

**Submission of the Department of Infrastructure
and Planning and the Coordinator-General to the
Queensland Ombudsman
February 2011**

Response to the Queensland Ombudsman's
Proposed Report
*Brisbane Airport Link Report: An investigation into
complaints about night time surface work
(5 January 2011)*



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1 Introduction

By letter dated 5 January 2011 the Queensland Ombudsman wrote to Mr Graeme Newton, the former Director-General of the Department of Infrastructure and Planning and the Coordinator-General, enclosing a copy of the Ombudsman's Proposed Report titled *Brisbane Airport Link Report: An investigation into complaints about night-time surface work*.

The Ombudsman has asked the Director-General and Coordinator-General to provide a written response to each proposed opinion and recommendation relating to their agency, and to provide submissions in respect of any other issues of concern.

By letter dated 28 January 2011 the Ombudsman agreed to a request by the former Director-General and Coordinator-General for an extension of the date by which to respond to the Proposed Report, given the recent flooding event, until Monday 14 February 2011 and for extensions of other consequential dates.

The following is a submission from the Coordinator-General and the Department in response to the Proposed Report. For ease of reference, the submission addresses the proposed opinions and recommendations contained in the Proposed Report in chronological order. The *Executive Summary* in this submission includes an overview and brief summary of the issues of particular concern to us.

We value and promote transparency, accountability and continuous improvement in the operation of the Office of the Coordinator-General and the Department. Accordingly, we welcome the opportunity to identify and implement improvements to the administrative practices of our agency, where it is needed, especially as this promotes the Department's vision of building strong Councils, strong communities, strong regions and sustainable growth.

To that end, you will be aware that the Office of the Coordinator-General and the Department have cooperated fully with the Ombudsman to assist him with his investigations, by providing information in a timely way and making officers available for interview purposes.

We understand that the Ombudsman will take this submission into account before issuing his final report.

Keith Davies
Coordinator-General
Department of Infrastructure
and Planning
14 February 2011

Paul Low
A/Director-General
Department of Infrastructure
and Planning
14 February 2011

2 Executive Summary

This is a joint submission by the Department of Infrastructure and Planning (*DIP*) and the Coordinator-General (*CG*) to the Queensland Ombudsman's (*Ombudsman*) Proposed Report.

Proposed Opinions and Recommendations

This submission addresses each of the Ombudsman's proposed opinions and proposed recommendations in turn.

There are a number of opinions and recommendations proposed by the Ombudsman which the CG and DIP welcome and which will be useful for future projects. There are valuable lessons to be learned from this Project and from the Ombudsman's final report which will assist with the ongoing compliance issues being encountered in this Project and for the conditioning and enforcement of conditions in future projects. In particular, the CG and DIP support the following recommendations:

- The recommendation that the EIS for future projects clearly communicate the possibility of night-time surface work. The CG is considering including this requirement in the terms of reference for future significant projects.
- The recommendations that certain technical terms are defined in the conditions, for example, 'major road' and 'minor road'.
- The recommendations to enable a more consistent application of the R categories and to expressly provide a façade reduction approach if internal noise monitoring is imposed in the conditions for future significant projects.
- The opportunity to read the opinions obtained by the Ombudsman from Mr Wensley QC and Wilkinson Murray which bring some useful clarity to some of the difficult issues which have arisen and which reinforce, in some instances, the advice obtained and the steps taken by DIP and the CG.
- The recommendation that, where the CG has a joint regulatory responsibility with another agency for a significant project, written arrangements be entered into identifying and allocating responsibilities.
- The recommendation to review the resourcing of the DIP Compliance Unit.

There are also a number of opinions and recommendations proposed that, in this submission, the CG and DIP ask the Ombudsman to reconsider. In some cases, alternative wording has been suggested for the Ombudsman to consider. In particular:

- The opinion that the CG's failure to define "excessive noise" in condition 7(b) was unreasonable administrative action (Proposed Opinion 10). The drafting of imposed conditions for significant projects has been an evolutionary process based on policies and standards in force at the relevant time as well as adapting from lessons learned in earlier projects. It was acknowledged at the time the Evaluation Report was prepared that the construction of the Project would have impacts on the community and that the conditions needed to require the management and mitigation of these impacts, while also balancing these impacts with the need to minimise the construction period (and the length of time the impacts would continue). At the time of drafting condition 7(b), it was reasonable for the CG (on advice from his technical, legal and environmental advisers) to consider that the condition as drafted would achieve the desired objectives.
- The opinion that the CG failed to question TJH's use of temporary noise goals and adoption of certain R categories for noise monitoring and that this was unreasonable and/or wrong administrative action (Proposed Opinions 18 and 20). These are matters that were assessed by the CG, were subject to independent noise expert opinion (which can differ) and for which the CG drew on the expert opinions and came to a decision that was reasonable.

- The opinion that the CG's statement (in his clarification of the meaning of "excessive noise") that the noise goals were set for the Project based on noise measured in sleeping areas after all reasonable and practicable mitigation and management measures have been applied was administrative action that was wrong (Proposed Opinion 22). The noise goal provision is a behavioural condition which is designed to drive behaviour of the contractor to mitigate the impact of noise, while still being able to construct the Project. This has the benefit of reducing the time the community is exposed to the impacts arising from the construction of the project. The requirement is to take all reasonable and practical measures to mitigate so that construction can continue. If the effect of the Ombudsman's opinion is that mitigation cannot be taken into account, this defeats the purpose of the conditions. The CG also has a number of concerns about how the conditions, as interpreted by the Ombudsman, can be enforced in practice.
- The opinion that the belief of the DIP Compliance Unit that CNI should oversee and investigate compliance with the imposed conditions, and that CNI arranged noise monitoring and would report concerns to the CG, was an administrative action that was wrong (Proposed Opinions 30 and 31). CNI clearly has a role in relation to compliance under the Project Management Agreement (*PMA*) with the State. The CG remains responsible for monitoring compliance with and enforcement of the imposed conditions, however, he is entitled to rely on the services carried out by CNI to assist him in his compliance role. CNI do arrange noise monitoring and do report suspected breaches of conditions to the CG and material supporting this is provided with this submission.
- The opinion that it is the role of the CG to establish a proactive monitoring program for the Project and that the failure to do so is unreasonable administrative action (Proposed Opinions 35 and 36). The Proposed Report also contains a recommendation that the CG and DIP, in conjunction with DERM, develop and implement a proactive monitoring program for night-time surface works (Proposed Recommendations 25 and 26). Proactive monitoring by regulators is not the current practice of DERM or in other Australian jurisdictions. It also is not efficient or effective and is not a good use of limited resources, especially when monitoring is already being carried out by TJH.
- The opinion that DIP failed to keep the CG informed about environmental coordination issues arising from the Project and that this was unreasonable administrative action (Proposed Opinion 40). The CG has a very active role in this Project. Supporting material including evidence of how the CG was regularly kept informed by DIP and issued instructions to the DIP Compliance Unit is provided with this submission.

While the CG and DIP have asked the Ombudsman to reconsider a number of his proposed opinions and recommendations, it is accepted that there are areas that need improving. The CG and DIP are looking to implement some other measures as a result of the Ombudsman's findings and are discussing with DERM ways to improve the management and monitoring of TJH's results (for example, by DERM increasing the number of compliance audits of noise monitoring through the conduct of spot checking and side-by-side monitoring to confirm TJH results).

The CG and DIP already continually refine and improve their policies and procedures. In particular, the CG's conditions imposed in his evaluation reports for significant projects are continually evolving in light of new environmental standards and policies and the lessons learned from previous projects. This is highlighted in the submission by reference to the conditions imposed in the Woolloowin Change Report and the Legacy Way project. However, it is acknowledged that the Proposed Report has identified some further improvements that can be made.

Matters of clarification

Section 9 of this submission contains a table setting out some minor matters for clarification.

Legal professional privilege

Section 10 of the submission requests the protection of the legal professional privilege held by the CG and DIP in a number of the documents provided to the Ombudsman as part of his investigation.

