

Queensland Competition Authority

Application by the FCAI for declaration of motor vehicle import services at the Port of Brisbane

Decision on whether the FCAI's application relates to a 'candidate service'

Statement of Reasons

BACKGROUND

Application for declaration

1. On 17 July 2009 (and amended on 15 September 2009), the Federal Chamber of Automotive Industries (**FCAI**) made an application to the Queensland Competition Authority (**Authority**) under section 77 of the *Queensland Competition Authority Act 1997 (QCA Act)* seeking to have the Authority recommend to the Ministers under section 79 that 'the motor vehicle import services provided by the Fisherman Islands cargo terminal' and operated by Australian Amalgamated Terminals Limited (**AAT**) be declared.
2. In this document:
 - (a) the motor vehicle import service for which declaration is sought is described as the '**FI Service**'; and
 - (b) the facility at the Fisherman Islands cargo terminal by which this service is provided is described as the '**FI Facility**'.

Preliminary question for determination under the QCA Act

3. At the time the application was made, section 77(1) of the QCA Act provided that:

A person may ask the authority to recommend that a particular candidate service be declared by the Ministers.
4. In the circumstances of this application, this raised a preliminary question for the Authority, namely whether the FI Service constituted a 'candidate service'.
5. A 'candidate service' was defined in the Dictionary to the QCA Act as:
 - (a) a service for which the facility used, or to be used, to provide the service is a public facility; or
 - (b) a service
 - (i) for which the facility used, or to be used, to provide the service is a private facility; and
 - (ii) that is declared under a regulation to be a candidate service.
6. A 'public facility' was defined in the Dictionary to the QCA Act as meaning:

a facility owned (whether legally or beneficially and whether entirely or in part) by the State or a government agency, and includes a facility owned by a water Authority.

7. Accordingly, before it could recommend declaration of the FI Service, it was necessary for the Authority to be satisfied that the facility used to provide the service was a public facility.

The Authority's initial view on the candidate service issue

8. In October 2009, having considered the FCAI's application and submissions from AAT and Port of Brisbane Corporation Limited (**PBCL**) (both dated 30 September 2009), the Authority published its view that the FI Service was a candidate service for the purposes of Part 5 of the QCA Act.
9. The Authority formed the view that the FI Facility was at least partly owned by PBCL, as it owned part of the land on which the FI Service was provided and, consequently, satisfied the definition of a 'public facility' under Part 5 of the QCA Act.¹

AAT's supplementary submission concerning the candidate service issue

10. On 16 December 2009, AAT submitted a supplementary submission to the Authority. AAT repeated its earlier submission that the facility used to provide the FI Service was not a public facility for the purposes of Part 5 of the QCA Act. AAT also made, among other things, the following further submissions:
 - (a) the Authority has adopted an incorrect legal interpretation of the term public facility rather than adopting a more appropriate purposive approach;
 - (b) under the QCA Act, the owner of a declared service has certain rights and obligations. In particular, the Authority may require the owner (or operator) to give a draft access undertaking and the owner must comply with an approved access undertaking given by or applicable to the owner. It would be incongruous with the purpose and intent of the QCA Act for these rights and obligations to apply to PBCL on the basis that, as the landlord, it is a part owner of the FI Facility;
 - (c) the reference to the facility being owned 'entirely or in part' in the definition of 'public facility' is not a reference to a discrete asset or physical part of the facility, but rather is a reference to ownership rights in relation to the whole of the facility; the facility should not be divided into its constituent parts when ascertaining whether it is owned by a particular party;
 - (d) when considering the term 'facility'² in Part IIIA of the *Trade Practices Act 1974* (as it was then known),³ the Australian Competition Tribunal in its 2000 decision *Re Sydney International Airport*⁴ held that the relevant facility comprised the minimum set of physical assets that were necessary for international aircraft to land at Sydney International Airport, unload and load passengers and freight and depart

¹ The Authority's reasons for reaching this view can be found at <http://www.qca.org.au/ports/appdecVIS/>.

² Under section 44F of the CCA, a person may make a written application to the National Competition Council asking it to recommend that a particular 'service' be declared. 'Service' is defined in section 44B as 'a service provided by means of a facility ...'. There is no definition for 'facility'.

³ As of 1 January 2011, the *Trade Practices Act 1974* (Cth) has been renamed the *Competition and Consumer Act 2010* (CCA).

⁴ (2000) 156 FLR 10.

in a safe and commercially sustainable matter; i.e. *the minimum bundle of assets required to provide the relevant services subject to declaration*;

- (e) the *minimum bundle of assets* required to provide the FI Service includes AAT's leasehold interest, which gives it a right of exclusive possession of the land. The relevant facility includes that interest, not PBCL's reversionary interest in the land;
 - (f) all of the infrastructure and equipment necessary for carrying out the FI Service are controlled by AAT. Accordingly, AAT is the 'owner' of the relevant facility;
 - (g) support for this conclusion can be drawn from similarities between the arrangements at the FI Facility and arrangements at Sydney International Airport and railway facilities in the Pilbara region of Western Australia because the entities with the leasehold interests in those cases are considered the owners, rather than the Commonwealth and the State of Western Australia respectively (which own the relevant land).
11. The Authority sought stakeholder submissions on AAT's supplementary submission by 22 January 2010. AAT was invited to make any submissions in reply by 29 January 2010. The Authority received submissions from PBCL, Port of Townsville Limited (**POTL**) and the FCAI, dated 19 January, 20 January and 22 January 2010 respectively. AAT also made short submissions in reply, dated 29 January 2010. The Authority considered each of these submissions.
12. In summary, PBCL and POTL made submissions supporting the same conclusion as AAT, i.e. the facility used to provide the FI Service is not a public facility for the purposes of Part 5 of the QCA Act.
13. The FCAI, in its submissions, reiterated that the FI Service constitutes a candidate service for the reasons given by the Authority in its October 2009 statement of reasons. In summary, the FCAI responded to AAT's submissions by making, among other things, the following points:
- (a) the Authority has no power to reconsider its decision;
 - (b) AAT's assertion that, under the QCA Act, the relevant facility should not be divided into its constituent parts when ascertaining whether it is owned by a particular party is incorrect. There is nothing to support this approach in the QCA Act. A 'facility' under Part 5 of the QCA Act can consist of different assets and have a number of different owners. The references to 'owner' in the QCA Act includes 'owners' as provided for in section 32 of the *Acts Interpretation Act 1954* (Qld);
 - (c) AAT's reference to analogies with cases under Part IIIA of the CCA, namely the Sydney International Airport case and the applications for declaration of BHP Billiton and Rio Tinto railways in the Pilbara region, are erroneous. There is no requirement in Part IIIA of the CCA that the facility to be declared be a public facility. Accordingly, there was no need in those matters to determine whether the Commonwealth and the State of Western Australia respectively were in fact the owner of all or part of the facilities. As the 'provider' of a service is defined under Part IIIA as the owner or operator of the facility used to provide the service, it did not matter in those cases whether the holder of the leasehold interest was considered the owner or operator of the facility as in either case, it could be considered the provider of the service and subject to Part IIIA;

