19 January 2007

Committee Secretary
Senate Rural and Regional Affairs and Transport Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Re: Airports Amendment Bill 2006

I refer to the amendments to the Airports Act 1996 proposed in the Airports Amendment Bill 2006 which has been referred to the Senate Committee following its second reading in the House of Representatives. I attach a submission which Council wishes to place before the Committee, for its consideration and deliberation.

These amendments have a significant impact on the development of Adelaide Airport, which is contained solely within the Council area of the City of West Torrens.

The Airport, which comprises 7 square kilometres in area, represents some 19% of the total area of our City, and has a significant effect on the amenity and the economic well being of our area.

Council provided a submission in 2003 on areas where we believed the earlier legislation could be strengthened to achieve better outcomes for the Airport operator, the Council and the business/residential communities which abut and surround the Airport.

Unfortunately, these recommendations have not been picked up in the revised legislation and our concern is that the West Torrens communities will continue to be disadvantaged by a soft approach to regulation of Airport development, continued revenue losses and depletion of the infrastructure base of our City as a consequence of limited financial contribution towards essential infrastructure upgrade by the Commonwealth as the owner or the Airport operator.

We remain concerned that while ongoing development of the Airport will provide benefits to Council and our community in an economic sense, its continued development in a vacuum or cocoon from State and Council development principles and objectives will result in inappropriate and conflicting land use, creating significant difficulties in amenity and the built form of our City.

Council earnestly requests that in the debate of this revised legislation, that the matters raised by Council receive a fair hearing.

I advise that Council has requested that it be granted the opportunity to further elaborate on our submission personally before the Committee, given the significant issues raised in our 2003 submission to the Minister, and this submission to the Senate Committee.

Mayor John Trainer and I have been asked to represent the Council at the Hearings if we are granted an opportunity.

We also confirm that local authorities in South Australia and the SA Local Government Association have requested that the City of West Torrens provides elaboration or explanation of their respective submissions.

Yours sincerely

Trevor Starr
Chief Executive Officer

The City of West Torrens as an Interested Party

This paper is focused on the relationship and impacts of the Airports Act 1996 on the City of West Torrens, its interface and the impacts positive and negative on the West Torrens community and the airport operator Adelaide Airport Limited. Council has been consulted on the submission of the Australian Local Government Association and believes that the response is a good overview of the issues of concern to Councils generally.

History

The area of the City of West Torrens comprises a total area of 37.1 square kilometres on the western side of the Adelaide Plains. The Adelaide Airport comprises 7 square kilometres or 19% of the Council area. For this reason the Council has a significant interest in the planning, development and regulation of the Airport site. It is fair to hypothesize that the airport is Council's greatest asset and its greatest liability in the development and amenity of the Council area. Council has an overriding responsibility to its constituency to ensure that all the commercial, industrial and community interests of persons who live, work and recreate within its boundaries are treated fairly and without favour. Consistency in development regulation across its area is one of the Council's primary focuses.

The constituency of the area, some 52,500 residents that live in the City believe it is a desirable place to live, work and invest. Its central location in metropolitan Adelaide together with a comprehensive range of resources and facilities within its boundaries makes it an ideal location for business, employment and families.

The development and operation of the airport is an important aspect of the community achieving its aspirations.

Council actively encourages businesses to establish in the City working with business and industry groups to create expanded opportunities for employment and economic development. There is a significant workforce estimated in excess of 40,000 who travel into the city for employment on a daily basis. The Council's vision for the City, together with sensible and responsive planning regulations, ensures ongoing development of the area to create an attractive and productive environment for the community.

In the year just past, 6 million passengers used the airport facilities for domestic and overseas travel. It is also an important facility for the delivering and distribution of time critical freight for industry and commerce. Total visitation to the airport of accompanying persons is not accurately known to Council however it is probably in the region of 18 million persons annually making it one of the most significant visitation venues in the State. Further there are about 6,000 employees of businesses on or associated with the airport most of whom travel into the area on a daily basis.

