that is that we say, as a matter of statutory construction of the Airports Act, the merits review that is contemplated by that Act is merits review of a

refusal to approve the plan, and that when the Minister decide to approve the plan, that, to use Dowsett Js words in the Brisbane Airports case, is the end of the matter.

35 Now, obviously I need to develop that submission, but it is, at the end of the day, a submission based on statutory construction and supported, we submit, by what Dowsett J said. It is contrary to the decision of Deputy President Forgie in the Queensland Investment Corporation case, and we submit that the learned Deputy President, in that decision, didn't properly construe the relevant part of the Airport

40 Act, and didn't give sufficient weight to Dowsett Js decision in Brisbane Airports.

So that is the primary way that we put it, and that, we submit, is a very clean jurisdictional point. If the tribunal accepted that point, then it would clearly be a matter not running into the merits.

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HIS HONOUR: Yes.

MR DONAGHUE: The alternative way we put the case does require reference to the facts that I've just gone to with the tribunal, and as we understand it, that the case there essentially is that while Mr McLaughlin has certain rights, including the easement right, that those rights are not affected by anything in this master plan, and

- 5 while it might be that he is concerned that they would be affected by some future plans, or some other plans that might come about at some point in the future, what's needed is an affectation of interest by this decision. That is, the decision to approve this master plan, and that, we submit, is what's absent. But to make that good, I'll have to take the tribunal to the master plan.
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Can I start, though, with the primary submission. There are, as the tribunal knows, many authorities about the meaning of the phrase used, amongst other places in, and relevant here in section 27 of the AAT Act, "a person whose interests are affected by the review." And I don't propose to take the tribunal through all of those cases. We have discussed them in our written outline of 11 February, which I hope the tribunal has.

HIS HONOUR: Yes.

- 20 MR DONAGHUE: They are reviewed in some detail by Dowsett J in Brisbane Airports, which I will come to shortly, and by Deputy President Forgie in Queensland Investment Corporations. What those authorities say, in substance, in my submission, is that the question is not a question of general or standing sufficient interest or special interest or something of that kind. It's does the person, having
- 25 regard to the scope, subject matter, and purpose of the particular act, does it contemplate that persons of the kind who are seeking to challenge a decision may do so. So the question, relevantly, we submit, is what measure of review does that Airport Act contemplate, having regard to its subject matter scope and purpose.
- 30 Now, if I could just take the tribunal to one authority to support that. We've provided the tribunal with a folder of authorities, although I wasn't sure if it had gone astray, so I think we have another - -
- HIS HONOUR: Well, we've got I've got a folder of authorities which have come
 from you, and a folder of legislation that's come from Corrs, which I assume is the airport operator.

MR DONAGHUE: Yes, they're my instructing solicitors, your Honour.

40 HIS HONOUR: Yes.

MR DONAGHUE: They were handed up in the course of argument about a summons that was the other day.

45 HIS HONOUR: Well, however they got to us, they're convenient, if I may say so.

MR DONAGHUE: Yes, well, I'm happy to hear that, your Honour.

HIS HONOUR: Can we - but can we proceed on the basis without looking further, that the Act, as it appears in this volume we've got is the Act as it concerns us.

MR DONAGHUE: Yes, you can.

HIS HONOUR: There haven't been any amendments or - - -

MR DONAGHUE: Not as far as I know.

10 HIS HONOUR: Yes.

MR DONAGHUE: My instructor, who is responsible for preparing that folder says that that's the case.

15 HIS HONOUR: Well, if there is any doubt, I'd like you to check it.

MR DONAGHUE: Yes.

HIS HONOUR: Because we will proceed on the basis that we don't need to go anywhere for the terms of the relevant legislation outside this volume.

MR DONAGHUE: As your Honour pleases.

MR WILSON: Your Honour - - -

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HIS HONOUR: Yes, Mr Wilson.

MR WILSON: --- we haven't received a copy of that clause.

30 HIS HONOUR: Okay. Right.

MR WILSON: It would be good if we could have one.

HIS HONOUR: Well, I think we'll ask them to arrange to let you have that. But I am sure you are well familiar with the legislation.

MR WILSON: Yes.

HIS HONOUR: The only thing you want to do is to check that what we've got is 40 right.

MR WILSON: Yes.

MR DONAGHUE: In the folder that we provided, and I have another copy if the tribunal needs it – or you've got copies each. Behind tab 3 there's a copy of the decision of the High Court in Allan v Transurban. HIS HONOUR: Yes.

MR DONAGHUE: And if I could just take the tribunal to page 174 of that decision, this is in the joint judgment of Gleeson CJ and Gaudron, Gummow, Hayne and

5 Callinan JJ. The relevant part is paragraph 15 to 17. In the third sentence of paragraph 15, their Honours note that:

It's necessary to ask the question posed in respect of section 119 of the authority.

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I don't think I need to take the tribunal back to that. It's set out at paragraph 8.

By reference to the subject, scope and purpose of that statute, rather than by the application of concepts derived from decisions under the general law, respecting what has come to be known as standing.

Then skipping down to the middle of paragraph 16:

A particular statute may establish a regime which specifically provides for its own measure of judicial review upon the application of persons meeting criteria specified in that statute. The present case involves such a statute. The starting point, as indicated by several authorities in the Full Court of the Federal Court, is construction of the authority act with regard to its subject, scope and purpose.

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So there, their Honours are, we submit, approving the decisions of the Full Court in Alphapharm, Edwards v ASIC and Byron Environment Centre, all cited in footnote 34. And in paragraph 17 their Honours acknowledge that:

30 What serves to identify a person as one affected by a reviewable decision will vary, having regard to the nature of the reviewable decision itself.

This is a case where – and I will need to come back to it later, but where it was found, as we submit it should be found in this case, that review was available –
merits review was available in relation to a refusal to issue a certificate which gave a tax concession, but was not available in reverse, when the decision was granted. And Alphapharm and Edwards were likewise decisions of the same kind. So we submit that there isn't anything unfamiliar about the idea that a legislative provision conferring merits review rights on this or other tribunals might confer it in one

40 direction but not in the other, and that, we submit, is how this Act should be understood.

Now, if I could ask the tribunal to go to the Airports Act at part 5. This, starting on my print, which I hope is the same as the court's print, at page 66, which is division 3 of part 5, headed Airport master plans. Now, before coming to the detail of that, this part, part 5, deals with the regulation of the development and work at an airport at three different levels. The top level, the highest level of abstraction is the master

plan level, which is dealt with in division 3, and for reasons I will develop shortly, we say that at that level the focus is upon a long-term strategic vision. This is a 20-year plan for where the airport might go. It deals with a wide range of topics – future runway development, future terminals, flight plans, noise pollution or noise

- 5 interference with areas surrounding the airport, environmental protection, surface access surface access being one of a whole range of topics dealt with at this high strategic level in the master plan.
- Coming down from that top level, in division 4 of part 5, which starts at section 88, there is a regime dealing with major development plans, defined in section 89, and the regime that is put in place there in relation to master development plans bears many similarities to the regime I'm about to take the tribunal through in relation to master plans, in that there has to be a proposal, there has to be public consultation in relation to that proposal, and the proposal has to be submitted to the Minister for
- 15 acceptance or rejection in the same way as the master plan, that decision being contemplated at section 94, that's the decision of the Minister, and there is a merits review right to this tribunal in relation to that decision.
- So these are major projects that occur at the airport, and it's not the master plan that actually causes any work to be done at the airport. It contemplates it, and work – for reasons I will develop – has to be assessed for consistency with the master plan, but even if a master plan contemplates that there will be a new runway, you don't actually get the new runway until the major development plan in relation to that runway is prepared, it goes through the consultation process, and is approved by the
- 25 Minister and were a review application to be brought, the decision is affirmed in this tribunal. So there is a level that is much more specific than the very high strategic level at which persons who stand to be affected by particular developments contemplated by a master plan, have a right to have their say about those particular developments, including to seek merits review of those particular developments, and
- 30 all of that is contemplated in division 4.

Division 5 is a further level down again, and it deals with – it starts at section 97 of the Act, building control, and it deals with building activities of a kind that don't reach the major development plan level and the definition of building activities is in section 98 and it's quite wide and it includes - - -

HIS HONOUR: Well, you might have to have a development approval for a project which in the end leads you to applying for building consent for the particular building.

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MR DONAGHUE: Yes, you may need both.

HIS HONOUR: Much the same as town planning generally schemes around Australia, that part of it, I think.

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MR DONAGHUE: Yes, quite how the regimes intersect isn't, at least to me, completely clear, and Dowsett J seemed to be – I took my reference to division 5

from his Honour's judgment, but certainly parts of the regime seem appropriate, even if there is a major plan. But certainly it's clear that if the work contemplated doesn't get to the threshold of a major development plan, nevertheless there is a detailed approval regime that has to be satisfied in relation to it, and that is all dealt with in part 5, which I will need to come back to right at the end of my submissions.

So it's not the case that if the applicants can't establish an interest in the top level document, the high level strategic master plan, that that's the end for them and that their interests will never again be taken into account in any development of the

10 airport that might impact upon their rights. On the contrary, it's clear that as things actually happen that might implement a master plan, there is a regime in the Act that deals with that situation, and that, in my submission, is in an important consideration in analysing the kind of review that this Act should be understood to have contemplated in relation to the master plan.

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Now, in approaching the question of the construction of division 3, which is really the key question for the tribunal, I seek to break those sections into four categories.

MR WILSON: Excuse me, what page on the Act are we at?

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MR DONAGHUE: We're at page 66, division 3, section 70. So section 70 is the provision that requires there to be a final master plan for each airport, and sets out in subsection (2) the purposes of the master plan, being:

- 25 (a) to establish the strategic direction for the efficient and economic development at the airport over the planning period ...
 - (b) to provide for the development of additional uses at the airport site to indicate to the public the intended uses of the airport site -

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that is, it's to provide an indication but doesn't seem to go further -

and

35 (c) to reduce potential conflicts between the uses of the airport site, and to ensure that uses of the airport site are compatible to the areas surrounding the airport.

Now, that subsection expressly providing in 70(2)(a) that the document is about
strategic direction wasn't in the Act at the time that Dowsett J addressed these
questions in Brisbane Airports. That seems to have been the most material
amendment since then, but, in my submission, when I come to Brisbane Airports in a
short time, it supports the approach that his Honour took as to the purpose of these
documents. Now, the next relevant section - - -

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HIS HONOUR: Just pausing there, why wouldn't the applicant here have an interest to be satisfied that he uses of the airport site proposed by the present master plan are compatible with the area surrounding the airport, namely, his land.

- 5 MR DONAGHUE: Well, that's his case, and we submit that when one has regard to the whole suite of provisions I am about to take the tribunal to, it is a suite of provisions that contemplate that this plan will have implications and will have a role of a kind that is not consistent with every person who might be able to say, "Well, this is a vision for the airport that might affect my interests to be given standing." If
- that is right, we submit the same would follow for civil users for aviation users of 10 the airport, for the people who hold leases to operate shops within the airport, for the hotels that operate within the airport.

It is possible to multiply the persons who might conceivably be affected by this 15 strategic vision in an airport in a way that doesn't admit an adequate drawing of lines as to who those persons might be, and if the consequence is that all of those persons have a right to set aside - to ask this tribunal to set aside the entire master plan because of the way it deals, or, in this case, doesn't deal with a very specific issue, then that would impact adversely, we say, upon the operation of a very major and 20 important piece of public infrastructure in this country. So that's why - - -

HIS HONOUR: That clause wouldn't confer any right on any shop owner, unless that was a shop owner who owned land in the area surrounding the airport. It wouldn't cover shop owners within the airport itself.

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MR DONAGHUE: Well, 70(d) might not, but there are other provisions that would - if one took that kind of approach to this, that would confer equivalent - perhaps even better rights than 70(d), because that reference to "area surrounding the airport" comes back in a section that I will come to shortly and was really the key to Deputy

- President Forge's judgment in QIC. It was by reference o an equivalent kind of 30 provision in relation to areas surrounding the airport that the Deputy President found that a shopping centre 10 kilometres away - the owners of a shopping centre 10 kilometres away had rights to review the master plan.
- 35 HIS HONOUR: What if, for example, the master plan had said - I am not suggesting for a moment it does - that, "The freeway reserve currently there will not be sufficient to service shopping centre development we are tuck in the corner between runway 1 and runway 5," or something, "and accordingly it will have to extend northerly right to the boundary of the airport land." Would Mr McLaughlin 40 have an interest then?

MR DONAGHUE: Well, this is a master plan that contemplates in the future the acquisition of his property rights.

45 HIS HONOUR: Well, it doesn't say anything about that.

MR DONAGHUE: No.

HIS HONOUR: Just contemplates this need, which, I suppose, would, in turn, require a resumption or something of that sort, or acquisition.

MR DONAGHUE: In my submission not, and that's not as harsh as it seems as an answer, because this is a 20 year vision. Quite when that freeway extension is supposed to happen may not be clear from the master plan. It may be contemplated as a 15 year vision. It may be that in the five year iterations of the master plan that happen, it changes before any step is actually taken to implement that proposal. If a step is taken to implement that proposal, then it will require action under division 4

10 or division 5, where the McLaughlin's interests would be able to be targeted at the thing that stands to hurt them, rather than at the whole of the master plan.

So it is only at the point where something concrete might affect their interests, in my submission, that they get to the line, and that is because it possible, as a matter of
construing this regime, to say personal interests are affected by a decision in one context - say, for example, the approval of a major development plan, while the same person's interests aren't affected in the way needed to review the master plan.

The master plan is not about everybody else's interests in relation to the area. It is
primarily, as the tribunal can see from section 71(2) about the airport lessee
companies' intentions - their future intentions in relation to the development of the
site. So if the tribunal looks at 71(2), this is a list of the necessary content of the
master plan. It must specify the company's - that's APAM - development objectives
for the airport, the company's assessment of the future needs of civil aviation users at
the airport, public users of the airport, the services and facilities.

Paragraph (c) is particularly important in this case, the company's intention for land use and related development of the airport site, where uses and development embrace air site, land site, surface access and land planning and zoning. Now, this is really where the Mal aughling focus. They say "Wall, the plan doesn't deal with surface

30 where the McLaughlins focus. They say, "Well, the plan doesn't deal with surface access in relation to our land." But it doesn't have to do so. It has to deal with surface access to the airport, and not even that with the company's intentions in relation to that. So if the company - if APAM has no intentions in relation to the McLaughlins' access, there is no reason that he master plan should deal with it.

Then, paragraph (d), noise exposure, flight paths, plans in relation to management and noise intrusion, draft environment strategy, in paragraph (h), so you can see the breadth of matters that the airport lessee company is required to address when it prepared a master plan, the vast majority of which have nothing whatsoever to do

- 40 with the McLaughlins and in relation to which their interest is no better than any other member of the public, simply by reason of the fact that they live nearby. The point where living nearby might matter is when things happen to implement specific parts of the vision contemplated in section 71.
- 45 Now, in section 72, the tribunal can see that the master plan must relate to a period of 20 years. This period is called the "planning period." So it has to look forward quite a long way in terms of the intentions of the airport lessee company, but

notwithstanding that it has to look forward 20 years, the tribunal can see from section 77 that it actually remains in force only for five years. So plans have to be prepared on a rolling five year basis - - -

5 HIS HONOUR: What section is that?

MR DONAGHUE: 77(1). So it's a document looking forward a long way, but you never get to the end, because every five years you renew and say, "Well, is my vision - strategic vision for the airport still as it was five years ago," which is why I

10 say it may be that the master plan would contemplate that shopping centre development that would impact on the McLaughlins' land, without that ever happening.

HIS HONOUR: Can I just ask a couple of questions, bearing in mind the greater
degree of informality that occurs in this tribunal? I can understand that this land
might be a pretty valuable piece of land. I am sure it's got some value. What its
value is may be another matter. A landlocked piece of land without access is
severely potentially affected in its value. Knowing what banks and others are like,
and I don't imagine they are getting any easier in the current times, in lending money

- 20 to purchasers of land, a bank might be a bit troubled by the fact that this is a land whose value depends wholly on access to the land. It looks like there is an easement but there is this master plan for the airport that says nothing whatsoever about it, and so a bank might be a bit reluctant to lend money to someone who wanted to buy from Mr McLaughlin if he ever wanted to sell.
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All of that could be rectified in a trice. I suppose I shouldn't be addressing you, but addressing the - has there been any attempt at mediation of this? I just wonder what we are fighting about really.

30 MR DONAGHUE: I think - - -

HIS HONOUR: I can see Mr McLaughlin's concern, and I, for one, right at the moment, subject to being explained to me that I have completely missed the point, it occurs to me that it is not unreasonable, and you say that, of course, they have got their right. Well, why not say so somewhere and let's all go home.

MR DONAGHUE: Well, we did say that in the letter. We said in the letter we - there is a letter on letterhead from my client's department saying, you've got an easement, we accept that you've got it, we accept that you can improve it and maintain it consistently with your common law rights.

HIS HONOUR: But if it's in the plan it also binds the airport operator.

MR DONAGHUE: Well, it depends what is meant by the word, "bind." The difficulty in some ways - - -

HIS HONOUR: Well, I'm not using that in any technical sense.

MR DONAGHUE: This tribunal has before it a tiny slice of a fight that I understand has been going for 10 or 15 years.

HIS HONOUR: Yes.

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MR DONAGHUE: And it's been going in the Supreme Court - - -

HIS HONOUR: Well, there are just - - -

10 MR DONAGHUE: And it's being going in VCAT, it's been going - and it's not really a fight that particularly involves my client. It involves the local councils who are controlling the use of the land and Melbourne water and the airport operator and there are - and I think the Commonwealth is one of them, one of the players but the question about the value of the land, I understand where the tribunal is coming from and obviously they've bought the land presumably hoping to develop it in a way that

would make - take advantage of its - - -

HIS HONOUR: Or sell it to somebody who would develop it.

- 20 MR DONAGHUE: But what they bought and what they own is land that at the time as I understand it was zoned for extractive purposes. You can see there is a quarry next to it. There have been steps to have it rezoned. There are still attempts being made to obtain permission from people who have nothing from the council, to take the local planning steps that are needed to entitle them to do anything to do with
- 25 the land and those steps include, as I said before and you can see from the VCAT decision, dealing with access, dealing with the state of the road in. So that's a matter that has not been overlooked and that's been litigated in other places. What, we submit is happening here, is that a decision about the strategic vision for the whole airport is being used as a forum in which to continue a debate which is really a
- 30 planning debate happening in planning forum in VCAT and that's not what the master plan is about.

HIS HONOUR: But if the tribunal finds that there's jurisdiction here then that opens up potentially yet another one of these, you know, kind of battles in an overall war and what I am trying to do is see whether that might be capable of being avoided. Does the master plan actually say anything about - anything at all about this land?

