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# Federal Court of Australia

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## Village Building Co Limited v Airservices Australia [2007] FCA 1242 (15 August 2007)

Last Updated: 15 August 2007

### FEDERAL COURT OF AUSTRALIA

#### The Village Building Co Limited v Airservices Australia

[\[2007\] FCA 1242](#)

**ADMINISTRATIVE LAW** – airports – draft Australian noise exposure forecast (ANEF) submitted by airport operator to Airservices Australia for endorsement – whether Airservices in performing its obligations under [s 9\(2\)](#) of the [Air Services Act 1995](#) (Cth) must examine all the underlying assumptions on which a draft ANEF is based – whether examination for technical accuracy sufficient – effect of the [Airports Act 1996](#) (Cth) on Airservices’ power or function to endorse an ANEF – whether an ANEF can be made for a period in excess of the 20 year planning period provided by [s 72](#) of the [Airports Act](#) – whether an endorsement given under the [Air Services Act](#) in the exercise of a function directed by the Minister to be performed is an endorsement in the manner approved by the Minister for the purposes of a later enactment, the [Airports Act](#)

**WORDS AND PHRASES** – ‘ensure’ – ‘as far as is practicable’ – ‘endorsed in the manner approved by the Minister’

**HELD** – application dismissed with costs

[Airports Act 1996](#) (Cth) [ss 5, 71, 72, 73, 78\(2A\)](#)

[Airports Regulations 1997](#) (Cth) reg 1.04

[Air Services Act 1995](#) (Cth) [ss 8\(1\), 9\(2\), 16](#)

*Clayton v Heffron* [\[1960\] HCA 92](#); (1960) 105 CLR 214 followed

*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 35 followed

**THE VILLAGE BUILDING CO LIMITED v AIRSERVICES AUSTRALIA & ANOR  
ACD 25 OF 2007**

**RARES J  
15 AUGUST 2007  
SYDNEY (VIA VIDEO LINK TO CANBERRA) (HEARD IN CANBERRA)**

**IN THE FEDERAL COURT OF AUSTRALIA  
AUSTRALIAN CAPITAL TERRITORY DISTRICT  
REGISTRY** **ACD 25 OF 2007**

**BETWEEN:** **THE VILLAGE BUILDING CO LIMITED  
ACN 056 509 025  
Applicant**

**AND:** **AIRSERVICES AUSTRALIA  
First Respondent**

**CANBERRA INTERNATIONAL AIRPORT PTY LTD  
ACN 080 361 548  
Second Respondent**

**JUDGE:** **RARES J**  
**DATE OF ORDER:** **15 AUGUST 2007**  
**WHERE MADE:** **SYDNEY (VIA VIDEO LINK TO CANBERRA) (HEARD IN  
CANBERRA)**

**THE COURT ORDERS THAT:**

1. The application is dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#).

**IN THE FEDERAL COURT OF AUSTRALIA  
AUSTRALIAN CAPITAL TERRITORY DISTRICT  
REGISTRY** **ACD 25 OF 2007**

**BETWEEN:** THE VILLAGE BUILDING CO LIMITED  
ACN 056 509 025  
Applicant

**AND:** AIRSERVICES AUSTRALIA  
First Respondent

CANBERRA INTERNATIONAL AIRPORT PTY LTD  
ACN 080 361 548  
Second Respondent

**JUDGE:** RARES J  
**DATE:** 15 AUGUST 2007  
**PLACE:** SYDNEY (VIA VIDEO LINK TO CANBERRA) (HEARD IN CANBERRA)

### REASONS FOR JUDGMENT

1 The Village Building Co Limited ('Village') is a land development company. It is the registered proprietor of a 57.5% interest as tenant in common in two parcels of land known as Tralee North and Tralee South at Queanbeyan in New South Wales. The land is presently zoned rural under the *Queanbeyan Local Environmental Plan 1998* prepared under the [Environmental Planning and Assessment Act 1979](#) (NSW). Village has sought to have the Tralee land rezoned to permit residential development.

2 The Tralee land is located in the vicinity of the southern flight part of aircraft landing and taking off from Canberra International Airport. Canberra International Airport Pty Limited has been the lessee and operator of that airport since May 1998. The airport lessee is responsible for the conduct of Canberra airport's business in accordance with the requirements of the [Airports Act 1996](#) (Cth). Canberra airport is a core regulated airport ([s 7\(1\)\(k\)](#)).

3 Airservices Australia has many functions under the [Air Services Act 1995](#) (Cth) relating to aviation. One of Airservices' functions is to be responsible for endorsing Australian Noise Exposure Indices/Forecasts for all Australian airports.

4 In early December 2006, the airport lessee submitted to Airservices, for the latter's endorsement, a draft Australian noise exposure forecast (ANEF) for areas surrounding Canberra airport. The draft was an 'ultimate capacity' ANEF. The draft ANEF projected that the ultimate capacity of the airport will be reached in 2050, some 43 years hence. An ultimate capacity ANEF is one which assesses the maximum number of aircraft movements of which the relevant airport is capable, and then makes a noise exposure forecast of land in the vicinity of the airport in respect of that number. Airservices completed its review of the draft ANEF and on 18 June 2007 advised the airport lessee that it considered the ANEF to be suitable for endorsement.

#### Issues

5 Village claims that it will be adversely affected if Airservices endorses the draft ANEF because the Queanbeyan LEP and other New South Wales planning provisions will then operate to impose additional costs and restrictions on Village's ability to exploit the Tralee land if it is rezoned to permit residential development. Village's application raises three principal issues as to the capacity of Airservices to endorse the draft ANEF, namely:

1. Village asserts that [s 9\(2\)](#) of the [Air Services Act](#) requires that Airservices must examine all the underlying assumptions on which the draft ANEF is based in order to see

whether they provide a reasonable or realistic foundation for the projections which are based on them. Airservices argues that its function of endorsement does not require it to make an assessment of the validity, commercial viability or likelihood of the assumptions which the proponent of an ANEF uses as a basis of its calculations.

2. Village argues because the draft ANEF makes projections beyond the 20 year planning period under the *Airports Act*, it cannot be endorsed by Airservices. The airport lessee argued that an ANEF could be made for any time period and that there was no requirement to limit it to 20 years or less. Airservices and the airport lessee say that Airservices does not have a function of endorsing ANEFs under the *Airports Act*. Rather they say that Airservices has a different function, which is to endorse ANEFs under the *Air Services Act*. The Minister has not yet approved a manner of endorsing an ANEF under the *Airports Act*. Accordingly, Airservices argues that any endorsement by it in the exercise of its functions under the *Air Services Act* of the draft ANEF cannot have any effect for the purposes of the *Airports Act*.

3. Village argues that the draft ANEF is not capable of being regarded as an ANEF at all. This is because, it argues, the draft ANEF is not a forecast within the ordinary and natural meaning of the word 'forecast'. It says that a 'forecast' must be based on present indications of forecast usage of the airport and that the draft ANEF was not so based.

6 It is common ground that Airservices does not intend to afford Village any opportunity to be heard before Airservices endorses the ANEF. Village asserts that Airservices is obliged to afford it such an opportunity.