- (d) it is difficult to see how it would be incongruous with the purpose and intent of the QCA Act for those provisions referring to the owner of a declared service to apply to PBCL. The object of Part 5 is to promote economically efficient operation of, use of and investment in, infrastructure by which services are provided, thereby promoting competition in upstream and downstream markets;
- (e) as to the rights and obligations of an 'owner' under the QCA Act, the FCAI submits that the Authority is likely to request AAT rather than PBCL to give the undertaking because AAT is in a better position as operator to provide access to the service. Further, the key provisions of the QCA Act which facilitate access to declared services refer to 'access provider' rather than 'owner' and the 'access provider' in this case is likely to be AAT. In those circumstances, it is not incongruous with the purpose and intent of the QCA Act for these provisions to apply to PBCL on the basis that, as the landlord, it is a part owner of the FI Facility.

- 14. AAT's short submission in reply included that the Authority has the power to reconsider its earlier decision concerning the candidate service issue for the reasons set out in that submission.

Amendments to the QCA Act

- 15. On 18 June 2010 and prior to any further consideration by the Authority of whether the FI Service was a 'candidate service', the Queensland Government released a consultation paper with proposed amendments to the QCA Act. The proposed amendments included the deletion of the requirement that a service be a 'candidate service' in order to be capable of being declared.
- 16. Given this development, the Authority informed the FCAI, AAT and PBCL that it would defer its further consideration of whether the FI Service was a 'candidate service' until it became clear whether the QCA Act would be amended to remove the 'candidate service' requirement.
- 17. The *Motor Accident Insurance and Other Legislation Amendment Act 2010 (Qld) (Amending Act)* received royal assent on 8 September 2010. The Amending Act made a series of amendments to the QCA Act, including the removal of the word 'candidate' from section 77(1) and other provisions in Part 5 of the QCA Act. Other amendments modified the declaration criteria in section 76 so as to require the Authority and Ministers to be satisfied that access to the service would promote a 'material' increase in competition in a dependent market and to require that the facility be significant having regard to its size and importance to the Queensland economy.
- 18. The amendments to the QCA Act commenced operation on the date of royal assent (i.e. on 8 September 2010). A declaration application made under section 77(1) after this date would not be subject to the requirement that the service is a candidate service. However, the Amending Act is silent on whether the amendments to the QCA Act, in particular those relating to the candidate service requirement and the declaration criteria, apply to an application made prior to the amendments coming into effect.
- 19. While the impact of these amendments on the FCAI's application is debatable, the Authority considers that the better approach is to continue to assess the FCAI's application under the QCA Act as in force prior to the Amending Act coming into effect. The FCAI has also expressed its preference to proceed on the basis of its existing

application to the Authority and for the Authority to make a decision on the candidate service issue.

Can the Authority give further consideration to the candidate service issue?

20. The Authority considers that it has the power to reconsider this issue, notwithstanding that the Authority published an earlier view that the FI Service was a candidate service.
21. There is no specific provision in the QCA Act (as in force prior to its amendment) that expressly requires the Authority to make a determination as to whether a service is a candidate service. Rather, the Authority is only empowered under section 79 to make a recommendation to Ministers with respect to a service that is a candidate service. The issue goes to the Authority's jurisdiction under Part 5 of the QCA Act (as then in force). If the service for which declaration is sought is not a candidate service, the Authority has no power to make a recommendation to Ministers. The Authority does not acquire such power because, at an earlier stage of the process, it has formed the view, incorrectly, that the service was a candidate service.
22. At an earlier stage of its inquiry, the Authority had satisfied itself that the FI Service was a candidate service, and that its inquiry could therefore proceed. However, this does not preclude the Authority from further consideration of this issue if the circumstances of the case require it, including (but not limited to) circumstances where further submissions have been put to the Authority on this issue. If the Authority, upon further consideration of this issue, including the further submissions that have been received, arrives at the view that the service in question is not a candidate service, it has no power to make a recommendation to Ministers under section 79.
23. Accordingly, the Authority is satisfied that it can and should give consideration to the question of whether the FI Service is a candidate service, having regard to the further submissions provided by interested parties.

DECISION

24. For the reasons set out below, the Authority has concluded that the FI Service is not a candidate service.
25. In light of this conclusion, the Authority has determined that:
 - (a) its investigation into whether the FI Service should be declared must be discontinued; and
 - (b) the FCAI's application for declaration of the FI Service must be rejected.

FINDINGS ON MATERIAL QUESTIONS OF FACT

26. The FCAI describes the **FI Facility** as 'that area of land at the Port over which AAT holds a lease or licence from PBCL (the foot print of the leased or licensed land which may vary from time to time)⁵.
27. The FI Facility, as described by the FCAI, includes land encompassing parts of two different title references for which the Authority obtained title searches:

⁵ FCAI's Application, paragraph 2.1 as amended by the FCAI's Submission to the Authority on the 'Candidate Service' Issue dated 22 January 2010, paragraph 3.3.