Adelaide Airport is an integral part of the business and community of West Torrens and South Australia at an economic, environmental and social level. Council acknowledges that the Adelaide airport is a valuable asset to the Council and the State, however it would argue that the airport operation impacts significantly upon the people of West Torrens in many ways both positively and negatively. The costs and loss of amenity Adelaide Airport imposes on the local community by virtue of location and its activities includes increased traffic movements, aircraft and traffic noise, air pollution, environmental depredation, drainage issues, depressed land values and the cost of major infrastructure upgrades to facilitate increased activity and growth.

Other than rate equivalent payments on a small part of the site Council it receives no additional or special funding for its presence which is a conundrum given much of the airport is exempt from local government rating provisions by virtue of it being owned by the Commonwealth.

As an interested party and in an attempt to optimise the outcomes of the airport presence, Council has been involved in the establishment of two consultative committees on airport issues and provision of an interface with residential and business communities. These are the Western Adelaide Consultative Group (WACG) and the Adelaide Airport Limited Consultative Forum however Council remains sceptical as to whether these forums constitute a conduit for the airport operator to disseminate information about decisions it has taken or whether they constitute a two way constructive communication process between the parties.

WACG provides a forum to consult and advise on common issues affecting western Adelaide, with a particular focus on planning, infrastructure and tourism. It is comprised of the members from:

- two statutory bodies
- five adjacent Council bodies

The AAL Consultative Forum was established specifically to provide communication between Adelaide Airport Limited, the surrounding Local Government bodies, local Members of Parliament, Planning SA and affected parties from the area, on the impact of the Airport site on adjacent areas and businesses. However its meeting frequency i.e. 3 monthly results in many issues being post formal consultation and decision making processes.

As a party effected by the operations of the Adelaide Airport, Council will continue its involvement on behalf of the community however in making this submission for alteration to the Airports Act 1996 Council believes it can on behalf of the community influence Adelaide Airport's activities achieving greater consistency with Council and State wide objectives without detrimentally affecting the commercial imperative of the airport operator and the operational requirements of South Australia's main aviation linkage.

Outstanding issues from Airport Privatization

The Council has experienced difficulties in consultation with the Adelaide Airport in a number of areas since privatization namely –

: planning and development for the commercialization of the airport i.e metropolitan form of areas not required for aeronautical purposes

: the rating of the airport land (commonly referred to as rate equivalent payments)

: impact on and lack of contribution towards infrastructure upgrade by the owner (the Commonwealth) and/or the operator of the airport

: a lack of support from the Federal Government in attempting to achieve equitable outcomes for affected parts of our community under the enabling legislation and airport operator agreements

: a lack of accountability and transparency in the decision making processes and the absence of any form of legal or judicial review for adversely affected parties under the provisions of the Airports Act

: complaints from off airport business of unfair competition from on airport businesses.

Arguably the new regime of privatized airport operators should have been accompanied by revised management and regulatory principles however sadly this was not the case and the revised legislation before the Parliament does nothing to address those issues notwithstanding a litany of requests and representations to the Commonwealth to seriously and more comprehensively address these issues.

Planning and Development

The South Australian planning regime requires an integrated approach to planning matters between State and Local Government including strategic planning, planning policies and development assessment. We recommend a similar system for the regulation of development upon Airport land. There is no such integration between Federal, State and Local Government especially in relation to the Airport and this was eluded to in our 2003 submission to the Minister of Transport and Regional Affairs for consideration and inclusion in the revised legislation.

A planning strategy for the Adelaide Airport Zone has been included within the City of West Torrens Development Plan, as a result of a Ministerial Plan Amendment Report however, the principles and objectives enshrined within this strategy cannot be applied to the Airport site and council seeks statutory amendment to allow this strategy to be considered and applied to any developments proposed for the Airport site.

Development proposals at Adelaide Airport since the airport privatization and recent examples highlight the need for a more appropriate and effective consultative process for airport planning and development. The level of accountability and transparency is considerably less than that of State and Local Governments and well

below that which should be expected from a company responsible for the operation of an important and valuable commonwealth asset and service.

