

Legal Aspects of Heritage issues at Perth Airport

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1. Heritage issues in relation to 40 hectares of bushland called Precinct 2C on the Master Development Plan: nationally listed bushland (also Bush Forever site); nationally listed species (*macarthuria keigheryii*)
2. Legal framework for protection of the bushland:
 - a. *Airports Act* (Cth) s 94 copy attached as Attachment 1
 - b. *Environmental Protection and Biodiversity Conservation Act* (Cth) s 160
 - c. *Australian Heritage Council* (WA) 2003
 - d. *Environmental Protection Act* (WA) 1986 MOU/ Bilateral governing how decisions are made when State and nationally significant environmental matters are impacted
3. State laws and Commonwealth laws – State laws apply on Commonwealth land unless Commonwealth business is interfered with, or inconsistent with the Act, so in this case land use and building laws were excluded, but not environmental laws, and (arguably) not land degradation laws (*Soil and Land Conservation* legislation).
4. **Standing and futility:**
 - a. Decision made on the 14th of November. UBC found out about it, by chance, on the **28th of November 2003**;
 - b. By 5 December, we had provided written advice. An appeal to the Administrative Appeals Tribunal, (“AAT”) provides a forum for review of the merits, or substance, of a decision provided the Tribunal has jurisdiction. We advised that an appeal lay from a decision under s 94 of the *Airports Act* and that an application could be made by third parties under s 27 of the AAT legislation. The EDO did not have the right or capacity to represent parties in the AAT. We therefore provided information about how an AAT matter is pursued by non-legally represented parties.
 - c. The land was being cleared at the time. It was considered that an application for a stay to stop the clearing and for review of the decision was not tenable until the decision had been received, and some reasons could be provided to the court for challenging the decision. The decision arrived mid December.
 - d. Meetings of 18 and 23 December: we further advised that a number of hurdles existed, namely:
 - Although the time for making an application in the AAT ran from the date the decision was received (it wasn't received until 22 December) an application for review could be declined on grounds of futility, due to the operation on the land being underway, as the AAT refuses to deal with matters on grounds of principle if the subject matter has disappeared and

- furthermore the UBC may be found to lack standing and we provided a copy of a relevant case (*Davnar*)
 - an application for a stay would have to be made but that it did not operate as a stay and the Judge would have to rule on that before the clearing could be stopped.
- d. Draft of grounds of appeal available by 24 December and so the EDO assisted in the drafting, together with UBC, over the holidays - during which the process of clearing the land had stopped.
 - e. The application was lodged by UBC mid January, together with the evidence on which the decision would be tested.
 - f. By 5 February, the clearing had been completed and so the stay application was withdrawn, by consent.
 - g. The Australian Government Solicitor then refused to respond to the grounds of appeal, or, provide all the documents before the first call of the matter. On 22 April, we assisted with preparations for the hearing by reviewing submissions on the preliminary issue.
 - h. Steve Walker was subsequently retained by UBC on a pro bono basis. Although the EDO then closed its file we have had a report from Steve Walker which will be in our next newsletter. His report was that although no record of reasons would be prepared by the Tribunal for the decision, the standing issue was decided in favour of the Australian Government and the submissions successfully put on behalf of the Minister about standing were that:
 - *the UBC is not a “person...whose interests are affected by” the decision within the meaning of s.27(1) of the AAT Act, and so cannot validly apply for a review; and*
 - *that s.27(2) – which appears to explicate the concept of a person whose interests are affected by including an incorporated body to whose objects or purposes the decision relates – did not assist UBC because the decision did not in fact relate to a matter included in its objects or purposes.*

The draft major airport plan was the subject matter of the decision rather than the land or its habitat and species and therefore the UBC was in no better position than a bystander. By contrast to this decision, in April, in the Supreme Court of the ACT, a decision was made which granted standing to a group very similar to the UBC. Ironically, the general law in the Supreme Court now provides more extensive rights of standing than the AAT - although the AAT is a costs-free merits-based appeal system that was partly promoted as a better way of providing access to justice to ordinary citizens than the Supreme Court. The gates are shut to third parties, however, if the issues involve Airport land.