40 MR DONAGHUE: Well, the relevant parts of - I have come to this out of order but - does the tribunal have the master plan?

HIS HONOUR: Yes, I believe I do.

MR DONAGHUE: It looks like that.

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HIS HONOUR: Yes, well, I've got a photocopy of a document.

MR DONAGHUE: Yes, there are - if you turn to page 13 - - -

HIS HONOUR: There is something on page 55, Deputy President McDonald is suggesting.

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MR DONAGHUE: Yes, there is a section on page 55 but that section doesn't say anything about the applicant's land.

HIS HONOUR: Right.

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MR DONAGHUE: There is a map immediately following page 13, figure 1.1, which is the 20 year vision of the airport.

HIS HONOUR: Following page 13 is it?

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MR DONAGHUE: Yes. I say that because there is no page number on the relevant page.

HIS HONOUR: Right, okay. Yes, right.

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MR DONAGHUE: So you if you find 13 and then go to the next page, that's figure 1.1.

HIS HONOUR: Yes.

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MR DONAGHUE: At the top, in the middle of that map, you can see a yellow dotted line.

HIS HONOUR: Well, mine's black and white.

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MR DONAGHUE: Okay, well a dotted line, right at the top, in the middle and it's got a point.

HIS HONOUR: I can't even see the dotted line - yes, I can now.

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MR DONAGHUE: And there is an area of - in fact we probably need to provide the tribunal with a colour copy of this I think or it's just not going to be - - -

HIS HONOUR: Well, we have one. We've got one.

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MR DONAGHUE: Yes, a second one.

HIS HONOUR: But if you've got a second one, it would be convenient if I could then take it away with me.

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MR DONAGHUE: The reason that I say a colour copy is needed, because there is an area inside the yellow dotted line but - - -

HIS HONOUR: What page, just remind me?

MR DONAGHUE: Just after page 13.

5 HIS HONOUR: Right, yes.

MR DONAGHUE: So there is a yellow dotted line and then there is the Tullamarine freeway running between the yellow dotted line and the blue area.

10 HIS HONOUR: Yes.

MR DONAGHUE: And just above the Tullamarine freeway, there is a very narrow gap which is all in white, so it's just blank. The master plan indicates that the 20 year vision of the airport has no plans in relation to this area of land. Nothing is

- 15 marked as intended, either well, in any way in relation to the land. The only place where the master plan even arguably deals more specifically with the point is in figure 7.1 which immediately follows page 46, which is headed, land for zoning. Does the tribunal have that?
- 20 HIS HONOUR: Sorry, 46?

MR DONAGHUE: Yes, the page after page 46.

HIS HONOUR: Yes.

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MR DONAGHUE: And there you can see that there is various colours indicating the various zones in the airport and the colour extends beyond - right up to the boundary line and it's purple, marked in the key as road zone 1. So to the extent that the master plan says anything at all about this narrow passage of land over which the

- 30 easement runs, it either says nothing or it indicates that it's intended as a road zone which of course is what it is. It's got the Tullamarine airway running through it and it's got the Western Avenue. If Western Avenue were to be upgraded or improved so that it was a better road, it wouldn't be inconsistent with the indication in the master plan. Now, obviously that's - - -
- 35

HIS HONOUR: Well, I mean, it clearly seems to be shown as a kind of - an identifiable area on the one after 13 but I'm not sure - it just shows the Tullamarine freeway and - - -

40 MR DONAGHUE: Well, it runs - the reason I say it includes it - - -

HIS HONOUR: Do you say that - is the dominant tenement of the easement inside or outside that purple?

45 MR DONAGHUE: It must be inside it because the purple runs right up to the dotted line, including that little spike or arrow in the middle of it, which clearly isn't part of the Tullamarine freeway. So the fact that - - -

HIS HONOUR: I see, yes, yes. Well, isn't that a potential cause for concern. I mean, if it's a freeway, the freeway may be designed so there's no exit.

MR DONAGHUE: Well, it's marked as a road zone. It's not marked that it's
freeway. The freeway already runs through there. If the McLaughlin's - and the only suggested, intended use of this area of Commonwealth land over the easement runs is to make it a road, to improve access to their land, there is already a poor quality road there. They want there to be a better quality road there, were there to be a better quality road there, that could not be said to be inconsistent with anything

- 10 that's in this master plan, because to the extent that there's any intention as to the use of that land and in the main we say there isn't but as you can see from figure 1.1 it would be consistent with it being used as it is current used or developed as a better quality road.
- 15 HIS HONOUR: The last thing I want to do is create issues where issues don't exist but if you go back to the plan annexed to - after page 13 and you see the purple bit borders the McLaughlin's land does it not?

MR DONAGHUE: That's the aviation fuel area.

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HIS HONOUR: Yes, well, mightn't somebody want to say, no, we don't want aviation fuel there, right on the border with our land because we know that VCAT won't approve or the local council won't approve parking next to an aviation fuel storage area.

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MR DONAGHUE: That's there. That's been there for a considerable period of time as I understand it. So this isn't a plan to put in a new aviation fuel area. It's a recognition of something that's already there.

30 HIS HONOUR: Okay, fine. It still seems to me to be a matter to take into account on this question of jurisdiction which is what we're here dealing with.

MR DONAGHUE: But we're dealing with the question whether the Minister's decision to approve this master plan affects their interests. If there's - -

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HIS HONOUR: I don't think we are, we're dealing with - well, yes, certainly, we're dealing with whether they have an interest.

MR DONAGHUE: That is affected by the decision that they seek to challenge. They may well have interests of a different kind but to have standing they have to have an interest that is affected by this decision and if there is an existing aviation fuel dump there, the acknowledgement of its presence can't affect their interests. Their interests are affected by its presence not by the Minister acknowledging that it's there.

45

HIS HONOUR: Yes, all right.

MR DONAGHUE: And in terms of the comment that the tribunal made about mediation, all I can say is I understand that there has been mediation between the relevant parties in relation to the use of this land in other proceedings on numerous occasions as I understand it, and while I have no personal knowledge of that, I think others at the bar table do and - - -

HIS HONOUR: I'm just asking - would just suggest that the parties reconsider the question. I don't - although I have power to direct it - have an immediate intention of directing it, but I mean, if this is a small area of dispute that can be got rid of and the parties can be left to fight over the things that really matter then that strikes me

10 the parties can be left to fight over the things that really matter, then that strikes me as not an inconvenient way of dealing with it, but I won't say anything more than that at this stage.

MR DONAGHUE: It is hard to see, things having got to where they are, how – like this master plan is in force, as things currently stand. So it is difficult to see how this proceeding can remedy the problem, unless the tribunal were to set the whole master plan aside, and then the matter could be considered in the preparation of a new one, and that is really the step that we are here to resist. And indeed, we say the tribunal has - - -

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HIS HONOUR: I don't actually see such a great difficulty in saying this master plan should take account of Xs interests. It does not take account of Xs interests, therefore the master plan is set aside. The airport operator then produces exactly the same master plan with the interest taken into account, presents it and it gets approved

approved.

MR DONAGHUE: After it goes through a three month public consultation process and various other consultation processes.

30 HIS HONOUR: Yes.

THE D.PRESIDENT: But wouldn't this be just another variation of the final master plan under section 84?

- 35 MR DONAGHUE: Well, that might be an option. That might be something that could be sought to be done, but this tribunal cannot do it in this proceeding, because what is being reviewed is the Minister's decision to approve the master plan. That decision has to be the tribunal has to be satisfied that the correct or preferable decision was not to approve the master plan in the circumstances.
- 40

HIS HONOUR: Well, the argument that this would involve an enormous exercise of decision-making power by the tribunal, that the tribunal would shy away from, is not, I don't think at the moment, your best argument, Mr Donaghue.

45 MR DONAGHUE: No, I am not suggesting it is my best argument, but it is – the difficulty is, of course, looking at it in isolation. In my submission, if the McLaughlins have an interest in setting aside an existing master plan, then it is not

just the McLaughlins who have that interest. And what is important, in my submission, is that the tribunal look at this act – the scheme of this act as a whole and determine where it is – we are not saying that people like the McLaughlins never have an interest that needs to be considered in the process of development of the airport.

We are saying they don't have – the point that this act engages that interest is not this point. It is not the point of the top level document; it is a more level – it is at the point at which something actually happens that affects them. Here, they are worried that something is going to happen that will affect them, but nothing has happened that affects them, for the reasons I have just shown you. There is nothing in this document that says anyone is intending to interfere with their access rights to their property at all. There is just nothing there that could give rise to that apprehension,

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Well, if someone ever does try to interfere with their rights, challenge it then, but not at the point where all there is is an ungrounded fear and a suggestion that the master plan should have dealt with the topic even though, as I pointed out to the tribunal, in section 79, the master plan is only supposed to deal with the airport lessee company's

20 intentions. There is no reason it should deal with something that the airport lessee company has no intentions about, and yet it is being said that the master plan is defective because it does not include something it had no - - -

THE D.PRESIDENT: Well, is that right? I mean, what about on page 55 with the ground transport plan - - -

MR DONAGHUE: Yes.

and yet, they have the apprehension.

THE D.PRESIDENT: --- what the master plan says is that the airport:

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The Northern Airport will work in conjunction with the Victoria local governments to develop a ground transport plan.

MR DONAGHUE: Yes.

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THE D.PRESIDENT: Well, isn't that a direction to them to do so?

MR DONAGHUE:

40 *About promoting and facilitating viable non-car travel alternatives to the airport.*

That is what the ground transport plan is about.

45 THE D.PRESIDENT: Well, what is clause 52.36 of the Victorian Planning Provisions? And there is a date there: by mid 2009. MR DONAGHUE: Yes. Well, apparently this plan is being worked towards -I think it is expected in July or August, is my understanding of the position. But with respect, we make the same point: that there is no reason to believe, on the face of this document, that the ground transport plan will have anything whatsoever to do

- 5 with the McLaughlins. If it were to contemplate that a bus terminal be established on the part of the Commonwealth land where the easement exists, then that would be a concrete proposal that would, before it could be actioned, require approvals under division 4 or division 5, at which point, the McLaughlins could say, "Hold on a minute, I have an easement that takes precedence over your intended operation. You can't do this."
 - And if an attempt were being made to do it, that point can be litigated. But at this point, the master plan just contemplating that there will be a document that may well say nothing about them, it does not give the decision to have the ground transport plan just does not affect their interests.
 - HIS HONOUR: I don't really think that is the way the case is put against you. The way I see the case put against you, goes along following repose: this document presents the airport land as land which is leased to the airport operator and relates to
- 20 development of that land. It does not recognise that there is part of the land which is not leased to the airport operator in any sense which gives it power over it because there is not much left after the right of carriageway is exercised. I mean, if, for example, the bit in the middle called Air Traffic Services, was owned by a third party, for some reason, wouldn't that person have an interest in saying, "Just a
- 25 moment. This plan should say that that Air Traffic Services land is owned by a third party who has interest."

And I think all they are saying is, "All right. It might not be substantial. It might not be the fee simple, but it should say here, 'This bit of land is land which is subject to a third party interest."

MR DONAGHUE: But then two questions arise. First, why should it say that? And - - -

35 HIS HONOUR: Because this is projecting or speaking about, or setting out a plan for the future relating to the development of the land which the ordinary reader would think was all land over which the airport operator had control.

40 MR DONAGHUE: But it does not intend to develop all of it; it only intends to develop parts of it.

HIS HONOUR: No. But I mean, the first thing is it - I mean, the first proposition is this is the land.

45 MR DONAGHUE: Yes.

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HIS HONOUR: Right. Now we will talk about how we are going to develop it. Mr McLaughlin might be happy to concede that in the "now we will talk about how we are going to develop it," it does not affect him, although Mr Deputy President McDonald has pointed out at least one possible matter of concern there. What they

5 are concerned about is the first step: the so-to-speak presentation of this as all airport land, subject to ownership by the Commonwealth and a lease to the airport operator.

MR DONAGHUE: But it is that.

10 HIS HONOUR: In any event, that is what is concerning me, I think, and possibly the tribunal generally.

MR DONAGHUE: Well, I think all I can - - -

15 HIS HONOUR: I mean, if owners of land do not have an interest – owners of land on the airport side do not have an interest, then who does? Who does?

MR DONAGHUE: Well, the airport lessee company does.

- 20 HIS HONOUR: So well, why doesn't the Act just say, "Let's be honest about it. The only person who can seek review is the airport lessee," but it doesn't say that. It says anyone whose interest is affected.
- MR DONAGHUE: Well, it actually gets close, in my submissions, for reasons I have not come to yet, but it - - -

HIS HONOUR: I mean, I am interested because I am – it is an odd paragraph, I have to say, having read it in Dowsett Js judgment. I mean, he talks about a preferred view and - - -

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MR DONAGHUE: Yes.

HIS HONOUR: I mean, either he was deciding – construing the Act or he wasn't. I think the reality is he wasn't construing. I mean, he did not want to commit himself to construction of the Act.

MR DONAGHUE: Well, he said, someone who lives - - -

HIS HONOUR: But if he is right, it does exactly accord with what you are putting.

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MR DONAGHUE: Yes.

HIS HONOUR: I accept that.

45 MR DONAGHUE: Yes. Indeed. And for some reasons based on provision that I have not yet managed to come to, but that he did not need to go to the – take the final

step I need to take because he found that, at least in relation to noise issues from the aircraft - - -

HIS HONOUR: Well, 10 kilometres away - - -

MR DONAGHUE: - - - 10 kilometres away - - -

HIS HONOUR: It was, in fact, the Prime Minister, wasn't it?

10 MR DONAGHUE: It was. It was the Prime Minister who was both the plaintiff and who argued the case.

HIS HONOUR: And who subsequently introduced the Private Members Bill in the Parliament, which ultimately did not proceed, to give standing to members of the Commonwealth Parliament to raise matters on behalf of constituents in the tribunal.

MR DONAGHUE: But in that case, his interest in the noise from the airport 10 kilometres away was not enough. Here, of course, the McLaughlins have a better interest than Mr Rudd was able to advance in that matter. But that doesn't dispose of

- 20 the force of the construction analysis that Dowsett J went through, and then said, "Well, that's my preferred view, but I don't need to take the last step because Mr Rudd loses anyway," was essentially the way that we submit that judgment should be read. In terms of the question, is it just enough that the master plan doesn't refer to the McLaughlin's easement, in my submission the answer is found in section 71, 25 section 2, which deals with things that the master plan has to contain; that's the first
- 25 section 2, which deals with things that the master plan has to contain; that's the first answer.

And the second answer is that even if the master plan should have contained a reference to the easement, it wouldn't follow that the Minister's decision to approve it affected the McLaughlin's interests, because all that's happened is a master plan

- 30 it affected the McLaughlin's interests, because all that's happened is a master plan has been approved which doesn't have any consequences until further steps are taken. Now, I should move - I said I was going to break the Act into four categories. And I've taken the tribunal to the provisions dealing with the nature and purpose of the master plan, and Dowsett J had some observations about those provisions in
- 35 Brisbane Airports. If I could ask the tribunal, perhaps, to take out that case, it's behind tab 5; I'm going to flip between the case and the Act in the next part of my submissions.
- As the tribunal knows, this is a case on squarely on point because it was about noise 40 affects, and his Honour undertook what is, in my submission - he summarises the provisions of the Act I am taking the tribunal through now, and he also summarised the relevant case law about when a person's interests will be affected.

HIS HONOUR: We're going to Dowsett, are we?

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MR DONAGHUE: Yes, we are.

HIS HONOUR: Right. It's just that that's tab 4 in my - - -

MR DONAGHUE: It's tab 4 in the folder, yes.

5 HIS HONOUR: Yes.

MR DONAGHUE: So I won't take the tribunal through the section dealing with the Act, because I'm doing that myself. If I could commend to the tribunal the analysis of the cases from paragraph 18 through to 27 without reading that, but his Honour's application of all of these principles to the case starts at paragraph 28, where his Honour makes, perhaps, more eloquently than I've been making a point, that the master plan is a document that focuses on the interests of the general community, but that seems to refer to collective rather than individual interests, he says:

15 This is of some importance, given that the Airport Act assumes the continuing commercial operation by lessees of airports at existing locations. Inevitably, some, perhaps many people, will be affected by the existing operation. They, and others, may be affected favourably or otherwise by any change in the mode of operation. In some cases the affect of any change will be minor; in the 20 others the affects will be extreme. It's the nature of a major airport operation that it is likely to affect many people in varying degrees. A master plan is a business plan an existing airport it is not a town planning document.

And his Honour, then, refers to section 71, sub 2 of the relevant parts thereof in that
case. His Honour returns to that point in paragraph 37 on page 167. Again, dealing, really, with the purpose or policy of the master plan, where he says in the second sentence:

To allow a wide range of people to seek review of the Minister's approval of a master plan might well threaten the capacity of the lessee to carry on its business as it has undertaken to do; a business which is of considerable public importance.

And, then, his Honour makes the point that I have been making:

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A master plan does not authorise any developments in the absence of a major development plan or building approval, although it may close off some options during its currency, at least in the absence of an approved variation.

40 So he is saying there are other parts of the Act that actually impact:

It must also be kept in mind that the master plan will deal with a period of 20 years. Many relevant circumstances will change, so that proposals appearing in one master plan may be abandoned in its successor. Too wide an approach to identification of affected interests would lead to the administrative review process becoming a purely theoretical exercise involving debate about near future possibilities and how they should be accommodated. It would also have

the potential capacity to disrupt a major public function. It seems unlikely that Parliament intended such an outcome.

That's what we submit is happening here. This master plan, for the reasons that I
have just taken the tribunal to, doesn't say anything that would impact upon the McLaughlin's interests. They fear that there will be an impact, but that fear is theoretical. Until it becomes concrete they don't have standing to challenge the master plan. Now, I'm going to take - if I could return to the Act, I'll come back to Brisbane Airports in a moment. The second category of provisions, and this, in my submission, is a very important category of provisions.

HIS HONOUR: Just tell me, what is your first category?

MR DONAGHUE: My first category are provisions concerning the purpose - nature and purpose of the master plan, and I took the tribunal to sections 70, 71, 72 and 77.

HIS HONOUR: So it's 71, 72 and 77?

MR DONAGHUE: No, 70 - particularly subsection 2.

HIS HONOUR: Seventy, 71, 72 and 77?

MR DONAGHUE: That's correct.

25 HIS HONOUR: Right. Okay.

MR DONAGHUE: My second category, provisions dealing with notification and reasons for the approval. And there, I need to go to section 81. And the decision itself - the decision that's under review here is the decision contemplated by section 81 sub 2:

30 81 sub 2:

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The Minister must (a) approve the plan, or (b) refuse to approve the plan.