Refer Appendix 1

With Airports throughout the country, having moved from public ownership to private tenancy and management, we believe issues of planning and development at the State and Local level have not been seriously considered or appropriately addressed during and post the privatization process. The publicly pronounced “light handed approach” to control of development on airports will in our view lead to substantial long term impacts on the continued efficiency and viability of the air travel and freight notwithstanding that it is arguably the most important emerging mode of transportation and freight distribution. In addition there remains in our view a disadvantage to off airport business interests notwithstanding the stated application “competitive neutrality” principles into airport operations. The relatively streamlined and self regulating form of development processes has effectively cocooned airport business from the rigors applied to all off airport business. This is seen as “lack of a level playing field” creating an unfair advantage to off airport operators. We understand the need for the airport operators to ensure cash flow for their continued development and profits for their shareholders, however the focus on short term return from retail development for example has effectively tied up important tracks of land for extended periods much of which is likely to be required for expansion of aeronautical or aeronautical related purposes during the period of lease. In addition the creation of extensive uncontrolled development in terms of State and Local Government planning regimes has the affect of establishing a number of regional facilities in a sector of metropolitan Adelaide with the need to assess its impact on the remainder of the business sector and the Adelaide Master Plan.

There is no Local or State legislative context to make an effective input into the Airport Master Plans or major development proposals on Airport land. In addition, the Airport Act expressly prohibits the application of State and Territory planning and

building regulation laws to development on airports. However there is a body of thought and argument that the Commonwealth in passing on their privileged powers to a private company have exceeded the purposes for the compulsory acquisition of the airport site by allowing serious divergence from the original intent and purpose of the acquisition.

The Adelaide Airport Master Plan is prepared having regard to Federal legislation only as there was no complementary Local or State legislation to give affect to the aspirations of community or local interest. Certainly consultation has occurred with development of the Adelaide Airport Master Plan however, in our view, submissions lodged by Local Governments and community representations receive superficial consideration and issues raised on individual planning proposals are rarely if ever reflected in a comprehensive manner or result in material changes to proposed developments. To have the Minister or the Airport Building Controller as the sole determiner of a particular proposal without any form of judicial review processes can hardly be described as transparent or accountable processes.

There is no substantial evidence we are aware of relating to significant amendment or rejection of a development at the final stage of approval by the Minister or his delegate which suggests a rubber stamp process of approval.

A case in point to illustrate this issue is the Brand Outlet development at Adelaide Airport by ING through the auspices of Airport West Pty Ltd. As part of developing a brief for representation to the Senate Committee we received information provided by ING to a Senior Officer of Council (documented at the time when the statement was made) that the development had to be staged due to the total development (some 22,000 square metres) exceeding the then $10M cap for a minor project. The project was subsequently commenced and developed in 3 stages denying the Council, the community and affected parties (i.e. adjacent retailers and businesses)

from having a “major development procedures” apply to the development. It is acknowledged that the proposed amendments to the legislation currently before the Parliament seeks to close to a degree this loophole however there is also in our view an apparent lack of regulation on the part of the appropriate federal body to ensure that both the spirit and the intent of the legislation and agreements under which airports were privatized are fully observed. This may be by direction of the Minister from time to time as evidenced in correspondence received by Council indicating a “light handed approach” has been adopted in control of development on airport sites.

Similarly when amendments, are proposed for Master Plans the consultative process appears token. Advice about proposed amendments is often ‘buried’ in a small public notice in the daily press. The current statutory process requires that a Major Development Plan be drafted and released for public comment when a major development is proposed at an Airport similar to the public consultation process required when drafting a Master Plan. However, the definition of a “major development” is specific and excludes the construction of buildings that have a cost value of less than $10 million currently $20 million under the proposed amendments before the Parliament. Amendment to a Master Plan or staging developments often appears to be manipulated thus avoiding the public consultation required for a Major Development Plan amendment or change to the Master Plan. There is a substantive question as to who is responsible for the integrity of the process! Is it ostensibly self regulated? Is it the responsibility of DOTARS and ultimately the Minister? Are there effective checks and balances?