Identification of DIP officers

Section 11 of the submission asks that the names of individual DIP officers which appear in the Proposed Report be removed in the event the Ombudsman's final report is made public.

Supporting material

A separate folder is provided containing additional material referred to in this submission, which may not have been seen previously by the Ombudsman.

Definitions

Unless stated otherwise, terms used in this submission have the same meaning as in the Proposed Report.

3 Chapter 6 – Project documents

3.1 Proposed Opinion 1

The public were reasonably of the view based on the Project documents that surface work would be limited to the daytime, except in special circumstances.

Please give consideration to amending Proposed Opinion 1 for the following reasons.

EIS

It is acknowledged that the reference in the EIS (in section 4.3.20 'Demand on resources' under the heading 'Workforce') to the hours of work for the construction phase states that surface / above ground work will be 6.30am to 6.30pm, Monday to Saturday (except where traffic volumes preclude daytime work).

Draft Construction Environmental Management Plan

On the other hand, the draft Construction Environmental Management Plan (*EMP*) in the EIS (page 19-17) contains a different description of hours of work.

The draft Construction EMP attempts to balance the requirements of the community and the Project, and provides advice about performance criteria and mitigation measures proposed for the performance of construction work. The part of the Construction EMP dealing with performance criteria and mitigation measures for hours of work (page 19-17) is extracted in the Proposed Report (page 43) and below with underlining added for emphasis:

| General – Construction | |
|-------------------------------|---|
| <i>Performance Criteria</i> | <p>...</p> <ul style="list-style-type: none"> • <u>Construction works are managed to avoid, or mitigate and manage impacts on the amenity and environmental conditions prevailing in the vicinity of the worksites</u> <p>...</p> |
| <i>Mitigation Measures</i> | <ul style="list-style-type: none"> • <i>Hours of work:</i> <ul style="list-style-type: none"> ○ <u>Construction activities on or above the surface and which generate excessive levels of noise, vibration, dust or traffic movements should only be undertaken between 6.30am and 6.30pm Mondays to Saturdays and at no time on Sundays or Public Holidays except for special circumstances where the above surface works should be conducted outside these days and hours.</u> ○ ... ○ <u>Notify local communities of duration and timing of surface works to be conducted outside of usual working hours.</u> |

Although community consultation on the EIS, submissions received, and the draft Construction EMP canvassed night time work, it is acknowledged the above statement in section 4.3.20 of the EIS could have led other members of the community to believe surface work would be limited to daytime hours, except in special circumstances, at the time the EIS was released for public consultation.

Evaluation Report

Condition 7(b) imposed in the Evaluation Report uses the same wording as the draft Construction EMP to describe the hours of work.

2008 Request for Project Change

The Proposed Report (page 47) refers to the 2008 request for project change and to the Heggies May 2008 report which is an attachment to the 2008 request for project change. Please consider amending the sentence *“That proposal does not appear anywhere in the request for project change”*. It is noted that the 2008 request for project change (at page 102) says:

“For possible nightworks to construct the cut and cover tunnels beneath Kedron Brook, effective notification measures would likely be required to achieve the environmental objectives and performance criteria specified in the Coordinator-General’s Conditions for general construction and for management of noise and vibration effects of construction.”

The Heggies May 2008 report attached to the 2008 request for project change also refers to 24 hour construction at Kedron Brook (at page 9 and page 15).

Alternative wording

Please consider amending Proposed Opinion 1 as follows:

“Elements of the community may have reasonably formed a view based on statements in the EIS that surface work would be limited to the daytime, except in special circumstances.”

3.2 Proposed Opinion 2

Condition 7(b) is inconsistent with the understanding of the community, from the Project documents that surface work would only occur during the daytime except in special circumstances.

Please also give consideration to amending Proposed Opinion 2 as follows:

“Condition 7(b) appears to be inconsistent with the understanding of elements of the community that surface construction work would only occur during the daytime except in special circumstances. However, Condition 7(b) is not inconsistent with the draft EMP contained at Chapter 19 of the EIS.”

3.3 Proposed Recommendation 1

Proponents of future significant projects be required in the EIS process to clearly and unambiguously communicate to the community any possibility of night-time surface work, the circumstances in which that work may be undertaken, and the likely duration (if known) in order that the CG may receive and consider submissions made by the community.

The CG accepts Proposed Recommendation 1.

The CG acknowledges that potential impacts associated with possible night-time surface work require more clarity during the EIS phase of a project.

The CG will give consideration to incorporating into the terms of reference for future projects a requirement that the EIS address whether night-time surface construction work may occur, whether such work may impact residential areas and, if so, the circumstances in which that work may be undertaken and the likely duration of that work.

4 Chapter 7 – Steps leading to 24/7 work

4.1 Proposed Opinion 3

There is no evidence that the community was intentionally misled by any party about the possibility of night-time surface work during the Project.

Acknowledged.

4.2 Proposed Opinion 4

As a result of communications from the State Government, the CG and DIP to the community leading up to and following the commencement of the Project, but prior to notification of the works commencing, the community reasonably formed the view that:

- (a) 24/7 work was not a possibility; and
- (b) night-time surface work would only occur in special circumstances.

Please consider amending the wording of Proposed Opinion 4.

Communications to the public about night-time work

Based on the Proposed Report, the chain of events was:

| | |
|---------------|--|
| August 2006 | Letter from Minister for Transport and Main Roads to Liddy Clark MP stating that construction will not be conducted 24/7 |
| October 2006 | EIS released for public comment including draft Construction EMP |
| May 2007 | Evaluation report released including condition 7(b) |
| May 2008 | 2008 Request for project change refers to possible night works at Kedron Brook |
| July 2008 | 2008 Change report including condition 7(b) |
| November 2008 | Construction commences |
| July 2009 | Toombul CLG meeting advised of proposed night-time surface works at Kalinga Park |
| August 2009 | Community notice given advising of 24/5 surface works at Kalinga Park |
| October 2009 | Community notice given advising of 24/7 surface work at Kalinga Park |

The Proposed Report also refers to minutes of CLG meetings however these meetings should not be considered "communications by DIP or the CG". Representatives of DIP or the CG do not usually attend these meetings and the minutes from the CLG meetings:

- are not prepared by representatives from DIP or the CG;
- are not a verbatim report of what is said at the meeting; and
- are not approved by DIP or the CG prior to being finalised and published nor are they approved at subsequent meetings.

The CLGs are each comprised of between 5 and 11 community members. As such, they represent an element of each community, rather than the whole community.

In section 3.1 of this submission, it is acknowledged how elements of the community could have formed the view that surface construction work would be limited to the daytime, except in special circumstances based on statements in the EIS. Apart from this, there is no evidence of communication by DIP or the CG that has been presented in the Proposed Report that night time works would not occur.

Please consider amending Opinion 4 as follows:

"Prior to the notification of proposed 24/5 surface works at Kalinga Park in July 2009, elements of the community may have reasonably formed a view that night-time surface work would only occur in limited circumstances."

4.3 Proposed Opinion 5

The reaction of the community as reported through the Toombul CLG minutes to the announcement of 24/5 works and then 24/7 works at Kalinga Park demonstrates that the community was not alive to the possibility of such work occurring during the Project.

DIP and the CG understand that the Toombul CLG is comprised of 11 community members. When this number is compared with the amount of residential premises in proximity to the Toombul worksites, it is submitted that the Toombul CLG only represents an element of this community, rather than the whole community.

Please consider amending Proposed Opinion 5 as follows:

"The reaction of the members of the Toombul CLG reported in the Toombul CLG minutes to the announcement of 24/5 surface works and then 24/7 surface works at Kalinga Park demonstrates that elements of the community were not alive to the possibility of such works occurring during the Project."

4.4 Proposed Recommendation 2

CNI, in consultation with BrisConnections and TJH, immediately prepare a projection of worksites in which night-time surface work, other than special circumstances work, is possible for the duration of the Project and send out community notices advising community members in affected areas of the possible works and their likely duration.

Noted.

