

CATCHWORDS

CIVIL AVIATION – airports – issuing of an Authority to Drive Airside – issuing of an Authority to Use Airside – power of an airport to impose conditions on these authorities – imposition of a commercial licence – context of the decision to create licence found to be commercial – airports within their rights to create such a condition – decision under review set aside – new decision substituted giving effect to the conclusions of the Tribunal

Airports Act 1996 (Cth)

Airports (Control of On-Airport Activities) Regulations – regs 125, 127, 135

Federal Airports Corporation Act 1986 (Cth) – ss 7, 72

Direct Factory Outlets Pty Ltd v Westfield Management Ltd & ors (2005) 144 FCR 23

REASONS FOR DECISION

14 May 2008

Deputy President P E Hack SC

INTRODUCTION

1. This case illustrates the tensions that can arise when what were governmental functions are privatised. The applicant, Mr Steven Hammond, says that he is entitled to be issued with the requisite authorities to allow him to conduct his business at the Archerfield Airport. The respondent, Archerfield Airport Corporation Pty Ltd (Archerfield Corporation), which operates that airport, says that before he becomes entitled to the issue of those permits he must pay to the Corporation a fee to obtain a “commercial licence”.
2. Unusually there is no agreement between the parties about the decision to be reviewed although it is not suggested by Archerfield Corporation that there is no decision capable of being reviewed.

FACTUAL BACKGROUND

3. I shall start by recounting the factual background which is uncontroversial. Prior to June 1998 Archerfield Airport was controlled by the

Federal Airports Corporation (the FAC) under the provisions of the *Federal Airports Corporation Act 1986* (Cth). In 1996 the Commonwealth gave effect to a decision to privatize the major Australian airports, including Archerfield Airport, by the passage of two enactments, the *Airports Act 1996* (Cth) and the *Airports (Transitional) Act 1996* (Cth).

4. Mr Hammond is a licensed aircraft maintenance engineer whose specialty is avionics. From about 1994 he provided his services to users at Archerfield Airport. He does not have premises there and services aircraft from a van.
5. Around the time that Mr Hammond commenced at Archerfield the FAC published a handbook dealing with the control of vehicles on the “airside”¹ of Archerfield Airport (the 1994 Handbook). The 1994 Handbook was expressed to have been produced by virtue of s 7(2)(b) and s 72(1)(k) of the *Federal Airports Corporation Act*. The former required the FAC to endeavour to perform its functions in a manner that “ensures the safety of persons using airports”. The latter gave the Board of the FAC power to make by-laws prescribing matters, *inter alia*, “regulating or prohibiting the use of vehicles at Federal airports ...”
6. By virtue of clause 2.1 of the 1994 Handbook, companies or persons wishing to operate a vehicle on the airside unescorted were obliged to make application for an Airside Vehicle Permit (AVP) and an Authority to Drive Airside (ADA), for each intended vehicle and driver. The AVP was vehicle specific and could be issued to persons who could demonstrate an operational need for a vehicle to enter the airside on a frequent and unescorted basis. The ADA could be issued to a driver who had a similar operational need and satisfied certain levels of proficiency. The FAC might,

¹ The other area being the “landside” or public area.

“at any time withdraw or suspend an Airside Vehicle Permit, or an Authority to Drive Airside should the owner be in breach of the rules set out in [the] handbook”.²

The 1994 Handbook does not, so far as I can ascertain, otherwise impose any temporal limitation upon an ADA or an AVP. Mr Hammond held an ADA and an AVP under this regime.

7. The next phase of regulation came following the enactment of the *Airports Act 1996*. The *Airports (Control of On-Airport Activities) Regulations*³ (the Regulations) commenced on 15 May 1997. Part 4 of the Regulations dealt with vehicles and within that Part, Division 4.4 dealt with “Airside vehicle operation”. The expression “Vehicle Control Handbook” “for an airport” was defined in the Regulations⁴ as meaning,

“the Airside Vehicle Control Handbook, published for the airport by the FAC, as in existence immediately before the commencement of this Division”.

8. Division 4.4 continued the existing mechanisms for the control of persons and vehicles airside. The ADA continued as the device to control the movement of people airside but the AVP was superseded by an Authority for Use Airside (AUA). Regulation 4.42A, as it then was, empowered the airport-operator company or approved issuing authority to issue an ADA and an AUA in accordance with regs 4.43 and 4.44 respectively. Those regulations required applications for an ADA or an AUA, and the issue of them, to be in accordance with the Vehicle Control Handbook for the airport.