Where a minor development is proposed there is no prescribed procedure for the production of a development plan or public consultation other than that proposed in each individual Airport Master Plan. While a proposed project may be advised to Council or community the development is approved solely by the Airport Building

Controller for determination. Often the development is so far advanced in planning terms that neither Council nor resident input is likely to influence the development.

There is no statutory framework within which submissions can be made such that issues raised must be considered. The results of this are that there are occasions when local and State issues are not addressed comprehensively, and during design and approval adverse impacts are forced upon our communities are e.g. inadequate parking or poorly designed road access etc. We have included for the Senate Committee recent documentation as an example of the process and outcomes for a very simple proposal for a supermarket on Adelaide Airport.

Refer Appendix 2

Several other examples of "minor" Master Plan amendments which have occurred in Adelaide illustrate the problem. The Adelaide Airport Master Plan was amended to incorporate some 12,000 square metres of bulky goods retailing. From a strategic point of view at State level the issue of bulky goods and where outlets might be bested located did not have to be addressed by the proponent. Subsequently a joint venture development proposal between the Airport Operator and a developer was negotiated to establish a retail or shopping outlet in lieu of a bulky goods outlet. These changes had both local and State significance as the retail proposal was not consistent with the States centres and retail hierarchy nor the planning objectives of the Council. There were consequential access and traffic signalised control requirements forced on the community and State that were not consistent with sound long term traffic management for the area.

These experiences provide an example of what can occur. In most, if not all cases the Federal Minister or his delegate is the sole arbiter of the approval process whether it be to amend the Master Plan or to approve the development. Federal legislation makes no provision to require airport operators to have serious regard for Local or State government input to Airport Master Plan policy documents. Economic

or financial imperatives appear to be the principal driving factor for development and creation of the master plan. There are no readily available review or appeal mechanisms in relation to planning policy or development proposals short of the major legal action launched on a major development proposal at Brisbane Airport. Clearly for local authorities and community groups the capacity for them to take similar actions to vindicate their concerns is not a practical option.

Infrastructure requirements

A further issue is that of infrastructure requirements and the costs faced by West Torrens Council in the management of flood zones throughout the City and the airport. Much of the City and the airport is built on a low lying flood plain between the Gulf St Vincent and the Mt Lofty Ranges. The emergence of bunding around the Airport boundaries to prevent flooding of the airport site from the Brownhill/Keswick Creek systems in particular was not covered within the Airport Master Plan and hence not subject to any form of public consultation created a significant and detrimental flood risk to both residential and commercial properties in the Council area. There are presently no statutory requirement that the Airport Master Plan should include consideration of the effect its development has on surrounding land and infrastructure or the need to contribute towards mitigation programs or infrastructure upgrades. Council seeks the insertion of a provision that would require the Airport Operators to consider the effects that development on Airport land can have on surrounding land. A provision of this type would place some statutory controls on the development proposals to avoid damage to adjoining property owners and the community and might give rise to reasonable developer contributions towards infrastructure upgrades.

In summary amendments to the Airport Act should include clearer and more transparent procedures to change Airport development policy presently contained in the Airport Master Plans requiring them to include issues that are of Local and/or State consequence. These are routinely required by State and Local Plans and ought to be contained within the plans of any competent planning regime.

It was our primary recommendation that the Section 112 exclusion of State and Territory laws be removed from the Airport Amendment Act or modified to reflect a more structured and strategic regime particularly in respect of –

- the Airport Master Plan reviews with upgrades being linked with the Adelaide Metropolitan Planning Strategy documentation;
- be greater consistency between Airport development policies and approval processes with the State Planning system;
- improved consultation processes by Airport Operators to State, Local Government and the community partners;
- provision for the referral of controversial applications to an independent assessment body, for example a Federal Development Assessment Commission, to approve, with or without conditions, any development proposal;
- appeal mechanisms for both the Airport Operator (as an applicant) for development and detrimentally affected parties i.e. State, Local Government or communities where developments have a significant impact on them;
- statutory obligations for infrastructure upgrade requirements.