4.5 Proposed Recommendation 3

CNI, in consultation with BrisConnections and TJH, inform itself of the timing and duration of night-time surface work, other than special circumstances work, as soon as the necessity to do that work becomes known and send out community notices advising community members in affected areas of that work at the earliest possible time.

Noted.

4.6 Proposed Recommendation 4

The CG evaluate the effectiveness of CNI's implementation of proposed recommendations 2 and 3 and provide direction as necessary.

The CG accepts the intention of Proposed Recommendation 4 but seeks clarification of what is intended. A suggested alternative wording is:

"DIP review CNI's implementation of Proposed Recommendations 2 and 3 and provide direction to CNI if DIP considers that CNI has not satisfied the recommendations."

The CG is not a party to the PMA and cannot use this to direct CNI to perform any particular activities.

DIP is prepared to review CNI's response and provide direction where allowed under the PMA.

4.7 Proposed Opinion 6

TJH and BrisConnections were not required to obtain approval to conduct night-time surface work from the CG, DIP or CNI.

Acknowledged.

4.8 Proposed Opinion 7

CNI, DIP, CG and DERM took some steps to satisfy themselves that TJH would be able to achieve compliance with the CG's imposed conditions upon commencement of night-time surface work at Kalinga Park.

Information in the Proposed Report (pages 54-57) shows that DIP and the CG obtained information from TJH and had meetings with TJH about how it intended to comply with the imposed conditions when night-time surface work commenced before any night-time surface work was undertaken. In these communications, noise modelling, noise monitoring, mitigation strategies and the community consultation plan for Kalinga Park were discussed. TJH also outlined the process it took to determine compliance with the CG's noise goals.

It is requested that the word "some" be removed from Proposed Opinion 7.

4.9 Proposed Opinion 8

TJH and BrisConnections were not required to give reasons for their decision to conduct night-time surface work to the CG, DIP or CNI.

DIP and the CG acknowledge Proposed Opinion 8 but ask that it be removed as it may have unintended consequences if the Ombudsman releases a public report of this investigation.

TJH and BrisConnections have previously cooperated in providing reasons for their decision to conduct night-time surface works. However, Proposed Opinion 8 has the potential to result in TJH forming a view that it does not have to provide reasons before conducting night-time surface works or other types of works. This could lead to poor performance in relation to the conduct of the Project.

5 Chapter 8 – Is surface construction work permitted at night?

5.1 Proposed Opinion 9

Condition 7(b) allows surface work to be carried out between 6.30pm and 6.30am Mondays to Saturdays and on Sundays and public holidays as long as those works do not generate excessive noise, vibration, dust and traffic.

Acknowledged.

6 Chapter 9 – Excessive noise under imposed condition 7(b)

6.1 Proposed Opinion 10

The CG's failure to define excessive noise in the Project documents constitutes unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act.

It is asked that the Ombudsman reconsider Proposed Opinion 10 for the following reasons.

Introduction of imposed conditions

The ability for the CG to impose a condition like condition 7(b) was introduced into the SDPWO Act on 28 November 2005 by the insertion of Part 4, Division 8 (ss 54A-54G). The Explanatory Notes to the State Development and Public Works Organisation and Other Legislation Amendment Bill 2005 which inserted Part 4, Division 8 indicate:

- it was considered desirable to have a statutory mechanism to enable conditions to be imposed by the CG on a significant project where there is no other approval to which the CG can recommend or state conditions to be attached; and
- the nature of the conditions imposed by the CG for a project may be stated as "*objectives to be achieved*" in the undertaking of the project or "*desired outcomes*" which are capable of being achieved by a range of measures, rather than prescriptive conditions with have clearly identifiable parameters.

CLEM7 and identification of issues with "excessive noise"

As identified in the Proposed Report, Condition 7(b) was imposed in the Evaluation Report in May 2007 and was not altered by the Change Report in July 2008.

The CLEM 7 road tunnel project was the first project for which there were imposed conditions under Part 4, Division 8.¹ The relevant wording of condition 7(b) about "excessive noise" was taken from imposed condition 5(a) (General Construction) for the CLEM7 project.

It is understood by the CG that there was nothing in the delivery of the CLEM7 project which should have triggered a review of the use of the words "excessive noise" in the CLEM7 condition before the condition was imposed in the Evaluation Report for the Airport Link project.

Woolloowin project change

Following the identification of concerns with the use of "excessive noise" in condition 7(b) on this Project, the CG decided not to use the phrase in the imposed conditions for the Woolloowin change report. Condition 7 (General Construction) in appendix 1, schedule 3 of the Woolloowin change report does not use the term "excessive noise" but rather makes prescriptive requirements for construction noise. These requirements include, among other things, that:

- work is only allowed to be undertaken at the worksite between 6.30 am to 6.30 pm Monday to Saturday, and at no time on Sundays or public holidays, until the acoustic shed is completed;
- work is allowed to be undertaken in the acoustic shed once it is completed at any time, subject to compliance with the Woolloowin conditions; and
- the construction of an acoustic barrier at the perimeter of the worksite prior to commencing any works other than site establishment works.

¹ The conditions originally appeared as recommendations in the CG's Evaluation Report for the North-South Bypass Tunnel (as CLEM7 then was) but were deemed to be imposed conditions by section 178 of the SDPWO Act.

The CG also considered whether the Woolloowin request for project change provided an ability to amend other conditions generally. However, the CG obtained legal advice [REDACTED]

Legacy Way project

The conditions imposed by the CG in April 2010 for the next road tunnel project in Brisbane, the Legacy Way project (formerly Northern Link Road Tunnel project), also do not use the term "excessive noise". Condition 18 (General Construction) in appendix 1, schedule 3 of the Coordinator-General's Report for the Northern Link Road Tunnel Project requires that:

- subject to certain stated exceptions (which have their own further conditions), surface construction works must be undertaken only between 6.30 am to 6.30 pm Monday to Saturday and no time on Sundays and public holidays ("standard construction hours"); and
- except for emergency work to avoid the loss of lives and properties, or to prevent environmental harm, where construction works are proposed to be undertaken for the stated exceptions outside the standard construction hours, details of the works, including copies of any associated approvals, must be provided to the CG and to the nominated entity for the noise and vibration condition at least five business days prior to the works being undertaken.

The stated exceptions in condition 18 are as follows:

- the delivery of oversized plant or structures that police or other authorities determine require transport along public roads to be outside of the standard construction hours and for which there is no feasible alternative;
- operation of the conveyor to transport soil from the tunnel boring machines to the Mt Cootha quarry, provided the relevant noise limits in condition 22 are met;
- construction works for which relevant authorities (for example road management authorities) require that particular works at particular locations can only be undertaken outside of the standard construction hours; and
- loading and haulage of spoil may be undertaken at any time between 6.30am Mondays to 6.30pm Saturdays provided the relevant noise limits in condition 22 can be met in relation to the loading and haulage in construction areas. There must be no haulage of construction spoil on Sundays or public holidays.

It therefore can be seen the drafting of the imposed conditions has been an evolutionary process based on policies and standards in force at the relevant time² as well as adapting from lessons learned in earlier projects. At the time of drafting condition 7(b) (and condition 9), it was reasonable for the CG (on advice from his technical, legal and environmental advisers) to consider that the condition as drafted would achieve the desired objectives. It was acknowledged at the time that the construction of the Project would have impacts on the community and so the conditions must require the management and mitigation of these impacts, balancing these impacts with the need to minimise the construction period (and the length of time the impacts would continue).

In the above circumstances, it cannot be said that the CG's failure to define "excessive noise" in the Project documents was unreasonable administrative action.

It is requested that Proposed Opinion 10 be removed.

² That is, May 2007. It is noted that the majority of the noise standards and policies referred to in the Proposed Report (5.6 Relevant Noise Standards and Policies) were made after May 2007.

6.2 Proposed Opinion 11

The CG's failure to issue the clarification to TJH until 28 April 2010 and to the CLGs until 7 May 2010 was unreasonable in view of:

- night-time work commencing at Kalinga Park in August 2009
- DERM raising concerns just prior to night-time work commencing at Kalinga Park about enforcing condition 7(b) in the absence of a definition of the term 'excessive noise'
- complaints having been received by DIP which led to the request for legal advice on 25 November 2009
- the legal advice which was received by DERM on 23 December 2009 [REDACTED]

The CG's failure constitutes unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act.