Subsection 3 deals matters to which the Minister must have regard, and that
 subsection I'll come back to. That's my fourth category, and that was really Deputy
 President Forgie's focus. But if I could ask the tribunal to look at subsection 6 and 7 of section 81:

40 As soon as practicable after deciding whether to approve the plan, the Minister 40 must notify the company -

That's APAM, the airport lessee company -

in writing of the decision. The notice obligation relates to the company and the company alone.

And in subsection 7:

If the Minister refuses to approve the plan, the Minister must notify the company in writing of the Minister's reasons for the refusal.

So notice goes to the company and the company alone, and, in the event of refusal,
reasons go to the company and the company alone. Now, it's only that the right of
review to this tribunal is provided for by section 242 of the Act, and subsection (3) of
that Act says that:

If the Minister makes a decision that is reviewable, and gets to the person or persons whose interests are affected by the decision written notice of the making of the decision, that notice is to include a statement to the affect that, subject to the AAT Act, application may be made to the tribunal.

So the Minister is only required to notify the company because of 81 sub 6. And it's only when there is a notification obligation that you have to take the additional step of saying there's an AAT merits review right. So those three provisions together you only have to tell the company, you only have to give reasons to the company if you refuse, and you only have to tell the company about merits review, in my submission, together, provide a very powerful indication in favour of the proposition

20 that what this Act is contemplating is review by the company and not by anyone else. And that was a consideration or an argument that Dowsett J gave great weight to. So if I could ask the tribunal to jump back to Brisbane Airports, at page 166, paragraph 33, where Dowsett J said:

Pursuant to section 81.6, the Minister must notify the lessee of any decision as to the master plan, and pursuant to 81.7, if he or she refuses to approve it, give reasons. In this respect the legislation appears to be similar to that considered in Allan and Alphapharm. The lessee is clearly a person whose interests are affected by such a decision within the meaning given by 242, sub (3), and so the Minister would have to give notice of the right to apply to review, pursuant to the AAT Act.

And, then, the critical sentence:

35 The absence of any requirement for notice to other persons, or for reasons in case of approval, might well suggest that where the decision is the approve, the matter is at an end, as was the case in Allan - see 178, paragraph 31.

MR DONAGHUE: Now, if we could follow that direction and turn to Allan, which is behind tab 3, paragraph 29 - start at 29 and go to 31. Just again, it's in the joint judgment of five members of the court. It's on page 178. So their Honours say, in paragraph 29:

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The first question which arises is whether, on its proper construction, section 119 provides for the reconsideration by the authority of decisions favourable to applicants for certificates, as well as refusals to issue certificates. This

question should be answered in the negative: that is, the review runs only one way.

- That answer means that Mr Allan, who was seeking reconsideration of the decision to issue certificates, not to refuse certificates, was in no position to rely on section 119, and then their Honours explain why: "Two points are significant here. They stem from 93(x)." And then they are quoted, and your Honours will see subsections (8) and (9) materially mirror sections 81(6) and 81(7). "Notice of refusal of an application must set out the reasons for refusal," but nothing about reasons in relation to grant and written notice to the applicant for the certificate.
- 10 to grant and written notice to the applicant for the certificate.

And then in paragraph 31, and this is the paragraph that Dowsett J expressly referred to:

- 15 Notice of a refusal but not of a grant must set out the reason for the decision. This suggests that where, as here, the decision is one to grant, the legislation treats that as the end of the matter, save for the potential operation of the variation and cancellation provisions.
- 20 Now, that legislative indication is why I said that this Act, in one sense, does go quite close to saying, in the same way as the Allan legislation, that the review contemplated is a review by the company. And that, indeed, is how the similar provisions were read in Allan and in Alphapharm and in Edwards. There's also a decision of Deputy President Hotop of this tribunal, though it's not reported, that
- 25 Deputy President Forgie refers to in QIC, where the learned Deputy President took the same approach, that is, that review was only available to the lessee company. The striking thing about Deputy President Forgie's decision in QIC is that she says nothing about those provisions.
- 30 That in discussing Brisbane Airport's that argument is summarised, but there's no indication in the Deputy President's reasons as to why it is that this indication which was so influential in Allan didn't lead to the conclusion that Dowsett J was minded to reach. So that is my second category, for notification of reasons provisions. My third category are the provisions relating to public submissions and publication of the
- decision, and there if I could take the tribunal to section 79? This gives the public an opportunity to have some input into the mastermind process.

HIS HONOUR: What are the sections there?

40 MR DONAGHUE: Seventy-nine.

HIS HONOUR: Seventy-nine, is it? Just 79?

MR DONAGHUE: Well, in this group, 79 and 86 are the only two I'm referring to.

HIS HONOUR: Okay.

MR DONAGHUE: Seventy-nine, subsection (1), provides that - I have skipped some provisions, but essentially how this scheme works is that APAM repairs the master plan for submission to the Minister, and if the Minister approves of it, it becomes the final master plan. Having prepared the document, APAM is required -

- 5 or the airport lessee company is required by 79(1) to give notice in a newspaper circulating generally in the state, indicating that the preliminary version will be available for inspection and purchase by members of the public during normal office hours for a period of 60 days.
- So the public have to be told by a newspaper that the plan is available out there for a 60-day period, specifying where it can be inspected or obtained, putting it up on the website, and, if the tribunal turns over to page 74 this is under subparagraph (a)(iv) in any case, inviting members of the public to give written comments about the preliminary version to the company within 60 business days after publication. So
- 15 there's a process by which the public are told the plan is out there and the public are invited to comment on it. And then, in subsection (2), members of the public who have given written comments about the preliminary version with the notice - sorry.
- If members of the public have given comments, that is, the plan that is eventually submitted to the Minister must be accompanied by copies of the comments, a certificate signed by the company listing the people who have made comments and summarising the comments, and demonstrating that the company has had due regard to those comments in preparing the draft plan. So there is a specific indication, given in the terms of section 79(2), as to how the company is required to respond to the
- 25 public consultation process. And that process is not confined to people who are adjacent to the airport or in the area surrounding the airport; it doesn't distinguish. It says the whole public can comment on the master plan under this provision. No differentiation drawn.
- 30 HIS HONOUR: And I saw somewhere, don't such submissions have to be handed on to the Minister?

MR DONAGHUE: That they do. 79(2)(b) - sorry, 79(2)(a) - must be accompanied by copies of those comments.

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HIS HONOUR: Yes.

MR DONAGHUE: So the Minister has to be given them, and the company has to summarise them and say that they have taken them into account. Now, both Dowsett J and Deputy President Forgie have accepted that the effect of this regime is that the

- Minister isn't required to take the comments into account. The company is required to take the comments into account, or to demonstrate that they have done so, but the Minister is not. So my main point about those provisions is that they give an opportunity to comment, but that they don't give priority or a special place to
- 45 particular persons who are in the area surrounding the airport.

HIS HONOUR: There was some section, you said, that Deputy President Forgie took particular notice of. Was that section 81(4)?

MR DONAGHUE: It was 81(3).

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HIS HONOUR: 81(3)?

MR DONAGHUE: Yes. And I will come to that in just a moment, if I could. But finishing my third category, the notice and notification provisions, this - 79 deals
with the public's involvement before the decision is made, and then section 86 deals with notification after the decision is made. And what it indicates is that - you will recall that once the decision is made, the Minister only has to give notice to the airport lessee company, not to anyone else. The way the public find out is pursuant to section 86, where, if the Minister has approved the master plan or a variation

15 thereof, the airport lessee company must cause to be published in the newspaper circulating generally in the state or territory a notice stating that the plan has been approved, that copies are available, places where copies are available, etcetera.

And compliance is - the bottom of subsection 2 - required within 50 business days
after the approval. So the company has to notify the public that this has happened and make it possible to obtain a copy, but they don't have to do that until 50 days after the decision has been made. And again, the notice is required in general terms. Now, the way that those provisions were approached by Dowsett J in Brisbane Airport is found at paragraph 34 through to paragraph 36, and his Honour notes - and we of course accept - that:

The presence of these provisions is one point of possible distinction between some of the decisions of the Federal Court, because in those regimes there was no provision for public notification.

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But his Honour notes, in the last three lines of page 166:

Section 79 requires notice to members of the public. It is most unlikely that it was intended that any member of the public - - -

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HIS HONOUR: Wait a minute. Oh, sorry, 166?

MR DONAGHUE: Sorry, I apologise.

40 HIS HONOUR: I'm looking at the wrong case. 166. The paragraphs - - -

MR DONAGHUE: One hundred and sixty-six, paragraph 34.

HIS HONOUR: --- you are taking us to are 34 to 36?

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MR DONAGHUE: Thirty-four to 36.

HIS HONOUR: Okay.

MR DONAGHUE: And I was just reading the last three lines on page 166.

5 It's most unlikely that it was intended that any member of the public might seek review of a decision to approve a master plan. Further, although the lessee must have due regard to public comment, that is part of the formulation of the draft master plan and not necessarily part of the Minister's decision-making process. As I have said, section 81 does not compel consideration of such 10 comments by the Minister.

The key to his Honour's reasoning on this point is paragraph 36, in the middle of page 167.

15 The difficulty inherent on relying on sections 79 and 86's justifying a wide approach to the question of entitlement to seek review is that those sections offer no guidance in that respect. The requirement is for notice to the general public, but it is most unlikely that Parliament intended that any member of the public could seek review. Nonetheless, it is difficult to see how these sections can be read so as to narrow the relevant range of affected interests, if it be consented that they are designed to facilitate the review process. The better view is that, while section 79 is intended to invite comment from the general public, section 86 is designed to inform the general public of the content of the approved plan. They are not relevant to the review process.

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So if the tribunal pleases, up to this point I have really made two affirmative points and one defensive point. The affirmative points are my first two categories, that the high-level strategic nature of the plan and the contents that it design doesn't suggest that it is directed to particular individuals.

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The notice provisions dealing with notice only to the company and with reasons only for refusal and the merits review also suggest that it is confined to the company. And the provisions in the scheme - they are my two positive points, and my defensive point is that the provisions that involve the public at large don't help you if you are

- 35 trying to create a wider category of persons whose interests are affected beyond the company, because they are too wide. They involve everyone with no differentiation, and you can't really read them down in a way that sensibly helps you say some persons are affected and others are not.
- 40 So up to that point, in my submission, the scheme of the Act is pointing toward the conclusion that only the company has review rights, or that the review right perhaps, to put it more accurately only engages where the Minister has refused to approve a plan. The final consideration is section 81(3), which was the provision that Deputy President Forgie relied most heavily upon. And this so to give a name
- 45 to this category, this is things the Minister is required to take into account, but the only provision that I am talking about is 81(3). And, in particular, Deputy President Forgie focused on 81(3)(b).

In deciding whether to approve the plan, the Minister must have regard to the following matters:

(b) the effect that carrying out the plan would be likely to have on the use of the land:

(*i*) within the airport site concerned; and

(*ii*) in areas surrounding the airport.

Now, that picks up the point the President asked me this morning when looking at the purposes of the plan, which also refers to areas surrounding the airport, and the -Deputy President Forgie was - concluded on the basis, really, of (3)(b)(ii), the reference to areas surrounding the airport, that the Minister should have considered

15 the effect of approving the master plan on the shopping centre 10 kilometres away, and failure to do so showed standing. My submissions about this are that one can't just pull out (b)(ii) and say, "This identifies a class of people who have standing," without explaining how (b)(ii) is any different from any of the other sub-paragraphs in subsection (3) that deal with the considerations that the Minister has to take into

20 account.

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So why, one could rhetorically ask, wouldn't (3)(a) - the persons referred to in (3)(a)have the same review rights? That is, persons who think the master plan is not meeting the present and future requirements of civil aviation users of the airport, or

25 other users of the airport. So, for example, as a regular business traveller, if I don't like the Qantas Club lounge, it is not meeting - taking adequate account - the failure to develop a new Qantas Club lounge is not meeting my future needs for the use of the airport. Does that give me standing? Now, that is an absurd example, but I am a civil aviation user of the airport and my interests are, under (3)(a), apparently

30 contemplated as something the Minister has to consider.

(3)(b)(i), uses of the land within the airport site concerned, this is why I said you can't just say, "The McLaughlin's are nearby." What about the hotel? What about the lessees who operate the restaurants or business facilities within the airport site? Are those all persons whose interests are supposed to be dealt with in detail - or dealt

- with expressly, rather, in the terms of this high-level 2-year plan? So our what we say is that it just doesn't provide a workable criteria for identifying some subset of persons, some subset of the public at large, who the Act contemplates should have review rights. And one is driven by the sections that I have already gone to,
- 40 subsections (6) and (7), just a few provisions later, to the conclusion that this is a regime designed to create merits review only of refusals and that the mandatory matters to be considered don't provide a sufficient reference point.
- Now, it seems that at a certain level, at least Deputy President Forgie might have 45 conceded as much, and if I could ask the tribunal to go to - behind tab 5, the Queensland Investment Corporation decision. There is a lot of background that I don't think I need to take - trouble the tribunal with, but the crux of the reasoning

appears from paragraph 111 onwards - from page 43. And without reading those paragraphs - I don't think I need to - but the tribunal will see the focus on section 81(3)(b), and then the conclusion is expressed in paragraph 118:

- 5 Having regard to the whole scheme established by the Act and regulations made under it, I have concluded that it is a scheme that does provide for its own measure of review. The measure it provides is delineated by those matters to which the Minister must have regard.
- 10 That is, her Honour says it is delineated by only the provisions in my fourth category and, in my submission, if the tribunal looks more generally at these reasons, you will not see, in particular, any answer to the point that arises from my second category, the noted provisions:
- 15 As the Minister must have regard to the manner in which the draft master plan may affect areas of land surrounding the airport, one of the delineating features is the use of the land.
- The other thing that is absent is any reference to the other paragraphs. The Deputy President says focus on (b), but why not focus on the other provisions? But having categorised the interest in that way, the Deputy President seems to have acknowledged that that test will be too wide, because she says:
- Therefore, those who have land whose use may be affected may come within the scope of review provided by the Act but only if they also pass a further test. That further test is whether they can show, if they were successful to some degree, that they would have an advantage that is over and above the satisfaction of righting a wrong and that is not generally shared by other land users in the area of the airport.
- 30

What the Deputy President seems to have done is to delineate the category by reference to mandatory relevant considerations, and then superimposed a sort of general law standing test to say, "You still have to show that you had a special interest." In my submission, that approach is not correct and for the reasons given by Depusett L there is a sufficient indication in the scheme as a whole that the review

35 Dowsett J, there is a sufficient indication in the scheme as a whole that the review was only intended to operate in the case of a refusal of the master plan.

If that be wrong, then on the basis of the approach in Allan and the other authorities, it can only be if the tribunal is able to construe the provisions I have just been going through as indicating some other class of person other than the public at large, who, on the face of these legislative provisions, was contemplated as having access because the question is not the general law standing question. Now, on the general law standing test, the fact that the applicants own the land would probably get them there, but that is not the question. The question is does this Act contemplate persons other than the lasses company having standing? THE D.PRESIDENT: Well, when you're looking at the purpose and scope of the Act, it would be a simple matter under section 242, which gives the right of appeal to the tribunal to exclude decisions of this sort under subsection (2), where a number of other decisions are expressly excluded. Why isn't this decision of the Minister

5 included in that section to make it abundantly plain as to where the Act was expected to extend?

MR DONAGHUE: Because if that happened, and the Minister refused to approve the plan that the airport lessee company had put forward, there would be no access to the tribunal.

MR WILSON: I'm sorry. Could you say that again? I just missed that.

MR DONAGHUE: If subsection 242(2) excluded decisions under section 81, then
that would be a total exclusion. But the regime appears to contemplate that if the
lessee company puts together the master plan, goes through the consultation process,
and gets knocked back, they can come to this tribunal and say, "My plan should have
been approved." And that is why they have to get reasons - why the Minister have to
give reasons if he refuses, but not otherwise, and that's why the Minister has to
notify the recipient of the refusal decision of review rights in the tribunal.

Now, I apologise to the tribunal for taking so long with all of that. That's what I said was my primary submission. We say as a matter of construction and on the reasoning in Brisbane Airports, your Honours should – or the tribunal should

- 25 conclude that, to use the language of Allen v Brisbane Airports, once the decision was made to approve, that was the end of the matter, and if that's correct, then it's not necessary to go any further. If the tribunal is against those submissions, then the question becomes well, what exactly – how exactly is it said that the Minister's decision to approve the master plan affects McLaughlin's interests.
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HIS HONOUR: Well, more particularly, isn't the question what changes would they be proposing relating to the master plan? Don't we need to know – well, the question for us is whether we have jurisdiction to hear this application. Doesn't that require us to know what the application is? The application appears to have been made by a latter dated 6 January 2008, and J'm not aware that there's have there

35 made by a letter dated 6 January 2008, and I'm not aware that there's – have there ever been any further particulars or points of claim - - -

MR DONAGHUE: No.

40 HIS HONOUR: --- or statement of facts, issues and contentions?

MR DONOGHUE: Not to my knowledge.

HIS HONOUR: No.

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MR DONAGHUE: There's that document; there's also a further document dated 2 March which was really a response to the Minister's submissions of 11 February.

HIS HONOUR: Yes. There's one of 6 January too but I haven't seen that.

MR DONAGHUE: 6 January?

5 HIS HONOUR: Yes – oh, that is the one I've been looking at.

MR DONAGHUE: That is the one the tribunal just mentioned.

HIS HONOUR: That's the one I've been looking at.

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MR DONAGHUE: So yes - - -

HIS HONOUR: Yes, so I've seen the other two.

15 MR DONAGHUE: Yes. So ----

HIS HONOUR: I've only seen 6 January here for the first time.

MR DONAGHUE: Have you seen the 2 March?

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HIS HONOUR: Yes.

MR DONAGHUE: Yes. As far as I'm aware, that's the extent of the case, but with respect, we don't accept that the question whether the applicant's interests are

25 affected by the decision turns upon what they want the master plan to say. They had an opportunity in the consultation process to say what they wanted the master plan to say.

HIS HONOUR: Well, I thought it would do on this part of your argument. So, for
example, an answer to – if the answer is, we think – before this plan is approved, it should contain an endorsement on each plan – each relevant plan recognising the easement of the McLaughlins. You might say then, I'm not sure whether this works or not, "Oh, but that's not something that the plan deals with. There's nothing anywhere that says the plan has to identify the land, and so it follows that there is no

35 jurisdiction to hear that application even if the McLaughlins would have standing if they wanted to say something else, if they wanted to say the provision for the fuel dump should be excluded." I mean, then you might have a good answer to that, "Well, that's already there," etcetera, etcetera.

40 MR DONAGHUE: Indeed.

HIS HONOUR: But on the question of jurisdiction and I mean, we talk about jurisdiction, but what we're really doing is dealing, are we not, with an application under section 42A(4) for dismissal, aren't we?