9. On the material before me there is a copy of an application by Mr Hammond dated 18 April 1997 described as an “Authority to drive airside & vehicle permit application form”. The document, which forms part of the documents lodged pursuant to s 37 of the *Administrative Appeals Tribunal Act*

² Clause 6.1

³ SR 1997 No. 57, notified in the Commonwealth of Australian Gazette on 20 March 1997, as amended by the *Airports (Control of On-Airport Activities) Regulations (Amendment)*, SR No 105, notified in the Commonwealth of Australia Gazette on 15 May 1997.

⁴ See s 4.2 of SR 1997 No. 105.

1975 (Cth) bears annotations that indicate that a “Card” was issued on 29 April 1997. Also with the material is a completed proficiency test bearing the handwritten notation “Steve Hammond 23 May 1997”. That test appears to be that required by clause 2.10 of the 1994 Handbook.

10. Despite the reference to 29 April 1997 as the date of issue it seems to me that the most likely inference to be drawn from the documents⁵ is that the application was made in anticipation of the new regulatory regime to take effect from 15 May 1997 and that Mr Hammond was issued with an ADA and an AVP⁶ (in relation to his Mazda B2000 vehicle, registration number 823-BBS) on or after that date.
11. It is next relevant to note that on 1 February 1998, at a time when Archerfield was still under the control of the FAC, a new version of the Airside Vehicle Control Handbook was published (the 1998 Handbook). This handbook introduced finite time limits upon ADA’s (24 months from date of issue⁷) and AVP’s (12 months from date of issue⁸).
12. Archerfield Corporation became the lessee from the Commonwealth of Archerfield Airport from 18 June 1998 for the term of 99 years. It became the sub-lessor of various tenancies both within and without the Airport proper. It paid a considerable price to acquire its leasehold interest.
13. It is material, at this juncture in the chronology, to notice certain transitional provisions in the Regulations. Regulations 4.43A (dealing with ADA’s) and 4.44AA (dealing with AUA’s) were introduced by the *Airports (Control of On-Airport Activities) Regulations (Amendment)*⁹ with effect from 1 July 1998. They have been subsequently re-numbered as regs 126 and 128 but the text is unchanged. So far as is presently material reg 4.43A was (and

⁵ Given the passage of time I place no reliance upon Mr Hammond’s claimed recollection of the dates on which he applied for the permits and sat the test.

⁶ Despite the change in the statutory scheme what appear to be “AUA’s” continued to be described as “AVP’s”.

⁷ Clause 4.8.

⁸ Clause 2.8.

⁹ SR 1998 No. 207.

reg 126 is) in these terms:

- “(1) An authority to drive a vehicle on the airside of an airport issued by the FAC after 15 May 1997 but before the commencement of an airport lease for the airport, and in force at that commencement, is taken:
- (a) to continue in force from 1 July 1998; and
 - (b) to be an ADA for the airport.
- ...
- (3) An ADA that is taken to continue in force under subregulation (1) ...:
- (a) is subject to the same conditions as the authority issued by the FAC; and
 - (b) may be withdrawn as if it had been issued under this Division.”

Regulation 4.43AA was (and reg 128 is) in similar terms except for a reference to “(a)n authority for the use of a vehicle on the airside of an airport”.

14. On the view I take of the facts, Mr Hammond had an authority to drive a vehicle, and an authority to use a vehicle, on the airside of Archerfield Airport issued by the FAC after 15 May 1997 but before the commencement of the airport lease for Archerfield Airport. Accordingly, and by operation of these regulations, he was taken to have had an ADA and an AUA that continued in force from 1 July 1998. They were, however, subject to the same conditions as the original authority issued by the FAC in May/June 1997.
15. Between May 1997 and May 2006 Mr Hammond took no steps to renew or change the documents upon which he had been permitted to be, and to take his Mazda vehicle, airside even when he changed his vehicle. By the same token Archerfield Corporation took no steps to require him to renew his documents, or seek fresh documents. From time to time Archerfield Corporation wrote to Mr Hammond (and I assume to others in a similar position) advising of proposed changes to the system of regulating the use of

vehicles airside but nothing came of that until early 2006. Up until then it seems apt to say that Mr Hammond continued to act as if he had authority to use his vehicle airside and Archerfield Corporation tolerated that situation without doing anything to either encourage or discourage this practice. The evidence of Mr Campbell, the Chief Executive Officer of Archerfield Corporation since July 2006 and before that the Chief Executive Officer of a large tenant at Archerfield Airport, suggests that there was an uneasy truce between Archerfield Corporation which was seeking to introduce greater control and many of the tenants, including Mr Hammond, who were content with the lax regulation that had existed under the regime of the FAC.