### **The Australian Standard for ANEFs**

7 The assessment of potential aircraft noise exposure at a given site, for land use and planning purposes, is based on the ANEF for the site. Standards Australia has published an Australian Standard: *Acoustics – Aircraft Noise Intrusion – Building Siting Construction: AS 2021-2000*. An airport lessee, in preparing a draft and final master plan under [s 71\(2\)\(e\)](#) of the *Airports Act*, must have regard to the Standard in developing plans for managing aircraft noise intrusion in the vicinity of an airport in areas forecast to be subject to exposures above 30 ANEF levels ([s 71\(8\)](#)). The Standard explains that the ANEF system takes account of noise levels, frequency and time of day of aircraft noise events. An ANEF depicts on charts noise exposure contours of 20, 25, 30, 35 and 40 ANEF. The contours indicate land areas around aerodromes which are forecast to be exposed to aircraft noise at certain levels.

8 The Standard prescribes a number of particular consequences depending on whether a building is proposed to be sited in a location between the 20 and 40 ANEF contours. The acceptability of a building site for the purposes of the Standard is dependent upon the type of building proposed and on the ANEF zone in which it is to be located as identified in Table 2.1. The Standard suggests that there will be usually no need to have any further regard to it if a building site is outside the 20 ANEF contour, because then it is likely that the dominant source of noise will come from other than aircraft. So, residential buildings will be acceptable for the purposes of the Standard if they are in an ANEF contour zone of less than 20 ANEF. The Standard states that within the area from 20 ANEF to 25 ANEF '... aircraft noise exposure starts to emerge as an environmental problem, while above 25 ANEF, the noise exposure becomes progressively more severe'. Thus, under the Standard, residential buildings will be conditionally acceptable where they fall within the 20-25 ANEF contour, but unacceptable where the zone is of a contour greater than 25 ANEF. The latter concern is also reflected in [s 71\(2\)](#) of the *Airports Act* which requires an airport lessee to specify, in each master plan under that Act, its plans for managing aircraft noise intrusion in areas forecast to be subject to noise exposure intrusions of greater than 30 ANEF.

9 Appendix A to the Standard states that the ANEF chart for an airport will have been reviewed by relevant authorities before release, '... and the chart will display the official endorsement of Airservices Australia or the Department of Defence'. Under the Standard, only one ANEF chart for a

given aerodrome can be current at any one time. For the purposes of the Standard a more recently endorsed ANEF chart will supersede an earlier one. The Standard describes its App A as being only for information and guidance. The way in which an ANEF contour map operates is described in App A of the Standard as:

*'... showing the forecast of noise exposure levels that will exist in a future year. It may be for a particular year, generally about 10 years from the date of issue, or in the case of some of the busier civil airports, it may represent the airport operating at "ultimate capacity". It is based on a firm forecast of aircraft movement numbers and operating times, aircraft types, destinations, flight paths and a given use of runways at the aerodrome.'*

### **The significance of the draft ANEF**

10 An airport lessee in the position of Canberra airport's lessee is required to prepare master plans under the [Airports Act](#) from time to time. In 1997, Canberra Airport ceased to be a joint-user airport (see: [s 7B\(2\)](#) and reg 1.04 of the [Airports Regulations 1997](#) (Cth)). This had the effect that Canberra Airport is now governed by the provisions of the [Airports Act](#), including [s 71\(2\)](#), which apply to most of Australia's major city civil airports. A draft or final master plan must relate to a period of 20 years, which is called the planning period ([s 72](#)). If a final master plan for an airport is in force, and a more recent ANEF for the airport is endorsed in the manner approved by the Minister under the [Airports Act](#), the airport lessee must give the Minister a draft master plan expressed to replace the current one within 180 days of the endorsement of the more recent ANEF ([s 78\(2A\)](#)). An ANEF must be specified in every draft or final master plan ([s 71\(2\)\(d\)](#)).

11 Under cl 69(3) of the Queanbeyan LEP the Council may grant development consent to land zoned residential, which is located under a flight path in the 20-25 ANEF contour, only if it is satisfied that any building to be constructed will satisfy the provisions of the Standard. The LEP defines an 'ANEF contour' to mean 'the noise exposure contour shown as an ANEF contour on the plan of Canberra (Fairbairn) airport or surrounding land prepared by an appropriate Commonwealth public authority'. And, cl 69(4) of the LEP requires the Council to consider, in granting development consent, any noise exposure contour prepared for the land concerned by Airservices and to assess whether the proposed use of the building will be affected adversely by exposure to aircraft noise.

12 A draft amendment to the LEP was prepared by the Council in March 2005. It proposed rezoning the Tralee land to residential. A public inquiry into the draft amendment was proposed to be held in 2006.

13 Queanbeyan Development Control Plan No 49 – Exempt and Complying Development, came into force in March 2007. DCP 49 provides, in cl 3.3d, that development carried out on land within the 20-25 ANEF contour which is habitable or capable of habitation for residential purposes will not be 'complying development'. 'Complying development' is defined in [s 76A\(5\)](#) of the [Environmental Planning and Assessment Act](#) as local development that can be addressed by predetermined development standards in an environmental planning instrument made under that Act. In other words, cl 3.3d of DCP 49 has the effect of requiring the Council to give individual consideration to conditions of consent for any of the Tralee land which is in the 20-25 ANEF contours.

14 In September 2005, the New South Wales Minister for Planning issued Ministerial Direction No 12 – Development Near Licensed Aerodromes, pursuant to [s 117](#) of the [Environmental Planning and Assessment Act](#). That provided that draft LEPs should not rezone land for residential purposes where the ANEF 'as from time to time advised by that Department of the Commonwealth [responsible for aerodromes and the lessee of the aerodrome] exceeds 25'. The State Minister also directed that if a draft LEP rezoned land for residential purposes where the ANEF was between 20 and 25, the LEP must include a provision to ensure that any development meets the requirements of the Standard in relation to interior noise levels.

15 In the draft ANEF for Canberra airport some parts of the Tralee land are within the contour of 20-25 ANEF and other parts are within contours greater than 25 ANEF. Hence, Village is concerned that if the draft ANEF is endorsed it will have the consequences, under the State planning laws, that its proposal to undertake a residential development of the Tralee land in the future will be affected adversely or its ability to exploit the land for that purpose will be inhibited.