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MR DONAGHUE: I might need to take that on notice. It's - - -

HIS HONOUR: Well, it's – I mean, it is. The question is that the decision does not appear to be reviewable by the tribunal, so I mean it - I think that - and not a lot turns on the words of the section either.

- 5 MR DONAGHUE: No. It's a question whether the decision could be reviewable but at somebody else's instance in this case, so that's why I'm hesitating. I'm not sure whether it's – but the person who can apply, as specified in section 27(1) and, of course, we say, well, this - the McLaughlins are not a person of a kind specified by section 27(1), so they're not able to invoke the jurisdiction of the tribunal in relation 10
- to this category of decision. That's how I had - -

HIS HONOUR: Where are you dealing with there?

MR DONAGHUE: Well, I was looking at section 27(1) of the Act, and I'm just not 15 sure procedurally how the tribunal deals with a case where an application is made by a person who is not entitled to bring the application.

HIS HONOUR: Yes, that's enabling section.

20 MR DONAGHUE: Yes.

> HIS HONOUR: But the power – I mean, being a statutory tribunal, we don't have any inherent powers. We've got - - -

25 MR DONAGHUE: Indeed.

HIS HONOUR: --- what we can get from the Act. So ---

MR DONAGHUE: I think - - -

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HIS HONOUR: --- I'd like to know if - sooner or later, if you confine yourself to 42A(4), and if not, what other basis do you add.

MR DONAGHUE: Yes.

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HIS HONOUR: I mean, I'm not – I see what you mean. It says that the decision isn't reviewable but - - -

MR DONAGHUE: At the instance of.

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HIS HONOUR: --- query whether that gets read in or query whether there is some implied power arising out of 27(1). I'm sure this has been dealt with.

MR DONAGHUE: I'm sure it has too. If I could have lunchtime to look at the 45 question of – and it may well be that the provision that the tribunal has identified is the appropriate one, but I'd just like to have a - reflect on that, but in terms of - - -

HIS HONOUR: I suppose you could also say one without jurisdiction is – if there is no jurisdiction, then it's vexatious.

MR DONAGHUE: Or it's incompetent; you don't need to dismiss it, because there's nothing actually properly before you.

HIS HONOUR: Yes, but 42B deals with frivolous or vexatious applications. Anyhow – okay.

10 THE D.PRESIDENT: But would they apply such jurisdiction where the inference is frivolous and vexatious.

HIS HONOUR: Yes.

- 15 MR DONAGHUE: Yes. No, I wouldn't be inclined to rely upon the frivolous and vexatious provision. It may be that subsection (4) would get us there. In terms of the point the learned President was making about needing to know what they want, we submit that the starting point is not what they would like to have in the master plan but what is actually in the master plan, because that is the decision that the Minister
- 20 has made. The Minister has made a decision to say, "I approve this particular document," and that unless that it may well be that the McLaughlins would wish to have, even for perfectly proper reasons, to have had other matters included in the master plan. That might be able to be conceded in some cases, but it wouldn't follow from the fact that they wanted, for good reasons, to have other things included in the plan that the decision not to include these things in the plan effected their interests.
- 25 plan, that the decision not to include those things in the plan affected their interests.

There is another step in the argument that is required. They have to show that what was actually done affects their interests rather than that they would like something else to have been done, and we submit that that is an important step in the approach

- to this question because when one then does turn to the document that the Minister chose to approve, it is, we say, impossible on the face of that document to say that the Minister, in approving it, did anything that affects the McLaughlins rights, and if that is correct, then we submit that approving a document that says nothing about the McLaughlins rights and has no impact on those rights, cannot affect their interests.
 Now, as we understand
- 35 Now, as we understand - -

HIS HONOUR: Where does it say who is to prepare the master plan?

MR DONAGHUE: I think it's section 75 or 76.

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HIS HONOUR: Oh, yes. See, this is what I've been trying to work through. It only gets its authority to prepare a master plan because it has an airport lease.

MR DONAGHUE: Yes.

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HIS HONOUR: Is that right?

MR DONAGHUE: Yes, that's correct.

HIS HONOUR: Well, there is absolutely nothing, is there, in the master plan that says anything about their title to produce the master plan?

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MR DONAGHUE: About APAMs title to produce it?

HIS HONOUR: Yes. There is nothing that says, "We've got an airport lease," is there? I mean, if there is - that's what I've been looking for, anyway.

10

MR DONAGHUE: I strongly suspect that there is but I haven't turned my mind to that question. But, again, I would respectfully submit that the content of the plan is controlled by section 71(2). It's not necessary that the plan disclose its jurisdiction on its face or provide evidence. If there were to be any question raised about

15 whether APAM was entitled to prepare the master plan in relation to Melbourne airport then that is a matter that we submit could readily be proved.

HIS HONOUR: In any event, I would be very interested to know if there is because one would have thought that would then say the company has an airport lease over
the land comprised in Melbourne airport subject to a restrictive covenant with respect to half an acre.

MR DONAGHUE: It may - I don't know whether it is. It may well be the case that around other parts of the boundaries of the Melbourne airport there are other - - -

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HIS HONOUR: There may be others.

MR DONAGHUE: There may well be.

30 HIS HONOUR: There may be.

MR DONAGHUE: There is no reason - it's a big site. There is no reason to think that this little particular part of land that we're concerned with is the only part that has any other interests associated with it. This - - -

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HIS HONOUR: I mean, perhaps it has got no business including in its plan land which is excluded from its lease by virtue of the existence of an easement. It is not excluded from the lease. It's just that the lease is subject to - - -

40 MR DONAGHUE: That's right. That's exactly - it's still Commonwealth land. It's just that the Commonwealth land is - but even - - -

HIS HONOUR: Well, we're not concerned with it being Commonwealth land, we're concerned with it being land leased by - - -

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MR DONAGHUE: Yes, APAM.

HIS HONOUR: --- yes. Well, the airport, Australian Pacific Airports.

MR DONAGHUE: We, with respect, don't necessarily accept the premise because even if - it may be that the master plan could include a vision for the airport that

involves the airport expanding beyond its existing parameters, for example, as part of 5 the long term vision for the airport site. That doesn't mean that the airport will ever actually expand in that way. It just means that there is a vision that it might and that, in due course, if that vision were to be implemented it may be that there would have to be land acquisitions or negotiations or purchases of other land. So there is no necessary - - -

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HIS HONOUR: Oh, yes. That's - - -

MR DONAGHUE: - - - coincidence.

15

HIS HONOUR: It can contemplate, as it does - - -

MR DONAGHUE: Indeed.

20 HIS HONOUR: - - - acquisitions of land.

> MR DONAGHUE: So it could contemplate a use over the easement. It doesn't. It could contemplate it. That wouldn't mean that it would have an effect on the easement. The effect would come later but here - I come back to the fact that what

- 25 the plan has to include are the lessee company's intentions in relation to, amongst other things, surface access. It doesn't have to deal with anybody else's intentions in relation to surface access whether over the airport site or otherwise because that's not what the master plan is doing. The McLaughlin's can intend what they wish but section 71(2) doesn't require that intention to be recorded in this document and to
- complain that the master plan is defective because it doesn't include things that 30 section 71 doesn't require it to include is, in my submission, not to make a proper criticism of the master plan.

It seems to us from the material from the McLaughlin's that has been filed that they put their case for standing in three different ways. One is that they say it fails to deal 35 with the intended use of their own land - because I'm going first, it's possible I'll get this wrong but, as I understand it, they say it should deal with their intention to develop or at least their intentions in relation to access to their land. And that seemed to be, as we understood it, the initial case that was made. Second, there

40 seems to be a complaint based on vagueness and the possibility that there will be future developments, particularly the ground transport plan that might affect them. And, third, in the latest material there seems to be an argument that the master plan impacts on their interests by restricting their capacity to themselves improve the Western Avenue easement.

45

I think I have, in the course of my submissions, said much of what I want to say about the first two of those points but I should alert the tribunal to the fact that in relation to the history of this matter Mr Ablett's affidavit of 11 February gives a summary showing, for example, that the McLaughlin's purchased the property - because the registered proprietors in - this is paragraph 2 - in July 1998 and it then gives a history of some of the litigation in relation to the property, including in

- 5 relation to the existing limitations that have nothing to do with the master plan on the use of the land. And why we say that that is relevant is, in some ways, for much the same reason as I gave in relation to the aviation dump example. If the fact that the aviation dump is actually there already means that the Minister's decision to acknowledge in the master plan that there is an aviation dump can't affect their
- 10 interests I've put that in a confused way but I hope the tribunal understands what I mean.

Acknowledging the facts, the reality, isn't making a decision that affects someone. What affects them is the reality and acknowledging it is really neither here nor there.

- 15 Here, the realities in relation to the McLaughlin's land are not realities that establish that at this point in time they have any capacity to use the land in the way that they plan to. They have to jump a lot of other hurdles. If they can jump those other hurdles then it might be that one would get to the stage where the master plan could be said to be impacting on this use that they're making, but without jumping the
- 20 hurdles we're just at a stage where, amongst many problems that they encounter in using the land in the way that they hope to use it they say, well, it should be reflected in the master plan, but really the facts on the ground don't bear out the proposition that this master plan is impacting on them adversely in any way, and to make that good and I've foreshadowed some of these points I would ask the
- 25 tribunal to look at the latest VCAT decision on these points which is at DA2 to Mr Ablett's affidavit, and I'll just direct the tribunal to a few paragraphs in this to highlight the parts that I think might assist the tribunal.
- And it's really from paragraph sorry, I've taken that slightly out of order. On page
 7 of the decision there's a quotation from evidence that the VCAT accepted that set out the current position in relation to planning restrictions on the land, so on page 7 of 19 in that exhibit there is a paragraph 17 which sets out the existing zoning and the prohibition on permits being granted until there is a development plan approved and then permits need to be granted. And it was at the development plan stage that there
 were interventions by Melbourne Water and APAM, so that paragraph gives you some planning background.

And then turning on to page 13 of 19 there's some factual details in relation to the carriageway, the Supreme Court action, the rights conferred by the right of way.

- 40 Now, so I don't seek to do anything more than that, other than to say that the tribunal shouldn't proceed to determine this application on the footing that if only the master plan acknowledged their rights, the McLaughlins' capacity to use their land would be unrestricted or available. They would encounter the problem that they don't have a development plan and planning permits, and until they rectify that position, which
- 45 has nothing to do with the master plan, they can't make use of the land.

MR WILSON: Could you say the things that you believe are blocking it again, please.

MR DONAGHUE: Well, rather than say them I'll just refer to the things that the
VCAT decision lists at BA2. So it refers to access over the right of way, stormwater treatment, geotechnical investigations, trees and landscaping, and I think that in the - - -

HIS HONOUR: So where's this on page 13?

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MR DONAGHUE: This is - sorry, I apologise, I've gone too quickly over that. It's from page 13 and following, and I was just reading the headings - - -

HIS HONOUR: I see.

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MR DONAGHUE: --- for the various reasons that the tribunal gave for refusing to grant the development plan.

HIS HONOUR: Right.

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MR DONAGHUE: Now, there are others here who know much more about the detail of all of this than I do.

HIS HONOUR: Yes.

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MR DONAGHUE: But my point is simply that there are obstacles that bear no relationship to this process, that bear upon whether the land can actually be used in the way planned. My second point I think I've made already, which was about the fact that if here were to be intended uses in relation to the airport site that don't

- 30 appear in the current master plan, those things can't provide a basis for attacking the current master plan. It's only that the point that, for example, a ground transport plan that impacts their interests comes about, or a variation of the master plan to take account of the new proposal comes into existence, that their interest might be affected, and the silence of the master plan, in relation to their land, demonstrates the
- 35 absence of any reason to believe, or any basis for thinking that the Minister's approval of the plan impacted on their rights.

Third and finally, and this, we apprehend, is a new argument, as of the recent debates about the summons. It appears the McLaughlins suggest that because their easement actually runs over the airport site, the master plan restricts their capacity to improve it or upgrade it. Now, the first thing that we say about that, and it's really a point the tribunal is alive to, is that section 22(3) means that the airport lease is subject to all existing interests in land. We accept that the easement - - -

45 HIS HONOUR: Where are you leading? What are you looking for there? Where's the reference to it being subject - - -

MR DONAGHUE: It's 22(3) of the Act.

HIS HONOUR: Right.

5 MR DONAGHUE: The airport lease is granted subject to existing interest in land.

HIS HONOUR: Right.

MR DONAGHUE: The McLaughlins referred to that section. We accept it's there. We accept that their easement is an existing interest, so we accept that the lease is subject to it. And I am just really accepting what the tribunal has put to me already.

HIS HONOUR: Yes.

- 15 MR DONAGHUE: But what we submit is that that being so, the lease can't do anything about the dominant tenement. APAM can't make - can't pursue it to their existing rights, take steps that would restrict the McLaughlins' access to their property. If they could, then that might be a reason for the McLaughlins to McLaughlins to fear that they were about to be - their one means of access was to be
- 20 cut off, and that demonstrates that they have interest in this document. But the plan itself simply cannot impact upon their existing right of access. It doesn't purport to, but even if it did purport to, it couldn't, as a matter of law. Now, that leaves out of account one point, and I need to take the tribunal back to the Act. This is really my last point. Back to division 5 of part 5, which deals with building controls, and specifically to section 98.
 - So this, the tribunal will recall, is the bottom tier of the control. You've got the master plans, major development plans, building control. Building control deals with the matters identified in section 98, and if I could just direct the tribunal to 1C, Undertaking Constructing or Altering Farthworks.
- 30 Undertaking Constructing or Altering Earthworks.

HIS HONOUR: Where are we now?

MR DONAGHUE: Sorry, I'm going to fast again. 98(1)(C).

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HIS HONOUR: 98(1)(C). Right.

MR DONAGHUE: So I'm scoping, if you like, the effect of part 5. It deals with, amongst other things, earthworks, and if you turn to 98, subsection (3) over the page, earthworks is defined to include roads. So work on a road prima facie falls within the scope of this part. And the part, then, and this isn't the master plan that does this, this is the Act itself, imposes restrictions in relation to building activities, such that you can only carry on building activities consistently with section 99. Section 99(1)

deals with work by the company, the lessee company, so it's not relevant. 99(3)
deals with work carried out by a person other than the airport lessee company, including, relevantly, the McLaughlins, and it says that:

Such a person, the McLaughlins, must not carry out building activity on the airport site unless carrying out the activity is in accordance with an approval granted under the regulations made for the purpose of the subdivision.

- 5 So they can't improve the road over the easement without an approval, not because of the master plan, but because the access section 99(3) says so. But at that point the master plan does potentially come into play, because if the tribunal looks at 101, subsection (2), if a master plan is in effect, the approval must not be granted unless it's consistent with the plan. And I've probably the punch line there, but they're the
- 10 critical words, is that it is the case, we accept, that improvement work could not be taken, carried out in relation to the easement because it's part of the airport site, unless it was consistent with the master plan.

Now, perhaps I could take the opportunity of noise to hand a couple of additional
documents to the tribunal. I'm going to hand up a copy of the Airport Building
Control regulations, two dictionary definitions, and one case. Now, the object of all
of this material is to prove - is to establish a fairly simple point, which is that when
section 101, subsection (2) says the approval for building work must not be granted
unless it is consistent with the master plan, what that means is so long as it's not

- 20 inconsistent with the master plan. That's the point I seek to establish. Now, I seek to establish it first by reference to the building regulations, and if the tribunal could turn to regulation 2.03. 2.01 just shows that the purpose of these regulations is to establish a system for approval of building activities. 2.03(2) indicates that:
- 25 Approval has to be refused by the Airport Building Controller for the airport site, unless the application for approval has the consent of airport lessee company.

That is, APAM have to consent, and if they haven't consented, then the building work has to be refused. Consent is then dealt with in 2.04:

The airport lessee company must not refuse consent to an application for building approval unless the proposed building activity is inconsistent with the final master plan amongst other things.

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So there it's quite clear on the face of - that there is a duty to consent on the lessee company unless the activity is inconsistent with the plan. So that's the first indicator, if I might put it that way, that that's how the words should be read. The next indicator arises from the dictionary definitions. If I could go first to Macquarie, which gives us its first definition of "consistent":

40 which gives us its first definition of "consistent":

Agreeing or accordant, compatible, not self-opposed or self-contradictory.

So that, in my submission, suggests that the ordinary meaning of the word is to ask
whether the matter is compatible or not posed - not self-opposed or selfcontradictory. Again, as matter of ordinary language, we say "able" properly to be read as meaning not inconsistent. And the Oxford definition is a little more opaque. There are a number of definitions. The relevant one appears to be definition six, although it says - it's in the middle column near the bottom of the page. Definition 6 - it says:

5 This and seven are the usual current senses.

So even though it's a long way down the list that's - and, finally, the case - - -

HIS HONOUR: Well, just before - where is the actual prohibition on development
without consent of the - - -

MR DONAGHUE: 99(3) of the Act.

HIS HONOUR: Good. So then you go to - - -

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MR DONAGHUE: Then you go to 101(2).

HIS HONOUR: 101 of the regulations - - -

20 MR DONAGHUE: No, 101 of the Act, subsection (2).

HIS HONOUR: Right.

MR DONAGHUE: In fact, probably - strictly it's not quite clear why the Act has been structured in this way, but 99(3) directs you in (c) to:

Unless the carrying out of the activity is in accordance with an approval -

So that's where you get to the regulations made for the purposes of the subdivision.
So 99(3)(c) takes you to the regulation, but there is an overriding requirement, if you like, in 101(2) which says that you can't grant approval unless it's consistent with the plan. And that largely mirrors 2.04, which says that:

APAM or the airport lessee company have to consent unless the activity is,
amongst other things, inconsistent with the master plan.

And, finally, the case was Katoomba Gospel Trust v Blue Mountains City Council. I don't need to take the tribunal to any of the detail of that, but if you look at page 278 at about point three on the page. This is the Land and Environment Court. Talbot J says, four lines into the first main paragraph:

For there to be consistency a positive finding of compatibility is not required so long as the development is not incompatible or inconsistent with the objective.

45 And his Honour then cites a long list of cases in support of that proposition. So we submit that to the extent that the Act - and it's the Act, not the master plan - imposes a restriction on the applicants in relation to the development of the easement over the

Western Avenue extension, it's a restriction that exists irrespective of the Minister's decision to approve or not approve any particular master plan. It's just there. It's true that as part of the approval process the master plan is engaged, but unless it could be said that there was an inconsistency between what the McLaughlins want to do and the master plan, then the master plan doesn't affect their interests.

And because the master plan is either silent or indicates that the area is to be used as a road zone no such inconsistency exists. So while it might be the case that if the master plan said, "Well, that's going to be a shopping centre," that would create a

- 10 problem for them because the approval couldn't be forthcoming because there would be an inconsistency between the plan and - given that it has to be shown that this master plan affects their interests its silence in respect of them meant that it doesn't impose any - doesn't even purport to impose any limitation - - -
- 15 HIS HONOUR: What about a suggestion that the plan shows it as, in effect, a public road over which the McLaughlins would have no right, rather than showing it as a right of carriageway?