16. Given the arguments of the parties it is material to note some correspondence from late 2001. By letter dated 5 November 2001 the then General Manager of the Airport wrote to Mr Hammond, pointing out deficiencies said to have been observed in his driving. The letter continued,

“Your airside access to Archerfield Airport will be cancelled on the 16th November 2001 unless you can provide a satisfactory written statement to the AAC why your approval should continue.

You will also need to be aware that the AAC is currently reviewing all trading on the airport that is conducted from motor vehicles. In the future you will need to apply for a licence to conduct your business whether landside or airside on the airport and a licence fee will apply. Based on your written statement for access to the airport an appropriate fee and level of access will be determined by the AAC Board.”

17. After Mr Hammond’s response dated 12 November 2001 he received a letter from Archerfield Corporation dated 18 December 2001 which advised him in these terms:

“Please be advised that the AAC has granted you provisional approval to continue to have access airside of the airport. The reason that it is a provisional approval is that during 2002 a new licensing system will be introduced. Once more details are available I shall send you an update.”

18. Despite the forecast of a change in the licensing system in 2002 nothing occurred until early 2006. At that time Archerfield Corporation gave effect to a risk assessment of the Airport that had been undertaken following the passage of the *Aviation Transport Security Act 2004* (Cth). As part of the changes introduced to give effect to altered security concerns Archerfield Corporation required Mr Hammond and all other seeking airside access to apply for an ADA and an AUA. Mr Hammond lodged those applications in May 2006.
19. Division 4 of Part 4 of the Regulations dealt with the applications for, and grant of, an ADA and an AUA. As at May 2006 reg 125 was in these terms:
- “(1) Application for an ADA at an airport must be made to the airport-operator company for the airport, or an approved issuing authority for the airport, in the way set out in the Vehicle Control Handbook for the airport.
 - (2) The criteria to be applied by the airport-operator company or approved issuing authority in deciding whether or not to grant the ADA are the criteria set out for that purpose in the Handbook.
 - (3) An approved issuing authority for an airport must not issue an ADA otherwise than in accordance with the Vehicle Control Handbook for the airport.
 - (4) An airport-operator company or approved issuing authority must issue a card or other suitable evidence of an ADA.
 - (5) It is a condition of an ADA that the holder must operate a vehicle on the airside of the airport only in accordance with:
 - (a) the rules set out in the Vehicle Control Handbook for the airport , including, in particular, any rules regarding the use of radio communications equipment; and
 - (b) any other conditions or the ADA; and
 - (c) if the vehicle is the subject of an AUA – any conditions of the AUA; and
 - (d) any directions of an employee of the airport-operator company.

- (6) It is also a condition of an ADA that the holder shows the ADA to an employee of the airport-operator company on demand.
 - (7) An ADA may be issued subject to any other conditions that the airport-operator company thinks necessary.
 - (8) Without limiting the generality of subregulation (7), the conditions may include a condition:
 - (a) that the person, or the person's employer, indemnify the airport-operator company; or
 - (b) limiting the person's right to drive in particular places, at particular times, or in particular circumstances."
20. Regulation 127, which dealt with the issue of AUA's, was in similar terms.
21. Archerfield Corporation did not issue Mr Hammond with an AUA or an ADA following his applications in May 2006. Its response, by letter of 25 May 2006, was to require Mr Hammond (or his company) to apply for a commercial licence at an annual fee of \$2,500 plus GST. Thereafter there has been a volume of correspondence between Archerfield Corporation and Mr Hammond in which Archerfield Corporation has reiterated its position that Mr Hammond must seek a commercial licence (and pay the appropriate fee) before an AUA and an ADA will be issued to him and Mr Hammond reiterated his objection to the imposition of that requirement.
22. Ordinarily in matters before this Tribunal there will be a clearly defined decision, evidenced in writing, sometimes accompanied by reasons and almost invariably accompanied by advice about the entitlement to seek a review of the decision. That is not present here, in all likelihood because Archerfield Corporation was unaware that some of its decisions were capable of being reviewed. But the parties accept that there has been a refusal to issue an AUA and an ADA, although there is a further refinement to Mr Hammond's case that needs be noticed.

