

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Application 268/05**

**Participants:**

Qantas Airways Limited  
**Applicant**

Cairns Port Authority  
**Respondent**

## DECISION AND REASONS FOR DECISION

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**REASONS FOR DECISION****1. Background**

- 1.1 By letter dated 14 December 2004 to the Cairns Port Authority (the Authority), the applicant applied for access under the *Freedom of Information Act 1992 Qld* (the FOI Act) to documents containing specific information relating to aspects of wildlife hazard management at the Cairns International Airport (the Airport), and the Authority's environment policy.
- 1.2 By letter dated 4 February 2005, MacDonnells Solicitors, on behalf of the Authority, advised the applicant that Mr Quinn, Chief Financial Officer of the Authority had decided to refuse access under s.11A of the FOI Act.
- 1.3 By letter dated 2 March 2005, Ebsworth & Ebsworth Lawyers, on behalf of the applicant, applied to the Airport for an internal review of Mr Quinn's decision dated 4 February 2005.
- 1.4 By letter dated 14 March 2005, Mr Geatches, Chief Executive Officer of the Authority advised the applicant that he had conducted an internal review of Mr Quinn's decision and decided to affirm that decision.
- 1.5 By letter dated 28 April 2005, Ebsworth & Ebsworth Lawyers, on behalf of the applicant, applied to the Information Commissioner for an external review of Mr Geatches' decision dated 14 March 2005, and included submissions in support of the application.

**2. Steps taken in the external review process**

- 2.1 By letter dated 13 May 2005, Assistant Information Commissioner (AC) Newbery wrote to the Authority, seeking copies of the documents in issue and submissions regarding the application of the FOI Act, and outlined specific issues to be addressed in those submissions.
- 2.2 By letter dated 30 May 2005, MacDonnells Solicitors, on behalf of the Authority, provided submissions, two statutory declarations of Mr N. Quinn and Dr W. Mundy respectively, and a list and electronic copy of the documents in issue.
- 2.3 By letter dated 28 July 2005, AC Newbery sought further information from the Authority in relation to the legislative requirements under which the Authority operates the bird and wildlife risks management program.
- 2.4 By letter dated 10 August 2005, MacDonnells Solicitors provided a copy of the Authority's Aerodrome Licence issued by the (former) Civil Aviation Authority, dated 19 December 1994; and copies of relevant parts of the Civil Aviation Safety Regulations.
- 2.5 By telephone on 23 August 2005, a staff member of this office advised MacDonnells Solicitors that the office was of the preliminary view that, pursuant to s.11A, the FOI Act did not apply to document 16 (Environment Policy), and asked whether the Authority would be willing to provide the applicant with access to that document.

- 2.6 By telephone on 7 September 2005, MacDonnells Solicitors advised that the Authority had agreed to provide the applicant with access to document 16 (Environment Policy). By letter dated 16 September 2005, MacDonnells Solicitors provided this office with a copy of the covering letter providing the applicant with a copy of document 16.
- 2.7 By letter dated 12 September 2005, I advised the applicant of my preliminary view in relation to this external review. I stated that it was my preliminary view that in developing and implementing the bird and wildlife risks management programme the Corporation was carrying out an activity conducted on a commercial basis. It was therefore my preliminary view that the documents in issue, which were received or brought into existence by the Authority in carrying out its commercial activities, were excluded from the application of the FOI Act by s.11A of the FOI Act and s.486 of the *Transport Infrastructure Act 1994* Qld (the TI Act). In the event that the applicant did not accept my preliminary view, I invited the applicant to provide submissions in support of their case.
- 2.8 By letter dated 30 September 2005, Ebsworth & Ebsworth Lawyers, on behalf of the applicant, provided further submissions to this office.
- 2.9 In making my decision in this review, I have taken into account:
- the contents of the documents in issue;
  - the applicant's FOI access application dated 14 December 2004, application for internal review dated 2 March 2005, and application for external review dated 28 April 2005;
  - the Authority's initial and internal review decisions, dated 4 February 2005 and 14 March 2005, respectively;
  - submissions and evidence, and other correspondence, provided by the Authority by letters dated 30 May 2005, 10 August 2005 and 16 September 2005; and
  - submissions and evidence provided by the applicant by letters dated 28 April 2005 and 30 September 2005.