MR DONAGHUE: I think that's what they want. I think the more people who can access their land the better, from their point of view.

HIS HONOUR: Yes. But - - -

MR DONAGHUE: I don't seek to gain too much from figure 7.1, which I think is what the tribunal is referring to. It's the zoning.

HIS HONOUR: Is that the one at 47 or after - - -

MR DONAGHUE: That's right. That's correct, yes.

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HIS HONOUR: Yes.

MR DONAGHUE: But all I say about that is that it doesn't actually deal specifically with the Western Avenue extension. It just colours in the section of the map in which the Western Avenue extension is located and says it's zoned as a road zone.

HIS HONOUR: As a road.

- 40 MR DONAGHUE: Now, that's how the McLaughlins intend to use it. That's how they currently use it. So a use of it in that way is not inconsistent with what the master plan contains. So because it needs to be shown that the decision to approve this particular master plan impacts upon their interests, the fact that there is this approval regime under section 99 and the other sections following doesn't, in my
- 45 submission, elevate their position to the point of conferring standing. So if the tribunal please, those are my submissions, as is no doubt apparent.

Our principle submission is the Brisbane Airports submission, based on Allan. Allan v Transurban gave particular weight to the equivalent of 81(6) and 81(7), together with - those two subsections, together with 242, in my submission, provide a very powerful indication that this is one way review of refusals to approve a master plan.

- 5 And if there's a matter of so I urge the tribunal to give weight to the High Court's reasoning in Allen, as applied by Dowsett J in Brisbane Airports. And unless there is a sufficient contrary indicator in the Act, that some wider class should be accorded standing, and, in my submission, there is not.
- 10 Those provisions compel the conclusion that, as was found to be the case of the Full Federal Court in Alphapharm and in Edwards v ASIC, and by the High Court in Allan, a provision that, on its face, appears to afford a very wide light of merits review, but the language doesn't expressly say you have to be this person. But nevertheless the scheme of the Act, properly construed, has that consequence. And -
- 15 as indeed, Dowsett J provisionally, if you like, recognised in Brisbane Airports. But even if the tribunal is against us for that reason, we submit that looking at this document, not the document that the McLaughlin - this master plan, not the master plan the McLaughlins would have wished for, but the master plan that the Minister actually approved, doesn't affect their interests; if the tribunal pleases. If I could
- 20 reserve the right to answer the question about what power we're relying upon until after lunch, I'd be grateful.

HIS HONOUR: Just before you sit down. This requirement for consent of the company, is that - did you say is that 99(3)(c)?

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MR DONAGHUE: The regulation - the requirement for approval is 99(3)(c); approval consistent with the regs.

HIS HONOUR: You say that picks up - - -

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MR DONAGHUE: That picks up 2.04.

HIS HONOUR: --- 2.04?

35 MR DONAGHUE: I do. And, indeed, the actual approval is, I think, reg 2.11. But the approval can't be given unless APAM have consented.

HIS HONOUR: So you make - the approval - the application for the approval is made under 2.02?

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MR DONAGHUE: That's correct.

HIS HONOUR: But the body that has the power to make or refuse the approval is the airport lessee company?

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MR DONAGHUE: Not quite, no. The application is made under 2.02. 2.03 makes consent a prerequisite - 2.03, sub 2. So you apply under 2, consent is necessary

under 2.03. Consent has to be given because of 2.04, unless there is inconsistency. And, then, at 2.11, which I didn't take the tribunal to, which is - that's really the end of the process - there is an application by the airport building controller, who is not APAM; that's an office holder.

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HIS HONOUR: Where's that, 2.0?

MR DONAGHUE: 2.11 is the decision. The airport controller is appointed under 4.01, but I don't need to take you to it, it's an office under the regulation, but the decision is 2.11.

HIS HONOUR: So - well, what's - well, why does it say:

An airport lessee company must not refuse consent.

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MR DONAGHUE: Because consent has been made a condition of approval by 2.03, subsection (2).

HIS HONOUR: Right.

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MR DONAGHUE: So you have a decision-making process; a separate decisionmaker, the controller, but there is an impediment to the exercise of the decision unless there is the consent of a third party, APAM.

25 HIS HONOUR: So you have to have consent plus an approval?

MR DONAGHUE: That's right. Consent from APAM and, then, an approval from the building controller; that's correct.

30 HIS HONOUR: Okay.

MR DONAGHUE: I apologise if I speak too quickly over that.

THE D.PRESIDENT: Before you sit down, Mr Donaghue, can I just ask you a couple of questions - take you back to this map. The road that's indicated in red, which is the old quarry entrance road - - -

MR DONAGHUE: Yes.

40 THE D.PRESIDENT: Does that impinge at all on the easement?

MR DONAGHUE: The old quarry - - -

THE D.PRESIDENT: Entrance road.

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MR DONAGHUE: --- entrance road. I believe the answer to that is no.

THE D.PRESIDENT: So where does the easement on this diagram actually end? Does it end where - - -

MR DONAGHUE: At the little foot that protrudes - - -

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THE D.PRESIDENT: I see. All right, yes. Okay, all right.

MR DONAGHUE: So on the certificate of title you can see that area sticking out, and the easement - the road actually continues along the foot, but the easement must end once the property ends.

THE D.PRESIDENT: All right. And is the old quarry entrance road a gazetted road that anybody can use, or what's it's - - -

15 MR DONAGHUE: I don't know the answer to that. It may well be that Mr Finanzio can help the tribunal with that.

THE D.PRESIDENT: All right. And the second thing is, I notice that the airport boundary in the northern part of the map coming down to the quarry entrance road gate, and the line that sets out the McLaughlin's land, that the airport boundary road is inside that land. Is that correct, or part of the land there is - - -

MR DONAGHUE: I think that's correct. But I didn't prepare this map and I would defer to APAM in relation to that. But my understanding was that the boundary of the airport was the boundary of the McLaughlin's land, but I may be incorrect in that statement.

THE D.PRESIDENT: All right. Thank you.

30 MR DONAGHUE: Thank you. If the tribunal pleases.

HIS HONOUR: Yes, Mr Finanzio? Can I ask you to give an indication of how long you think you might take?

35 MR FINANZIO: Five minutes, your Honour.

HIS HONOUR: Right.

40 MR FINANZIO: Can I indicate to you that - to the tribunal that I don't propose to make any submissions about the question of standing.

HIS HONOUR: Right.

MR FINANZIO: And that ultimately we abide the decision of this tribunal on that question.

HIS HONOUR: Right.

MR FINANZIO: I do want to say just a couple of things about things that have emerged during the course of argument.

HIS HONOUR: Yes.

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MR FINANZIO: My presence here is as a joint party, if you like, and I'm happy to be of assistance to the tribunal to clarify any matters that APAM, as the airport lessee, is in a position to assist you with. Can I just deal, first, with the question of the quarry entrance road? You will see on that plan, members of the tribunal, that that red line extends down to about here - do you see that?

THE D.PRESIDENT: Just above Terminal Drive?

MR FINANZIO: That's right. The old quarry entrance road was the road that - in
the 1950s, all of this land was owned by one person, and subject to, essentially,
mining leases, quarrying leases. This used to be - part of the road, it doesn't sort of
appear down here any longer - used to be called Lancefield Road, and the road from
Lancefield Road up to the quarry is what's been referred to on this plan as Old
Quarry Entrance Road. The existence of that road is a fact in issue, not necessarily

20 in dispute, in Supreme Court proceedings which are presently - well, they're not listed, they're waiting to be heard; there's a directions hearing coming up, I think, in a couple of weeks.

HIS HONOUR: As is another issue relating to the Quarry Road, or was - - -

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MR FINANZIO: The whole case in the Supreme Court is about what rights, if any, the McLaughlins enjoy over what's designated on this plan in red as Quarry Road.

HIS HONOUR: Right.

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MR FINANZIO: The position of the Commonwealth, and the position of APAM, for whom I act in those proceedings, is that the McLaughlins have no rights over that, but they are issues in dispute. There are, as I recall it, four bases upon which they seek - upon which they claim that right. The matter was listed for trial to commence in early February, and you don't need to - - -

HIS HONOUR: Yes. I've seen the history of this.

MR FINANZIO: --- deal with all of that. But the purpose of this - this plan was produced as an aid to some of the evidence in that case. And, so, as a consequence, some of the designations don't, in fact, at all have any bearing on the matters before you in this application. Old Quarry Road or Old Quarry Entrance Road is one, the location of Quarry Road, Quarry Road gate, Link Road and so on are all - pardon me - are all in that category. So if there are any questions about the content of this

45 plan, and what the lines on the plan designate, I am happy to assist the tribunal, but I just hope that those observations are of sufficient broad assistance in the way that you approach the questions.

THE D.PRESIDENT: Just on that, where you see Western Avenue easement, between the words "Western" and "Avenue" there is a white line that dips down to the blue line.

5 MR FINANZIO: Yes, that's correct.

THE D.PRESIDENT: What does that indicate?

- MR FINANZIO: I can explain that. What happened was that in the last 1950s, this
 land the airport land was acquired by the Commonwealth for the purposes of
 establishing the airport, and in doing that, the original access of Quarry Road down
 to Lancefield Road was cut off, and as a consequence, alternative accesses were, if
 you like, created informally. What happened with Western Avenue was that a road
 was constructed. Subsequent to that, the Commonwealth granted an easement in
- 15 favour of the then registered proprietor of Mr McLaughlin's predecessor in title. The alignment of the road did not exactly match up with the title boundaries as they were then, and so there was a slight acquisition and then the creation of the easement.
- And I think you will see from the plan that Mr McLaughlin tendered that there are different parcels of land that are identified by the surveyor which all add up together to comprise the easement that is now in the McLaughlin's favour, and those white lines are intended to do that. You will see at the very bottom of that corner – that little, if you like, pan-handle – that there is a diagonal splay.
- 25 HIS HONOUR: Yes.

MR FINANZIO: That diagonal splay was intended, at the relevant time – and I think the documents bear this out pretty accurately – there was a – the road curved into that splay, and so the title – rather than move the road to perfectly accord with the title boundaries, the splay was created to move the title boundary to

accommodate the existing road: an example of - - -

HIS HONOUR: Well, we can proceed on the basis that the fee of the whole of the easement we are concerned with is with the Commonwealth.

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MR FINANZIO: Correct.

HIS HONOUR: There is a lease for the whole of it to your client.

40 MR FINANZIO: Correct.

HIS HONOUR: And there is a prior easement, by way of right of carriageway over it, in favour of the applicants.

45 MR FINANZIO: Yes, you can.

HIS HONOUR: And so we do not need to trouble ourselves with the though that part of the Cleanaway land, for example, is underneath this easement.

MR FINANZIO: Indeed, it is not any longer.

HIS HONOUR: No. Well, that is what it - - -

MR FINANZIO: That was all – it was - - -

10 HIS HONOUR: That has been fixed up.

MR FINANZIO: It was all resolved in the 1970s, and the Cleanaway land is not part of the easement at all.

15 HIS HONOUR: And is it also your case that if this plan had been drawn accurately, the - - -

MR FINANZIO: Which plan had been drawn accurately?

20 HIS HONOUR: This - - -

MR FINANZIO: That plan is accurate for the purposes of what it is doing in the Supreme Court proceedings.

25 HIS HONOUR: Right. Well, why does it show the airport boundary as not running on top of the boundary to the McLaughlin's land?

MR FINANZIO: You are referring there to - - -

30 HIS HONOUR: The north/south - - -

MR FINANZIO: Yes.

HIS HONOUR: --- course of the western boundary.

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MR FINANZIO: The distinction between the white line and the dotted purple line?

HIS HONOUR: Yes.

- 40 MR FINANZIO: Yes. I don't know why that is the case, but my suspicion is that the airport boundary land is the dotted line, and that the white line indicates that location of gates and fences. But I can get some instructions about that from the person who prepared this plan, just to clarify it.
- 45 HIS HONOUR: Well, I mean, if there is any issue there, what this suggests is that not only do they have the dominant tenement of an easement - -

MR FINANZIO: Of the easement, but also a little bit of the Commonwealth land.

HIS HONOUR: --- but they also have some fee simple.

5 MR FINANZIO: That is not the case. That has certainly never been asserted anywhere.

HIS HONOUR: Right. So - I mean, that suggests that if this - to go back to what I said, if this plan had been drawn accurately, the purple dotted line would be over the top of the white line.

MR FINANZIO: Quite right, and I am not convinced that it is not accurate for the purposes for which this plan was prepared, although it might be a little confusing.

15 HIS HONOUR: Well, that is the same as saying that the white line then is not intended to - - -

MR FINANZIO: To be in that spot, or to - - -

20 HIS HONOUR: --- identify the boundaries, but some ---

MR FINANZIO: --- to illustrate some other point.

HIS HONOUR: - - - something else.

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MR FINANZIO: And I will try and get some instructions about that over lunch.

MR WILSON: I can actually say what it is, if you like.

30 MR FINANZIO: I don't know how; we have made the plan.

MR WILSON: It's – yes, I know, but we understand the history. It is what we call the "zigzag land." There were a number of stuff-ups with the acquisition. One of them was a purported surveyor's mistake which we have not been able to verify later,

- 35 but nevertheless, this surveyor's mistake caused the Commonwealth to come back at the land's previous owner and say, "We want a little bit more, please, because we did pay for it." And so the owner did not have a fight with the Commonwealth, but she gave up that extra portion there, and that is part of a separate title, and that is where that came from. It is the Commonwealth's land.
- 40

HIS HONOUR: So what you call the "zigzag land" is in a separate title, but – and it is not Mr McLaughlin's?

MR WILSON: No. It is the Commonwealth's land.

45

HIS HONOUR: So we should treat the boundary here - - -

MR WILSON: As correct.

HIS HONOUR: --- the relevant boundary on that side of the land is the dotted – the purple dotted line.

5

MR WILSON: Yes, your Honour, except - - -

HIS HONOUR: And really, if you look at it, there is a white line under that purple dotted line because if you look at the further northerly part of the purple dotted line, there is no white under it.

MR WILSON: Yes. Well, at first glance, we don't dispute that part of the map as being accurate. Obviously it has been prepared for their case. We cannot endorse some of the other points on it.

15

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HIS HONOUR: Now, Mr Finanzio - - -

MR FINANZIO: Yes, your Honour.

20 HIS HONOUR: --- you have had your five minutes.

MR FINANZIO: Well - - -

HIS HONOUR: It is just that I normally adjourn at 12.30, that is all.

25

MR FINANZIO: Your Honour, I did not mean to keep you beyond 12.30. I did not want to say anything specific about the application. There were just a couple of things that had emerged during the course of argument.

30 HIS HONOUR: Yes. Well, I will just ask Mr Wilson: how long do you think it will take for you to put your submissions to us? And are you going to speak for Mr McLaughlin; is he going to add anything of his own?

MR WILSON: I am sure he will, your Honour. We have already put together quite a few submissions, and - - -

HIS HONOUR: Well, we have read your written submissions - - -

MR WILSON: Yes. So I don't have to go over them - - -

40

HIS HONOUR: --- as is probably pretty apparent from some of the things we have been saying.

MR WILSON: Yes. I don't have to go over them again.

45

HIS HONOUR: Yes.

MR WILSON: I would like the opportunity to rebut some of the things raised.

HIS HONOUR: Yes. So how long do you think that is going to take you?

5 MR WILSON: I would probably – I would like an hour, if I could, thank you.

HIS HONOUR: Not longer than – not more than an hour, is what I am hearing.

MR WILSON: Yes. Yes.

10

HIS HONOUR: All right. Well, look, I think we will – that means, because I have to conclude this case this afternoon, that 3 o'clock will be satisfactory. So I think we will adjourn until 2 o'clock this afternoon. I will hear anything further you wish to say then, Mr Finanzio.

15

MR FINANZIO: Look, nothing I have to say has any bearing on the jurisdictional argument.

HIS HONOUR: Yes.

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MR FINANZIO: I was just going to say something about the indication about mediation; that is all.

HIS HONOUR: What do you want to say about that?

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MR FINANZIO: I was just going to say that you would be the last in a long line of judicial officers - - -

HIS HONOUR: Who have said that.

30

MR FINANZIO: --- who have made that suggestion. And the ---

HIS HONOUR: Yes, but I mean, this is a very narrow point.

35 MR FINANZIO: It is.

HIS HONOUR: I am not suggesting – I am not - you know, I am not going to be so bold as to suggest the whole thing could be mediated.

40 MR FINANZIO: No, no, of course not.

HIS HONOUR: Just this one point.

MR FINANZIO: And the simple answer to that question is, obviously enough, if
my learned friend succeeds in his argument, then there is not any point to have to
mediate, but the next question is, I suppose - - -

HIS HONOUR: Yes. But if he is unsuccessful, then we have got a potential, you know, minefield.

MR FINANZIO: And if it was as simple as simply making an acknowledgment in the master plan that there exists some right, then that – we understand that is - - -

HIS HONOUR: Well, we will find out if that is what it is or not, because Mr Wilson, the first thing – Mr McLaughlin, you might like to take note of this – the first thing I am going to ask you at 2 o'clock, or when you begin your submissions, is take this document and tell me, in detail, what you want added to it.

THE D.PRESIDENT: Well, just before you sit down, can I ask you a further question?

15 MR FINANZIO: Yes.

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THE D.PRESIDENT: Would you regard the notification in the master plan of the easement as a minor variation?

- 20 MR FINANZIO: I would have issues about whether or not it is desirable to treat the master plan as some kind of repository for the acknowledgement of all kinds of interests in land that are at the boundaries or within the airport. That, in our submission, is something that I don't have instructions about, but I can imagine is an issue of considerable difficulty, and whilst it may and what I was going to say a
- 25 moment ago was it may be superficially attractive to say, well, the easy way to solve this problem in this dispute with this particular litigant is to add a one-liner which says, "Everything in this document is subject to any property rights that exist in the name of Mr McLaughlin," or indeed, any property rights at all.
- 30 The question is whether or not it is necessary to do that in order to exercise the proper discretion under the master plan, and then what happens if you do it in the master plan and you leave somebody out? There is an administrative when we are talking about a plan that is at that level of planning - -
- 35 HIS HONOUR: I am not terribly impressed by that, Mr Finanzio, but what I would like you to address - -

MR FINANZIO: Yes, your Honour.

40 HIS HONOUR: --- perhaps at 2 o'clock, because I think we will adjourn – is why doesn't this document say anywhere - unless it is there and I have not seen it – what is the standing - - -

MR FINANZIO: Yes. If I can ask - - -

45

HIS HONOUR: ---I mean, why can't I just send along a master plan and say, "Please prove this master plan"? I would not get very far because I wasn't an airport lessee.