### The Statutory Context

16 Airservices was established by [s 7\(1\)](#) of the [Air Services Act](#). Airservices' functions are contained in [s 8](#) of the [Air Services Act](#). They include:

- providing services and facilities for purposes relating to the safety, regularity or efficiency of air navigation, whether in or outside Australia ([s 8\(1\)\(a\)\(iii\)](#));
- promoting and fostering civil aviation, whether in or outside Australia ([s 8\(1\)\(b\)](#));
- carrying out activities to protect the environment from the effects of, and the effects associated with aircraft operated in the course of trade or commerce with other countries or among the States, in a Territory, between Territories or between a Territory and a State, or, in the course of or for the purposes of the provision of services by a trading corporation or foreign corporation ([s 8\(1\)\(d\)\(i\)](#)) and see the definition of 'Commonwealth jurisdiction aircraft' in [s 3](#).
  - any functions conferred on Airservices under the [Air Navigation Act 1920](#) (Cth) or the [Aviation Transport Security Act 2004](#) (Cth) ([s 8\(1\)\(f\)](#));
  - any other functions prescribed by the regulations, being functions relating to any of the matters referred to in [s 8\(1\)](#) ([s 8\(1\)\(g\)](#));
  - providing consultancy services and management services relating to any of the matters referred to in [s 8\(1\)](#) ([s 8\(1\)\(h\)](#));
  - any functions incidental to any of the other functions in [s 8\(1\)](#) ([s 8\(1\)\(i\)](#));
  - providing services and facilities, whether or not related to aviation, for other purposes than mentioned in [s 8\(1\)\(a\)-\(i\)](#) which are within the executive or legislative powers of the Commonwealth, utilise Airservices' air capacity and maintain or improve the technical skills of Airservices' employees while not impeding its capacity to perform its other functions ([s 8\(1\)\(j\)](#)).

17 Airservices must exercise its powers and perform its functions:

*'... in a manner that ensures that, as far as is practicable, the environment is protected from:*

- (a) the effects of the operation and use of aircraft; and*
- (b) the effects associated with the operation and use of aircraft.'* ([s 9\(2\)](#))

18 And, in the performance of its functions and the exercise of its powers, [s 10](#) requires Airservices 'where appropriate' to consult with government, commercial, industrial, consumer and other relevant bodies and organisations. In addition to any other powers conferred on it by the [Air Services Act](#), but subject to that Act, Airservices also has power to do all things necessary or convenient to be done for or in connection with the performance of its functions ([s 11\(1\)](#)). This includes a power to do anything incidental to any of its powers ([s 11\(2\)\(g\)](#)).

19 Significantly, by dint of [s 16](#), the Minister may give written directions to Airservices relating to the performance of its functions or the exercise of its powers. Airservices must comply with a direction given by the Minister under [s 16\(1\)](#) ([s 16\(3\)](#)). Subject to compliance with a direction by the Minister under [s 16\(1\)](#), the extent to which Airservices provides its services and facilities is a matter for its discretion ([s 8\(3\)](#)).



## The Minister's s 16 Direction

20 On 3 May 1999 the then Minister gave Airservices a written direction under [s 16](#) for the purposes of [ss 8\(1\)\(d\)](#) and [9\(2\)](#) of the [Air Services Act](#). The schedule to the direction included the following function:

*'(x) make available data for the development of aircraft noise exposure analyses and prediction and be responsible for endorsing Australian Noise Exposure Indices/Forecasts for all Australian airports.'*

21 The Minister transmitted this direction to Airservices in a letter in which he expressed an expectation that Airservices would '... work very closely with my Department to determine and settle the scope and parameters of the activities it will perform under the Direction'. The ANEF system can be used to produce both an Australian Noise Exposure Forecast and an Australian Noise Exposure Index, as the Standard explains in App A3.

22 In August 1999 Airservices and the Department formalised their agreed understanding about those matters. Each of the items in the Minister's direction under [s 16](#) was set out in the agreed understanding and each was followed by a statement headed 'Agreed Interpretation'. The agreed interpretation for item (x) in the [s 16](#) direction was:

*'It is understood that this item refers to the provision of data to the Department. Airservices currently sells data and noise modelling services to the private sector and nothing in this item in the Direction is intended to restrict this. The intention is to ensure that the Minister and the Department have continued access to noise modelling data (eg INM input files) and that they can request services, such as those currently provided in relation to the [Airports Act](#), on a no-charge basis. **The formal endorsement of ANEF/ANEI for technical accuracy**, a requirement of Australian Standard AS2021, will continue. However, it is noted that there may be a conflict of interest issue with respect to Airservices both endorsing and producing noise exposure charts.'* (Emphasis added.)

23 The agreed understanding for item (x) has not been changed since it was recorded in August 1999. On the evidence, the Minister has not complained that in the performance of its functions of endorsing ANEFs under the [Air Services Act](#), Airservices has acted otherwise than in accordance with his [s 16](#) direction.

## The [Airports Act](#)

24 It is necessary now to turn to the [Airports Act](#). That Act came into operation in 1996. It was most recently amended in May 2007. The Bill for the Amendment Act was introduced into the House of Representatives on 29 November 2006. The objects of the [Airports Act](#) include the establishment of a system for the regulation of airports that has due regard to the interests of airport users and the general community ([s 3\(b\)](#)).

25 Item 7 of [Pt 1](#) of Sch 1 of the [Airports Amendment Act 2007](#) (Cth) inserted the following definition into s 5 of the principal Act:

*'Australian Noise Exposure Forecast, for an airport, means an Australian Noise Exposure Forecast endorsed in the manner approved by the Minister.'*

The [Airports Amendment Act 2007](#) did not repeal any earlier definition of an Australian Noise Exposure Forecast. Both before and since the 2007 amendments, the [Airports Act](#) contained a definition of 'significant ANEF levels' as meaning a noise above 30 ANEF levels. This definition related to the inclusion in [ss 71\(2\)\(e\)](#), [71\(3\)\(e\)](#) and [71\(8\)](#) of references to significant ANEF levels and

the Standard. Before those amendments [s 71\(8\)](#) required an airport lessee to have regard to the 1994 version of the Standard. The amendments updated this to the current version of the Standard.

26 Before commencement of the [Airports Amendment Act 2007](#), s 71(2) required an airport, such as Canberra airport, to have a draft or final master plan which had to specify:

*‘(d) forecasts relating to noise exposure levels.’*

That was amended, so that s 71(2)(d) now requires draft and final master plans to specify ‘an Australian Noise Exposure Forecast (in accordance with the regulations, if any, made for the purpose of this paragraph) for the areas surrounding the airport’. The explanatory memorandum stated that these amendments:

*‘... respond to community concern about adequate information concerning flight paths and aircraft noise exposure patterns around airports by providing that an airport master plan released for public comment is to specify such information in accordance with requirements to be set out in regulations.’*

And, the 2007 amendments added s 71(4)(c) which contained an express power to provide by regulation that proposals, forecasts and other matters covered by s 71(2) could relate to:

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

27 The recent amendments and their explanatory memorandum provide a context in which the airport lessee’s ultimate capacity draft ANEF came to be submitted to Airservices. Before the 2007 amendment, s 72 had set a 20 year planning period to which any master plan was limited. The explanatory memorandum envisaged that the amendment to the regulation making power by the insertion of s 71(4)(c) would:

*‘... allow for a draft or final master plan to include [ANEF] information that extends beyond the 20 year planning period, enabling State and Territory land use planning agencies to implement long-term planning goals that are compatible with an airport’s proposed long term aeronautical operations.’*

28 In addition, the 2007 amendments inserted s 78(2A) into the Act. That provides that if a final master plan for an airport is in force (namely for a five year period as provided in s 77(1)), ‘... and a more recent [ANEF] for the airport is endorsed in the manner approved by the Minister’, then, within 180 days from that endorsement, the airport lessee must give the Minister a draft master plan expressed to replace the then existing one, unless the Minister grants a longer period.