- (a) Lot 88 SP 108337; and
 - (b) a lot previously described as Lot 83 on SP 108337. As a consequence of new survey plans being registered, the part of land leased to AAT by PBCL now forms part of Lot 99 SP 238079.⁶ For ease of reference, this document refers to the relevant area as **former Lot 83 SP108337**.
28. Subject to the events relating to the privatisation of the Port of Brisbane (described below) those searches reveal:
- (a) Lot 88 SP 108337 is State land leased in perpetuity to PBCL and includes the strip of land comprising No 1 Wharf, No 2 Wharf and No 3 Wharf at the FI Facility. In PBCL's submission dated 30 September 2009, PBCL enclosed a copy of the 'wharf licence' between it and AAT. Pursuant to that licence, PBCL grants AAT a non-exclusive licence to use the wharfs, defined to mean 'wharfs 1, 2 and 3 at Fisherman Islands';
 - (b) former Lot 83 SP 108337 is land in respect of which PBCL is the registered owner. PBCL leased part of that land to AAT pursuant to two leases, both of which are registered (Lease FAO on SP 190973 (now registered on SP 238079) and Lease FBJ on SP 214516). The operation of these leases is explained in AAT's submissions.⁷
29. In November 2010, the Port of Brisbane was privatised by the Queensland Government. The title searches reveal that as part of this privatisation, PBCL granted a 99-year sublease of its interests at the Port of Brisbane to QPH Property Co Pty Limited as trustee for the QPH Property Trust (**QPH**). Simultaneously, QPH sublet its interest for a term of 99 years less one day to Port of Brisbane Pty Ltd (**PBPL**). This included PBCL's interests in Lot 88 SP 108337 and former Lot 83 SP108337. The subleases to QPH and PBPL are concurrent with (among other leases and licences) the licence to AAT referred to in paragraph 28(a) above and the leases to AAT referred to in paragraph 28(b) above.
30. The effect of these arrangements to interpose the acquirer of the Port of Brisbane (PBPL) between PBCL and AAT. During the concurrency of the subleases, PBPL and AAT stand in the relationship of:
- (a) licensor and licensee in respect of Lot 88 SP 108337; and
 - (b) lessor and lessee in respect of part of former Lot 83 SP108337.

However, Lot 88 SP 108337 remains State land and PBCL remains the registered owner of former Lot 83 SP108337.

⁶ Lot 83 on SP 108337 (together with the adjoining Lot 94 on SP 205694 (located to the North East of Lot 83)) was cancelled upon registration of a survey plan SP 227043 and a new amalgamated Lot 96 on SP 227043 was created. Subsequently, another survey plan SP 238079 was registered cancelling Lot 96 on SP 227043 (together with another lot known as Lot 97 on SP 236540) and the current Lot 99 on SP 238079 was created.

⁷ See in particular AAT's Submission to the Authority dated 30 September 2009 at item 2.1 and AAT's Supplementary Submission to the Authority dated 16 December 2009 at item 3.0.

MATERIAL ON WHICH THE AUTHORITY'S DECISION IS BASED

Submissions

31. The Authority took into account the FCAI's application (as revised) as well as the submissions (and their attachments) referred to in this statement of reasons. Each of these submissions can be found at <http://www.qca.org.au/ports/appdecVIS/CanServMat.php>.

Property searches

32. The Authority obtained title searches of the relevant parcels of land that constitute the FI Facility, both before and after the privatisation of the Port of Brisbane. These are described above.

Legal advice

33. Prior to the amendment of the QCA Act, the Authority sought advice from Mr Walter Sofronoff QC on whether the FI Service constituted a 'candidate service' under the QCA Act (as then in force). A copy of Mr Sofronoff's opinion, dated 4 May 2010, is attached.

REASONS FOR THE AUTHORITY'S DECISION

34. The Authority has approached the task of identifying the 'owner' of the facility in accordance with the approach outlined by Mr Sofronoff in his advice dated 4 May 2010. That is, by reference to the particular facts of this case, the Authority has sought to identify the person (or persons) who has (or have) the right to put the facility to use in the provision of the services in question.⁸
35. As to the identification of the relevant facility, the Authority accepts that the 'minimum bundle of assets' approach used by the Australian Competition Tribunal in the *Sydney International Airport* case is an appropriate approach to identifying the facility used to provide the FI Service for the present purpose.
36. The Authority accepts that the land on which the FI Facility is located, is owned by PBCL (former Lot 83 SP 108337) and the State (Lot 88 SP 108337), albeit the subject of long-term leases to QPH and PBPL. This is evidenced from the land title information obtained by the Authority and the submissions of interested parties. However, former Lot 83 SP 108337 has been leased to AAT, while Lot 88 SP 108337 is subject to the grant of a licence to AAT. While this licence is expressed to be non-exclusive it would be difficult, in practical terms, for another person to put this land to use to provide the service in question as AAT has a lease (and therefore exclusive possession) over the land that is adjacent to Lot 88 SP 108337.
37. The Authority accepts, based on the submissions received, that the other infrastructure and equipment necessary for providing the FI Service is controlled by AAT.
38. For these reasons, the Authority has concluded that the person who has the right to put the relevant facility to use in the provision of the FI Service is AAT. The State and PBCL's ownership of the land on which the service is provided does not give either entity the ability to put the land to use to provide these services.

⁸ Legal advice, page 15.

39. The Authority is of the view that this conclusion would be reached whether the matter is considered before or after the privatisation of the Port of Brisbane. In neither scenario would the State or PBCL have the ability to put the land to use to provide a motor vehicle import service. For this reason, we consider that Mr Sofronoff's advice, while obtained before the privatisation of the Port of Brisbane, is also relevant to facts that now exist.
40. It follows that the FI Facility is not a 'public facility' as it is not, for present purposes, owned by the State or a government agency. As there was no regulation in effect declaring the FI Service to be a candidate service (see paragraph 5 above), the FI Service was not a candidate service within the meaning of the QCA Act before it was amended on 8 September 2010.

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MEMORANDUM OF ADVICE

Re: Queensland Competition Authority FCAI's application for declaration of "motor vehicle import services"

The Federal Chamber of Automotive Industries ("FCAI") has applied to the Queensland Competition Authority ("the Authority") under s.77 of the *Queensland Competition Authority Act 1997* ("the Act") requesting that it recommend to the Ministers that certain services provided at the Fisherman Island's cargo terminal be declared by the Ministers.

I have been asked to advise whether the service which is the subject of the application is a "candidate service" within the meaning of the Act. I also have been asked some subsidiary questions which will be dealt with in the course of this opinion.

The Port of Brisbane Corporation Limited ("PBC") is the registered owner under the *Land Title Act 1994* of certain land adjoining the Brisbane River. By a registered lease which commenced on 7 May 2006, it leased a portion of that land to Australian Amalgamated Terminals Pty Ltd ("AAT"). In addition, PBC is the lessee of Crown land under the *Land Act 1994* of other land adjoining the Brisbane River. I am instructed that it has sub-leased that land to AAT.

There are three wharves which abut part of the land that has been leased. By a document dated 7 May 2006, PBC granted a licence to AAT to use the wharves. The licence is expressed to be a non-exclusive licence; however, the non-exclusivity appears to be limited

so that any access to the wharves by PBC itself must not unreasonably interfere with the activities properly carried out by AAT on the wharves. From the material which I have been given, it appears that the wharves cannot be adequately used by any person other than AAT because AAT has an exclusive right of possession of the adjoining land pursuant to its leases from PBC.