5 MR FINANZIO: Can I save me doing it at 2?

HIS HONOUR: Yes.

MR FINANZIO: If you take the document, go to the – not the cover page, but the page immediately inside - - -

HIS HONOUR: Which one: executive summary?

MR FINANZIO: No, no.

15

HIS HONOUR: Forward?

MR FINANZIO: No. Even before that, just on the inside of the first - - -

20 HIS HONOUR: Please note?

MR FINANZIO:

Please note - - -

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HIS HONOUR: Yes.

MR FINANZIO:

30 --- this master plan was prepared by APAM as part of its internal strategic planning and in accordance with the provisions of part 5 of the Airports Act.

HIS HONOUR: But it does not say it is a lessee; it says what it prepared it in accordance with. The problem is if it said it was a lessee, it is bound to say "subject to it" somewhere, isn't it?

THE D.PRESIDENT: And you still have not answered my question. You have answered another question, but you haven't said whether you regard it as a minor variation.

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MR FINANZIO: Yes. Can I consider that over lunch?

THE D.PRESIDENT: Yes.

45 HIS HONOUR: All right. We will adjourn till 2 o'clock.

[12.47 pm]

[2.03 pm]

RESUMED

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HIS HONOUR: Yes, Mr Wilson no, sorry, Mr - - -

MR FINANZIO: I think I was to answer the learned Deputy President's question.

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HIS HONOUR: Yes, Mr Finanzio, yes.

MR FINANZIO: The answer to that question is – the question being whether or not the change which was described before lunch, the addition of the words "subject to" and so on, could be a minor variation to the master plan.

HIS HONOUR: Yes.

MR FINANZIO: And it would appear that it could be so. It is to be noted that there is then followed in the Act, section 84A and following, a series of provisions which are similar to the process of consultation which is involved in the creation of the master plan proper or the original master plan.

THE D.PRESIDENT: Thank you.

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HIS HONOUR: Is there anything else you wanted to add?

MR FINANZIO: No, your Honour.

30 HIS HONOUR: Right. Do you want to - - -

MR DONAGHUE: Can I just answer the question that I reserved?

HIS HONOUR: Yes, Mr Donaghue.

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MR DONAGHUE: I believe the answer is section 31, subsection (1) of the AAT Act, which provides:

40 Where it is necessary, for the purpose of this Act, to decide whether the 40 interests of a person are affected by a decision, that matter shall be decided by 46 the tribunal and if the tribunal decides that the interests of the person are 47 affected by the decision, the decision of the tribunal is conclusive.

So it appears to be directed precisely to the task upon which the tribunal is now engaged, whereas section 42A is more concerned with the nature of the decision.

HIS HONOUR: Yes.

MR DONAGHUE: If the tribunal pleases.

HIS HONOUR: Yes, Mr Wilson.

- 5 MR WILSON: Thank you, your Honour and Deputy President. Keith and I had a discussion over lunch about what we would like to see in the master plan, and I think in submissions it's sort of indicative of this, but I thought perhaps the best thing to do is to look at figure 8.2, which is called Existing Airport. One of the things that - -
- 10 HIS HONOUR: Yes, go on.

MR WILSON: Yes, sorry. One of the things which we believe is this is probably one of the most important maps in the whole master plan because this establishes a base line of what the master plan believes exists today or purports to exist today, by

- 15 which we can measure the changes in the other plans. So if something is in this plan, but missing from another plan, we know that it has been taken out. Now, that means that this existing airport master plan we would like to see actually representing the existing airport, and it has a number of deficiencies, as you can see, in the area surrounding Keith and Norma's land and their carriageway easement. The freeway
- 20 just kind of disappears and it's really nondescript about what has happened there. And there is no access really clearly shown going from the freeway, from the Sunbury Road freeway into the airport. There is some – if we take a look at the – if we can just compare this map with the Minister's submission which gives a picture, and I'll just hold it up so we can see. This is the picture I'm referring to at the had many and the minister's literate and had to the source and had to the source of the
- 25 beginning. Do you have that picture? It was stapled to the same submission as the - -

HIS HONOUR: Yes, that's the "where is."

30 MR WILSON: Yes, that's right. It shows what exists on the ground today very clearly, and as you can see by the shape there, there is a road there called Marker Road next to the facility in the centre of the photograph. Marker Road runs off - - -

HIS HONOUR: I haven't got it yet. Just wait till I find it.

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MR WILSON: I'm sorry, your Honour.

HIS HONOUR: I thought it was at the beginning of your material, wasn't it -no?

40 MR WILSON: It's at the beginning of the Minister's submission.

HIS HONOUR: It's the Minister's?

MR WILSON: Yes.

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MR FINANZIO: It was tendered last week, your Honour, or at the time at which we had the hearing on the summons.

HIS HONOUR: Yes, but it's just a matter of me finding my copy of it, which isn't all that clear, but – okay, well, I think I've got what you're talking about now, so can you go back to it?

5 MR WILSON: Yes, does it have the red lines - - -

HIS HONOUR: This doesn't have any colour on it.

MR WILSON: Really? Perhaps you would like to put that line on it.

10

HIS HONOUR: You haven't got another – you've only got one copy? So this is something you provided, is it?

MR WILSON: I think that - - -

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HIS HONOUR: It's an AGS letter of 21 April.

MR DONAGHUE: We provided a series of different maps, and I think this was one of them. There were several different maps provided together by my instructors.

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HIS HONOUR: Yes.

MR WILSON: Yes, your Honour, you will see a road called Marker Road, which is right next to the central building in the centre of the map. That swings into an

25 underpass that goes underneath the freeway, and in the dispute over Quarry Road, the access to the airport relies on that underpass. We call this the Sunbury Road complex. That's just the name we thought of, but in the old CRB maps in fact, Sunbury Road started at the point where the airport turn-off from Melbourne, when you turn into Airport Drive, that's the beginning of Sunbury Road as opposed to the

30 freeway in the old CRB maps when the airport was originally built. So the thing about that is that that shape in that road – that the access from the north, going through Marker Road into the underpass and into the airport - - -

HIS HONOUR: We can't see this underpass, can we?

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MR WILSON: Well, you can see it loops under the freeway, the red line goes under the freeway.

HIS HONOUR: Yes.

40

MR WILSON: Yes. Well, that underpass provides access from our side of Sunbury Road, your Honour, and that's very important because without that underpass there is no access to the airport from our side of Sunbury Road. And you will notice in what the master plan purports exists today does not show any of that. It is simply – well, it

45 makes – it's very vague, your Honour, and so we don't have a very good base line of what's really intended in the future because there is no detail in what they purport exists today. We can't tell if things have been taken out because it could have just

been left out of their base map. So this really does affect the interests that Keith and Norma have, and that's explained in the submissions I have made and I won't repeat myself there except to say that the whole issue of the Quarry Road case presumes that the gazetted freeway entrance into the Sunbury Road complex will stay and that there is a place for Quarry Road to gaz. So melly they do have a very important

5 there is a place for Quarry Road to go. So really they do have a very important interest.

HIS HONOUR: What you're saying so far is that the relevance of the Quarry Road argument, which I don't think at the moment is in any event before us, is that that's what gives you access to this Marker Road, and that in turn gives you access to the

main airport.

10

MR WILSON: Indeed, your Honour, and that if you leave Mr McLaughlin's plan by the Western Avenue easement and you get yourself to Victoria Street, where do you go then? Well, you have to cross – you keep on going, you can't cross at

15 you go then? Well, you have to cross – you keep on going, you can't cross Victoria Street. You have to keep on going all the way down to - - -

HIS HONOUR: Go back to Mickleham.

MR WILSON: Mickleham Road, that's it, and then you go back up again, and I think it's roughly a seven kilometre hike as opposed to three or four hundred metres. Now, it would be a terrible thing if Keith and Norma fought the Supreme Court case and won only to find that Sunbury Road had been cut or turned into a tunnel or something of that nature. Now, the master plan and the zoning plan shows there is a tunnel there to replace - - -

HIS HONOUR: Yes, I noticed that. That's in the 70 point -7.1, isn't it?

MR WILSON: Yes, your Honour, and - - -

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HIS HONOUR: It shows a tunnel. That tunnel isn't there now?

MR WILSON: No, your Honour, the tunnel is not there now, and obviously this concerns us. It concerns Keith and Norma greatly and for the reasons referred to in the submission, the land has been long known as having a strong connection with Sunbury Road. The study that - the 1992 study which is listed in the master plan twice refers – in the submission refers to that underpass and the need to be able to access that for Keith and Norma's land to realise its potential as it is zoned for airport-related use for freight, etcetera. So there is a strong affection if this tunnel

40 goes through. We think it could be, we don't really know but all we know is even the base map of what is existing today doesn't show the proper connection to the airport from Sunbury Road.

So it's difficult for us to actually make a comparison because the base line is simply
missing. That's our claim, of course. If you go up the other end of that particular
map, you will notice the freeway, sort of, disappears. It's almost like there's a hole
there waiting to be filled by something and, sure enough, if you go to the plan

number 1.2, I think it is. You will see what fills that hole, and it's the entrance of the Apac Drive into the freeway, the new - - -

HIS HONOUR: Where are you looking at now?

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MR WILSON: --- flyover. 1.1, I think it is, your Honour, or 1.2. You'll have to help me because I don't have the map any more. It's - I'm looking for the airport development 1.1.

10 HIS HONOUR: Unique airport development concept; that's 1.2.

MRWILSON: No, 1.1 is the one I'm looking at, your Honour, and you can see there is a thing called Apac Drive. It's – there is a – in plan 1.1, there is a thing called Apac Drive. It's near the blue section at the top of the map, and there is a flyover

- 15 that is going to be extended out of Apac Drive, and it swings by, perilously close to where the Commonwealth now says our easement lies, and where our easement should lie. The trouble we have with it, your Honour, is that there is no scale on this map, as far as I could see and so, once again, there is no real base line to say whether this imperils the easement of not. However, as a rough indication, and it's only a
- 20 rough indication, we can look at other roads on that map, and notice that the width of all the other roads on the map is greater than the width allocated for the entire width of our easement which is supposed to be about 50 foot in that area.
- So, you know, we're really concerned about this and I'm just astonished that some of
 the examples the Commonwealth has used, such as the Qantas Club complaining or
 bus terminals on runways or - -

HIS HONOUR: Yes, you don't have to worry us about that.

30 MR WILSON: Yes, your Honour. These are hypotheticals whereas we're talking about something real here. So, your Honour, this is why we really need to see the roads as they really are in the established – in the existing - - -

HIS HONOUR: Well, on one view of this map, this Apac Drive could pass over your easement.

MR WILSON: Yes, indeed, your Honour, and it – when the land was rezoned, APAM agreed to withdraw its objection to the land being rezoned for airport-related use on the basis that in any future development of the carriageway easement, we take

- 40 the airport's operations into account or, rather, it's a bit more less than that. It's that the airport's operations be considered by the responsible authority in any future development of the easement, and the granting of our own development plan, so we're concerned at the encroachment and we believe that, in order to support this overhead thing, they're going to need quite a big embankment, and we just can't see
- 45 the room for all that in this particular plan. Now, it may well be, I don't know we don't know, and we just really want to see our easement in there. So that's, I guess, to sum up - -

HIS HONOUR: But you would like to see where it is in relation to Apac Drive, for example.

MR WILSON: Yes, indeed, and we would also like to see what's going to happen to Sunbury Road and - - -

HIS HONOUR: And me, as though a little degree of openness in this matter would be extremely helpful, but that doesn't seem to be happening.

10 MR WILSON: Your Honour, that's where we sit as regards to what we would like to see, although I will say - - -

HIS HONOUR: Could we adjourn this matter, Mr Finanzio and Mr Donaghue, and have all these questions answered? We're dealing here with government now,

- 15 transparency in government is the absolute watch-word of government. Why I have the greatest difficulty in seeing why these the landowners with a very substantial interest, I've been given chapter and verse or more. I mean, I heard what you said, Mr Finanzio, about the problems of mediation. I hope there wasn't any veiled suggestion there that the difficulty in mediation was all on one side, and not
- 20 yours.

40

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MR FINANZIO: Not at all, your Honour. I would make no veiled suggestion about anything in the content of mediation.

- 25 HIS HONOUR: Well, if we adjourned this matter, could we could some effort be made to try and sort this out. Could some senior executive of your organisation make time available to talk to Mr McLaughlin and the people advising him, and tell them in words of one syllable what their proposals are?
- 30 MR FINANZIO: There are two parts to what your Honour has said that I need to respond to.

HIS HONOUR: Yes.

35 MR FINANZIO: The first is that this plan is an indicative plan only.

HIS HONOUR: But it's – well, then - - -

MR FINANZIO: No, no - - -

HIS HONOUR: But it indicates something called Apac Drive.

MR FINANZIO: Yes.

45 HIS HONOUR: Why doesn't somebody say what it's indicating. It's no good saying it's not terribly important; it's there.

MR FINANZIO: You're quite right. Quite right, it's there as indicating - - -

HIS HONOUR: Well, how does it relate - - -

5 MR FINANZIO: No - - -

HIS HONOUR: Well, how does it relate to the easement? Where does the easement – is it over the top of the easement, is – does that assume a resumption?

- 10 MR FINANZIO: How would first of all, at this stage, what my learned friend has told the tribunal about is that this is a master plan intended to indicate future development options. That's what it's about. It's not a stage where there is any detailed design that could indicate exactly how it's designed, but that doesn't mean that it happens in the absence of context. Your Honour quite rightly pointed out
- 15 before that Mr McLaughlin's land is only lawfully accessed by the easement at present, that is, the Western Avenue extension. Any attempt to resume that land would leave Mr McLaughlin's land landlocked, and as resumption law makes it abundantly clear, that kind of resumption would be extraordinarily expensive.
- 20 So all that can be said about the status of the plan at the moment is that it is intended to derive access to the airport from Apac Drive extended into the area that – there is a triangle. There's no detailed design about that at this stage of the game and one can infer from the facts and circumstances that it is unlikely but even if it were to occur, couldn't occur without any – that is, the resumption of the Western Avenue easement
- 25 couldn't occur without Mr McLaughlin knowing about it. Now, the second part of what I wanted to address your Honour on it, was that it would be wrong to assume that there have been high level discussions between members of my client company, and Mr McLaughlin over a considerable period of time.
- 30 I seek to imply no veiled suggestion about where negotiations have gone to one way or the other, other than to indicate to your Honour that those negotiations commenced in the context of four separate VCAT proceedings, one of which was commenced by my client in relation to a series of illegal filling that occurred on Mr McLaughlin's land. There are the Supreme Court proceedings that are proceeding in
- 35 the court at the moment, but all of those cases were adjourned for a period of more than 12 months while we were in supervised mediation at VCAT. So I do not mean to suggest anything other, your Honour, than that the balance of the issues which have been ventilated before – which have been touched upon in the submissions of my friend, Mr Wilson, have been the subject of considerable - - -
- 40

HIS HONOUR: All right. Well, I suppose I should be tying down a bit, but - - -

MR FINANZIO: No-one is trying to - - -

45 HIS HONOUR: --- I mean, there is an Apac Drive here. You cannot dismiss it by saying it is only just a proposal because it is there.

MR FINANZIO: No, it is there. That is correct.

HIS HONOUR: And surely - - -

5 MR FINANZIO: But the plan must be - - -

HIS HONOUR: --- somebody who has an easement over land right where Apac Drive is shown would legitimately ask the question, "Where is this in relation to my easement?"

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MR FINANZIO: What the plan shows is a future plan to extend Apac Drive so that it connects with the freeway. A person who has an easement in that location may turn around and say, "Well, I have got an easement there," but that is not a logical or fair place for that person's inquiry to stop. The next step in the reasoning is, "I have

- 15 an easement and they cannot do anything with Apac Drive, in respect of my easement, unless they take other steps." That is the simple fact of it. It is not for Mr McLaughlin does not sit before you saying he does not know about his rights of easement, or that he does not know about how those rights might be enforced if there was any unlawful interference with them.
- 20

This plan does not more than to indicate in, if you like, a town-planning sense – a broad master plan planning sense - that there will be another access to the airport, or it is intended that there would be one in the future. But it cannot be construed – indeed, the Act makes it expressly so – that this plan overrides any existing rights.

- 25 My learned friend referred you to section 20, subsection (3) of the Airports Act which makes that point good 22, pardon me, subsection (3). I find myself on my feet, your Honour, when it was my intention not to make submissions to you about - -
- 30 HIS HONOUR: Well, you have got a very substantial interest here.

MR FINANZIO: It is our - - -

HIS HONOUR: I mean, in other cases I have done of this kind, the Commonwealth
has just sat down and said nothing and allowed the intervening third party to make
the running, so - - -

MR FINANZIO: The Commonwealth has taken the jurisdictional point, and we have, if you like – we are prepared to answer the detail of the plan if it becomes
something that is reviewable to the tribunal. It is not our intention to stand before the tribunal and - - -

HIS HONOUR: All right. Well, I am sorry I got a bit carried away there, you know.

45

MR FINANZIO: No, no, no. Not at all, your Honour. I am glad I could be of assistance.

HIS HONOUR: But I mean, you have to understand that I do know there is a whole plethora of disputes out there beyond this one, but I don't know anything about those, and - - -

5 MR FINANZIO: No, no, of course not.

HIS HONOUR: --- all I am trying to do is see ways of dealing with this narrow issue so that the other things, which presumably are the more important ones, because they are the ones that relate to the actual development or not of the land, can be the focus of the parties' intention ---

MR FINANZIO: That is true.

HIS HONOUR: - - - rather than side issues like this. Yes, Mr Wilson; you continue.

MR WILSON: I would just like to ask Mr Finanzio, on behalf of APAM, is he prepared to concede that the carriageway easement is a section 22(3) interest in the land concerned, as the Commonwealth has volunteered? Because it might save some time, your Honour, without having to go through all that.

MR FINANZIO: The carriageways?

MR WILSON: Yes, the carriageways.

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MR FINANZIO: If the question is being asked about the Western Avenue - - -

MR WILSON: Yes.

30 MR FINANZIO: --- easement, section 22 ---

MR WILSON: Three.

MR FINANZIO: Just let me get the provision out. And section 22, subsection (3) provides that:

An airport lease is granted under section 13, subject to all other existing interests in the land itself.

40 I don't think I need to make the concession, but it is obvious that it is the case.

HIS HONOUR: An easement is an interest in land, Mr Wilson, so I think that answers the question.

45 MR WILSON: Thank you, your Honour. I did ask it because it is an important question for us.

HIS HONOUR: Yes.

MR WILSON: We have never, until today, heard that, and I wanted to hear it from both parties. But I would like to read out - - -

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HIS HONOUR: Well, whether you hear it or not, as a matter of law, an easement is an interest in land.