### **Role of Airservices under the [Airports Act](#)**

29 No function under the [Airports Act](#) is expressly conferred on Airservices. On the other hand, [s 8\(1\)\(f\)](#) of the [Air Services Act](#) creates a function of Airservices to perform any functions conferred on it under two other Acts which deal with air navigation and transport security. There is some similarity in the descriptions of ‘endorsement’ of an ANEF referred to in the [s 16](#) direction under the [Air Services Act](#) and that in the [Airports Act](#). However, no direction or other manner of endorsement has been given or approved by the Minister for the purpose of the [Airports Act](#) that Airservices endorse ANEFs.

### **Issue 1: Must Airservices endorse the assumptions in an ANEF?**

30 Village argued that Airservices has an imperative duty by dint of [s 9\(2\)\(b\)](#) of the [Air Services Act](#)



and the operation of the [s 16](#) direction to ensure the appropriateness and adequacy of each assumption underlying a draft or final ANEF. Village contended that [s 9\(2\)](#) requires Airservices to ‘ensure’ that the environment is protected from the direct ([s 9\(2\)\(a\)](#)) and indirect ([s 9\(2\)\(b\)](#)) effects of the operation and use of aircraft when performing its function of endorsing ANEFs. It argued that, relevantly, this meant that in performing its function of endorsement under the [s 16](#) direction, Airservices cannot limit its consideration to the technical accuracy of the ANEF without examining the validity of all the assumptions on which it is based.

31 It was common ground that the words ‘be responsible for endorsing’ in the [s 16](#) direction meant that Airservices had authority or control for declaring its approval of an ANEF.

32 Village submitted that in [s 9\(2\)](#) the word ‘ensure’ was used in the sense of making certain that an occurrence, or arrival of an event, or the attainment of a result, would occur. It relied on the construction which the word ‘ensure’ had been given in contractual documents, in cases such as *Reliance Permanent Building Society v Harwood-Stamper* [1944] Ch 362 at 373 per Vaisey J; *Commercial and General Acceptance Limited v Nixon* [[1981](#)] [HCA 70](#); (1981) 152 CLR 491 at 505 per Mason J, 508 per Aickin J, 521 per Wilson J and 524 per Brennan J; and *Gration v C. Gillan Investments Pty Ltd* [2005] 2 Qd R 267 at 270-271 per Williams JA.

33 However, the performance of a public duty or the fulfilment of a public function by a body such as Airservices is different to the performance or fulfilment of private rights or privileges by a private individual or corporation acting in its own interest. If the Court took a strict view of the public duty or function, a deviation from the conditions laid down in the statute would make the act of the public body invalid: *Project Blue Sky Inc v Australian Broadcasting Authority* [[1998](#)] [HCA 28](#); (1998) 194 CLR 355 at 392 [[97](#)] per McHugh, Gummow, Kirby and Hayne JJ. The inconvenience to the public which that approach would occasion is a powerful reason against adopting that construction: *Clayton v Heffron* [[1960](#)] [HCA 92](#); (1960) 105 CLR 214 at 247 per Dixon CJ, McTiernan, Taylor and Windeyer JJ. In *Project Blue Sky* 194 CLR at 392-393 [[99](#)]-[[100](#)] the majority held that while the statute there imposed a legal duty on the authority, an act done in breach of the statutory duty was not invalid. But, they held, a person with a sufficient interest could sue for a declaration that the authority had acted in breach of the statute and, in an appropriate case, could obtain an injunction restraining it from taking any further action based on its unlawful conduct.

34 Village recognised that [s 9\(2\)](#) qualified ‘ensure’ by the words ‘as far as is practicable’. These words, it said, meant ‘capable of being put into practice, done, or effected’. It said that the word ‘practicable’ required an assessment to be made by Airservices in which risks had to be weighed against measures necessary to eliminate those risks but this did not affect its obligation to examine each assumption in an ANEF.

35 The obligation imposed on Airservices by [s 9\(2\)](#) of the *Air Services Act* is intended to assist in the protection of the environment from the direct and indirect effects of the operation and use of aircraft, ‘as far as is practicable’. *The Macquarie Dictionary* (revised 3<sup>rd</sup> ed) gives a fuller meaning of the word ‘practicable’ as:

*‘capable of being put into practice, done, or effected, especially with the available means or within reason or prudence; feasible.’* (Emphasis added.)

What is ‘practicable’ includes consideration of Airservices’ available means to perform the relevant function and the nature of the task itself.

36 Airservices’ function of ‘promoting and fostering civil aviation’ in Australia under [s 8\(1\)\(b\)](#) raises the possibility that there may be an expansion of civil aviation over time to meet the changing needs and demands of the people of Australia. Nonetheless [s 9\(2\)](#) recognises that that activity has an environmental consequence. Thus [s 9\(2\)](#) requires Airservices to take measures, in a way that is

reasonable and prudent, to adopt a means of promoting and fostering civil aviation that is to be the least harmful, and will offer the greatest protection, to the environment. However [s 9\(2\)](#) does not impose on Airservices an absolute obligation to protect the environment. Rather the section imposes a condition on the exercise of the functions entrusted to Airservices.

37 And, [s 16\(1\)](#) is a power of the Minister to give directions to Airservices relating to the performance of its existing functions or the exercise of its existing powers. When Airservices exercises a function in a manner directed by the Minister under [s 16](#), [s 16\(3\)](#) requires it give effect to the policy objectives of the executive government.

38 The manner in which Airservices performs the function or exercises the power the subject of a [s 16](#) direction is further qualified by the words ‘as far as is practicable’ in [s 9\(2\)](#). What is ‘practicable’ for the purposes of [s 9\(2\)](#) can be affected by the resources available to Airservices with which it can perform its functions. Here, the [s 16](#) direction gave Airservices a function of endorsing someone else’s forecast without specifying how that was to be done. Some discretion to select the means and the nature of its endorsement or approval must be afforded to the repository of that function of endorsement or approval. But, Village says that any discretion is removed by the requirement to ensure, as far as is practicable, the protection of the environment in the way [s 9\(2\)](#) provides.

39 If the Minister’s [s 16](#) direction had explicitly provided that the manner of endorsement would be that which was agreed in August 1999 between Airservices and the Department, Airservices’ function would be limited to an analysis of an ANEF’s technical accuracy. Confining Airservices’ role in the endorsement process to assessing the technical accuracy of a forecast is a means of ensuring, as far as is practicable, the protection of the environment from the direct or indirect effects of the operation and use of aircraft. Apart from the expansive construction it attributed to [s 9\(2\)](#), Village did not identify how Airservices had a power or function to examine, for example, the commercial needs, objectives, forecasts, plans or analyses of airport lessees.

40 Kenneth Owen, the senior environment specialist of Airservices’ Environment Branch, has responsibility for overseeing and undertaking the review of ANEFs for technical accuracy. Mr Owen explained in his affidavit that the result of ANEF calculations is a set of contours joining points of equal aircraft noise exposure on a map depicting the airport. Some of the input data for the ANEF are forecasts which, he said, were inherently subject to the variability which must be expected with any forecasting process. But, Mr Owen said that the accuracy of the computational process itself can be checked by comparing aircraft noise levels directly measured over a period of time with the computer modelled levels for the actual aircraft traffic which existed over the same period of time. That comparison indicates whether the measured and modelled levels were well correlated. Mr Owen pointed out that an ultimate capacity ANEF could contain several sets of information relating to progressive stages in the development of an airport within a definite time horizon. He said, and the Standard confirms, that an ANEF requires review at regular intervals to ensure its continued validity.