It is noted that the final dot point should read "DIP" and not "DERM".

The CG acknowledges that it would have been better if this clarification was issued sooner, and, with hindsight, perhaps the clarification could have been issued sooner.

However, it should also be acknowledged that the CG and the officers involved were actively pursuing a resolution to this complex issue, investigating noise complaints and arranging independent monitoring, as well as dealing with a number of other issues that arose in this time on the Project. It was also appropriate that the proper decision-making processes were followed and proper consideration given to how best to present the CG's view as to what constitutes "excessive noise".

A lot of the work being done by the CG at the time was aimed at mounting a successful enforcement action. The CG's enforcement powers were introduced in 2008 and had not yet been used. It was considered necessary to understand how condition 7(b) could be enforced and how this could be assisted by a statement of clarification.

The CG and DIP will learn from this experience and the Ombudsman's recommendations to achieve a quicker resolution of such issues in the future.

6.3 Proposed Opinion 12

The following paragraphs of the CG's statement clarifying and reinforcing the meaning of excessive noise:

The Coordinator-General has clarified and reinforced the term 'excessive noise' with reference to the Coordinator-General's Change Report on the Environmental Impact Statement for the Airport Link Project, July 2008.

The Coordinator-General has taken the view that the generation of excessive noise, as stated in condition 7, occurs when noise measured at a sensitive place (for example inside a bedroom of a home nearby which has had mitigation measures applied) exceeds the noise goals stated in the Coordinator-General's Report, appendix 1, schedule 3, condition 9, or the background noise (whichever is greater).

Internal noise goals for sleeping areas have been set for the project during night hours (from 6.30 pm to 6.30 am). These noise goals are based on existing national standards for sleep disturbance. The goals are detailed at appendix 1, schedule 3, condition 9 (d) (i) and (ii).

are reasonable in that they accurately reflect the legal advice DIP had obtained and other professional advice concerning the practicalities of measuring the internal noise goals contained in condition 9.

The CG acknowledges Proposed Opinion 12.

Section 10 of this submission raises issues concerning legal professional privilege. If the Ombudsman's report of the investigation is published as a public report, it is requested any reference to legal advice in Proposed Opinion 12 be removed.

Perhaps the last paragraph of Proposed Opinion 12 could be amended as follows:

"are reasonable because they accurately reflect the professional advice DIP had obtained".

6.4 Proposed Opinion 13

The numerical criteria in condition 9 provide a reasonable indication of excessive noise in the context of night-time surface work for the Project, with the proviso that the night-time criterion of 40 dBA LAeq for steady, temporary noise in R4-R6 areas is at the upper end of relevant criteria and should be applied only with care.

Acknowledged.

6.5 Proposed Opinion 14

The Airport Link monitoring reports do not provide sufficient information to permit the CG, DIP or DERM to make any meaningful analysis of exceedences of the noise goals in condition 9.

Please reconsider the wording of Proposed Opinion 14.

It is recognised that there are some problems with the adequacy of the information contained in the Airport Link monitoring reports. However:

- the deficiencies and lack of information to explain results found in the Ombudsman's analysis of the Airport Link monitoring reports were found in specific instances and not in all reports (page 117 of the Proposed Report)
- despite the problems with the adequacy of information, meaningful analysis may still be made of the Airport Link monitoring reports; and
- WM was able to undertake meaningful analysis of the Airport Link monitoring reports to determine the exceedence of the relevant noise criteria (page 134-136 of the Proposed Report).

It is suggested Proposed Opinion 14 be amended as follows:

"The inadequacy of information contained in the Airport Link monitoring reports makes it difficult for the CG, DIP or DERM to make meaningful analysis of exceedences of the noise goals in condition 9."

6.6 Proposed Recommendation 5

The CG and DERM review the information in the Airport Link monitoring reports relating to noise, and request that TJH include the following information, as a minimum, in future Airport Link monthly reports:

- the street address or location where monitoring was undertaken and the location of the noise generating activities
- whether internal or external monitoring was undertaken and whether mitigation has already been applied
- nature of the mitigation applied
- the date, time and duration of monitoring undertaken
- atmospheric conditions prevailing when monitoring undertaken
- names and relevant qualifications of monitoring personnel
- a clear description of the construction activities taking place and the plant and machinery being used

- the relevant R category for the receptor, including whether there has been any change in category and any explanation for the change
- the criterion applied, that is, for steady state noise, temporary or long term and rationale for selection of the criterion for the type of work being conducted at the time of monitoring
- the relevant CG goal for steady state noise
- the relevant CG goal for intermittent noise
- any façade reduction applied
- monitoring results against the relevant CG goals or façade reduction levels
- continue to highlight in red the exceedances by the Project

where exceedances are claimed to be a combination of Project work and external factors, an assessment to be made by TJH of the dominant noise source and if the dominant source is Project work, record the entry as an exceedance attributable to the Project.

The CG accepts Proposed Recommendation 5.

The CG's powers to make a request of TJH to include such information are limited to the requirements about monitoring and reporting construction noise in the imposed conditions.

6.7 Proposed Recommendation 6

DERM monitor and evaluate the information contained in the revised monthly reports to assist it in determining whether TJH are in compliance with the noise goals.

Noted.

6.8 Proposed Recommendation 7

In the event the information gained as a result of proposed recommendation 6 indicates noise from night-time surface work may constitute excessive noise for condition 7(b) (also noise nuisance), DERM:

- report its assessment to the CG and
- consider whether its regulatory powers under the EP Act should be exercised.

Noted.

6.9 Proposed Opinion 15

The type of noise as intermittent or steady state is adequately distinguished by the noise goal criterion in condition 9.

Acknowledged.

6.10 Proposed Opinion 16

In the noise reports examined by my Office, both the intermittent and steady state components have generally been considered.

Acknowledged.

6.11 Proposed Opinion 17

CNI's acceptance of TJH's application of the temporary noise goal for monitoring was unreasonable.

Please see comments under Proposed Opinion 18.

6.12 Proposed Opinion 18

The CG's/DIP's failure to question TJH's application of the temporary noise goal for monitoring was administrative action that was unreasonable and/or wrong for the purposes of s.49(2)(b) and s.49(2)(g) of the Ombudsman Act.

It is asked that the Ombudsman consider removing Proposed Opinion 18 for the following reasons.

The application of the term "temporary" or "long term" to construction noise is the subject of independent noise expert opinion, based on an assessment of the construction activities being conducted at a point in time. For example, for a work activity requiring the use of fixed plant and mobile/intermittent activities, the use of "temporary" or "long term" noise criterion needs to be considered in the context of the activities being undertaken and the equipment being used.

DIP and the CG did not fail to question TJH's application of the temporary noise goal. The CG actively considered the matter and concluded it was not unreasonable for TJH to apply the temporary noise goal. It was open to the CG to accept TJH's argument because CNI reported in the CNI Report that based on the CG's conditions, it accepted TJH's change in noise goal use and that construction was temporary noise, but that this remained subjective.³

The CG's conclusion is supported by the following:

- WM's opinion (in section 2.4 of the WM report and extracted in page 122 of the Proposed Report) is that the terms "temporary" and "long term" noise are open to a wide range of interpretation;
- to the Ombudsman's knowledge, there is no definition of the terms temporary or long term in the context of construction noise in Queensland statutes or guides to noise measurement (page 122 of the Proposed Report).

6.13 Proposed Opinion 19

The CG's failure to define the terms 'temporary' and 'long term' in the context of noise from construction work in the Project documents constitutes unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act.

Please consider removing Proposed Opinion 19 in light of the following.

Introduction of imposed conditions

The ability for the CG to impose a condition like condition 9(d) was introduced into the SDPWO Act on 28 November 2005 by the insertion of Part 4, Division 8 (ss 54A-54G). The Ombudsman is referred to the comments made under Proposed Opinion 10 about the legislative intention behind these amendments.