### **3. Documents in issue**

- 3.1 As set out in paragraph 2.6 above, the Authority has provided the applicant with a copy of document 16 (Environment Policy). Accordingly, that document is no longer in issue in this review.
- 3.2 The documents in issue in this review therefore comprise documents relating to the Authority's bird and wildlife risks management programme.

### **4. Application of s.11A of the FOI Act**

- 4.1 Section 11A of the FOI Act provides:

*11A. This Act does not apply to documents received, or brought into existence, in carrying out the activities of a GOC mentioned in schedule 2 to the extent provided under the application provision mentioned for the GOC in the schedule.*

4.2 Schedule 2 relevantly provides:

***APPLICATION OF ACT TO GOCs***

*Section 11A of the Act*

***GOC***

***Application provision***

***1. Queensland Rail, or a port authority (within the meaning of the Transport Infrastructure Act 1994) that is a GOC*** Transport Infrastructure Act 1994, section 486

4.3 Section 486 of the TI Act relevantly provides:

***Application of Freedom of Information Act and Judicial Review Act***

***486.(1)*** *The Freedom of Information Act 1992 does not apply to a document received or brought into existence by a transport GOC in carrying out its excluded activities.*

...

***(3)*** *A regulation may declare the activities of a transport GOC that are taken to be, or are taken not to be, activities conducted on a commercial basis.*

***(4)*** *In this section—*

***"commercial activities"*** *means activities conducted on a commercial basis.*

***"community service obligations"*** *has the same meaning as in the Government Owned Corporations Act 1993.*

***"excluded activities"*** *means—*

***(a)*** *commercial activities; or*

***(b)*** *community service obligations prescribed under a regulation....*

...

4.4 I am satisfied that the Authority is a port authority within the meaning of the TI Act. No community service obligations have been prescribed as excluded activities under a regulation. Accordingly, the question for determination is whether the documents in issue were received, or brought into existence, by the Authority in carrying out activities conducted on a commercial basis.

Activities conducted on a commercial basis

4.5 Regulations have not been made under s.486(3) of the TI Act declaring activities of the Authority that are taken to be, or are taken not to be, activities conducted on a commercial basis. As set out above, s.486(4) of the TI Act defines "commercial activities" as activities conducted on a commercial basis. No other definition of "commercial" is contained in the Act, or in the *Acts Interpretation Act 1954* Qld. Information Commissioner Albietz discussed the application of s.11A of the FOI Act and the meaning of "commercial" in his decision in *Re Hansen and Queensland Industry Development Corporation* (1996) 3 QAR 265. At paragraphs 25 and 26 of that decision he stated:

25. *Major dictionaries give the primary meaning of the adjective "commercial" as "of, connected with, or engaged in, commerce; mercantile" (Collins English Dictionary, Third Aust. Ed), "of, engaged in, bearing on, commerce" (Australian Concise Oxford Dictionary), "of, or of the nature of, commerce" (Macquarie Dictionary). The corresponding primary meaning of the noun "commerce" is "the activity embracing all forms of the purchase and sale of goods and services" (Collins English Dictionary, Third Aust. Ed.), "exchange of merchandise or services ... buying and selling" (Australian Concise Oxford Dictionary), "interchange of goods or commodities" (Macquarie Dictionary). ...*
26. *There is a subsidiary meaning of the adjective "commercial" which may be appropriate to the context of the phrase "activities conducted on a commercial basis" in s.35 of the Queensland Industry Development Corporation Act 1994, that is, "having profit as the main aim" (Collins English Dictionary, Third Aust. Ed.), "capable of returning a profit; ... preoccupied with profits or immediate gains" (Macquarie Dictionary). ...*