41 Mr Owen exhibited to his affidavit a checklist of 31 pages which he used in assessing the draft ultimate capacity ANEF for Canberra airport, the subject of these proceedings. He checked the particular assumptions used to produce the draft ANEF for the purpose of determining whether they were based by the applicant for the ANEF on an identified appropriate and relevant source. He said that in performing this function, his practice of determining whether an ANEF may be endorsed under the [s 16](#) direction is not to assess any of the data in a qualitative way or to seek to determine the likelihood of the assumptions behind the relevant data actually occurring. Nor does he undertake an audit of the business plan of the airport operator which stands behind the assumptions used in a draft ANEF application. In exercising the function of endorsement Mr Owen, and Airservices, check that:

- the appropriate aircraft types have been selected for use as input data;
- the runway used in flight path data is operationally suitable;
- the forecast numbers of aircraft operations are no greater than the

anticipated physical capacity of the airport;

- the assumed data have been correctly entered into the ANEF model which has been submitted for endorsement;

- the correct version of the software has been used;

- the shape and size of the draft ANEF contours appear to be consistent with the input data;

- the chart and data presented in the draft ANEF format contain all the items required;

- the sources of data submitted with the draft ANEF can be identified.

42 Village does not challenge those aspects of the function undertaken by Airservices in checking for technical accuracy, except to say that it does not go far enough. Village's complaint is that Airservices has not gone further by checking the underlying validity of the airport lessees' assumptions as to user.

43 I am of opinion that the function of endorsement required by par (x) of the Minister's s 16 direction relates to the authentication of the technical accuracy of the draft ANEF submitted by an airport lessee or other proponent. The assumptions upon which the draft ANEF was based will be exposed for others to consider when reviewing it, such as planning bodies, or the Minister, or the public. Critical assumptions in a draft or final ANEF as to the commercial level of operations of an airport will depend upon economic and market factors. Thus, those assumptions will involve consideration of matters such as potential demand for airline services, growth in population, tourism, visitors and other matters that attract or may attract airline movements to the particular airport. For example, an airport located at a tourist destination may have a particular predicted growth pattern in future years depending upon whether or not developments of resorts or other infrastructure nearby occur. On the other hand, development considerations for capital cities may depend upon a variety of demographic, market and other factors.

44 Factors which underpin an estimate of future demand for aircraft movements to and from the airport in question, do not have the character of matters appropriate for endorsement by Airservices exercising its functions under the *Air Services Act*. Factors concerning the demand for aircraft movements relate to the commercial operation of an airport, as opposed to the noise effects which particular levels of that operation may be expected to generate. Although it is not legitimate to use another enactment as an aid to construction of Airservices' functions under the *Air Services Act*, the distinct character of the commercial considerations which a proponent of an ANEF will be uniquely placed to provide as assumptions on which noise impacts can be calculated, can be seen in the factors in s 71(2) of the *Airports Act*. Thus, the requirements that an airport lessee specify its development objectives for the airport, or its assessment of the future needs of civil aviation users of the airport and of other users of the airport (s 71(2)(a) and (b)) are relevant as assumptions for the future demand of aircraft movements at an airport. The character of an ANEF is of a forecast which applies known formulae to assumptions of demand or user of an airport. Those assumptions are derived separately from the technical process involved in calculating the ANEF.

45 Once an airport operator formulates its assumptions as to the likely level of demand for the use of the airport, an ANEF becomes a valuable planning tool for assessing the impact of that postulated user. And, the endorsement of Airservices for a particular ANEF will be understood, in terms of the s 16 direction under the *Air Services Act*, as being an approval of the complex calculations and formulae needed to produce an ANEF on its identified assumptions. The Standard recognises that an ultimate capacity ANEF identifies its critical user assumption as being the maximum reasonable use of the airport, based on the physical ability of the airport to cope with that use applying ordinary methods of aircraft movement management. In preparing such an ANEF, it is not necessary to examine whether it is realistic to assume that the airport will be used to its maximum capacity, because that is not the purpose for which the forecast is produced. Its purpose is to assess the noise

impacts when the airport is used at its maximum capacity, applying the formulae and calculations in the Standard.

46 I am satisfied by the terms of the Standard and Mr Owen's unchallenged evidence that assessment of the technical accuracy of an ANEF is a matter of some complexity. It involves the application of skills and expertise of the kind which Airservices has. An ANEF is calculated by using complex mathematical formulae to produce one or more logarithmic values. The Standard explains in App A2 how the calculations are made. The calculations use the results of surveys of the reactions of Australian communities to aircraft noise near airports at various times, levels and frequencies of aircraft operations. Further mathematical adjustments are then made including allocating the number of aircraft movements assessment to the various possible runways and flight paths. These are then used with existing and forecast air traffic control procedures and noise abatement precautions to calculate the ANEF. The Standard recognises that the ANEF method is sensitive to the forecast of air traffic movements and their flight paths. It explains that an ANEF '... is a contour map showing the forecast of noise exposure levels that will exist in a future year'.

47 Thus, an ANEF is a static prediction, in the sense that it identifies at a particular point in time what areas will be affected to what degree by the noise generated by a postulated level of aircraft movement. The Standard contemplates two types of ANEFs. One is an ANEF formulated as a projection based on assumptions at a particular future time. The Standard postulates this as generally 10 years from the date of issue. (In the [Airports Act](#), a 20 year planning period is provided.) The Standard also contemplates that an ultimate capacity ANEF can be made. The latter identifies as the basis of its forecast the maximum number of aircraft movements which can occur at an airport. The fact that that maximum may not be reached for a very considerable period of time, including the 43 years in the present case, does not detract from its utility as a planning tool. An ultimate capacity ANEF will identify the areas in the vicinity of the airport and its flight paths which have the potential to be adversely affected in the future using the measure of the ANEF contours.

48 If a projection is technically accurate, environmental impacts from noise exposure can be assessed for the purpose of [s 9\(2\)](#) of the [Air Services Act](#) and informed decisions can be made. The purpose of an ANEF is to provide forecast information about the noise impact on an area from a particular level of future aircraft movements. The Standard does not evince an intention that the purpose of an ANEF is to analyse whether or when that number of aircraft movements will be achieved. Rather, the Standard suggests that its use as a planning tool is to explain how to calculate what the ANEF contours will be when the particular level of movements up to maximum capacity is reached.

49 An ultimate capacity ANEF is simply a calculation which expresses a forecast of the noise impact of the maximum use of the airport. That calculation does not depend on an assessment of whether or when that maximum capacity will be reached. The validity of the assumptions as to when a particular level of usage or the ultimate capacity will be reached cannot affect the actual calculation of the noise impact at that usage once it is reached. In those circumstances, the commercial basis or reasonableness of projections as to when the ultimate capacity will be reached cannot affect the validity of an ultimate capacity ANEF.