With regard to the specific amendments proposed in the legislation before Parliament we consider that the proposed amendments should be strengthened or modified as follows –

Section 70 – Final Master Plan

(2) The purposes of a final master plan for an airport are

(a) to establish the strategic direction for efficient and economic development at the airport over the planning period of the plan and

- insert prior to "*and"* (last line)

"as a component of an integrated and structured development of the broader area and its communities".

(b) to provide for the development of additional uses of the airport site and

- insert prior to "*development* " "complimentary"
- insert after "*airport site"* "that are not in conflict with the broader State and Local Government development objectives".

(c) to indicate to the public the intended uses of the airport site and

- insert after "*to indicate"* "with a reasonable degree of certainty"

(d) to reduce potential conflict between uses of the airport site, and to ensure that uses of the airport site are compatible with the areas surrounding the airport

- insert after "*to reduce* " "actual and"
- insert after "*airport" (last line)* "consistent with the State and Local Authority's planning regimes".

Section 79 Public Comment

(1) (a) "cause to be published in a newspaper circulating generally in the State or Territory in which the airport is situated a notice"

- insert after "*published"* "prominently"

(1) (a) (ii) "stating that copies of the preliminary version will be available for inspection and purchase by members of the public during normal office hours throughout the period of 45 business days

- insert after *"period of"* "90 calendar days" in lieu of 45 business days

(1) (a) 1(iv) insert as above "90 calendar days" in lieu of 45 business days

(2) (e) - insert new clause "that a copy of the summary prepared by the airport operator to go to the Minister will be available either publicly or alternatively provided to those parties who have made written submissions"

Section 81 Approval of draft by Minister.

(5) Removal of clause 5 in its entirety.

Comment: it is a ridiculous notion that "non exercise" of a Ministerial power results in automatic approval of a draft master plan notwithstanding that interested parties may have made substantial and material representations on the plan.

Section 84 Minor variation of final Master Plan

(a) as for 79 (1) (a) ii

- insert after "*period of*" "90 days"

(a) (ii) delete after "*to have*" and replace with "rejected the variation

Section 84 A Public Comment – minor variation

(1) (a) insert after "cause to be" "prominently"

(1) (a) (ii) insert after *"period of"* "30 days"

(1) (a) (iv) insert after *"within"* "30 days"

Section 89 Meaning of major airport development

(1) (e) (ii) the cost of construction exceeds $20M or such higher amount as is prescribed; or

(4) - insertion clause

insert after "*prescribed*" "the amount of which is to include all preparatory site works and final fittings".

"Major airport development must not be carried out except in accordance with an approved major development plan."

General principle for all Sections containing timeframes i.e. 90 calendar days or 45 business days, etc.

Council proposes that the existing timeframes be retained in calendar days and not be shortened for all Sections.

Rates/Rates Equivalent Payments

The issue of rating of airport land commonly referred to as rate equivalent payments under the contractual agreements between the owner (the Commonwealth) and each individual airport operator continues to be the cause of concern for a number of affected Councils and West Torrens in particular. It is difficult to understand why this should be the case given the huge jump in growth and profitability during the 1990s particularly the latter part of the 1990s under privatized arrangements and record passenger numbers being experienced in the most recent figures of capital city airports which translates into significant rises in profitability. Graphical representation of the most recent figures released by the Prices Surveillance Authority of the trend for Adelaide Airport are appended to illustrate this trend. What is similarly of surprise is that the local government tax regime plays such a minute proportion of the expenses of operating the airport. In the case of the City of West Torrens where the airport is 20% of the gross area of the City and with substantial

exemptions for aeronautical components in essence the airport operator “feeds off the rate contribution of off airport residential and business ratepayers”.

In 1996/97 prior to privatization the total revenue of Adelaide airport was $28.5m with a profit of $16.8m before depreciation interest and taxes compared with $64.95m total revenue in 2004/05 and $29.65m before depreciation, interest and taxes in 2004/2005.