MR WILSON: Yes.

10

HIS HONOUR: So unless the easement is – there is some defect in the easement, and there is registered title - that is not an easy thing to make out – Mr McLaughlin has an interest in the land.

15 MR WILSON: Yes, your Honour.

MR FINANZIO: And I should say, it has never been denied.

HIS HONOUR: But whether or not that is conceded is - - -

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MR FINANZIO: Yes. And that interest, in particular in relation to Western Avenue, has not been refuted by the - - -

HIS HONOUR: Challenged? Yes. All right.

25

MR FINANZIO: - - - either by APAM or the Commonwealth.

HIS HONOUR: All right.

- 30 MR WILSON: Your Honour, this is really important to us because in the Airports (Building Control) Regulations, which was referred to by Mr Donaghue, one of the automatic, if you like, things that happens when you put in a permit to fix the easement, as was previously pointed out, you need the consent of the airport operator. However, there is a provision here which says that – and I'm looking, I
- 35 think I've found it, which is amazing. It's 2.04 subsection - -

HIS HONOUR: You're in the regulations now, are you?

MR WILSON: The Airports (Building Control) Regulations your Honour, referred to by the Commonwealth earlier, and this is a right that we have because of the easement which really does need to be shown in the master plan, and I will make that point out in moment, your Honour, and this is how it really does affect us in a material way, even as we speak. So I'm looking at section 2.04, or it's actually not a section, is it, it's a regulation, 2.04 subregulation (2).

45

An airport-lessee company must not refuse consent to an application for building approval if, to do so, would be inconsistent with an obligation of the company, relating directly or indirectly to approval of the building activity –

5 and I go to point (b) –

under an interest to which subsection 22(3) of the Act applies.

So this means that because the easement is a subsection 22(3) interest, APAM must automatically approve of the building works for it. Now, I wish to read one of the affidavits put in by the Commonwealth, by Mr McLaughlin – not, Mr McLaughlin, it's the Australian Government Solicitor, and I wish to turn to page 13, and I wish to point out on page 13, and we are reading now the reasons for VCATs disallowance of version 16 of the master plan, and this is one of the reasons for it. It's on page 13 and point 18, and it says:

Although the right-of-way secures a lawful means of access to the McLaughlin land, it does not bestow other rights upon them. It cannot become a public highway by means of the common law doctrine of declaration and acceptance.

20

I'm not necessarily agreeing with all this. This is what they found.

The McLaughlins and future owners or users of their land do not have legal rights in relation to the right-of-way land, except the right to come and go over
it. It appears that they are not legally entitled to dig it up or change it or even improve it without the consent of the Commonwealth of Australia and APAM. To do so would be to commit trespass. This puts the McLaughlins in an unusual and rather complex situation. To obtain the subdivision they ultimately seek, and even to obtain approval of the necessary development plan, they need to secure access to their land that is not only lawful but suitable and adequate. We would not be minded to regard the right-of-way in its current state as being suitable or adequate, notwithstanding there is a legal right to use it. It would need to be improved.

35 The standard to which it would need to be improved is something that is dispute in the current case. That is something we can comment on. However, it is not much use making comments unless the McLaughlins can demonstrate an ability to put the right-of-way into an adequate and suitable condition or see to it that someone does to. To achieve this they need the concurrence of APAM. As Mr 40 Finanzio, the barrister who appeared on behalf of APAM, points out, they need the agreement of APAM and they do not have it. Unless and until they obtain it in some reliable form, they cannot demonstrate an ability to provide suitable access to the land, whatever the standard we determine to be suitable for the purpose. We do not regard its present state as suitable.

45

Even if it was brought up to a suitable standard, presumably after agreement was reached between the parties concerned about who should do the work and

who should bear the costs, there would be a question of continuing suitable access. It would not be enough, in our opinion, to achieve a suitable standard of access for the time being without further suitable arrangements to secure maintenance of the roadway so as to maintain it in a suitable condition over the years and decades ahead. No doubt all this would be much simpler if access was available over private land, but - - -

so then they go on to say they're not satisfied.

10 HIS HONOUR: Was Mr McLaughlin represented in this proceeding?

MR WILSON: Your Honour, he was represented. One of the difficulties is that VCAT doesn't have jurisdiction to – this is what I understand, and you know, your Honour, I'm not a legal person, but VCAT doesn't have jurisdiction over federal matters, and that is why, in our submission, one of the submissions I put up, we said we want this tribunal to make an ultimate determination for us because one of the reasons how APAM got into the fight at VCAT was because they claimed that the status of the road was uncertain.

- 20 So all of these assurances we've heard today unfortunately were forgotten at the other hearing, and that is why we really needed it shown in the master plan, isn't it? If it was shown in the master plan, your Honour, we could simply wave that at VCAT and say, "This is in force for five years, and we can rely on it because it's in force." That's what we want, your Honour. That's why we're here. So I have to get 25 emotional about it because I've seen what these guys have gone through. I would
- like to give the court some more information, just about how - -

HIS HONOUR: I don't know what the learned senior member of the Victorian Civil and Administrative Tribunal is saying there. The rights of the McLaughlins under their easement is determined by the general law, and broadly speaking, I don't see 30 any reason why the rights should be different from those I mentioned earlier, namely a right to enter on the land and improve it where necessary. However, the actual act of improving it may require consent by a local government authority and perhaps that is what the senior member is referring to; or alternatively referring to something in

35 the Act itself.

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MR WILSON: Your Honour, he might be referring to something in the Act itself. As Mr Donaghue pointed out, you can't do – well, the Act purports on the surface at least to say that you can't do anything on the airport land unless it's consistent with

- 40 the master plan, and so VCAT didn't really want to venture into that, and there was very strenuous representations made by APAM that Mr McLaughlin could not improve the road until he made an agreement with them and in fact - so this is why even this hearing is very significant for us because we have been able to obtain from them an understanding that this is a section 22(3) matter. And I would submit, your
- 45 Honour, that as a section 22(3) matter this distinguishes this matter entirely from the other matters that have been previously raised by Mr Donaghue.

Those other matters related to people who did not have strong affections with the airport land, people who live 10 miles and were concerned about future soundwaves coming from future flight paths. You know, the other matter I think that was referred to was in connection with an association of shopping centres who disliked something

- 5 about the master plan but had no actual interest in the airport land itself, and I would like to also refute the idea that the case law supports the Commonwealth's position just by simply referring again to my submission where it is said that if the matter related to land use issues there could be, in fact, an opportunity to mount, as he quotes it, an attack on the master plan. We don't see this as an attack on the master
- 10 plan. I'm genuinely sorry that it's a little bit awkward and it's going to take something to fix because it doesn't break anything down - approve or disapprove but that's the certainty I think APAM needs.

They need to know where they stand with us and I can understand why the Act is written the way it is but that's not Mr McLaughlin's fault and Mr McLaughlin owned this land before the Airports Act was passed. He owned it in 19 - it was finalised in '87 but he was on the land in '82 and it's not his fault that this Act has come into being, so I don't believe that the case law really supports the Commonwealth's case as has been made out and, as you can see by the VCAT matter, there is absolutely

- 20 genuine and ongoing issues genuine on the ground interests in play right now and we're going - the other matters referred to, stopping the development of Mr McLaughlin's land, are in hand and we believe a resolution will be - we're hoping within months, not 20 years, what this master plan is supposed to project out to and we reject the idea that a master plan that is supposed to project out to 20 years should
- 25 assume that Mr McLaughlin's land and Mrs McLaughlin's land Keith and Norma will never be able to develop their land for another 20 years. That is a bad assumption and I think it actually shows the heart of what is going on here.

I have got some other documents Mr McLaughlin - Keith wants me to give you.
They are his attempts to get some reason out of all of this. They are letters to the Minister, previous Minister - and I have to say, your Honour, that none of these issues took the Commonwealth by surprise - - -

HIS HONOUR: Have you seen these letters, Mr Donaghue? I think you had better show them to Mr Donaghue.

MR WILSON: Yes, there's one for everybody. None of these issues took the Commonwealth - - -

40 HIS HONOUR: Will you just let me know whether you have any objection before we look at them?

MR WILSON: Oh, sorry, your Honour. I don't know the procedure.

45 MR DONAGHUE: I haven't seen these letters before but I have no objection to the tribunal looking at them.

HIS HONOUR: Right. Thank you. So there's two letters, is there?

MR WILSON: There are three, your Honour.

5 HIS HONOUR: Right. I take it you don't object either, Mr Finanzio?

MR FINANZIO: I haven't got through all of them yet, your Honour. The two on the Commonwealth letterhead I have no objection to. I'm just looking at the one from Mr McLaughlin.

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HIS HONOUR: Right.

MR FINANZIO: I don't object to the letters being relied upon. Obviously enough I don't - - -

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HIS HONOUR: You don't say - - -

MR FINANZIO: --- agree with the content of them.

20 HIS HONOUR: Yes, righto. Well, we've got those, thank you, Mr Wilson.

MR WILSON: Thank you, your Honour. These letters are presented to show that Mr McLaughlin did try to talk to both APAM and the Commonwealth. They are only samples of the letters. There's more, but the thing about it is that even with this

- 25 master plan both the Minister was given a copy of the objection Mr McLaughlin put into the - during the comments period, so he did make - and the issues that are before you today, by and large, are in the letters - in the letter to the Minister and to APAM objecting so that they were on full notice that these things were concerns and I don't believe they can therefore say, "Well, it's too inconvenient for us to address them,"
- 30 because they knew about them and they could have addressed them in the process had they wanted to.

And there was the same sort of thing happened in 2004 as well. However, there was not that thing coming from Apac Drive going across the - well, going perilously - I'll say at this stage, perilously close to their easement. There was in the 1998 master plan an area reserved for their easement which - we've included that in the submission and that was just there to show that this was actually taken out and Keith

- was objecting to the removal of the land area in the zoning for the easement, and that's outlined in the submission also. I'll just run through some of the other things
- 40 which were mentioned which I felt needed to be talked about; first of all, the structure of the Airports Act by the way, one more thing. As said in the as we mentioned in the submission, it's actually by law these things have to be addressed in the master plan. It's Keith's right to have in them so he can wave them at VCAP.
- 45 Anyway, that's all in the submission, but what I want to say now is that the structure of the Act it's been said that the building control sorry the major development plan and I think I should actually refer to the Act is a similar kind of a process to a

master plan but, in fact, although the comment - public comment is very similar, as you would expect - there's only so much you can do with that - the actual criteria for which a major development plan is measured on is astonishingly different from a master plan. The development plan actually - the major development plan actually relies on a whole lot of other plans already being in place and that is the criteria on

- 5 relies on a whole lot of other plans already being in place and that is the criteria on which the major development plan is measured and I'll go to the actual part of the Act. So if the interests in the land concerned are not established in the master plan there is actually not much in the major development plan contents here - section 91, page 87, that's where I'm on and section 1.
- 10

HIS HONOUR: Sorry, of the master plan?

MR WILSON: No, of the Act. I'm sorry, your Honour. Have I skipped ahead too fast?

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HIS HONOUR: Yes. Right.

MR WILSON: My apologies, your Honour.

20 HIS HONOUR: Section 91, page 87, is it?

MR WILSON: Yes, indeed, your Honour, 87, section 91.

HIS HONOUR: Yes.

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MR WILSON: Now, as you can see here, there is a fundamental difference with the major development plan. First of all in point (A) you can really see it. It's the airport leases company's objectives for the development, so it's really a commercial thing and rightly so because the public interest is supposed to be protected by the

- 30 master plan, and then after that, you know, the extent of future needs of the airport, etcetera, and a detailed outline of the development, but there are not the purposes of the master plan articulated in the development plan. If you look at the purposes in section 1A by which the Minister will make his decision, it has got to relate to the airport but it has got to be consistent with the airport I'm looking at (1A)(b) it has
- 35 got to be consistent with the airport lease of the airport; that is, the Commonwealth and APAMs commercial interests and the final master plan for the airport, so the criteria - the purpose of the development plan is not to protect the interests of the public.
- 40 That's already assumed in the master plan to which the development plan refers. So if Keith and Norma don't establish their section 22(3) interest in the master plan, it will not necessarily be reflected in the development plan because as I run down the list, it's not part of the purposes, and if I run down the list I just see a lot of other things to the flight paths of the airport and the exposure draughts and so forth.

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HIS HONOUR: What are you taking me to now?

MR WILSON: Sorry, your Honour - - -

HIS HONOUR: Don't apologise. I probably should have followed. Just tell me what it is.

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MR WILSON: Yes, your Honour. Section 91(1) and I'm running down the list.

HIS HONOUR: Yes, you said (A)(b) somewhere. I can't see an (A)(b).

10 MR WILSON: 91(A) do you not have 91(1A) on your - - -

HIS HONOUR: Yes.

MR WILSON: That's the purposes. Now - - -

15

HIS HONOUR: And (b) of that?

MR WILSON: Yes, (b) is consistent with the airport lease.

20 HIS HONOUR: Okay.

MR WILSON: And that's the commercial interest – the airport lease is the commercial interests of APAM and the Commonwealth. I have no objection to this, your Honour. I'm not saying there's anything sinister about it because it relies on the

25 master plan to protect the public interest, and if that public interest, and if that interest of the other people in the land concerned is not established in the master plan, it will not necessarily come through the development plan as my reading of the Act. Now, you know, perhaps another argument could be made why my reading is wrong. I'm not a lawyer. But that's the way I read it, and that is also the way the

30 regulations in the airports regulations read exactly like that. So if I look, for example, in the regulations, the Airports Act Regulations, I wish I had a copy – I do have a copy, but by memory it's the Airports Regulation 5.02 or something of that nature. It says that a master plan must address any existing – any section 22(3) interests.

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HIS HONOUR: Yes, well, you've pointed that out.

MR WILSON: Yes, well, it then goes on, your Honour, and I think by memory it goes on to say, because I've lost it – thank you, Keith – it then goes on to say what a development plan must address, and it is not section 22(3) interest, it's the interests of subleases.

HIS HONOUR: So where is that?

45 MR WILSON: I am looking for it furiously, your Honour. Airports Regulations, your Honour, and I'm looking at, yes, it's actually, as I pointed out 5.02(3) for the section 22(3). It says:

Address any interests to which the relevant airport lease is subject under section 22(3).

That's 5.02(3), but then going to 5.04 - - -

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HIS HONOUR: Now, wait a minute. 5.02, subsection (3) is that it?

MR WILSON: That's the first one, your Honour, where it says that the master plan must address Keith and Norma's section 22(3) interests in the land. Silence is not
good enough. It must address it. This is clause (3)(b), 5.02, subrule (3), clause (b). Yes, this is the Airports Regulations. Interestingly, the way the Act is structured they have to do this and I don't want to get into why I think that happened, but anyway, it's there in the regulations, and so the master plan by law must address the interests,

not just be silent about it. And for these sorts of reasons, this is why we're here. If it

did address that interest properly, we wouldn't be here. But anyway, if you flick over the page to 5.04 it talks about contents of a major

development plan, and it says there – it talks about any obligation that has passed the relevant airport leasing company under section 22(2) or 26(2) or any interest to
which the relevant airport lease is subject under 22(3) of the Act, it's there as well. Sorry, your Honour, I mucked up, it's there as well.

HIS HONOUR: Where are you now?

25 MR WILSON: I'm in 5.04, I found something new. You discover something new every day in this thing.

HIS HONOUR: 5.04.

- 30 MR WILSON: Yes, it looks there, any interest to which the relevant airport lease is subject under section 22(3), it has got to be in the development plan as well thank goodness for that major developments. But, your Honour, anyway, it has got to be in both.
- 35 HIS HONOUR: More importantly from your point of view, 5.02 deals with the master plan.

MR WILSON: Indeed, your Honour, it does, and that is really important, as Mr Donaghue pointed out earlier, from the Constitutional validity point of view it must

- 40 be addressed, so that there's no so that a master plan can't actually cause the acquisition of property. But the other thing too is the building so my point was, by looking at the Act, that the criteria for approving a master plan is a lot broader and it encompasses interests of outsiders, whereas, you know, I would take Mr Donaghue's point that mainly a development plan is about the execution of the master plan and
- 45 therefore it is mainly about the airport operator's execution of it, because those issues surrounding the land and all the other things that have been settled in the master plan already upon which the development plan relies. And so it's not sufficient to say,

"Look, just let us do anything we like in the master plan, and you can sue us later if we do something wrong in the development plan."

We can't accept that, just as we can't accept the basic premise that our standing and
the relevance of this tribunal's jurisdiction is dependent on an implication that only
APAM could possibly have something to come to the tribunal about in these regards.
And why I say that is simply because of when interpreting the Act for implications, I
understand – I mean, I'm not a lawyer, your Honour, but I understand a good place to
start is the objectives of the Act. I know I'm bouncing around a bit, but I'm running

10 out of time, so I do mean to finish on time. If I go to the objectives of the Airports Act, and that's on page 1, it says:

To promote the sound development of civil aviation in Australia.

- 15 And it talks about to establish a system for the regulation of airports, but has due regard to the interests of airport users and the general community and to promote the efficient and economic development and operation of airports. Well, I would imagine that Mr Donaghue's contention about the airport operator would come under point (c) as to the efficient and economic operation - -
 - HIS HONOUR: Where are you now?

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MR WILSON: I'm sorry, your Honour. I'm in the objects of the Airports Act.

25 HIS HONOUR: Yes, where are they?

MR WILSON: They are at the beginning of the Airports Act on page 1. I should slow down, you're right.

30 HIS HONOUR: Well, it's just that I like to think about what you last said, and when you rush on I'm sometimes behind you. Right, of the objects, which one are you referring us to?

MR WILSON: Well, I'm merely making the point, your Honour, that perhaps Mr
Donaghue's contention slips into point (c) when it comes to interpreting the Act, but points (a) and (b) are above it, and point (b) is to establish a system for the regulation of airports that has due regard to the interests of airport users and the general community. With that, your Honour, I would like to give one more handout, and that is the amendments to the 2007 amendments because none of the case law that was

- 40 given to you, which we don't believe is actually against us, but nevertheless even if taken against us, none of that took these amendments into account because they all happened before the amendments, and the amendments that Parliament put through all speak very strongly of the public interest – well, I shouldn't say that. I'll say that a lot of them do. Obviously they're technical things and so forth, but the substantial
- 45 amendments you can see in there that the Parliament put in in 2007 were about consultation with the public. It was also about a new thing called the purposes of the master plan which includes, as Mr Donaghue referred to, a thing for the public to

give an indication to the public of what to expect, and I don't think we've been given a fair indication.