AAT's purpose in obtaining the leases and the licence was to operate a service by which new vehicles imported into Australia can be discharged from vessels which berth at the wharves. Vehicles unloaded from such ships are then stored on a part of the leased area called a "pre-delivery facility" or immediately loaded on a car carrier for delivery to a dealer or to an external storage facility.

For the purpose of providing the services which I have described, AAT agreed with PBC that it would construct a 6000m² cargo shed, an office, an amenities building and workshop for AAT's own operations, certain buildings for a company which provides pre-delivery services, power outlets for refrigerated containers as well as other ancillary improvements. These include a maintenance garage, security and IT systems, security fencing and wash facilities for the cars which have been approved by the Australian Quarantine Service. AAT also owns machinery, including forklifts, cranes and vehicles which it uses in the provision of these services.

PBC' s interest in the operation is restricted to its interest as landlord and licensor; it receives a substantial annual rent under the lease of its fee simple.

Part 5 of the Act has as its object:-

... to promote the economically efficient operation of, use of and investment in, infrastructure by which services are provided, with the effect of promotion effective competition in upstream and downstream markets.

The expression "infrastructure" is not defined. The Act employs another term, namely "facility" which is defined to include port infrastructure.¹ Section 72 of the Act provides, relevantly:-

- (1) Service is a service provided, or to be provided, by means of a facility and includes, for example-
 - (a) the use of a facility (including, for example, a road or railway line);
and

¹ Section 70(1)(b).

- (b) the transporting of people; and
- (c) the handling or transporting of goods or other things; and
- (d) a communications service or similar service.

Section 73 provides:-

In this part, a reference to a facility in association with a reference to a service or part of a service is a reference to the facility used, or to be used, to provide the service or part of the service.

A “candidate service”, which is the subject of the application that can be made under s.77, is defined in the Schedule to mean:-

- (a) a service for which the facility used, or to be used, to provide the service is a public facility; or
- (b) a service -
 - (i) for which the facility used, or to be used, to provide the service, is a private facility; and
 - (ii) that is declared under a regulation to be a candidate service.

The expression “public facility” is defined to mean:-

A facility owned (whether legally or beneficially and whether entirely or in part) by the State or a government agency, and includes a facility owned by a water authority.

It can immediately be appreciated that the answer to the question which I have been asked will depend upon the meaning that is to be given to the terms “a facility” and “owned”.

PBC is a “government agency” within the meaning of the definition of “public facility”;² the Crown owns part of the land used by AAT; PBC is its lessee and it is sub-leased to AAT. PBC itself is the registered owner of the remaining part of the land and it has leased that land to AAT. AAT has the right to exclusive possession of all of the land (and a non-exclusive licence to use the wharves) and it is the owner of the chattels used to provide the services.

At a superficial level it can be said that the State or a government agency “in part” owns the facility because PBC is the head lessor of part of the land used to provide the services and is the registered owner of the balance. However, in order to determine whether this comes within the meaning of the expression “owned” it is necessary to consider the terms of the Act as a whole and the purposes for which it was enacted.

² See definition of government agency in the Schedule to the Act.

The term owner, and its derivatives ownership, own and owned, are not legal terms of art. That is to say, these terms do not have a fixed, technical legal meaning. Their meaning will depend upon the context in which they are found.

Dictionaries are unhelpful in the illumination of their meaning. Thus, the *Macquarie Dictionary*, Third Edition, defines “own” as a verb to mean “to have or hold as one's own; possess”.

At common law, the meaning of these terms is variable. *Halsbury's Laws of England*³ states that:-

Ownership consists of innumerable rights over property, for example the rights of exclusive enjoyment, of destruction, alteration and alienation, and of maintaining and recovering possession of the property from all other persons. Those rights are conceived not as separately existing but as merged in one general right of ownership.

The ownership of goods differs from the ownership of land in that the common law did not treat land as the subject of absolute ownership but only of tenure. The common law also did not recognise the possibility of the ownership of goods being split up into lesser successive interests or estates, nor did it contemplate remainders or reversions in chattels.

Ownership is nevertheless divisible to some extent. For example, one or more of the collection of rights constituting ownership may be detached. Thus *prima facie* an owner is entitled to possession or to recover possession of his goods against all the world, a right which a dispossessed owner may exercise by peaceable retaking. ...

Osborne's Concise Law Dictionary, Fifth Edition, defines ownership as follows:-

The right to the exclusive enjoyment of a thing (Austin). Strictly, it denotes the relation between a person and any right that is vested in him (Salmond). Ownership is absolute or restricted. Absolute ownership involves the right of free as well as exclusive enjoyment, including the right of using, altering, disposing of or destroying a thing owned. Absolute ownership is of indeterminate duration. (Land is in strictness not subject to absolute ownership because it cannot be destroyed, and because of the theory that all land is ultimately held of the Crown.) Restricted ownership is ownership limited to some extent; as, for example, where there are several joint owners, or a life tenancy, or where property is charged with the payment of a sum of money, or subject to an easement ...

The theory of ownership is the subject of elaborate treatment in *Holdsworth's History of English Law*.⁴ After pointing out the feature of the English doctrine of tenure which permitted many legal interests to exist simultaneously in a given piece of land, Holdsworth went on:-

³ Fourth Edition, re issue, paras 1227-1228.

⁴ Volume 7 at 448 *et seq.*

As we have seen it was the nature and the variety of [the remedies available to the holder of an interest] which, in the Middle Ages, gave to all the simultaneous estates in the land that reality, and that capacity for simultaneous coexistence, which is the distinguishing characteristic of the English doctrine of estates. The estate, whether in possession or not, was regarded, not as a mere chose in action, but as a very real thing; and this conception tended to increase the owner's power of disposition; for, although not entitled to the possession or seisin he could be regarded as the owner of an actually existing interest, which was merely deferred in point of time.

When one comes to consider the meaning of a term such as “own” or “ownership” in a statute, further considerations arise. In *Yanner v Eaton*⁵ the High Court was concerned with the term with “property” in the *Fauna Conservation Act 1974* (Qld). By that statute all fauna, with certain exceptions, was said to be “the property of the Crown”. The High Court held that the “property” which was conferred on the Crown by the *Fauna Conservation Act* was not a full beneficial, or absolute, ownership of the fauna but was merely an aggregate of various rights of control created by the statute. The plurality⁶ pointed out:-

“Property” is a term that can be, and is, applied to many different kinds of relationship with the subject matter. It is not “a monolithic notion of standard content and invariable intensity”. That is why, in the context of a testator's will, “property” has been said to be the “most comprehensive of all the terms which can be used, in as much as it is indicative and descriptive of every possible interest which the party can have”.