Refer Appendix 3

Airport operators have advanced the concept of selling “location” to perspective retailers in particular so that the airports have become a leisure destination in their own right e.g. IKEA at Adelaide. An indication of the future value of the airport can be understood from the consortium acquisition costs of the privatized airports which in the case of Adelaide was $370m.

The Head Lease of Adelaide Airport commenced on 20.5.1998 to 28.5.2048 under the principles of the Airports Act 1996.

The lease agreement between the Commonwealth and the Airport Operator, Adelaide Airport Limited at Section 26 states the following in respect of payments to be made for rating purposes –

26.1 Payment of Rates and Land Tax and Taxes

The Lessee must pay, on or before the due date, all Rates, Land Tax and Taxes without contribution from the Lessor.

26.2 Ex Gratia payment in lieu

(a) Where Rates are not payable under sub-clause 26.1 because the Airport Site is owned by the Commonwealth, the Lessee must promptly pay to the relevant Governmental Authority such amount as may be notified to the Lessee by such Governmental Authority as being equivalent to the amount which would

be payable for rates if such rates were leviable or payable in respect of those parts of the Airport site:

(i) which are sub-leased to tenants, or

(ii) on which trading or financial operations are undertaken including but not limited to retail outlets and concessions, car parks and valet car parks, golf courses and turf farms, but excluding runways, taxiways, aprons, roads, vacant land, buffer zones and grass verges, and land identified in the Airport Master Plan for these purposes,

Unless these areas are occupied by the Commonwealth or an Authority constituted under Commonwealth law which is excluded from paying rates by Commonwealth policy or law. The Lessee must use all reasonable endeavours to enter into an agreement with the relevant Governmental Authority, body or person to make such payments.

The substitution of AAL as the airport operator and body immune from State and Local Government legislation i.e. having the same legal status as the Commonwealth has placed them in a position of power over the Council in the application of this clause of the agreement. They have used this position to argue for a decrease of the rates payable or rate equivalent payments having constantly abused the immunity granted by refusing to fulfil the obligations outlined within Clause 26.2 of the Lease agreement. At various points of time this position appears to have been actively encouraged by the Department responsible for administration and oversight of the agreement. Although in more recent times there appears an improved willingness to ensure airport operators meet their legal obligations.

Copies of relevant correspondence is attached for the Committee's information.

The Council has spent considerable time and resources in an attempt to make the operator fulfil its contractual obligation however, Council recognises that, as it is not a

party to the lease agreement, it has no legal standing to enforce the fulfilment of their obligation without protracted constitutional proceedings in either the Supreme Court or the High Court of Australia.

The Council attempted to formulate a Memorandum of Understanding ('MOU') between the two parties in order to define their relationship and the obligation on AAL to make rates equivalent payments however this has been to no avail.

To remedy the current situation the Council is seeking legislative amendments to the Airports Act in order to make the payment of the rates equivalent by AAL a statutory obligation that can be enforced by the Council and is not subject to avoidance behaviour. This is similar to the obligations of any other business or resident within the City.

Notwithstanding substantial exemptions the Minister and DOTARS have consistently encouraged the Airport Operators to reach "agreements" to pay less than would be levied on "off airport" business. The Council has attempted to treat AAL as any other ratepayer within the council area however outstanding amounts as a consequence of delayed payment or non payment of their obligations has resulted in outstanding amounts in excess of a $1M on numerous occasions.

A sample of correspondence illustrating this issue is appended for the Committee's information. **Refer Appendix 4**

From a Council perspective if attempts are made to distinguish categories of ratepayers on a "benefits received" basis or "expenditure saved" basis, where does that distinction stop? It is clear that the rating provisions of the Local Government Act

1999 neither legally obligate a Council to grant rebates nor create any presumption in favour of rebates for a particular category of ratepayer.