And in the – it says when considering whether to approve or disapprove a master
plan in the Act, and I'll have to look it up for your, your Honour, because I don't know it, but it says that one of the things that needs to be looked at is whether it fulfils the purposes that the Parliament just put in, and that was an amendment put in in 2007. So whether to approve or disapprove a master plan, or sorry, refuse to approve, my contention is that the public interest is definitely one of those things the

10 Minister in the new parts of the Act has to consider, and I will just find that for you in the Act now, and these things were not available to the learned judges when they made their decisions and had they been available, they may have come to a different conclusion. Nevertheless, we do believe that they do support our position anyway. I'll just find it in the – it's 81, isn't it, or something of that nature.

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MR DONAGHUE: 81(3)(aa).

MR WILSON: 81(3)(aa), thank you very much for that, because in my copy I've missed a page and that's it. But I take it, it is 81(3)(aa). I'd like to read it out, I can't, Keith, because I don't have it. It simply says that the purposes of the master

- plan need to be taken into account by the Minister. Those purposes relate to the public interest as well, and the other interests of I think the land surrounding the airport, etcetera, and to assert that these things can be considered without reference to the content of the master plan, I submit is unrealistic, because if you 're going to give
- 25 an indication to the public, you have to have content in the master plan because if it's a blank sheet of paper obviously the public aren't going to know what's going to happen. And in the areas around Keith and Norma's land, it is in many respects blank sheet of paper because there are big blanks in there. And so I come to my first point, your Honour, and I think I will leave it there. There are plenty of other things
- 30 I could say, but I think the points have been made that when you look at the base line of this master plan it omits the detail of how it is today. There is no means to measure exactly what alterations are going to happen in the plan, and those things appear to affect Keith and Norma's land.
- 35 HIS HONOUR: Thank you. Now, Mr Donaghue, there are a couple of things I would like you particularly to deal with, but obviously you, because of the way these matters proceed, can have a reply.

MR DONAGHUE: Yes.

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HIS HONOUR: Does the Airports Regulations, which is tab 2 of the volume prepared by Corrs apply to this land, and if so, what do you have to say about 5.02(3)(b) which says address any interest under 22(3) and this is an interest under 22(3) isn't it?

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MR DONAGHUE: Yes.

HIS HONOUR: How does the master plan address it?

MR DONAGHUE: It doesn't.

HIS HONOUR: It doesn't? 5

MR DONAGHUE: It does not, no. I frankly concede that that regulation is - - -

HIS HONOUR: Well, you didn't draw our attention to it.

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MR DONAGHUE: Well, I didn't, because I didn't know about it. I frankly concede that it is somewhat buried in the regulations.

HIS HONOUR: Yes, all right.

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MR DONAGHUE: If I had known about it, I of course would have drawn to the tribunal's attention.

HIS HONOUR: All right, I'm prepared to accept that you've got to ferret around a 20 bit. Well, that may have – I mean, I understand it's not fatal to your argument, but it's relevant to your argument.

MR DONAGHUE: I accept that. In order to get there you have to go from a general regulation making power at the end of section 71 into one of several sets of regulations and then find the provision, but I apologise for not having found that or 25 identified it.

HIS HONOUR: All right. Well, that's the first point, and the second point is maybe this is a matter for Mr Finanzio as much as it is for you, and frankly, I'm not 30 sure where it goes anyway, but is there not an inconsistency between the paragraph you pointed me to in the Government's letter to Mr and Mrs McLaughlin of 12 March 2009 which says you do have rights to undertake work on the easement site, which is necessary to create or maintain reasonable vehicular access should you choose, and the statement in paragraphs 18 to 21 of the VCAT decision, particularly

35 paragraph 21?

> MR DONAGHUE: Yes. Well, there is, I accept, a tension between those two documents. My instructions are that the position is as reflected in the letter sent by my client's department to the McLaughlins. It may be that the answer is that there is

- 40 an area within which the common law easement entitles upgrading and maintenance of the road, but whether it entitles public access in the way of a normal public road, that may go further than the common law rights would go, and it may be that there is an area of that kind that would account for the discrepancy, but my client's position is the position set out in the letter, and it is that it is open to the McLaughlins to
- 45 exercise their common law rights to develop the land.

In that regard, can I just develop a point that Mr Wilson made, because it is, we submit, important, and to do that I need to ask the tribunal to go back to the Building Regulations, regulation 2.04, paragraph – well, let's go first to paragraph 1 and then to paragraph 2. I took, in my submissions, the tribunal to paragraph 1, which talks about the airport lessee company not being permitted to refuse consent unless the activity is inconsistent with the master plan.

HIS HONOUR: Yes.

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- 10 MR DONAGHUE: And I said, well, that doesn't show the master plan affects their interests because there is no inconsistency, but actually the position is a little stronger from my client's point of view by reason of paragraph (2)(b), which is the provision to which Mr Wilson referred, because it doesn't matter what the master plan says, if they have an interest under 22(3), the company can't refuse consent. Now, what that
- 15 does is rather underline a point I was trying to develop this morning, which is that the master plan is not a document by its nature that is capable, nor does it purport to interfere with their property rights, including the attendant common law property rights and that regulation just acknowledges that. They can, without worrying about APAMs consent, because APAM has to give it, exercise any rights that the common
- 20 law attaches to their easement, and that can be done, as that regulation makes clear, without any question of assessment against the master plan, because that's the distinction between paragraphs 1 and 2.

So really what I think the submissions made this afternoon boil down to is a focus very much upon the fact that the McLaughlins have an existing interest in land of a kind recognised by section 22(3) and we accept that for our part. And obviously that places them in a different position than the applicants in the existing cases, and obviously it places them in a stronger position than the applicants in the existing cases. They're not shopping centres 10 kilometres away or residents 10 kilometres

- 30 away, and I'm not suggesting that they are. They have a better interest than that. Now, when I made a reference to shopping centre lessees or the Qantas Club, that wasn't completely facetious - I wasn't suggesting that the McLaughlins' interest was of that character.
- 35 My point is this: it is one thing to have a property interest in the land of a kind that for many purposes would give you standing, to use that term – whether in a common law judicial review term or that would make your interest affected. But we're not asking that question in the abstract. We're asking it in a very specific context, the context created by division 3, part 5, and it is necessary within the four walls of
- 40 division 3, part 5, to find some reason why a person who has a 22(3) interest in land gets standing, when other persons don't. And Mr Wilson has taken the tribunal to a number of provisions, including the recent amendments - -
- HIS HONOUR: Well, maybe the best answer to that is this newly discovered
 regulation which says because that interest must be addressed in the I mean, to my mind that particular provision has two relevant operations. One, it does address that which in a sense I have been struggling to find somewhere.

MR DONAGHUE: Indeed, yes.

HIS HONOUR: But more importantly, it shows, through delegated legislation, I agree, but I imagine we're not going to be asked to deal with whether it's ultra vires or not in this application.

MR DONAGHUE: No, no.

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HIS HONOUR: The Parliament, speaking through delegated legislation, is saying
something that would be taken into account in construing section 242 and section 27
in the context of the legislation.

MR DONAGHUE: Well, that, with respect, is ultimately the question upon which this application turns and, as I said, if I had known about the provision I would have highlighted it.

HIS HONOUR: Yes.

MR DONAGHUE: I would have highlighted it for that reason because it does provide a possible footing within the four walls of the statutory scheme.

HIS HONOUR: Well, I'm beginning to think that if - I mean, that - yes, well, anyway.

- 25 MR DONAGHUE: The problem, in my submission, with the I think there are two points I need to make. One is that if the tribunal would otherwise have accepted the submissions that I've made, particularly about the force of the legislative intention that is evident in section 81(6) and 81(7), together with 242, as Dowsett J interpreted them. Then you have an intention derivable from the primary legislation itself as to
- 30 the scope of the merits review right that is intended to be conferred and it's what I call a one-way review of the kind in Allan v Transurban. If the way that the primary legislation is properly construed then in my submission it does not follow from the making of a regulation under sub (5) that says that the master plan has to include something that failure to include it creates standing where standing would not
- 35 otherwise have been.

It's possible it's an error. It's possible that it's something that it should have but it doesn't necessarily and, in my submission, in fact it's difficult to see how it could - how a delegated piece of legislation could change the scheme for merits review that the primary legislation contains so - - -

HIS HONOUR: Mr Wilson, just - we'll give you a chance in a moment.

MR DONAGHUE: So in much the same way as, in my submission, it would not follow from the detail of the matters that are required under 71, subsection (2), to be dealt with in the plan - that have to deal with - mainly they're straightforward because they're matters to do with the airport lessee company's intent, what it plans to do in relation to various different topics, but there are matters about noise exposure forecasts and flight plans and environmental assessments and draft environmental strategies. Persons might be affected outside - other than the lessee company - might be affected by those plans of various kinds and they are things that

- 5 are supposed to be dealt with in the master plan but, in my submission, there isn't an immediate equivalence between things that are supposed to go into the plan on the one hand and people who have standing on the other.
- And, indeed, the distinction between those concepts is those ideas is apparent from the fact that the amendments that Mr Wilson took you to and, indeed, the scheme of the Act more generally does give the public a role - an input into the master plan and it's an input that has to be put before the Minister and summarised - that has to be taken into account - so there are many things that are supposed to be inputs into this scheme but it doesn't follow that because you have a right to have an input you have
- 15 a right to review the product. They are not the same thing, with respect, and this legislation creates a wide range of people who have a right to have an input and, in my submission, a very narrow scheme of people who have a right to review the outcome and that's, in my submission, how it should be determined.
- 20 It is, in my submission, quite wrong for Mr Wilson to say as he did that they need to establish their 22(3) right through the master plan. They establish it through the easement document that the tribunal looked at this morning, the document that shows they have a registered interest in the land. That's how they prove their property rights. They don't prove them through a high level document that at no point not
- 25 just in relation to the McLaughlin's but really at no point does it descend to the level of detail that they are asking for in relation to their own interests. So to take the overpass, the Apac Drive point - our learned President asked, "Well, why can't someone just sit down and give the detail?" That, in my submission, respectfully, assumes there is detail at this point whereas a 20 year visionary document won't
- 30 have by definition the underpinning level of detail required to know exactly whose rights are going to be affected if the plan is followed through.

It just is not, in my submission, realistic to expect a plan at a very high level which says, "We would like there to be a new onramp to the freeway between the airport and Mickleham Road," to say, "Well, where exactly is that going to run? How exactly is it going to be constructed? What will its precise route be and, therefore, what impact will it have on the easement?" And if it turns out that a route is proposed that would impact on the easement the McLaughlin's would be entitled to say, "How is it that you expect to build on my property; - to cut off my legal right of

40 access?" and that would be, with respect, a very good point that they could make at that stage.

The other thing, of course, in relation to regulation 5.02 3 that the President has directed me to is that it's one thing to say, as the regulation says, that it has to acknowledge the 22(3) interests. It's quite another thing to say that it has to deal in the level of detail that the McLaughlin's seek with what they call the Sunbury Road complex and the other matters of that kind. It's quite a different thing to acknowledge the property right than to contain detail of a level of planning specificity that isn't otherwise required in relation to the document. If the tribunal pleases, those are my submissions.

5 HIS HONOUR: You wanted to add something, Mr - there does come a limit. Do you want to say something, Mr - - -

MR FINANZIO: Only if you want to hear from - - -

10 HIS HONOUR: There is a limit to back and forth but - - -

MR FINANZIO: Only if you want to hear from me, your Honour, about - you pointed out to my learned friend - - -

15 HIS HONOUR: Oh, yes. Do you want to say - - -

MR FINANZIO: - - - there was an apparent inconsistency - - -

HIS HONOUR: Yes. I mean, what is VCAT - - -

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MR FINANZIO: Not really - - -

HIS HONOUR: - - - driving at there?

25 MR FINANZIO: Not wanting to - or this tribunal - - -

HIS HONOUR: Maybe the learned Senior Member hasn't done as many conveyancing cases as I did when I was at the bar.

30 MR FINANZIO: I don't want to be on the transcript saying anything at all about that, your Honour and I wouldn't want the exact terms of the way in which the VCAT has recorded my submissions to be taken to be exactly the way it was put by me. There is, on its face, a tension about the way in which those regulations apply but the point is that approval is required under the regulations. Consent is required by us but that consent can't be refused - - -

HIS HONOUR: No.

MR FINANZIO: - - - in certain circumstances. There is no question about that 40 but - -

HIS HONOUR: All they have got to do is say to you, "This is what we want to do. We want to bring on 55 10 tonne trucks and a grader," and, provided that's reasonable, you wouldn't be entitled to object, would you?

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MR FINANZIO: Correct, and it's that last caveat - provided that's reasonable - which is the source of potential dispute between my client and the McLaughlin's

because what perhaps hasn't been brought out in the way in which you have been taken to the decision of the VCAT is that what the McLaughlin's propose for the approval of their development plan is the conversion of land which had been originally - very originally farmland and then a quarry land to a - I think a - I can't

- 5 remember whether it's a 16 lot or 12 lot industrial subdivision which is going to require considerable road upgrades, not the kind of thing arguably that might fall within what the dominant tenement owner is entitled to, as a right, under the easement. And the simple fact of the matter is - and I don't want to go into and wouldn't be permitted to go into the details of negotiations between the various
- 10 parties is that what's borne out by this decision of VCAT is that the council wanted a high standard of construction for this road in order to approve the development plan.
- The McLaughlins had originally agreed to that standard and then altered the version of the development plan to lower the standard. At the hearing there was no agreement between anybody about what the ultimate standard of that road would be and ultimately that's recorded in the tribunal's decision. The fact of the matter is, though, that in the context of all of that we're one party whose consent is required either under the Act or in the context of our easement right. So whilst there is -
- 20 whilst, on the face of it, there seems to be a glaring tension between what's written by the VCAT in these paragraphs and the position in the regulations, there's a lot more nuance and subtlety to it.
- HIS HONOUR: But I mean, as I that's one reason why I wanted to see the
 easement, because just on my quick look at it it's about as extensive a right of
 carriageway as you can get.

MR FINANZIO: Correct.

30 HIS HONOUR: I accept that it's short of forming a public road.

MR FINANZIO: Correct.

HIS HONOUR: And there is still the element of invitation that has to exist for its use.

MR FINANZIO: Correct. But it's fair to say, your Honour - - -

HIS HONOUR: But short of that it's as extensive as it could be.

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MR FINANZIO: And there's no argument about that. The bottom line, I suppose, is that that gap between the extent of the right of easement and the full rights of a public highway is perhaps the one thing that remains yet un-litigated between APAM, the Commonwealth and our clients. But it is - that is a matter that has been

45 the subject of ongoing discussion.

HIS HONOUR: All right, thank you.

MR FINANZIO: I did want to say as well, your Honour - I wanted to join my learned friend on his sword, that that clause - that regulation of - that particular regulation I had overlooked as well. I didn't think it would be fair that - -

5 HIS HONOUR: I had actually formed the view that you had not overlooked it and that was why you were sitting quietly.

MR FINANZIO: No, I wouldn't have - no, no, your Honour, I wouldn't have sat quietly.

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HIS HONOUR: Right. Okay.

MR FINANZIO: As your Honour pleases.

15 HIS HONOUR: Yes, Mr Wilson. Well, it seems that the non-lawyer here has turned up - - -

MR WILSON: The trump card. Thank you, your Honour. I just wanted to say that my - without taking away - here I'm talking like a lawyer now, aren't I? Without

- 20 taking away any of the affections expressed in the submissions which are, like, you know, where land surrounding the airport we have rezoning and all this sort of stuff without taking away anything from them, which I sincerely believe in, I want to say that the submission I made that the the submission I made that this place is different because it is a 22(3) interest is different in both law and fact. It's different in fact as
- 25 I've pointed out before, it's not soundwaves or some shopping centre somewhere else who is jealous.

It is actually - it is fact by the physical locality, but it's also law in the sense that APAM only acts in relation to the master plan as a lessee. Although in VCAT they

- 30 asserted they were a responsible authority, in fact, under the Act it says "the lessee shall do this. The airport lessee shall do that." And so, therefore, intrinsic in the structure of the Act itself, which is - I'm driving the point contrary to what Mr Donaghue said. Obviously we're at loggerheads about this. But intrinsic in the Act itself is the section 22(3) subjection in every point that the lessee does because it
- 35 does so in the capacity of the lessee in putting together the master plan. Does that point make sense, your Honour? Have I expressed myself - -

HIS HONOUR: Well, I think we pretty clearly understand what you're trying to say, Mr Wilson.

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MR WILSON: Yes, thank you, your Honour. And I will finish off by saying it's even in the lease, the airport lease - it says - as an obligation in the airport lease that APAM must put together a master plan. It is definitely something under the lease and, therefore, it is implied in the Act, in the structure of the Act, that a section 22(3)

45 interest takes precedence and it's not just in the regulations. It is the way the Act is formed, the actual words of what happens. And, finally, I want to - - -

MR McLAUGHLIN: There's copies of the lease - - -

MR WILSON: If you want the lease, your Honour - do you want the lease?

5 HIS HONOUR: I don't think we need it.

MR WILSON: No. And, finally, in the regulations it says about appeals to the tribunal in the regulations. There's a column here. It says:

10 Item - decision -

15

And that's the various things in the regulations.

HIS HONOUR: What are you looking at now?

MR WILSON: I'm sorry, your Honour - - -

HIS HONOUR: The airport regulations.

20 MR WILSON: --- it is page 51 of the Airports (Building Control) Regulations, your Honour.

HIS HONOUR: All right. No, that's the building regulations. Yes.

25 MR WILSON: Yes, the Building Control Regulations. I'm just pointing them out as an example.

HIS HONOUR: And what is it you're taking us to?

30 MR WILSON: Yes, page 51 of the Building Control Regulations, your Honour. I'm pointing out an example of what can be done - - -

HIS HONOUR: Well, I haven't got 51, I'm afraid.

35 MR WILSON: Very well. We have - yes, that's it. Thank you, Keith. And we've got another here and we've got one for everyone probably.

HIS HONOUR: So what is it you want to take us to?

40 MR WILSON: Here we go, page 51. It says - all I want to say is that if it was the intention of Parliament to lock people out of review, they could do it just like it was done in here. And I'm saying they didn't do it - - -

HIS HONOUR: Yes.

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MR WILSON: --- and they did do it here.

HIS HONOUR: Yes.

MR WILSON: I don't think you can draw the inferences that Mr Donaghue does, your Honour. Thank you.

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HIS HONOUR: All right. Well, this is a case in which perhaps we might have given an oral decision, but I think because of the existing decisions of Deputy President Forgie and Dowsett J in the Federal Court of Australia it's probably better that we give some reasoned decision, so we will reserve our decision in the matter.

10 Unfortunately, for various reasons associated with my commitments, that's going to mean it's going to be weeks rather than days before we can actually give our decision. I would like to thank counsel and you, Mr Wilson, on behalf of Mr McLaughlin and we will give our decision as soon as we can.

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MATTER ADJOURNED at 3.27 pm INDEFINITELY