50 Likewise, the way in which ANEFs may be used, for example, under the [Airports Act](#) in the promotion or consideration of a draft master plan, depends upon a variety of assumptions and analyses that are separate from the technical accuracy which an ANEF has as a forecast. The question of whether those responsible for the planning of airports and the surrounding areas wish to provide for the use of Canberra airport at its ultimate capacity may be informed by the provision of an ultimate capacity ANEF. It is open to Airservices to endorse such an ANEF under the [s 16](#) direction.

51 I am of opinion that Village's argument on the first issue fails.

**Issue 2: Is the draft ANEF precluded from being able to be endorsed by Airservices because of the [Airports Act](#)?**



52 Village asserted that if Airservices endorses the draft ANEF it will be acting in a manner approved by the Minister within the meaning of the definition of the term 'Australian Noise Exposure Forecasts' in [s 5](#) of the *Airports Act*. Village asserted that this result followed because Airservices had the function of endorsing ANEFs for the purposes of the *Air Services Act* under the [s 16](#) direction given to it in May 1999.

53 However this argument fails to address the source of the power or function which Airservices presently is able to exercise or perform and whether it answers the definition in the *Airports Act*. The source of Airservices' power or function to endorse an ANEF is the direction of the Minister under [s 16](#) of the *Air Services Act*. That direction was given in 1999, well before the May 2007 amendments to the *Airports Act* which made provision for the Minister to approve a manner for endorsing an ANEF under that Act. Both the *Air Services Act* and the *Airports Act* are silent about Airservices having any role under the *Airports Act* in relation to ANEFs.

54 In addition, Village's argument is not supported by the legislative history of the *Airports Act*, in light of the 2007 amendments. Those amendments inserted for the first time in the *Airports Act* the defined term Australian Noise Exposure Forecast as meaning a forecast '... endorsed in the manner approved by the Minister'. At the time of the hearing, no manner for the endorsement of such a forecast under the *Airports Act* had been approved by the Minister. It follows that the Minister had yet to exercise his power, created by the 2007 amendments, to provide any mechanism for the endorsement of an ANEF under and for purposes of the *Airports Act*.

55 Airservices indicated on 18 June 2007 that the draft ANEF was in a suitable form for its endorsement. This indication can only have been a reference to an endorsement made pursuant to the function conferred on Airservices by the Minister's 1999 direction under [s 16\(1\)](#) of the *Air Services Act*. Such an endorsement is not one which meets the definition of an ANEF approved by the Minister for the purposes of the *Airports Act*. This is because he has not yet approved any manner for endorsing an ANEF under that Act.

56 If Airservices were to endorse the current draft ANEF, such an endorsement would not enliven any obligation of the airport lessee under [s 78\(2A\)](#) of the *Airports Act* to prepare a new draft master plan. This is because, once again, no manner approved by the Minister for the endorsement of ANEFs for the purposes of the *Airports Act* has yet come into existence. Unless and until the Minister exercises his power to approve a manner for endorsement of ANEFs for the purposes of the *Airports Act*, the new amendments to that Act, including [s 78\(2A\)](#), will not operate on ANEFs endorsed by Airservices were it merely to act under the [s 16](#) direction given under the *Air Services Act*.

57 Village also argued that an ANEF could not be made which forecasts noise exposures for a period in excess of the 20 year planning period provided by [s 72](#) of the *Airports Act*. This is, it says, because [s 72](#) provides that a draft or final master plan 'must relate to a period of 20 years', called the 'planning period', and [s 73](#) requires an assumption to be made for the purposes of a draft or final master plan for an airport, that the then airport lessee will continue to hold the lease for the duration of the planning period of the plan. Village noted that [s 78\(2A\)](#) of the *Airports Act* created an obligation for an airport lessee to give the Minister a new draft master plan when a more recent ANEF was endorsed in a manner approved by that Minister. Village contended that because [s 72](#) of the *Airports Act* was in mandatory terms, any new draft master plan for which [s 78\(2A\)](#) provided could not relate to a period longer than the 20 year planning period in [s 72](#).

58 However, [s 71\(4\)\(c\)](#) was also inserted into the *Airports Act* by the 2007 amendments. It now provides a power to make a regulation which authorises a forecast, including an ANEF under [s 71\(2\)\(d\)](#), that relates to a longer period than the 20 year planning period. Both the explanatory memorandum and a letter dated 16 July 2007 from the deputy secretary of the Department of Transport and Regional Services to the general manager of Queanbeyan City Council contemplate that, in fact, regulations will be made under [s 71\(4\)\(c\)](#) to permit forecasts in ANEFs to be specified in a master plan for a period greater than the 20 year planning period.



59 I am of opinion that the proper construction of the [Airports Act](#) does not support a requirement that the ANEF specified in a draft or final master plan must be limited to the planning period of 20 years. The possibility of a longer period to which a forecast may relate in respect of matters which must be specified in a master plan is now expressly contemplated by the power to make regulations under [s 71\(4\)\(c\)](#) to that end.

60 Moreover, the construction of [s 71\(2\)](#) must accommodate the fact that the Parliament intended to provide a means of regulating the development and future use of airports which are major infrastructure assets. The section operates in respect of elements of master plans, some of which will endure longer than 20 years even though the plan itself relates to that limit as its planning period. Thus, [s 71\(2\)\(a\)](#) requires a draft or final master plan to specify the airport lessee's 'development objectives for the airport'. And, [s 71\(2\)\(c\)](#) requires an airport lessee to specify its intentions for land use and related development of the airport site. Those requirements necessarily involve the existing airport as well as matters such as the maintenance, removal, amelioration or erection of fixtures, including runways and buildings, which are capable of enduring beyond the 20 year planning period.

61 If Village's argument were correct, the only planning concepts available for consideration in a master plan under the [Airports Act](#) would be those which in express terms are for no more than 20 years.

62 The Parliament could not have intended that an ANEF could not go beyond 20 years in a draft or final master plan with the consequence that other development, surrounding an airport in a major city in Australia, could occur which would prevent the airport's future development. If that were correct, a new site would later be required on which to build another airport when the needs of the city for aircraft movements exceeded the 20 year projection. That would create further environmental impacts from noise in two locations, rather one, for the one city.

63 I am of opinion that on its proper construction the [Airports Act](#) does not prevent an ANEF being made for a period beyond the planning period provided that it relates to that planning period. Indeed, it can hardly have been the intention of the Parliament in enacting the [Airports Act](#), as amended, to have stultified the future growth potential of an airport in the way contended for by Village. The consequence of Village's argument, that an ANEF cannot extend beyond 20 years, absent a regulation under [s 71\(4\)](#), is that third parties would be able to engage in development or uses of land around an airport which created a planning conflict between the user of the airport and the surrounding development at a time over 20 years away, that prevented the future expansion of use of the existing capacity of the airport.