Whether the documents in issue were received or brought into existence by the Authority in carrying out commercial activities

- 4.6 In determining whether the documents in issue were received or brought into existence by the Authority in carrying out activities conducted on a commercial basis, the contents of the documents in issue are relevant only to the extent that they assist the task of properly characterising the nature of the activity carried out by the Authority in the course of which the documents in issue were brought into existence. Having examined the documents in issue, I am satisfied that such documents are documents received or bought into existence in carrying out the development and implementation of the Authority's bird and wildlife risks management programme.
- 4.7 It is possible for a document containing information about the Authority's commercial activities to have been brought into existence in carrying out an activity that was not conducted on a commercial basis, for example accounting to the shareholding Minister of the Crown for the performance of the Authority's functions; or in carrying out a function of a public regulatory nature. In such a case, the document would be subject to the application of the FOI Act, and a decision would be required as to whether any of the matter was exempt matter under any of the exemption provisions in Part 3, Division 2 of the FOI Act. If, on the other hand, the document was brought into existence in carrying out an activity conducted by the Authority on a commercial basis, the matter would be excluded from the application of the FOI Act.
- 4.8 I note that the applicant's letter, dated 28 April 2005, referred to recent decisions of the Administrative Appeals Tribunal (the AAT) regarding whether certain activities of Australia Post were "commercial activities" for the purposes of the *Freedom of Information Act 1982 Cth* (the Commonwealth Act), and therefore access to documents that related to those activities could be refused by Australia Post under that Act: see *Pye and Australian Postal Corporation* [2004] AATA 1097; *Papps and Australian Postal Corporation* [2004] AATA 833. However, with the exception of a specific reference to *Re Pye* in paragraph 4.9 below, as I stated in my letter to the applicant dated 12 September 2005, I note that there are important distinctions between those cases and this review, and I do not propose to apply these cases in my decision in this review. For instance, unlike

the Authority, Australia Post has prescribed community service obligations which were, particularly in *Papps and Australian Postal Corporation*, key factors in the consideration by the AAT of whether the activities were commercial activities under the Commonwealth Act.

4.9 The Authority owns and operates the Airport and has other functions unrelated to the Airport. I note that, in submissions contained in the application for external review dated 28 April 2005, the applicant contended that one of the "rules" in applying s.486 of the TI Act was:

*to determine if the activities bringing about a document were carried out on a commercial basis, the starting point is the functions of the entity in question (Pye and Australian Postal Corporation [2004] AATA 1097)*

- Functions of a public regulatory nature

4.10 I note that, certain functions of a port authority, for example as set out in s.275(1)(f) of the TI Act, are of a public regulatory nature. In *Re Readymix Holdings Pty Ltd and Port of Brisbane Corporation; Brisbane Mini Mix Pty Ltd (Third Party)* (2003) 6 QAR 294, it was decided that where the Port of Brisbane Corporation was carrying out a land use planning and approval function, documents relating to such functions were subject to the FOI Act.

4.11 In the present case, the applicant submitted, by letter dated 28 April 2005, that *"the activities by which the documents requested were produced or received were activities carried out ... which are of a public regulatory nature"* and also referred to compliance with legal obligations of the Authority. However, for the reasons set out below, I am satisfied that the documents in issue do not relate to a public regulatory function being undertaken by the Authority.

4.12 By letter dated 10 August 2005, the Authority provided this Office with a copy of the Aerodrome Licence issued on 19 December 1994 by the Civil Aviation Authority. The licence states that the Authority's operation and use of the Airport is *"subject to the Civil Aviation Act 1988, the Civil Aviation Regulations, and conditions set out in the Civil Aviation Orders to which the aerodrome is subject"*.