While the Council obviously works with the airport operator this matter has been the subject of quite vexatious dialogue over an extended period in fact from the day the airport was transferred from Commonwealth control to a privatized operation. The Committee may recall the questions raised during the past year's Estimates Committee hearing along these lines.

While there have been partial resolutions to the issue the matter will continue to be contentious unless legislative provisions and /or binding agreements to which the Commonwealth are a party are put in place. The Commonwealth has declined to take such a course of action and the cost to the City of West Torrens of trying to obtain an outcome to this issue presently stands at several hundred thousand dollars without a final outcome.

We argue that the appropriate place for the issue to be addressed in a general sense is in Airports Act and the Airports Amendment Bill presently before the Parliament.

The difficulties encountered in this issue are similar to those of development of the airports in that the Minister or the part of the Commonwealth and the airport operators are the parties to the agreement with Council being a beneficiary under the agreement and thereby not having a clear and simple option in law to bring matters to a head in the event of default or avoidance by the airport operator or a lack of resolve on the part of the Minister or the Department to enforce the obligations under the agreement.

Recent Historical perspectives

The Airport Operator has consistently argued that rate equivalent payments should be made following practical completion of buildings and occupation of premises by sub lessees/occupiers.

Documentation of a proposed Memorandum of Understanding between the Airport Operator and Council in January 2005 specified that the Airport Operator would make payment on the following premise –

(1) "Vacant buildings or vacant areas within buildings which have been or are predominately used for commercial aeronautical purposes will be exempt from Rate Equivalent Payments until such time as the buildings or areas are leased to an Occupier".

(2) "does not refer to or include aeronautical services made available by AAL in the course of operating the Airport".

(3) If any part or parts of the New Terminal Building constitute a part of the Rateable Airport Site the Applicable Airport Area will attract Rate Equivalent Payments at the full rate pursuant to this Agreement; but shall not attract Rate Equivalent Payments in respect of any period prior to the official operating of the New Terminal Building.

In respect of the New Terminal Building –

(4) "recovery of the PFL (passenger facilitation levy) by AAL does not constitute a trading or financial operation since it relates directly to the provision of aeronautical services to the public at the Airport".

In respect of new leases –

(5) "the Rateable Airport Site shall be deemed to have been leased to an occupier"

- "as at the time from the date on which AAL and the Occupier execute a binding lease and the Occupier enters into physical possession of the Rateable Airport site (whichever shall last occur)"
- "ignoring any fitout period"
- "ignoring any rent free period."

In respect of New Developments –

"For the purposes of determining the date on which a Rateable Airport site will attract Rate Equivalent Payments" they will apply

- as at and from the date on which a Certificate of Occupancy is issued by the Airport Building Controller
- "ignoring the date on which AAL or the Occupier enter into possession of the Rateable Airport site for the purposes of completing the new development including any site works, preliminary works or building works associated with the new development
- ignoring the date of commencement of any ground lease granted to the Occupier if the Occupier is obliged to construct the new development itself".

These conditions have been sought to be enforced notwithstanding that the agreement between the owner (the Commonwealth) and the airport operator states specifically that

(i) parts of the site "which are sub-leased to tenants"

(ii) "on which trading or financial operations are undertaken"

The principle issues which remain outstanding and in need of clear direction by the owner (the Commonwealth) can be simplistically described under the following headings –

- when does vacant land under the respective agreements become subject to rate equivalent payments

- if airport terminals are not rateable then what exclusions should be provided
- the obligation of the airport operators to provide full accurate and timely information for the purposes of enabling rate equivalent payments to be established by Councils.

Using the City of West Torrens Adelaide Airport as an example members will gain an understanding of some of the issues which we believe warrants clarity by way of a more concise legislative framework.

Council rates are in essence a tax. Section 150 of the Local Government Act states that "*rates constitute a system of taxation for local government purposes*". Rates payable is generally determined upon the value of the land, rather than being attributable to a specific service or level of service provided by the Council. Equally rating provisions are not based on the concept that rates should be determined according to the extent to which different categories of ratepayers receive different levels of benefits or save certain expenditures by the Council. They are a general tax, not a fee for service.