Because “property” is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in item B invites the question “What is the interest that A has in B”? The statement that A has property in B will usually provoke further questions of classification. Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable? For present purposes, however, the important question is what interest in fauna was vested in the Crown when the *Fauna Act* provided that some fauna was “the property of the Crown and under the control of the Fauna Authority”?

Their Honours concluded that the statutory vesting of property in the Crown by the Act was nothing more than “a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource”.⁷

Gummow J said:-

Property is used in the law in various senses to describe a range of legal and equitable estates and interests, corporeal and incorporeal. Distinct corporeal and incorporeal property rights in relation to the one object may exist concurrently and be held by different parties. Ownership may be divorced from possession. At common law, wrongful possession of land might give rise to an estate in fee simple with the rightful owner having but a right of re-entry. Property need not necessarily be susceptible of

⁵ (2000) 201 CLR 351.

⁶ Gleeson CJ, Gaudron, Kirby and Hayne JJ.

⁷ At 369, paragraph 28.

transfer. ... Hohfeld identified the term “property” as a striking example of the inherent ambiguity and looseness in legal terminology. The risk of confusion is increased when, without further definition, statutory or constitutional rights and liabilities are so expressed as to turn upon the existence of “property”. The content of the term then becomes a question of statutory or constitutional interpretation.⁸

Many statutes use the term “owner” or “own”. The *Land Act* 1994 uses the term “owner” sometimes to mean the registered owner of land and sometimes to mean a lessee.⁹ The same Act provides that in certain circumstances a reference to the owner of land is a reference to the owner of improvements on the land.¹⁰ The *First Home Owner Grant Act* 2000 includes in the term “owner of land” a person whose only interest in the land is that the person holds shares in a company which entitles the holder of the shares to exclusive occupation of a home owned by the company.¹¹ The same Act extends the meaning of the term “owner” to include a mere licensee in certain circumstances.¹²

Many other Acts use the term “owner” in ways that are peculiar to the purposes of the enactment in question.¹³

The *Land Title Act* 1994, which is, of course, fundamental to an understanding of land tenure in this State, also recognises the elasticity of such expressions. The Act proceeds by creating “an indefeasible title for a lot”.¹⁴ The term “owner” is not used except in the composite expression “registered owner” which is defined in the Schedule to mean the person recorded in the register as the person entitled to the fee simple interest in the lot. The Act uses the expression “registered proprietor” to mean any person recorded in the freehold land register as a proprietor of the lot. Such a proprietor will include a lessee or mortgagee.

It can be seen that statutes, including the *Land Title Act* 1994, frequently employ terms with connotations, such as owner or proprietor, not because they have accepted meanings as terms of art in real property law, but by reference to the meaning accorded to the term by the statute itself.

As I have observed, the term “owned” is not defined in the Act. However, the expression “owner” is unhelpfully defined in these terms:-

⁸ At 388 – 389 paragraph 85.

⁹ See *Land Act* 1994, Schedule 6, definition of “adjoining owner”.

¹⁰ See *Land Act* 1994, s.231(1)(b).

¹¹ See *First Home Owner Grant Act* 2000, s.8 and definition of “owner” in Schedule.

¹² See *First Home Owner Grant Act* 2000, s.8(1)(g) and definition of “owner” in Schedule.

¹³ *Transport Operations (Marine Safety) Act* 1994, s.9(2); *Land Tax Act* 1915, s.21, s.3B(1) and (2); *Local Government Act* 1993, s.4(1); *Valuation of Land Act* 1944, s.7(1); *Local Government Act* 1993, ss.4(1), 63(1).

¹⁴ Section 37.

For a service, means the owner of the facility used, or to be used, to provide the service (whether or not the service is a declared service).

Consequently, it is necessary to give consideration to the whole of the Act in order to determine the meaning of the relevant terms. In this respect it is helpful to have regard to the history of the legislation.

In *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*¹⁵ the Full Court of the Federal Court was concerned with s.46 of the *Trade Practices Act* 1974 (Cth). In the course of argument, the appellant sought to rely upon United States decisions concerning s.2 of the *Sherman Act* 1890. That provision made it an offence for persons to “monopolise or attempt to monopolise, or combine or conspire with [other persons] to monopolise any part of the trade or commerce among the several States”. Section 46 of the *Trade Practices Act* is concerned with misuse of market power by corporations that have a “substantial degree of power in a market”. In the United States, s.2 of the *Sherman Act* was construed so that it extended to a person who controlled an “essential facility”. Such a person would come under a duty to give access to that facility to competitors by virtue of s.2. The appellant sought to make use of this American authority.

The Full Court of the Federal Court declined to accept the relevance of the United States jurisprudence to s.46 of the *Trade Practices Act*. When the matter was heard by the High Court the decision of the Federal Court was reversed. However, the High Court did not consider the applicability of the American doctrine of “essential facility”.¹⁶

Subsequently, the issue of monopolies constituted by control of essential facilities was picked up in the *Hilmer Report* of 25 August 1993. The *Queensland Wire Case* was referred to in it and one of the issues considered in that report was the question whether many government businesses, including public monopolies, ought to be brought within a national competition policy.¹⁷

It is in the *Hilmer Report* that the term “owner” first appears, in relation to facilities whose use might be anti-competitive. The report stated:-

An “essential facility” is, by definition, a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole. In addition, where the owner of the facility is also competing in markets that are dependent on access to the facility, the owner can restrict access to the facility to eliminate or reduce competition in the dependent markets. ...

¹⁵ (1987) 17 FCR 211.

¹⁶ See (1988) 167 CLR 177.