Condition 9(d) was imposed in the Evaluation Report in May 2007 and was not altered by the Change Report in July 2008.

CLEM7 and identification of issues with "long term" and "temporary"

The noise goals in condition 9(d) and the use of the terms "long term" and "temporary" noise were taken from imposed condition 7(d) (Noise and Vibration) for the CLEM7 project.

It is understood by the CG that there was nothing in the delivery of the CLEM7 project which would have triggered a review of the use of the words "long term" and "temporary" in the CLEM7 condition before the condition was incorporated into the Airport Link road tunnel project.

³ CNI Report, page 12.

It is also understood by the CG that no significant issues arose with respect to the use of the words "long term" and "temporary" in condition 9(d) in the delivery of the Airport Link project until night-time surface work was first proposed to be conducted at Kalinga Park in July 2009.

It is appreciated that subsequent noise expert reports available to the CG since that time have shown that there is room for different interpretations of these terms. However, it is appropriate that the classification of works as temporary or long term be undertaken on a case by case basis by a noise expert. In the circumstances outlined above, it cannot be said that the CG's action in not defining the terms was unreasonable. The position may be different if the CG was alerted to an issue with them prior to setting the conditions and did not do anything about it in his imposed conditions, but that is not the case.

6.14 Proposed Recommendation 8

The CG review the night-time surface work being undertaken at all worksites, and planned future works, to determine whether the works are properly classified as temporary or long term under condition 9.

The Coordinator-General accepts the intent of Proposed Recommendation 8 but questions whether this is an efficient and effective use of limited resources.

The preferred approach of the CG is one reflective of the way the Project has been conditioned and the way in which the CG conducts strategic compliance. There are four main avenues available to the CG to determine whether to escalate compliance action in accordance with the Strategic Compliance Plan:

- complaint trend data about particular matters (complaints management is a condition of the Project);
- matters raised by the project's independent auditor (a condition of the Project);
- advice from CNI concerning environmental matters; and
- advice from a compliance agency (for example, DERM) to the CG concerning environmental matters.

Where compliance action relating to night-time surface work is triggered by one or more of the above, the CG agrees that determining whether the works subject to investigation are properly classified as temporary or long term is a matter which requires consideration.

6.15 Proposed Recommendation 9

Where appropriate, the CG provide guidance and/or instruction to DERM and TJH on the appropriate classification of work as temporary or long term and the relevant noise criteria for modelling and monitoring work.

The CG accepts the intent of Proposed Recommendation 9, in the context of the response provided to Proposed Recommendation 8.

6.16 Proposed Recommendation 10

Where appropriate, the CG provide guidance and/or instruction on the meaning of 'major' or 'minor' road.

The CG accepts Proposed Recommendation 10.

The CG will provide guidance on the meaning of 'major' and 'minor' road with reference to the BCC City Plan 2000 for this Project or the relevant local government road hierarchy for other projects. The CG notes that while these terms were taken directly from the Australian Standard AS/NZS2107, they are not defined in the standard.

6.17 Proposed Opinion 20

The CG and CNI's failure to question TJH's adoption of the R categories or the numerical noise goals in assessing whether noise generated by the Project works exceeded those noise goals in condition 9 constitutes unreasonable administrative action for the purposes of s.49(2)(b) of the Ombudsman Act.

Please consider removing Proposed Opinion 20 in light of the following.

Relevant views

The ANE reports (extracted in the Proposed Report at page 125) state:

- [in the Kalinga Park area] overall the adopted noise goals of R1 to R3 to the west of the railway line, and R4 to R6 to the east of the railway line were considered to be suitable, based on the pre-construction monitoring (February 2009); and
- much of the area around the Kalinga Park construction site is in the R3 category (September 2009).

However, the Heggies report (page 5) states that, for its assessment, the R4 category was considered applicable to the residences near the Kalinga Park construction site for setting the night-time noise goals, as train noise is a significant contributor to the ambient noise environment in this community.

Response to ASK report

In response to the ASK report [REDACTED], the CG considered the issue of TJH's adoption of the R categories (and the corresponding numerical noise goals) in assessing whether noise generated by the Project works exceeded the noise goals in condition 9.

A comprehensive briefing note (reference 10/14312)⁴ was prepared for the CG which provided an assessment of the ASK report and Heggies report and comments from the DIP Compliance Unit and CNI.

The CG's letter of response [REDACTED] dated 22 June 2010 said:

"I am advised that the application of a relevant R category is, by its nature, a subjective judgement based on levels of transport and industry in the subject area and associated pre-construction background noise levels ... in their most recent report the noise engineer [Heggies] has clearly stated that the [Kalinga Park] area is considered to be an R4 category area.

While I acknowledge that your consultant [ASK] considered the area to be R3, the subjective nature of the category assessment does not justify the Coordinator-General disputing the category used by TJH in their assessments, which is essentially a professional judgement of the experienced noise consultant, based on the circumstances as determined by that consultant at the time."

In conclusion, the CG considered the issue, drew on his own noise expert's advice, and came to a conclusion that was reasonable. The CG did not fail to question the TJH's adoption of the R categories (and the corresponding noise goals).

6.18 Proposed Recommendation 11

As AS1055 shows indicative background noise levels for the various R categories in day, evening and night periods, the CG ensure that, for future projects where NIAPSP applies, provision is made for background noise readings to be taken pre-construction for the period 10.00pm to 7.00am as the basis for determining the night-time R category.

The CG accepts Proposed Recommendation 11.

It is suggested that Proposed Recommendation 11 be amended as follows:

⁴ See Supporting Material .

“As AS1055 shows indicative background noise levels for the various R categories in day, evening and night periods, the CG ensure that, for future projects where NIAPSP applies, provision is made for background noise readings to be taken pre-construction for the period 10.00pm to 7.00am, which, together with detailed consideration of the receiving environment and other relevant matters, will form the basis for determining the night-time R category.”

6.19 Proposed Recommendation 12

In any future significant project, where:

- *night-time goals rely on a determination of the R category under NIAPSP and*
- *the contractor has changed the classification of any sensitive receptor property identified in predictive modelling as R1-R3 to R4-R6*

the CG have in place a system by which the owner of that sensitive receptor property may complain directly to the CG, and the CG will coordinate an evaluation of the change and make a decision about the change.

The CG accepts Proposed Recommendation 12.

6.20 Proposed Recommendation 13

For the remaining stages of the Project, the CG:

- (a) evaluate any proposed change by TJH of the R category to R4-R6 where predictive modelling reports previously identified that an R1-R3 category applied to particular noise sensitive receptors
- (b) make a decision about the change
- (c) advise TJH of the decision

The CG accepts Proposed Recommendation 13.

6.21 Proposed Recommendation 14

In determining the R category to be applied to a certain sensitive receptor, the CG and DERM take into account available background noise readings and, if unavailable, obtain:

- for night-time noise, the LA90 background noise level at each residence in the absence of noise from the Project; and
- for daytime noise, the contribution of noise from a minor or major road to the total LAeq noise level at each residence, in the absence of noise from the Project.

The CG understands that Proposed Recommendation 14 relates to a proposed change by TJH to the R category for the remaining stages of the Project referred to in Proposed Recommendation 13.

The CG accepts the intention of Proposed Recommendation 14 but asks it be amended to take account of the reasonableness and practicality of obtaining background noise readings *“at each residence”* in the event that no background noise readings are available.

WM recommends in its report (at section 2.5) that more detailed studies of background noise levels be performed at potentially-affected residences to accurately determine their classification, based on the background noise level classifications in AS 1055. WM’s report goes on to say:

“Measurements would need to be performed either in the absence of construction noise or at similar locations that are unaffected by the construction noise.” (underlining added)

It is considered unreasonable to request that background noise levels be taken at "at each residence" in the absence of noise from the Project as this approach was not undertaken in the predictive modelling. It may also be impractical. As noted in the CG's clarification and reinforcement of the term "excessive noise" of May 2010, TJH advised of the difficulty of obtaining noise measurements at night.