64 The process of approving a use of land and providing a planning regime for land necessarily involves consequences in the immediate short term, as well as in the longer term. Any major public or private infrastructure development will have planning impacts which are of indefinite duration. Once built, the development will affect the surrounding environment by the manner, nature and extent of its user. But its effect may also extend to the potential for further development in the future not only of that site but of surrounding property. A development consent to permit a large factory, for example, will create development impacts including those from emissions, noise, traffic, supporting infrastructure (such as shops, food outlets and transport for workers) and the appropriateness of planning controls for nearby land.

65 One significant purpose of Div 3 of [Pt 5](#) of the [Airports Act](#) is to enable proper and public assessments to be made of draft and final master plans for major Australian airports on a regular, at least five-yearly, basis. But a major airport of the kind regulated under [s 68](#) of the [Airports Act](#) is not merely a development with a fixed life of 20 years. Rather, it forms a vital and necessary part of the transport infrastructure not only of the city in which it is located but also of the nation. A master plan is contemplated by [s 71](#) of the [Airports Act](#) to relate to a planning period of 20 years. But the development, being the airport itself, has planning impact for an indefinite duration. The mere requirement in [s 72](#) that a master plan relate to a period of 20 years, does not preclude the plan also

referring to a longer period, provided that it otherwise satisfies the obligation specifically to address the matters in [s 71\(2\)](#) in a manner which relates to the planning period of 20 years. It would be absurd to conclude that because a new runway will last and be used for more than 20 years, a draft master plan would be invalid if it considered the runway's use as a long-term fixture beyond the 20 year planning period.

66 Thus, [s 71\(2\)\(e\)](#) requires draft and final master plans to include the airport lessee's plans for managing aircraft noise intrusion in areas forecast to be subject to exposure above 30 ANEF levels. These plans are required to be developed following consultation by the airport lessee with airline users and local government bodies in the vicinity of the airport. And the airport lessee is also required to develop those plans having regard to the Standard (cf: [s 71\(8\)](#) of the *Airport Act*). As explained above, the Standard recognises that one type of ANEF is an ultimate capacity ANEF. This can be a planning tool of significance in a master plan. An ultimate capacity ANEF can be both current (ie at the present time or at a time within the [s 72](#) planning period) and prospective (ie beyond 20 years hence). It can be current because it measures what user the airport is actually able to achieve in its present state, if it were ever required to be used to that level. It is prospective in the sense that the forecast time at which the airport's normal operations are expected to be at ultimate capacity may be years into the future. But in each sense, an ultimate capacity ANEF will relate to the 20 year planning period because any long term development of the airport and the surrounding vicinity must have regard to the impact of its operations at its ultimate capacity, whenever the airport is used at that level.

67 The purpose of [ss 71\(4\)](#), [72](#) and [73](#) requiring a master plan to relate to planning period of 20 years, or such other period as is prescribed, is to ensure that detailed analyses will be undertaken for that identified period. The power in [s 71\(4\)](#) to prescribe a longer period to which elements of the master plan may relate permits the period on which the plan focuses to be increased. But a master plan which in fact relates to the 20 year or greater or other planning period provided in [s 72](#) or by a regulation under [s 71\(4\)](#) of the *Airports Act*, is not prohibited by any provision of that Act from, in addition, referring to another period which is longer. Suppose an airport lessee specified in a draft master plan under [s 71\(2\)\(a\)](#) a development objective to construct a new runway in the five year period which the draft plan was to cover. If Village's argument were correct, the airport lessee could not lawfully analyse in the draft master plan the longer term needs of the airport beyond 20 years. That is unlikely to have been a result intended by the Parliament when enacting [s 72](#). Of course, the airport lessee would need to specify its objectives for the new runway and relate them to the use of the airport during the planning period. But there is no express constraint in the *Airports Act* which would prohibit the airport lessee from explaining that its objective in developing the proposed runway is that by doing so the likely needs of the airport for the next 50 years will be met. Such an explanation may be needed to make sense of a proposal which would seem to be an overdevelopment if the only considerations to which the master plan could have regard were those inside the 20 year planning period (eg because the present or a smaller, less extensive, runway would suffice during that 20 year period).

68 And the environmental and planning consequences of Village's construction could be profound. First, neighbouring developing would be considered by State or Territory planning authorities in ignorance of what was likely to occur beyond the 20 year planning period (cf: [s 71\(6\)](#)). Thus, as Village wishes to occur here, properties in the vicinity of a flight path may be zoned to permit development which is compatible with all actual and potential use of the airport during the planning period, but is incompatible with the use intended more than 20 years hence. And once such incompatible development occurs, the airport may be constrained in being developed or used to meet the future needs of the city it services by the intervening development in the vicinity of the airport.

69 If the Tralee land were developed as residential land, the increase in the local population living there could add to demand over time for flights from Canberra airport. Yet the presence of that new development under the southern flight path could act as a practical constraint on the future increased use of the airport. That is the result for which Village contends here. It says that the ultimate capacity ANEF cannot be endorsed because it predicts a noise exposure for areas under the southern flight

path 43 years hence. If that ANEF is used by the State planning authorities, Village will not be able, or will have to pay more, to develop residential land under the southern flight path, because in more than 20 years it will be affected adversely by noise in excess of the 20 ANEF contour. If Village is right, and is able to develop residential land because any valid ANEF, on its construction, cannot go beyond 20 years, then Canberra airport will not be able to be used at its maximum capacity, because the intervening residential development will be affected adversely in many years' time. Proper planning would seek to avoid such a result.

70 I am of opinion that a master plan will not be invalid if it contains additional or supplementary forecasts concerning matters which are required to be specified under [s 71\(2\)](#). Such additional or supplementary forecasts can extend beyond 20 years so long as the master plan also contains the forecasts which [ss 71\(2\)](#) and [72](#) require specifically to address and relate to the planning period. Those sections do not prohibit other matters from being considered in a master plan or being taken into account, in addition to the mandatory ones. And, [s 71\(4\)](#) specifically permits the actual matters specified in [s 71\(2\)](#) (as opposed to additional or supplementary ones) to relate to different periods if regulations are made to bring about such a result.

71 Indeed, the 2005 master plan for Canberra airport contains an ultimate practical capacity ANEF as at 2050 (par 10.5.5 and fig 10.5) and a comparison between the 20 ANEF contours for the 2050 ultimate practical capacity ANEF, the 2024 ANEC ('Australian Noise Exposure Concept') and the former 1997 ANEF (fig 10.6). A master plan which is approved by the Minister becomes a final master plan which comes into force at the time of the approval. It is unlikely that the inclusion of matters in addition or supplementary to those required to be included in a master plan were intended by the Parliament to have the effect of rendering invalid a draft or final master plan: *Project Blue Sky* 194 CLR at 391 [94]–[95]; see too at 381–382 [69]–[71], 384 [78] per McHugh, Gummow, Kirby and Hayne JJ, *Clayton v Heffron* 105 CLR at 247 per Dixon CJ, McTiernan, Taylor and Windeyer JJ. The consequence of Village's argument is so impracticable that it cannot have been intended in the absence of express words.

72 I am of opinion that the [Airports Act](#), in requiring a master plan to relate to the 20 year planning period, does not preclude the master plan from addressing in addition matters, such as ANEFs, for lengthier periods. Such a construction gives effect to the objects in [s 3](#) of promoting 'the efficient and economic development and operation of airports' and of promoting the sound development of civil aviation in Australia.