¹⁷ See *Hilmer Report*, 25 August 1993, s.8 Overview of Additional Policy Elements at p.183 *et seq.*

Where the owner of the “essential facility” is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits. Like other monopolists, however, the owner of the facility is able to use its monopoly position to charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency. In these circumstances, the question of “access pricing” is substantially similar to other monopoly pricing issues, and may be subject, where appropriate, to the prices monitoring or surveillance process outlined in Chapter 12.¹⁸

The report recommended a process by which a legislated right of access should be created by Ministerial declaration under legislation.¹⁹ The report stated:-

Access to a facility should only be declared if the legitimate interests of the owner of the facility are protected through a requirement for a “fair and reasonable” fee for providing access, and other appropriate terms and conditions.²⁰

The report went on to consider “essential facilities” owned by governments. Such facilities, while capable of contributing to the same kind of mischief as those which were privately owned, raised different considerations. The report stated:-

Many of the facilities potentially subject to an access regime are currently owned by Commonwealth, State and Territory Governments. This is particularly so of key infrastructure assets such as electricity transmission grids, rail tracks and the telecommunications network, and the Committee was cognisant of this fact in designing the general rules outlined above. Indeed, as these assets are held on behalf of the public, the benefits to the public of improving the efficient use of those assets, and improving the competitiveness of the economy generally, will usually be additional factors supporting the creation of an effective access regime.²¹

However, the report went on to record three matters of concern raised by State and Territory governments about the pro-competitive policies which the Committee was considering. First, profits derived from government-owned monopoly businesses were often an important source of government revenue. Second, many such businesses were required to perform community service obligations of various kinds, some of which may be funded from cross subsidies between different classes of services. Finally, there were constitutional issues surrounding both the legislative competence of the Commonwealth to legislate for state owned assets and the necessity for federal and state cooperation to solve such issues of potential conflict.²²

The report concluded, in these respects:-

¹⁸ See Hilmer Report, s.11 at pages 239 – 241.

¹⁹ Hilmer Report at p.250.

²⁰ Hilmer Report at pp.253 – 254.

²¹ Hilmer Report at p.260.

²² Hilmer Report at pp.262 – 264.

While it seems likely that the Commonwealth has power to create access rights to many of the more significant infrastructure facilities, the principle of comity between governments in a federal system suggests that the Commonwealth Government should generally respect the prerogatives of a State government unless an important national interest is at stake. The Committee supports this principle, and encourages the use of cooperative processes wherever they will meet the national interest.²³

The formal recommendation in relation to this matter provided as follows:-

The proposed general access regime be capable of application to facilities owned by State or Territory Governments. As a measure of comity to other governments in a federal system, the Commonwealth should place primary emphasis on cooperative approaches to the declaration of access, based on the agreement of the owner of the facility. Where that cooperation is not forthcoming, however, the Committee considers the important national interests at stake in some circumstances may be sufficient to justify unilateral action.²⁴

The *Hilmer Report* led to a meeting of the Council of Australian Governments in Hobart on 25 February 1994. The result of that meeting was the Competition Principles Agreement of 11 April 1995 to which the Commonwealth and all of the States and Territories were parties. Consistently with the recommendation in the *Hilmer Report*, the Agreement foreshadowed that the Commonwealth would enact legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities where competition considerations favoured such a course.²⁵ The Agreement was expressed in entirely general terms in this respect; it made no reference to whether the “significant infrastructure facilities” under consideration were those which were in private hands or owned by a government. However, in accordance with the recommendation contained in the *Hilmer Report*, the Agreement provided:-

The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated, has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of a State or Territory; or
- (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.²⁶

Part IIIA of the *Trade Practices Act* was inserted into the Act by Act Number 88 of 1995. It adopted the recommendations of the *Hilmer Report* and provided for a power in the Minister

²³ Hilmer Report at pp.264 – 265.

²⁴ Hilmer Report at p.268 – Recommendation 11.7.

²⁵ See clause 6(1) of the *Competition Principles Agreement* of 11 April 1995.

²⁶ See clause 6(2) of the *Competition Principles Agreement* of 11 April 1995.

to “declare” a “service”.²⁷ Part IIIA does not distinguish between facilities which are privately or publicly owned. It is concerned with services provided by means of facilities which it would be uneconomical for anyone to develop and which are of national significance having regard to certain matters. In deference to the recommendation in the *Hilmer Report* that the Commonwealth Government should generally respect the prerogatives of a state government, s.44G(2)(e) provided a requirement that a service not be recommended to be declared unless the National Competition Council (created by the same amending provisions) considered that access to the service was not already the subject of an effective access regime. Section 44G(3) thus foreshadowed an access regime established by a State that was a party to the Competition Principles Agreement.

Consistently with the Agreement, the Queensland Parliament enacted the *Queensland Competition Authority Act 1997*. It must be remembered that the *Hilmer Report* was concerned in this respect not only with access to essential facilities; it was also concerned with public monopolies, that is to say, monopoly businesses conducted by governments, and the competitive advantage enjoyed by government-run businesses by reason of the freedom of those businesses from many governmental constraints.

The *Queensland Competition Authority Bill* reflected each of these three matters. In respect of the first two matters, relating to monopoly government business activities and the competitive advantage enjoyed by government businesses, it is clear from the very subject matter that the Bill, and the Act when it was passed, was concerned solely with government owned businesses and not with private businesses. The latter came within the jurisdiction of the *Trade Practices Act*. Indeed, the only reason for enacting the Queensland statute was to ensure that insofar as Queensland government-run businesses were concerned, those businesses would be subject to State regulation and not to Commonwealth regulation. The second reading speech²⁸ by the Treasurer of Queensland contained the following:-

As Honourable members are aware, Queensland is a fully participating jurisdiction on the National Competition Policy. This package of reforms was agreed between all States and Territories and the Commonwealth through the Council of Australian Governments in 1995 and significant benefits are attached to its implementation. ...

In this respect, the Bill does not contain mechanisms to reduce the delivery of community service obligations, nor does it force government businesses to abandon the provision of these services. The Bill does contain specific requirements that public interest tests be conducted before reforms are implemented. ...

²⁷ Section 44H *Trade Practices Act 1974*.

²⁸ 30 April 1997, Hansard p.1131.

As mentioned earlier, the Bill comprises three components – prices, oversight of monopoly or near monopoly government business activities, a complaints mechanism for alleged breaches of competitive neutrality and a third party access regime. Government business activities with monopoly powers are in a position to charge prices which are excessive. Accordingly, it is important that there is a mechanism to ensure independent oversight of the prices charged by these organisations to ensure they do not abuse their monopoly powers. The prices oversight component of the Bill provides for the QCA to oversee the prices charged by monopoly or near monopoly government business activity.

The second component of the Bill deals with a competitive neutrality complaints mechanism. Government business activities – be they undertaken by government departments, GOCs or other statutory authorities – compete with private sector businesses in a variety of markets. ...

The third component of the Bill comprises a State third party access regime. This regime is to apply exclusively to public infrastructure, although subsequently it may also apply to selected private infrastructure after due consultation with affected owners. ...