Impediments to third parties review of decisions about land use planning at airports:

1. The *Airports Act* does not provide for any appeal rights for third parties (meaning that standing had to be argued) or even a copy of the decisions on draft development plans to be given to third parties (so that something could be done about it in a reasonable time frame);
2. The Australian Government expressly forbids EDOs (unlike CLC's) from representation of parties in the Tribunal which means that third parties have to upskill quickly, and the AAT registry's outreach service was not as client-friendly as it needed to be on this occasion;
3. Standing laws in WA's AAT are out of date, as other States and other jurisdictions provide a more liberal test; and
4. There does not appear to be a robust decision-making process in place between the various key players in order to provide third parties opportunities to be heard. It is a natural justice requirement in administrative law that all affected parties be heard. Fairness means, in my view, allowing persons representing some relevant aspect of the public interest the opportunity to put their case directly to the actual decision-makers. It appears that the relevant Commonwealth Ministers were at third remove here. UBC speaks to WAC or the State government officers or the Minister, who then liaise with the federal agencies pursuant to MOU's, who advise the Australian Government Ministers. The AAT, which is allowed to substitute its decision- for that of the actual decision-maker, in effect 'stand in the shoes of the decision-maker', refused to hear them.

Attachment 1

Sections 93 and 94

93 Consultations

- (1) This section applies if:
 - (a) an airport-lessee company gives the Minister a draft major development plan; and
 - (b) before the publication under section 92 of a notice about the plan, the company consulted a person covered by any of the following subparagraphs:
 - (i) a State or Territory government;
 - (ii) an authority of a State or Territory;
 - (iii) a local government body;
 - (iv) an airline or other user of the airport concerned;
 - (v) any other person.
- (2) The draft major development plan submitted to the Minister must be accompanied by a written statement signed on behalf of the company:
 - (a) listing the names of the persons consulted; and
 - (b) summarising the views expressed by the persons consulted.

94 Approval of major development plan by Minister

- (1) This section applies if an airport-lessee company gives the Minister a draft major development plan.
- (2) The Minister must:
 - (a) approve the plan; or
 - (b) refuse to approve the plan.
- (3) In deciding whether to approve the plan, the Minister must have regard to the following matters:
 - (a) the extent to which carrying out the plan would meet the future needs of civil aviation users of the airport, and other users of the airport, for services and facilities relating to the airport;
 - (b) the effect that carrying out the plan would be likely to have on the future operating capacity of the airport;
 - (c) **the impact that carrying out the plan would be likely to have on the environment;**
 - (d) **the consultations undertaken in preparing the plan (including the outcome of the consultations);**
 - (e) the views of the Civil Aviation Safety Authority and Airservices Australia, in so far as they relate to safety aspects and operational aspects of the plan.
- (4) **Subsection (3) does not, by implication, limit the matters to which the Minister may have regard.**
- (5) If a final master plan is in force for the airport, the Minister must not approve the draft major development plan unless it is consistent with the final master plan.
- (6) If the Minister neither approves, nor refuses to approve, the draft major development plan before the end of the period of 90 days after the day on which

- the Minister received the draft plan, the Minister is taken, at the end of that period, to have approved the plan under subsection (2).
- (6A) However, if the advice of the Minister administering the Environment Protection and Biodiversity Conservation Act 1999 is sought under Subdivision A of Division 4 of Part 11 of that Act in relation to a draft plan, subsection (6) applies as if it referred to the day on which the advice was given, instead of the day the draft plan was received.
 - (7) The Minister may approve the draft major development plan subject to one or more conditions.
 - (8) As soon as practicable after deciding whether to approve the draft major development plan, the Minister must notify the company in writing of the decision.
 - (9) If the Minister refuses to approve the draft major development plan, the Minister must notify the company in writing of the Ministers reasons for the refusal.
 - (10) The regulations may provide for fees to be payable in respect of the lodgement of a draft plan under subsection (1).