WHAT IS THE DECISION?

23. Ms Skennar, counsel for Mr Hammond, advanced the argument that there were, as a matter of law, alternative decisions open. The first argument was that the ADA and the AVP issued to Mr Hammond in 1997, which were taken to be, by operation of the Regulations, an ADA and an AUA for Archerfield Airport, remained current up until 2006 when Archerfield Airport purported to withdraw them. On this argument the relevant decision by Archerfield Corporation was a decision to withdraw made under regs 133 (in the case of the ADA) and 134 (in the case of the AVP). Such decisions, if made, are reviewable¹⁰.
24. Next, it was submitted that Mr Hammond was granted airside access by the letter of 18 December 2001 and that the decision, in 2006, to refuse access amounted to a decision to withdraw access.
25. The third argument for Mr Hammond was that Archerfield Corporation's refusal to grant him an ADA and an AUA following his application in May 2006 was a decision also capable of being reviewed under reg 135.
26. It was accepted by Archerfield Corporation that the last of these was a decision capable of being reviewed in this Tribunal. In answer to the contention of Mr Hammond that there had been a decision to withdraw the ADA and the AUA issued in 1997 Mr Atkinson, counsel for Archerfield Corporation, submitted that there was no such decision because the ADA and the AUA had long since expired and there was nothing capable of being withdrawn. Mr Hammond's access to the Airport following the expiry of the ADA and the AUA, and from 18 December 2001, was merely tolerated, he submitted; it was not authorised by any Authority issued by virtue of the Regulations.

¹⁰ See reg 135.

27. I am unable to accept the argument that the 1997 ADA and AVP “remained valid and current in May 2006 and at all times thereafter”¹¹ nor am I able to accept that Mr Hammond “was granted airside access in December 2001 and that access has been withdrawn contrary to regs 134 and 135”¹².
28. I accept that Mr Hammond was taken to have had an ADA and an AUA that continued in force from 1 July 1998. They were, however, subject to the same conditions as the original authority issued by the FAC in May/June 1997.
29. The original authorities were issued at a time when the 1994 Handbook was in force. That handbook did not impose any temporal term on ADA’s and AVP’s. That changed in February 1998 with the 1998 Handbook, published on 1 February 1998, providing for a term of 24 months for ADA’s and a term of 12 months for AVP’s.
30. It is relevant in the present circumstances to have regard to clause 9.5 of the 1998 Handbook which provided:
- “As far as possible, actions taken under a previous Airside Vehicle Control Handbook for the Airport shall be taken to have been done under this Handbook and shall be subject to amendment, renewal, cancellation and for suspension as the case may be in accordance with this Handbook.”
31. The consequence of this clause must be that the ADA and the AVP earlier issued without a finite term became subject to the finite terms of 24 and 12 months imposed by the 1998 handbook. It matters not whether those terms run from the date of issue in May/June 1997 or the date of introduction of the 1998 Handbook. On either basis the ADA and AVP issued to Mr Hammond have been expired for a number of years. Thereafter, in my view, Mr Hammond’s presence was tolerated and not objected to, but it was not authorised by an ADA or an AUA. Accordingly the conduct of Archerfield

¹¹ Applicant’s submissions, paragraph 3.1(b)

¹² Applicant’s submissions, paragraph 3.1(c)

Corporation in 2006 or 2007 could not amount to a withdrawal of authorities and there is no decision of that nature capable of being reviewed.

32. The argument that Mr Hammond “was granted airside access in December 2001 and that access has been withdrawn contrary to regs 134 and 135” may be dealt with shortly.
33. There is no doubt that Mr Hammond was given access. Archerfield Corporation’s letter of 18 December 2001 granted him “provisional approval to continue to have access airside of airport”. But the question of access in the sense of a grant of entitlement to enter onto particular areas is quite different from the statutory process involved in the grant of an ADA and an AUA. Allowing Mr Hammond to have access in the way that was done is not the same as granting him an ADA and an AUA and the decision by Archerfield Corporation to subsequently withdraw the permission earlier given is not a reviewable decision. The decisions that may be reviewed are those set out in reg 135.
34. It follows that in my view the only decision that is the subject of review is the decision by Archerfield Corporation to refuse the May 2006 application for the issue to Mr Hammond of an ADA and an AUA.