Moreover, the reform should not be seen as a catalyst to privatisation. Nothing in the Bill compels any privatisation of government functions. Accordingly, the Bill should not be viewed as one which threatens to dismantle any part of the public sector in this State. It will, however, promote greater commercial accountability in major State government business undertakings and will facilitate fairer competition between government businesses and the private sector.²⁹

The Act is thus concerned with three broad subject matters: government monopoly business activities,³⁰ competitive neutrality on the part of businesses conducted by government,³¹ and access to services³² - provided by publicly owned infrastructure.

In each case, the relevance of competition policy and regulation to such businesses is due to the power of “the owner” to exploit a monopoly position. It would be a remarkable construction of the legislation to construe Part 5 as though it were applicable to a business when the State has no right to control the provision of services by the business, nor has no interest in the manner in which that business is conducted nor in its profits or losses.

In my view, it is significant that Part 5 contemplates a single facility, rather than many parts of a facility. That is to say, it refers to “the use of *a* facility” (s.72(1)(a)), “*the* facility used” (s.73), “the owner of *a* facility” (s.75(1)) and “*a* facility owned by a local government entity” (s.84(2)). Like Part IIIA of the *Trade Practices Act*, the Act is concerned with a collection of infrastructure that can be regarded as a single composite whole. In some cases it might be necessary to identify the facility with great precision. I have been referred to the decision of

²⁹ Hansard, 30 April 1997, pp. 1131 – 1132.

³⁰ Part 3.

³¹ Part 4.

³² Part 5.

the Australian Competition Tribunal in *re Sydney Airport Corporations Ltd.*³³ In order to determine whether it would be uneconomical for anyone to develop another facility to provide the services, a matter of which the Tribunal in that case needed to be satisfied, it was necessary to define “the facility”. The Tribunal considered that its task was to identify “the minimum bundle of assets required to provide the relevant services subject to declaration”.³⁴ In that case the alternative definitions of facility included the concrete hard stands at the airport, the hard stands as well as the passenger and freight aprons adjacent to the international terminal, a combination of the hard stands, the aprons and the terminals and, finally, the airport as a whole. The Tribunal concluded that the airport as a whole was “the facility”.

I respectfully agree with the approach adopted by the Tribunal in that case. The facility in this case cannot be limited to the land or to any other single component of all the things that, taken together, are used to provide the service of unloading and dispatching imported cars. Rather, it is the use of the wharves, the land, the buildings and other improvements upon the land as well as the machinery employed which constitutes “the facility”.

In my opinion the owner of that facility for the purposes of the Act is the person or persons who, alone or in combination, has the right to enjoy the use of the facility and to control access to it. That person is AAT alone.

AAT has exclusive possession of the land on which the services are provided. PBC has no right to enter upon the leased land³⁵ except for the extremely limited rights of entry conferred by the lease.³⁶ Its interest in the land is limited to its interest in the reversion on the lease, which I discuss below.

We have seen that the *Hilmer Report*, which is the genesis of the Queensland Act, was concerned, relevantly, with the consequences for the public good of monopoly businesses, supplying goods or services, conducted by governments. Queensland was not concerned with claiming for itself jurisdiction to regulate competition policy in respect of private businesses; it was only concerned with businesses run by the State itself.

In this respect the Hilmer Committee was concerned with controlling the behaviour of the “owner” of the monopoly business or the “essential facility”. It is the person whose

³³ (2000) 156 FLR 10.

³⁴ (2000) 156 FLR 10 at 65 paragraph 192.

³⁵ See clause 11.1 of the Lease of the freehold.

³⁶ See eg. clause 5.3 of the Lease.

anti-competitive conduct is in question who is the “owner” for the purpose of the discussion of the problem. Thus, section 11 of the *Hilmer Report*³⁷ contains the following references:-

- An “essential facility” is, by definition, a monopoly, permitting *the owner* to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole.³⁸
- In addition, where *the owner* of the facility is also competing in markets that are dependent on access to the facility, the owner can restrict access to the facility to eliminate or reduce competition in the dependent markets.³⁹
- Like other monopolists, however, *the owner* of the facility is able to use its monopoly position to charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency.⁴⁰
- Access to a facility should only be declared if the legitimate interests of *the owner* of the facility are protected through a requirement for a “fair and reasonable” fee for providing access, and other appropriate terms and conditions.⁴¹
- A right of access to a facility only be created if *the owner* agrees.⁴²

(emphasis added)

It can be seen from these references that, at least insofar as the Committee was concerned, its reference to the “owner” of a facility was not intended to be a reference to a person whose interest in the matter was limited to an interest as a landlord of land upon which the facility is operated.

The Act not only refers to the owner of a service⁴³ but it defines the owner of the service as the “owner of the facility used to provide the service”.⁴⁴ In addition, it distinguishes between the owner of a service and the “operator of the service”.⁴⁵ Finally, it refers to an “access provider” which is defined in the Schedule to mean the entity that is able to give someone else access to the service under an access agreement.

³⁷ At pages 239 *et seq.*

³⁸ Hilmer Report, p.239.

³⁹ Hilmer Report, p.239.

⁴⁰ Hilmer Report, p.241.

⁴¹ Hilmer Report, p.253.

⁴² Recommendation 11.4(a) of the Hilmer Report.

⁴³ See definition of “owner” in Schedule.

⁴⁴ *Ibid.*

⁴⁵ See s.85(2)(c).

Notwithstanding this legislative potpourri of concepts, the text of Part 5 demonstrates that neither the “access provider”, nor the “owner of the service” nor the “owner of the facility used” nor the “operator” could have been intended to denote the lessor of land upon which the facility is found and who otherwise has no interest in either the facility or the services provided by means of that facility.

Division 2 of Part 5 of the Act sets out the process by which a declaration can be made. Any person can make a request of the Authority to recommend that a particular candidate service be declared.⁴⁶ Before the Authority can make such a recommendation it must consider all of the access criteria set out in s.76. The statute requires that notice of the request is given to the “owner of the service”.⁴⁷ It is unlikely that the State, or one of its entities, as lessor of land upon which the service is provided by means of a facility found upon that land would be interested in receiving such notice and in making submissions concerning the question whether the access criteria have been satisfied. The interests of the State, or one of its entities, is limited to the rental that it will receive under its lease. It has none of the interests in being heard upon the request that a true owner of a facility would have.