73 More significantly, the ANEF which [s 71\(2\)\(d\)](#) requires is one endorsed in a manner approved by the Minister. Other ANEFs not so endorsed are not proscribed from being prepared or checked for accuracy by a body such as Airservices. However, they will not be capable of satisfying the requirement of [s 71\(2\)\(d\)](#) unless endorsed under the [Airports Act](#) in a manner approved by the Minister.

74 I reject Village's arguments on this issue.

### **Issue 3: Must an ANEF be completely based on present indications of future matters?**

75 Last, Village argued that the draft ANEF was not a forecast at all. This is because, it argued, a projection as to when Canberra airport's maximum capacity would be reached is not 'based on present indications'. For this, Village relied on one definition of 'forecast' in *The Oxford English Dictionary* (2<sup>nd</sup> Ed, Vol VI) to support its argument, namely:

*'a forecasting or anticipation; a conjectural estimate or account, based on present indications, of the course of events or state of things in the future.'* (Emphasis added.)

76 But the same dictionary gives a definition of the verb 'forecast' as 'to estimate, conjecture, or

imagine beforehand (the course of events or future condition of things)'. Conjecture involves the formation of an opinion or supposition as to facts on grounds which themselves are insufficient and includes guessing and surmising (see the definition in *The Oxford English Dictionary* (2<sup>nd</sup> ed)). In my opinion, the ordinary and natural meaning of the word 'forecast' as used in the term 'ANEF' must connote conjecture, at least to some degree. This is so whether the ANEF is made under the [Air Services Act](#), the [Airports Act](#) or the Standard. So, a forecast can involve a number of inputs, some more certain or capable of proof than others. The formula from which an ANEF is derived is complex. It involves both technical calculations about the particular noise that will be produced in certain circumstances and assumptions as to what might produce those circumstances. There is no necessity that every element of a forecast in an ANEF be founded in fact or be based on a prediction with which all reasonable people will agree. Businesses, entrepreneurs and governments all make budgets or forecasts of their projected economic performance. It is unsurprising that a good many do not come true and there is informed debate about whether the assumptions underlying them are appropriate.

77 Village's construction of Airservices' function of endorsing ANEFs necessarily requires Airservices to 'approve' the economic prediction of demand for use of the airport at a future date which is inherent in an ANEF. I am of opinion that this construction should not be adopted. It requires Airservices to analyse and then approve the economic predictions of an entrepreneur as how that entrepreneur predicts it would be able to achieve its projected results. The task would involve assessing the entrepreneur's business skills. A business can be a success in a vendor's hands yet later fail in a purchaser's hands, or vice versa, because one is a better entrepreneur. But there may be many other causes of the failure. Individual talents, business judgments and skills are hallmarks of commercial success and failure. Yet, if Airservices' function of endorsement of an ANEF were to include, as Village argued, approving an airport lessee's demand forecasts or its business plans, Airservices would have to make assessments of that lessee's entrepreneurial skills as well as its commercial judgments. Stockmarkets and those who participate in them seek to perform such assessments daily, and not always with success.

78 I am of opinion that Airservices was not entrusted with such a function when the Minister directed it to 'endorse' ANEFs under the direction made pursuant to [s 16](#) of the [Air Services Act](#). Mr Owen's evidence demonstrates that checking an ANEF for technical accuracy involves significant analysis and expertise. Airservices could be expected to use its resources and expertise to ensure that an ANEF conformed to the requirements of the Standard or such other formulae as Airservices considered appropriate to produce it.

79 Village asserts that, in effect, each ANEF must be a forecast by Airservices if it is to endorse it. The question is, whose forecast must the ANEF be? The nature of conjecture in estimation or forecasting suggests that Airservices' function of 'endorsement' need not necessarily be to verify or approve every integer in an ANEF as a valid forecast. While Airservices must 'endorse' the forecast, I am of opinion that the forecast is not that of Airservices. The function of endorsement can be achieved by Airservices' approach of ascertaining the technical accuracy of the ANEF. There is no error in Airservices exercising its powers and functions in that way. Indeed, the fact that it has done so with the agreement of the Department administered by the Minister for a number of years, without provoking a further direction from the Minister to broaden the ambit in the way suggested by Village, suggests that this is the way in which the Minister's direction intended the power to be exercised.

80 The draft ANEF will still be a forecast even though Airservices does not ascertain the underlying accuracy of the projected times within which the ultimate capacity will be reached. Relevantly, as the Standard sets out, an 'ultimate capacity' ANEF is a firm forecast of aircraft movements, numbers, operating times, aircraft types, destinations, flight paths and given use of runways at an aerodrome. When the airport is operating at ultimate capacity, it will be possible to estimate the values to be attributed to the inputs for an ANEF. The year in which the ultimate capacity is arrived at may be a product of commercial factors which it is not 'practicable' for Airservices to assess in exercising its functions under [s 9\(2\)](#) of the [Air Services Act](#). Nor does the precise timing when ultimate capacity



will be reached have any substantive relationship to the environmental impact which the noise then produced will have. The environmental impact is the noise, not the number of years hence in which that noise will occur. Once the projection is made, others can make a judgment as to whether, for example, a new master plan should be approved under the [Airports Act](#). That has a public consultation process for the consideration and later approval of a draft master plan (see [s 84A](#)).

81 In my opinion this argument fails. For these reasons, I am satisfied that it is a lawful manner of discharging the function of endorsing an ANEF under the [s 16](#) direction for Airservices to assess it for technical accuracy, as contemplated in the agreed understanding of August 1999 and in Mr Owen's evidence.

### **Village's standing to sue**

82 Airservices and the airport lessee argued that Village was not a person whose interests were affected by the proposed endorsement of the draft ANEF. It was common ground that Village did not wish to be heard on the technical accuracy of the draft ANEF in the manner in which Airservices had assessed it. Rather, Village wished to be heard so as to call into question the underlying assumptions as to demand, usage and timing in the draft ANEF, and whether Airservices was entitled to assume their accuracy or required to examine their validity before endorsing the draft.

83 Because I have come to the conclusion that Village's arguments for wishing to be heard fail, it would not be appropriate to grant Village any relief. Compliance with the rules of natural justice or the procedural fairness hearing rule could have made no difference to the assessment by Airservices of the technical accuracy of the draft ANEF: *Stead v State Government Insurance Office* [[1986](#)] [HCA 54](#); (1986) 161 CLR 141 at 145.

84 For the reasons I have given, I am of opinion that no jurisdictional or reviewable error in the endorsement process by Airservices has been established. It follows that I do not need to decide if Village has standing as a person whose interests could be adversely affected by what Airservices did or by any endorsement of the draft ANEF by Airservices under the direction given by the Minister pursuant to [s 16](#) of the [Air Services Act](#).

### **Conclusion**

85 In my opinion, the application should be dismissed with costs.

I certify that the preceding eighty-five (85) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 15 August 2007

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Solicitor for the Second Respondent: Mallesons Stephen Jaques

Date of Hearing: 27 July 2007

Date of Judgment: 15 August 2007

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