4.13 Regulation 139.090(1) of the *Civil Aviation Safety Regulations 1988* provides:

*The operator of a certified aerodrome must have an aerodrome manual, in accordance with regulation 139.095, for the aerodrome.*

4.14 Regulation 139.095 provides:

*For subregulation 139.090(1), the aerodrome manual must include:*

...

*(a)(ii) the particulars of the aerodrome administration and operating procedures mentioned in Appendix 1 to this subparagraph;*

...

*Appendix 1 to subparagraph 139.095(a)(ii) (Particulars of the aerodrome administration and operating procedures)*

*For subparagraph 139.095(a)(ii) the particulars are as follows:*

...

*Bird and animal hazard management*

(k) *particulars of the procedures to deal with danger to aircraft operations caused by the presence of birds or animals on or near the aerodrome, including details of the following:*

- (i) *the arrangements for assessing any bird or animal hazard;*
- (ii) *the arrangements for the removal of any bird or animal hazard;*
- (iii) *the names and roles of the persons responsible for dealing with bird or animal hazards, and the telephone numbers for contacting them during and after working hours; ...*

4.15 While the Authority is required to meet the requirements of the Aerodrome Licence, the Authority is not itself carrying out a public regulatory function, as was the case in *Re Readymix*, where the Port of Brisbane Corporation was carrying out a land use planning and approval function. In the present case, the Authority is a licensee taking actions to comply with conditions of a licence it is required by the Regulator (the Civil Aviation Safety Authority (CASA)) to hold in order to operate the airport. The licence requirement is the same as that for other airports that are not government owned corporations (GOCs), and applies nationally.

- Bird and wildlife risks management programme

4.16 The fundamental issue to be determined in this review is whether the bird and wildlife risk management programme is an activity conducted on a commercial basis. If the bird and wildlife risk management programme is an activity conducted on a commercial basis then, in accordance with s.11A of the FOI Act and s.486 of the TI Act, the FOI Act will not apply to the documents in issue.

4.17 The Authority stated, in its submissions dated 30 May 2005, that the whole of the documents in issue *"were generated in the conduct of activities by the Authority on a commercial basis"*. In its 2003-04 Annual Report, the Authority recognises the costs of bird strikes and states that it has developed and implemented a 'best practice' strategic approach to reduce the risk of such costs:

*Bird and other wildlife collisions with aircraft can have very serious consequences both in human and financial terms. Worldwide bird strikes cost the civil aviation industry an estimated AUS \$1.7 billion per annum. [The Authority] has a 'best practice' strategy to define the risk that wildlife poses to air traffic at the airport which sets objectives, responsibilities and procedures to reduce the risk.*

4.18 Clearly the Authority has elected to develop and implement a bird and wildlife risk management programme as a strategic commercial investment to reduce the risk to the profitability of the Airport posed by incidents. As outlined below, it is acknowledged in the aviation industry that such programs are highly recommended to protect an airport's commercial viability and profit margins.

4.19 The commercial imperative for strategic investment in a comprehensive risk management programme has been outlined by CASA and the Australian Transport Safety Bureau in recent reports and publications. In their 2002 publication, *Safety Management Systems: What's in it for you?*, CASA states (at pp14-16) that *"there is a strong economic case for pursuing an integrated Safety Management System"* for organisations such as aerodromes

and lists a range of costs associated with incidents (such as those caused by bird and bat strikes) including:

- Loss of business and damage to reputation of the organisation
- Legal and damages claims
- Increased insurance premiums
- Cost of internal investigation
- Loss of use of equipment by an airline can lead to lost business and jeopardise existing contracts – this is likely to have flow-on effects on services provided, and thus revenue raised, by the Airport

CASA also states that *"there are significant marketing advantages in being seen as an organisation with high safety standards"* and that *"a good safety reputation can contribute to profitability and repeat business"*.