It is requested that Proposed Recommendation 14 be amended as follows:

"For the purposes of Proposed Recommendation 13, in determining the R category to be applied to a certain sensitive receptor, the CG and DERM take into account available background noise readings and, if unavailable, obtain:

- *for night-time noise, the LA90 background noise level for the sensitive receptor in the absence of noise from the Project or at a similar location that is unaffected by construction noise from the Project; and*
- *for daytime noise, the contribution of noise from a minor or major road to the total LAeq noise level for the sensitive receptor, in the absence of noise from the Project."*

6.22 Proposed Opinion 21

The façade reduction method of assessing internal noise levels contained in the CG's statement of clarification of excessive noise is generally accepted industry practice, especially where the façade attenuations of the relevant residences have been explicitly measured.

Acknowledged.

6.23 Proposed Recommendation 15

In any future significant project where internal noise goals for sleep disturbance are utilised, the CG should prescribe, in imposed conditions, a facade reduction approach where:

- entry to sleeping areas for monitoring purposes cannot be achieved; or
- where broader noise testing programs around worksites to determine the likely impact on sleeping areas is required, or desirable.

The CG accepts Proposed Recommendation 15.

In future, the CG will also consider conditioning the measurement of noise using external monitoring in accordance with the *DERM Noise Measurement Manual*.

6.24 Proposed Opinion 22

The CG's statement that noise goals were set for the project based on noise measured in sleeping areas after all reasonable and practicable mitigation and management measures have been applied constitutes administrative action that was wrong for the purposes of s.49(2) of the Ombudsman Act.

Please reconsider Proposed Opinion 22 in light of the following,

Condition 9(d) requires reasonable and practicable mitigation and management to be adopted where predictive modelling of the potential construction noise predicts that the noise goals for sleep disturbance are likely to be exceeded by construction works. These measures must be developed in consultation with the owners and occupants of potentially-affected premises.

The mitigation measures may be taken at the source of the noise or at the receptor.

Source mitigation may include:

- installation of physical controls, such as noise barriers;
- implementation of training in relation to minimising noise during construction works;

- the use of mufflers and other insulation to reduce plant engine noise.

Receptor mitigation may include:

- the installation of acoustic treatments to premises, such as double-glazed windows, insulation and air conditioning;
- offers of financial assistance to cover additional electricity costs associated with operation of pre-owned air-conditioning;
- offers of temporary or long-term accommodation.

The thrust of condition 9(d) is to identify likely impacts through predictive modelling and then take reasonable and practical action to mitigate and manage them, while allowing the Project works to proceed as quickly as practicable to reduce the long term impact of the Project. If the predictive modelling does not show the noise goals for sleep disturbance are likely to be exceeded, then no mitigation measures are required to be taken. It is only when the predictive modelling shows that the noise goals are likely to be exceeded that the requirement to take mitigation measures arises.

The corollary of this is that the measurement of compliance with the noise goals during construction work must be after all reasonable and practicable mitigation and management measures have been applied.

Such an approach is supported by the WM report, which states (at section 2.7) that if a resident agrees to noise mitigation measures being provided by the proponent then noise mitigation can be claimed. This is reinforced in WM's report where it says (at section 2.8) that

"criteria should be compared with noise levels measured with open windows, unless the residence has been specifically treated by the proponent or supplied with means to allow windows to be closed."

It should be remembered that condition 9(d) is a behavioural condition and performance based and that it imports noise goals, not limits. It is not a prescriptive condition.

An interpretation of condition 9(d) which intends noise to be measured against the noise goals inside a residence before any mitigation measures have been applied to it results in the requirement for reasonable and practical mitigation measures to be adopted being made redundant. The better interpretation is that the object of the measures is to "bring back" the noise level to within the noise goals following the predictive modelling and the noise goals should be measured accordingly.

The Ombudsman has suggested a reasonable approach is to "take residences as you find them" (Proposed Report, page 132). This is true when the predictive modelling required by condition 9 is carried out prior to the commencement of construction work. However, condition 9(d) then requires ongoing monitoring. The obligation is to take certain measures in response to predictive modelling and the CG's statement is consistent with this view. It is a balancing act between the community impacts and the construction program.

[REDACTED]

[REDACTED]

be offered. The difficulty arises where the resident does not accept mitigation. The Ombudsman's view is that it is an exceedance of the noise goals if the noise measured in the sleeping area (with the windows open) exceeds the noise goals and this is a breach of condition 7(b). If the CG was able to successfully argue this is an enforcement action, the enforcement action would most likely result in an order that TJH stop the night work causing the noise.

To put this into perspective 84 residences were offered mitigation measures by TJH in the Toombul precinct. 79 residences have had mitigation measures put in place, and 5 residences have refused the mitigation offered. The CG has sympathy for these residents that do not want or like air conditioning and want to continue to sleep with their windows open. The difficulty for the CG is that these conditions were included to allow the Project to proceed with impacts minimised and managed in consultation with the community. It was recognised that limits on working hours would mean the Project would take longer to build, increasing the impact on the community in other ways.

The CG is concerned that Proposed Recommendation 16, if it can be enforced, will result in delays to the construction of the Project with the resulting impacts on the wider community because a small number of residents have not accepted the reasonable mitigation measures offered.

It is discussed a number of times in this submission the intent of the CG's imposed conditions. A good summary is provided by Mr Wensley QC in his advice dated 8 October 2010 (page 13-14):

"There is a public interest, presumably, in constructing the project for the greater good of the community. If the efficient and economic achievement of that means that, for a short, or even longer, time, some individual citizens will be discommoded, then that may be a matter to be weighed in the balance in deciding what is 'excessive' in a particular factual situation."

- Another concern is that the adoption of the proposed recommendation will be a disincentive to TJH to offer reasonable mitigation measures even though they are required by condition 9(d). The CG has had much more success in achieving "good behaviour" using the performance based conditions and by working with TJH on the ground. Results are achieved much more quickly this way rather than using the statutory enforcement powers.⁵

It is requested that Proposed Opinion 22 be removed.

6.26 Proposed Recommendation 16

The CG remove the statement 'noise goals set for the project are based on noise measured in sleeping areas after all reasonable and practicable mitigation and management measures have been applied' from the DIP website and replace it with a statement to the effect that noise is to be measured against the noise goals inside a residence in the absence of the effect of any mitigation measures.

The CG's concerns about Proposed Recommendation 16 are set out under Proposed Opinions 22 and 23.

The CG requests Proposed Recommendation 16 be removed.

6.27 Proposed Recommendation 17

In assessing whether there has been excessive noise from the Project, the CG, DIP, CNI and DERM give greater weight to monitoring results where monitoring with windows open shows exceedances against the noise goals.

DIP and the CG request Proposed Recommendation 17 be revisited in light of the concerns expressed in this submission.

⁵ Statutory enforcement powers have been used by the CG for other breaches as a last resort.

The CG and DIP note many residents in affected areas have accepted noise mitigation measures. The noise monitoring results with windows open will therefore only be representative of the limited number of premises which have not had mitigation measures applied.

6.28 Proposed Opinion 24

In respect of nearby residences with windows open there is evidence of regular and considerable 'excessive noise' within the meaning of condition 7(b) from night-time surface work at the Kalinga Park worksite since such work commenced in August 2009.

The CG and DIP acknowledge Proposed Opinion 24.

However, it is noted that the Ombudsman is only able to form Proposed Opinion 24 if it is accepted that for the purposes of condition 7(b), the measurement of the noise goals in condition 9(d) is required to be taken in the absence of the application of reasonable and practicable mitigation and management measures being applied at the receptor. This is not consistent with the CG's clarification of the meaning of "excessive noise". It also has the result that it is possible to comply with condition 9(d) (as mitigation measures may have been offered to the resident but rejected), but at the same time not comply with condition 7(b).

7 Chapter 10 – Investigation and enforcement of imposed condition 7(b)

7.1 Proposed Opinion 25

DERM did not advise TJH that the section 451 notices had been adequately answered.

Noted.

7.2 Proposed Recommendation 18

DERM ensure that all responses to statutory notices issued under the EP Act are received, assessed and replied to.