Any and all services available to other ratepayers of the area are available to the airport operator on the same basis or principle as all ratepayers.

We recommend one of the following options, in order of preference be incorporated into the Airports Amendment Act 2006 -

- complete removal of the Section 112 exclusion of State and Territory laws;
- alteration to Section 112 providing an exception to the exclusion of State and Territory laws where the law is to impose a rate upon the Lessee of Airport land;

- insertion of a clause that obliges the Federal Treasurer to charge a rates equivalent payment upon the land that is to be received by the Federal Treasurer and paid directly to the relevant Local Government Authority; or
- insertion of a provision that expressly allows for the enforcement of a contract by a third party where there is a benefit assured to that third party under the contract.

Alteration to S112 – Exclusion of State and Territory Laws

Under Section 52(1) of the Constitution the Commonwealth has the exclusive power to legislate with respect to all commonwealth places. Section 4(5) of the Commonwealth Places (Application of Laws) Act 1970 states that a State law cannot apply to a Commonwealth place so as to impose a tax. We therefore request amendment to the Commonwealth Airports Act to allow the State laws regarding the imposition of Council rates to apply.

The Council proposes the insertion of an exception to Section 112 to allow the operation of a State law that imposes a financial impost on land owned by the Commonwealth but leased by a private company. We suggest the following format for such a provision:

Exception where Commonwealth Land Leased to Private Company

Laws of the State which impose any form of financial impost, including Local Government rating provisions, will apply to Commonwealth land occupied by a non-Commonwealth third party as if the land were not a Commonwealth place.

The Council believes it to be unfair that a privately owned company should receive the immunity of the Crown acting in its capacity as the Commonwealth in relation to payment of rates and other financial imposts. A provision such as this will also provide greater certainty of the obligations on the Airport-lessee to pay Council rates. In this situation the Council will have a right to enforce the obligation to pay.

Inclusion of a Section specifically addressing a Rates Equivalent Payment System

An alternative to the above provision is the inclusion of a provision that makes an Airport-lessee company liable to pay all Council rates as would normally apply under the law to the Federal Treasurer. The Federal Treasurer would then be obliged to pass on the payment to the relevant Local Government body that would normally receive rates payments. We suggest the following provision:

Inclusion of a Section to allow third party enforcement of obligation to pay rates equivalent under an Airport Lease

If it is not possible to include a statutory provision regarding the payment of a rates equivalent within the Airports Act, then the Council requests that a provision be inserted that allows it to enforce the obligation contained in clause 26.2 of the Lease.

Under the current doctrine of privity of contract enshrined within the common law, a third party, that is not a party to a contract, has no power to enforce its fulfilment. There is some case law that states that where a contract is made for the benefit of a third party, the third party can compel the enforcement of the contract if it can be

inferred that there existed a trust relationship between the promisee and the third party local government body. Inference of such a trust relationship in the present situation of a lease between the Commonwealth and AAL would be difficult to establish, especially where the payment of a rates equivalent payment is not the dominant purpose of the lease.

Conclusion

Notwithstanding unprecedented growth potential and the likelihood of “super profits” and returns on investment by airport operators the legislation presently before the Senate gives the operators greater “carte blanche” in terms of easing of accountability/transparency to the communities in which they are located. It reinforces the self regulation regime to the detriment of affected parties and facilitates the continued growth of economic and shareholder gains without any corresponding contribution to community infrastructure. In development terms it would appear that development of the airports will become significant leisure and retail destinations with terminal and runways as almost an incidental activity. The no strings attached and light handed approach to regulation of airport operatives and development of the airport can be seen as a significant financial gain to the Commonwealth through the sale process but at the ongoing expense of local government and local communities.

Council is not being flippant in its view on this issue as the period since privatization in the case of Adelaide Airport has created escalating tension between the communities and the airport particularly where simple regulation, true consultation and reasonable compromises on both sides would result in improved outcomes for the travelling public, the airport operator and the community in which the facilities are located.