4.20 The 2003 Australian Transport Safety Bureau Report, *The Hazard Posed to Aircraft by Birds*, commences with a focus on the financial implications of birdstrike incidents:

*Birdstrikes continue to be a problem for aviation worldwide, costing approximately \$US3 billion annually.*

Further, (at pp6-7):

*...the likelihood of a birdstrike appears to substantially increase within, or in close proximity to the airport environment. ...*

*There is an increasing tendency for airlines to seek to retrieve costs arising from serious birdstrike incidents through the courts. Additionally, the costs arising from litigation that may occur should a fatal aircraft accident result from a birdstrike could be immense. This would be particularly true if the airport authority could not demonstrate that it had taken reasonable steps to assess and minimise, the risk posed to aircraft by birds in the vicinity of the airport.*

*Birdstrike liability (FAA, 2002)*

*[Following a birdstrike incident in 1993 at New York's JFK airport] the aircraft was out of service for 5 days while repairs were made. The airport operator (the New York Port Authority) paid \$5.3 million in compensation to Air France for losses incurred.*

4.21 An article in a 2005 CASA publication states:

*Qantas estimated the 1995 incident [at the Gold Coast Airport] cost the business and its insurers \$8 million, including the engine replacement, downtime and the cost of changing schedules.*

...

*Insurers estimate bird strikes cost civil aviation around \$US1.2 billion annually.*

...

*Over 90 per cent of bird strikes happen at or near aerodromes.*

...



*Aerodrome operators should put into place a bird management strategy, ideally guided by biologists experienced in assessing bird strike risk.*

*There is a growing trend for operators and their insurers to seek compensation ...*

*... [after an incident in Croatia] airline insurers claimed reimbursement from the airport for the damage compensation paid to the airline.*

*Aerodromes that put some effort into managing the risk of bird strike might find that it's a worthwhile long-term investment.*

(My underlining.)

Source: CASA. (2005) *Flight Safety Australia*, (January-February), pp40-43.

4.22 Therefore the approach selected for reducing the risk of bird and bat strike at the Airport is a significant commercial and strategic investment for the Authority in many respects. The Authority has developed and implemented a bird and wildlife risks management programme to address the risk of bird and bat strike at the Airport. Such a programme reduces the risk of costs to the Authority associated with an incident, including liability for damage compensation sought by insurers, legal costs, increased insurance premiums and costs of internal investigations. The degree to which the Authority reduces that risk depends on their commercial decision as to the extent of the investment and the strategies undertaken.

4.23 The applicant submitted, by letter dated 28 April 2005:

*We acknowledge that the above mentioned activities of the Authority may result in increased air travel and consequently profit. However, we submit that the specific activities in themselves are not aimed at making a profit or any gain, and therefore are not carried out on a commercial basis. Rather the activities by which the documents requested were produced or received were activities carried out:*

- (i) in accordance with the Authorities' legal obligations;*
- (ii) having public safety as their main aim*
- (iii) to meet the Authorities' obligations to the community to ensure safe air travel;*
- (iv) which are of a public regulatory nature.*

4.24 By letter dated 30 September 2005, the applicant submitted:

*We submit that activities which are mandated by statutory and regulatory instruments in the interests of safety ought not be characterised as commercial activities. The Authority has no choice but to engage in wildlife management activities so as to comply with the law. If it can gain a commercial benefit in doing so or at least recoup its expenses, so be it. However, that does not affect the fact that there is no discretion as to whether the activity is engaged in or not and that the legislative reason for requiring airport operators to engage in the activity is safety not profit.*

*That the key aim of imposing obligations on airports to manage wildlife is safety is supported by terms of the Civil Aviation Act. That Act states that it is "An Act to establish a Civil Aviation Safety Authority with functions relating to civil aviation, in particular the safety of civil aviation..." ....*

*Also, it is stated at s 3A that "the main aim of this Act is to establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents".... The Civil Aviation Safety Authority develops the Civil Aviation Regulations and Manual of Standards (Regulation 139), which are necessarily aimed at matters of safety. Similarly, other legislative instruments guiding airport authorities' management of wildlife focus on issues of safety and not profit.*