Noted.

7.3 Proposed Opinion 26

DERM's failure to consider, or take action in respect of, the findings contained in the Heggies report constitutes administrative action that was unreasonable for the purposes of s.49(2)(b) of the Ombudsman Act.

While Proposed Opinion 26 is directed at DERM, the CG notes that the Heggies report states (at page 22) that the Project was compliant in nearly all respects when windows and doors were closed. Proposed Opinion 26 can therefore only be formed if it is accepted that the measurement of noise should ignore mitigation measures provided or offered at the sensitive receiver. As discussed in this submission, this is not a clear cut issue.

7.4 Proposed Opinion 27

I consider that:

- condition 7(b) is enforceable
- powers are available to the CG, DIP and DERM under the SDPWO Act and EP Act to compel TJH and/or other entities to comply with condition 7(b) (specifically, to ensure that noise from night-time surface works is not excessive).

DIP and the CG accept Proposed Opinion 27, however, make the following observations.

Exercise of powers

The CG is of the view that all of the imposed conditions for the Project are enforceable. However, the issue is whether there has been a breach of a condition in respect of which enforcement action can be brought.

Before the CG can exercise his enforcement powers, the CG must be satisfied:

- that TJH or the other entities are in breach of condition 7(b);
- there is evidence available that would be capable of supporting the allegation of a breach of condition 7(b) *to the relevant standard*, including robust technical evidence that the noise goals have been exceeded and statements from the affected resident (which have proved difficult to obtain in other enforcement actions undertaken by the CG);
- the Strategic Compliance Plan has been complied with; and
- consideration has been given to the two-tiered test for the decision to prosecute in the Director of Public Prosecutions' *Directors Guidelines* of whether there is sufficient evidence and whether it is in the public interest.

As the Ombudsman observes (at page 152 of the Proposed Report), there are challenges in enforcing the conditions due to, amongst other things, the technical complexity of the issues and the resources necessary to enforce compliance. Another challenge is the length of time it takes from commencement to conclusion of enforcement proceedings generally. For these reasons, the CG favours an approach using non statutory tools such

as communication and education which encourages immediate improvement in behaviour on the ground, with enforcement action only taken as a last resort.

CG powers only

The SDPWO Act confers the Part 7A enforcement powers on the CG only⁶ (and not DIP).

7.5 Proposed Recommendation 19

The CG and DERM:

- (a) review the legal advices of Mr Wensley QC and the expert report of Wilkinson Murray (Dr Bullen, acoustical consultant) (appendices 1, 2 and 3 of this report) and
- (b) collate and review all reliable and probative evidence relating to noise generated from the Project, including for example the Heggies report and CNI report and
- (c) decide whether the CG and/or DERM should take regulatory action under the SDPWO Act and/or the EP Act including whether to seek a declaration under s.54G(2) in the Planning and Environment Court concerning whether there has been substantial compliance with condition 7(b) in relation to noise from night-time surface work.

The CG accepts Proposed Recommendation 19.

7.6 Proposed Recommendation 20

By 14 March 2011, the CG and DERM advise me in writing of their decisions, together with reasons, concerning whether to take any of the regulatory action mentioned in proposed recommendation 19(c).

The CG accepts Proposed Recommendation 20.

⁶ The entities listed in Section 54F(2) of the SDPWO Act have the right to bring proceedings under SPA and the EP Act or to seek a declaration under section 54G of the SDPWO Act. These are, for condition 7(b), the CG, Brisbane City Council, the proponent (the State) and anyone whose interests are significantly adversely affected by the subject matter of the proceeding.

8 Chapter 11 – Coordination resourcing and future monitoring

8.1 Proposed Opinion 28

Having regard to schedule 4, the CG has primary responsibility for ensuring night-time surface work complies with condition 7(b) and for taking appropriate regulatory action when there is prima facie evidence of non compliance with the condition.

The CG accepts Proposed Opinion 28.

The CG also has the option to confer jurisdiction in relation to condition 7, or any other imposed condition, to another entity at any time by public notification pursuant to section 54B(3)-(6) of the SDPWO Act.

8.2 Proposed Opinion 29

DERM has jurisdiction under the EP Act to:

- investigate alleged noise nuisance from night-time surface work
- take regulatory action (whether administrative or statutory) against a person who has caused an environmental nuisance, to the extent that the imposed conditions do not authorise the environmental nuisance.

Noted.

8.3 Proposed Recommendation 21

For all future significant projects where there is joint regulatory responsibility between the CG and another agency, the CG have appropriate arrangements in place in accordance with the relevant legislation (supported by a written agreement such as a memorandum of understanding) identifying which agency is the lead agency for specified categories of cases and the responsibilities of the lead agency and partner agencies.

The CG accepts Proposed Recommendation 21.

8.4 Proposed Opinion 30

The opinion of the DIP Compliance Unit that CNI should oversee and investigate compliance with the imposed conditions in schedule 3, appendix 1 of the change report on a once off or continuing basis constitutes administrative action that was wrong for the purposes of s.49(2)(g) of the Ombudsman Act.

DIP requests that Proposed Opinion 30 be removed.

The DIP Compliance Unit is well aware that the CG is responsible for compliance with and enforcement of imposed conditions and has not attempted to devolve this responsibility to CNI.

The State is the proponent for the Project. CNI (being a special purpose vehicle company wholly owned by the State) has a role in relation to compliance for the Project because it provides management services for the contracts awarded by the State for the Project. CNI performs these services on behalf of the State. The CG is entitled to rely on the services carried out by CNI to assist the CG in his compliance role.

CNI's functions and responsibilities mean that it is familiar with all aspects of the Project and the operations of the contractor, TJH. Consequently, CNI is usually able to promptly provide or access information (whether factual or technical) in response to a request from the CG.

When assessing whether there has been a breach of a condition in respect of the Project and if so, whether enforcement proceedings should be undertaken, the CG would take detailed consideration of a range of information, available evidence and advice, including reports and information provided by CNI (as well as any submissions by BrisConnections and TJH).

This procedure was followed by the CG:

- prior to issuing enforcement notices in November 2010 pursuant to section 157B of the SDPWO Act, to BrisConnections and TJH in respect of contraventions of a condition requiring the transport of spoil by road using only those haulage routes identified in an applicable EMP; and
- prior to issuing enforcement notices in December 2010 to BrisConnections and TJH in respect of contraventions of a condition concerning night time shotcrete deliveries to the Woolloowin Worksite.

Project Management Agreement

There are two sections in the PMA which make CNI responsible for managing the contractor's compliance with the CG's imposed conditions.

First, part (b) of the definition of "Services" in the PMA provides an ongoing obligation to provide "*management services in relation to the contracts awarded by the State for the Projects*". The Macquarie Dictionary defines management as "*the act or manner of managing; handling, direction, or control.*" An industry definition of "project management" is:

*"Project management is the application of knowledge, skills, tools and techniques to project activities to meet project requirements. Project management is accomplished through the application and integration of the project management processes of initiating, planning, executing, monitoring and controlling, and closing. The project manager is the person responsible for accomplishing the project objectives."*⁷

Secondly, clause 7.2 of the PMA states:

"Without limiting the scope of the Services, the parties acknowledge that CNI may be required to carry out the following contract management activities for the Projects:

- manage any risks, issues or disputes which arise;*
- monitor and evaluate the delivery of the Projects and the performance of the contractors;*
- review any contractual incentives and performance indicators to ensure they remain appropriate;*
- negotiate and coordinate any modifications, if any, to the delivery of the Projects;*
- appoint any personnel to manage the contracts during the construction and ramp-up phases ..."*

The State, as the proponent of the Project, implements the conditions in the Change Report through a contractual agreement between the State of Queensland and BrisConnections (**Project Deed**).⁸ BrisConnections, in combination with related entities, has a contractual agreement with TJH ("the Design and Construct Contract") to design and construct the Project.

Clause 9.2 of the Project Deed (page 93) requires BrisConnections to ensure that TJH (and BrisConnections other associates) comply with the conditions and recommendations contained in the Change Report, in carrying out the Project Activities.