THE DECISION TO REFUSE

35. The arguments of the parties accept that the essential question is whether Archerfield Corporation was entitled to impose the requirement of having a commercial licence upon commercial operators like Mr Hammond, who seek to undertake their business on the airside of Archerfield Airport.
36. The argument for Mr Hammond focussed upon regs 125(2) and 127(2) each of which specify “the criteria set out ... in the Handbook” as being the criteria to be applied in deciding whether or not to grant an ADA or an AUA. Reference to the current Handbook for Archerfield Airport, that published in November 2005, establishes, so it is said, that there is no criterion set out

which requires an applicant for an ADA or an AUA to be an “AAC Approved Company” by obtaining a commercial licence from Archerfield Corporation.

37. As it seems to me the entitlement of Archerfield Corporation to require Mr Hammond to obtain a commercial licence is not a matter of satisfying criteria, rather that entitlement is justified, if at all, on the basis of the power in regs 125(7) and 127(5) which permit an ADA or an AUA to be issued:

“subject to any other conditions that the airport-operator company thinks necessary”.

38. Obviously enough that power is not entirely unfettered. The power to impose conditions, like the exercise of a discretion, is constrained by the context. The present context is entirely commercial.

39. Archerfield Corporation is not providing a government service. It has paid a considerable capital sum to obtain the leasehold interest in the land with a view, necessarily, to obtaining a profit from its investment. It does so, according to Mr Campbell, by sub-leasing areas to tenants outside and inside the airport perimeter. It seeks to impose upon Mr Hammond, and others in a similar position, a charge for the privilege of coming onto the land in the possession and under the control of Archerfield Corporation.

40. The remarks of Cooper J, in connection with the privatisation of Brisbane Airport, are equally apposite here. His Honour said:

“The objective of the [*Airports (Transitional) Act*] and the [*Airports Act*] was to carry into effect a policy to sell specific airports in Australia to qualified companies by creating a long term leasehold interest in the airport sites of each of the named airports to which the [*Airports (Transitional) Act*] and [*Airports Act*] applied. The creation of those leasehold interests brought into operation all of the common law rules touching and concerning leasehold interests in land and the rights and obligations of the lessee to the use and enjoyment of the land during the term of the lease. Accordingly, the [*Airports Act*] is to be construed in conformity with the common law and an intention to alter the common law principles should not be attributed to it unless such an intention is manifested according to the true construction of the statute, especially in relation to the common law principles respecting property

rights: *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682-683.”¹³

41. As it seems to me I ought construe the power to impose conditions on an ADA and an AUA similarly. So viewed, it seems to me perfectly reasonable to impose a fee upon those who would use Archerfield Corporation’s land for the purposes of earning income where those persons are otherwise not compensating Archerfield Corporation for the use being made of its land. The commercial licence fee may be seen as the reasonable fee payable to Archerfield Corporation for the service it provides, making its land and improvements available to Mr Hammond. In my view Archerfield Corporation is entitled to impose a condition on Mr Hammond’s Authorities requiring him to hold a Commercial Licence. The imposition of such a condition is reasonable and the fee sought is also reasonable.

CONCLUSION

42. The decision-making process involved here was not altogether clear and I have approached the matter in a different way to the approach of Archerfield Corporation. There was no suggestion that Mr Hammond was otherwise not entitled to the issue of an ADA or an AUA. It would be best, in my view, to give effect to my conclusions by:

- (a) setting aside the decision under review;
- (b) substituting a decision that Archerfield Corporation issue to Mr Hammond an Authority to Drive Airside and an Authority to Use Airside, each Authority being subject to a condition that at all times during the term of the Authority and any renewal of it Mr Hammond be the holder of a Commercial Licence issued in the form and upon the terms ordinarily used by Archerfield Corporation.

¹³ *Direct Factory Outlets Pty Ltd v Westfield Management Ltd & ors* (2005) 144 FCR 23 at 41, [46].

I certify that the 42 preceding paragraphs are a true copy of the reasons for the decision herein of Deputy President P E Hack SC

Signed:

.....Signed.....

Jacqueline Woods, Associate

Date of Hearing	20 March 2008
Date of Decision	14 May 2008
Counsel for the Applicant	Ms D Skennar
Solicitor for the Applicant	Van Zyl Lawyers
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