- 4.25 The applicant attached a number of supporting documents, including an Advisory Circular published by CASA, *Developing a Safety Management System at Your Aerodrome*, which states "An SMS is a coherent, integrated and documented set of policies, procedures and practices, for effectively managing the safe operation of your business". As set out in paragraph 4.24 above, the applicant submitted that such requirements are focused "on issues of safety not profit", and actions taken in relation to such requirements, which the Authority has no discretion but to take, cannot be characterised as commercial activities.
- 4.26 The Authority stated, in its submissions dated 30 May 2005, that the whole of the documents in issue "were generated in the conduct of activities by the Authority on a commercial basis". While the Authority is required to comply with minimum regulatory requirements, the Authority does have discretion as to the strategies employed in conducting the bird and wildlife risk management programme and the extent of their investment made in managing the risk of bird strike for purposes, other than regulatory requirements, that are commercial considerations.
- 4.27 As it is not possible to illustrate this point without revealing the contents of the documents in issue in the present case, I will further explain by way of an analogy. While aircraft pilots are required to meet minimum training requirements for safety purposes, it is possible that an airline may elect to invest in a comprehensive training scheme, that involves sending pilots to a superior training facility overseas that has particular expertise in the field and will expose the pilots to more sophisticated simulation equipment, internationally lauded trainers, and innovative training techniques, etc. The scheme could be further enhanced by engaging expert consultants to undertake assessments of the airlines procedures at specific intervals and to provide advice and assistance in establishing and/or maintaining strategies and procedures in accordance with contemporary world best practice.
- 4.28 The motivation for the airline to strategically invest in a comprehensive training scheme could include reducing the risk of accidents, which would otherwise result in a range of costs, including substantial financial implications; and promoting and maintaining the international reputation and marketability of the airline as a carrier with a superior safety management system, with higher quality services for clients. Clearly, such a scheme would go well beyond minimum regulatory training requirements, and be a considerable investment for the airline. However it would not be possible to separate parts of the scheme that merely meet the minimum regulatory requirements.
- 4.29 As further outlined above, it is acknowledged in the aviation industry that there are several types of costs for an aerodrome associated with an incident, including potential liability for damage compensation paid to airlines. The bird and wildlife risk management programme also ensures the attractiveness of the Airport to international airlines as a destination that can demonstrate a low incident record with consequent reduced risk of downtime. This is important to the commercial success of the Airport, as it has a direct impact on revenue from fees, charges and leasing arrangements. Given the significance of such costs and impacts, the Authority argues that the programme is an important risk management strategy

for the Airport to protect its commercial viability and profit margins. As outlined by CASA, and noted at paragraph 4.19 above, such programmes are acknowledged in the aviation industry as vital for marketing and enhanced profitability.

4.30 While the bird and wildlife risk management programme may also serve to meet the minimum regulatory requirements for an aerodrome licence, the documents in issue clearly demonstrate that the bird and wildlife risk management programme is a comprehensive activity carried out on a commercial basis involving a substantial investment by the Authority to manage the significant risks to the Authority's profit margins posed by bird strikes. I am therefore of the view that the documents relating to the programme, were received, or brought into existence, by the Authority in carrying out an activity conducted on a commercial basis.

#### Conclusion

4.31 For the reasons set out above, I am satisfied that the documents sought by the applicant in this review were received or bought into existence in the development and implementation of the bird and wildlife risks management programme and that this programme is an activity conducted by the Authority on a commercial basis. I therefore find that the documents remaining in issue were documents received or bought into existence in carrying out the Authority's commercial activities.

### **DECISION**

5.1 I affirm the decision of Mr Geatches, Chief Executive Officer of the Authority, dated 14 March 2005, that the documents remaining in issue are excluded from the application of the FOI Act by s.11A of the FOI Act and s.486 of the TI Act.

CATHI TAYLOR  
**INFORMATION COMMISSIONER**

Date: 15 November 2005