It must not be forgotten that if the Act does not apply to the services provided by AAT, then AAT remains liable to the regime under Part IIIA of the *Trade Practices Act 1974*. The State's only interest in these matters is to ensure that, in respect of businesses conducted by it, any competition-based restrictions upon those businesses will be subject, at least in the first instance, to the authority of the Queensland Competition Authority and not to the authority of a federal body. In particular, having regard to the matters raised in the *Hilmer Report*, which led to the Agreement between the States and Territories and the Commonwealth, the State would have no interest in promoting its own regime in preference to that of the Commonwealth in respect of an essential facility where it is merely the lessor of land upon which the services are provided by a private entrepreneur. Relevantly, none of the “potential concerns” identified in the *Hilmer Report*⁴⁸ have any bearing. The State has no control over access to services provided by means of the facility. Its powers are not in issue. The State receives no revenue from any monopoly business conducted by AAT so its revenues are not in issue. Nor does the State have any involvement in any community service obligations of any kind, involving cross subsidies between different classes of consumers in relation to this facility. Finally, and importantly, there are no constitutional implications whatsoever in the Commonwealth body imposing an access regime upon AAT; such a regime would affect

⁴⁶ Section 77(1).

⁴⁷ Section 78(2).

⁴⁸ At pp.262 – 264.

AAT in the operation of its business but could not affect the State's interest in its land or its rents.

In short, the State's interests would not be involved at all if the federal body were to become engaged upon the matter. Why, then, should the term “owned” be construed so as to engage the Act?

It is true that the State “owns” the reversion in the lease. However, an estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.⁴⁹ The reversion is, in no sense, “port infrastructure” or any part of “the facility used ... to provide the service”.⁵⁰ The relevant interest in land which enables the service to be provided is the right of exclusive possession: and that is “owned” by AAT alone.

A question remains whether the facility is a public facility because it is a “facility owned in part by the State” by reason of the State's ownership of the wharves. The licence granted by the State merely confers a contractual right upon AAT; no interest in land is conveyed.

Nevertheless, in my view, the facility does not fall within the definition of “public facility”. First, I am of the opinion that the definition of “public facility” has as its focus the term “owned”. Ownership, as I have endeavoured to point out, is concerned with control over access to the facility and therefore to services provided by means of that facility. Such an “owner” might be the registered owner of freehold land, a lessee or even a licensee. In my opinion it is the person who has a right to put the facility to use in the provision of the services in question. Legal ownership of a small part of a facility, with no right to use it to provide the services, would not constitute part ownership of the facility. It is AAT which “owns” the valuable contractual right, the licence, which it uses to provide its services.

Second, it is arguable that in referring to a facility “owned in part by the State”, the definition intends to refer to an undivided interest in the whole of the facility rather than an interest in part of the facility. It is not necessary to consider this argument further.

The alternative argument is that a facility will be a public facility whenever any part of it is actually owned by the State as Crown land, as registered owner or, perhaps, in some lesser interest. This argument would have it that the State, having leased the facility in its entirety or in part to a person who has the sole right to use it to provide services, remains an owner of the

⁴⁹ *Blackstones Commentaries on the Laws of England*, Vol. 2 at 141.

⁵⁰ See s.73.

facility for the purposes of the Act. It is difficult to see any statutory purpose to be served by that construction. As I have pointed out, Parts 3 and 4 of the Act are concerned solely with businesses actually conducted by the State or one of its emanations. Part 5 would, upon this construction, be concerned not only with services provided by the State (alone or as a co-venturer) but it would also be concerned with private businesses conducted on State land. It is difficult to see how the purpose of the legislation, in rendering State business subject to State legislative control rather than federal control, would be served.

In its original submission, FCAI submitted that the facility sought to be covered by its application was a public facility “as it is owned by a company Government owned Corporation, the PBC”.

It provided no analysis or explanation for that conclusion.

For its part, AAT submitted that, whilst the land was owned by PBC, a “significant proportion of the infrastructure or bundle of assets at the FICT are in fact owned by AAT and not PBC”. AAT did not explain in its submission how, if the land is “owned by PBC” and AAT has “expended a substantial amount to construct improvements to the FICT” it follows, as a legal consequence, that PBC is not an owner and AAT is such an owner.

PBC, in its submission, pointed out that “the service cannot be provided by using the Corporation's assets alone”. It did not explain how that conclusion led to the consequence that the facility was not a public facility.

In a supplementary submission, AAT submitted that the reversionary interest in land held by PBC was not a “facility” under the Act.⁵¹ AAT went on to submit that the minimum bundle of assets required to provide the relevant services were constituted by the leasehold interests that permitted AAT to have exclusive possession of the leased land, its license rights and the improvements made by it. The facility, it concluded, was constituted by the interests held by AAT and not by the reversionary interest in the land or PBC's interest as licensor. I respectfully agree with that submission.

In summary, it is necessary to identify the tangible things and the associated legal rights that constitute the infrastructure which comprise the facility. The person who has the present right to put those tangible things to use in the provision of the services “owns” the facility for the purposes of the Act. In this case, that person is AAT and not PBC or the State.

⁵¹ See paragraph 3.2 of submission of AAT of 16 December 2009.

SUMMARY OF ANSWERS

1. Is the motor vehicle import service (the subject of FCAI's application) a “candidate service” under the Act?

Answer: No.

2. In determining whether the motor vehicle import service is a “candidate service”, should the Authority:

- (a) proceed on the assumption that the “facility” used to provide that service is the FI facility as defined by the FCAI in its application; or
- (b) satisfy itself as to the identity of the “facility” used to provide the motor vehicle import service?

Answer: The Authority should satisfy itself as to the identity of the “facility” used to provide any particular service the subject of a request. The Authority would commit jurisdictional error if it acceded to a wrong identification by an applicant of the relevant facility.

3. If the latter, should the Authority adopt the “minimum bundle of assets” approach used by the Australian Competition Tribunal in the *Sydney International Airport* case to determine what “facility” is used to provide the motor vehicle import service?

Answer: Yes.

4. Does the “facility” used to provide the motor vehicle import service include:

- (a) the land over which AAT holds a lease from PBC (i.e Lot 83 SP 108337);
- (b) the land over which AAT holds a licence from PBC (ie. Lot 88 SP 108337);
- (c) the right of exclusive possession of land pursuant to AAT's lease referred to in paragraph (a); and/or
- (d) a non-exclusive right to use the land pursuant to AAT's licence referred to in paragraph (b)?

Answer: Yes, in each case.

5. Does PBC or the State own, “whether legally or beneficially and whether entirely or in part”, the facility used to provide the motor vehicle import service? In this context, would it matter that the State and/or PBC may only own a discrete part of the facility, rather than a part of the entire facility?

Answer: No. The identity of the person who “owns” a facility, in its entirety or in part, depends upon more than the identification of a legal interest which the person has in a discrete part of the facility.

I advise accordingly.

With compliments

WALTER SOFRONOFF QC