In addition, the CEO of CNI has been appointed as the State's Representative under the Project Deed and can direct the contractors on behalf of the State (see Clause 6.4 on page 73 of the Project Deed).

Therefore, CNI has a responsibility under the PMA to monitor and evaluate the performance of the contractors under the Project Deed, which includes the obligation on

⁷ Project Management Institute, *A Guide to the Project Management Body of Knowledge (PMBOK Guide)*, Third Edition.

⁸ The Project Deed can be accessed at http://citynorthinfrastructure.com.au/media-and-publications/project_documents.html

the contractors to comply with the conditions of the Evaluation Report and the Change Report.⁹

Consistent with the above it has always been the view of DIP (at all levels) and the CG that part of CNI's function is to ensure that the contractor complies with the imposed conditions for the project. See, for example, the letter from the Deputy CG, a delegate of the CG, to the CEO of CNI dated 24 December 2009 which states:

"I wish to remind you of your obligations to monitor and manage the contractors involved in this project and I consider that this role includes ensuring that all works for the project comply with the conditions imposed in the Coordinator-General's report and change reports for the project."¹⁰

Additionally, CNI has previously acknowledged that it has this role. Please see the Supporting Material for Proposed Opinion 30 for examples of CNI undertaking investigation of complaints as part of its normal practice.

Statements by DIP officers

DIP would like to clarify the context of the statements made by Officer E in his interview which are relied on by the Ombudsman in the Proposed Report (page 157) to reach Proposed Opinion 30.

The first comment from Officer E (Line 333) was in response to a question from the investigators regarding a statement in the submission provided by DIP on 27 July 2010 in response to the Ombudsman's preliminary inquiries (*DIP Submission*) that CNI has responsibility for risks, issues and incidents. The investigator asked at Line 326 "Can you explain a bit more about the definitions of those things?". This was not a question "about the responsibilities of CNI under the PMA", but rather a request to clarify the DIP Submission. Officer E clearly stated that he wasn't sure what the reference in the DIP Submission was to, but then attempted to provide an answer. It is not stating it fairly to conclude from these comments that this reflects the DIP Compliance Unit's view of CNI's role under the PMA.

The second comment from Officer E (Line 196) was made in the context of an earlier discussion with investigators of whether the Compliance Unit had any manuals or written policies as to how investigations should be conducted. While the discussion is poorly transcribed (Lines 165 to 171), Officer E mentioned to investigators that he had recently attended a Crown Law Update for environmental regulators which advised that regulators should refer to the manual on tips and traps for regulators issued by the Ombudsman, which sets out investigative practices. Officer E confirmed that the Compliance Unit does not have a written policy on investigations (Lines 157, 174 and 191). Officer E had a copy of the Ombudsman's Manual with him in the interview and showed it to the investigators during this discussion and specifically asked at Line 171 "Is that the sort of thing you're talking about?". The investigator's response was "Yeah, yeah, well most regulators will have something in their, in that order." Officer E's response was stating that the Compliance Unit does not do investigations of that nature, by which he meant formal investigations which follow the procedures outlined by the Ombudsman of setting up an investigation plan, conducting interviews and gathering evidence and submitting a formal report for consideration. The comment at Line 196 was an attempt by Officer E to provide further relevant information regarding the investigation process.

⁹ The ongoing role of CNI in the management of the Project was confirmed by the Government when it did not support the recommendation to wind up CNI and transfer CNI's compliance management responsibilities to the departmental form. In "Brokering Balance: A Public Interest Map for Queensland Government Bodies An Independent Review of Queensland Government Boards, Committees and Statutory Authorities Part B Report by the Independent Reviewers: Ms Simone Webbe and Professor Patrick Weller AO March 2009" the authors noted that "CNI is a wholly State Government owned Special Purpose Vehicle (SPV) company under the Corporations Law to undertake contractual activities and compliance management for the Airport Link, Northern Busway (Windsor to Kedron) and Airport Roundabout Upgrade Projects." (underlining added). The authors recommended (recommendation 103) that these functions be transferred to a suitable departmental form.

¹⁰ See Supporting Material.

8.5 Proposed Opinion 31

At least until October 2010, the DIP Compliance Unit was of the view that:

- CNI arranged for and/or carried out technical noise monitoring and
- if as a result of its noise monitoring CNI is concerned about compliance with the imposed conditions, CNI will refer the results to the CG.

This constitutes administrative action that was wrong for the purposes of s.49(2)(g) of the Ombudsman Act.

Please reconsider Proposed Opinion 31.

The Ombudsman is referred to the comments under Proposed Opinion 30 in relation to CNI's role in relation to compliance.

CNI does arrange for technical noise monitoring. The DIP officers interviewed did not have this information to hand when interviewed but examples of CNI arranging monitoring are now provided in the Supporting Material:

- CNI engaged Heggies to conduct noise monitoring in November 2009. The Ombudsman was provided with a copy of this report.
- The CEO of CNI advised the CG on 18 October 2010 of a revised ongoing compliance monitoring regime, including *"Additional monitoring ...with a specific focus on: Night time construction noise..."*.
- CNI advised the CG in BN 10/111301 dated 8 December 2010 that *"In October 2010, CNI commissioned Heggies Pty Ltd to undertake a new round of independent night time noise monitoring sessions at Bowen Hills, Lutwyche/Windsor, Kedron, Wooloowin and Toombul. Heggies had previously provided monitoring of activities at Kalinga Park in November 2009."*
- In "Interim Report – Noise Levels at 41 Gorman Street October 2010" (CNI reference 10/093498) on page 3 CNI state that they requested a resident *"allow our consultants to monitor noise independently..."* and *"CNI has requested the opportunity to undertake internal independent (Heggies) monitoring..."*.

Officer E's reference to CNI doing monitoring was a reference to both the engagement of Heggies to conduct technical noise monitoring and to informal noise monitoring.

CNI also reports concerns about non-compliance with imposed conditions to the CG. Examples of such reports are provided in the Supporting Material. In "Report – Noise Mitigation Erskine Avenue" (CNI reference 10/27037) CNI reported non-compliance with noise mitigation requirements through removal of a temporary noise wall (shipping container).

8.6 Proposed Recommendation 22

The CG/Director-General of DIP:

- assess the capacity of the DIP Compliance Unit to discharge the CG's and DIP's responsibility to coordinate compliance with conditions on significant projects and
- if necessary, acquire or engage sufficient human and technical resources to meet their obligations to coordinate compliance with such conditions.

The CG and DIP accept Proposed Recommendation 22.

8.7 Proposed Opinion 32

DERM is the lead agency for the regulation of environmental nuisance in Queensland.

Noted.

8.8 Proposed Opinion 33

DERM has failed to effectively monitor compliance with the noise goals in condition 9 and such failure constitutes administrative action that was unreasonable for the purposes of s.49(2)(b) of the Ombudsman Act.

Noted.

8.9 Proposed Recommendation 23

The Director-General of DERM:

- assess the capacity of DERM to discharge its responsibilities about noise regulation in Queensland, including responsibilities about noise from significant projects under the SDPWO Act; and
- if necessary, acquire or engage sufficient human and technical resources to meet their obligations to discharge those responsibilities.

Noted.

8.10 Proposed Recommendation 24

In addition to the matters identified in my proposed recommendation 5 concerning the information contained in the Airport Link monitoring reports, I consider the CG should require TJH to produce external monitoring results in the monthly reports.

The CG accepts Proposed Recommendation 24 but requests the substitution of the word "request" in place of "require", consistent with Proposed Recommendation 5.

8.11 Proposed Opinion 34

DERM has failed to undertake an effective reactive monitoring program in respect of compliance with the noise goals for the Project. This constitutes administrative action that is unreasonable for the purposes of s.49(b) of the Ombudsman Act.

Noted.

8.12 Proposed Opinion 35

The CG has a coordination role in respect of the monitoring of noise from the Project to ensure compliance with condition 7(b), part of which is to ensure that a proactive monitoring program is in place.

The CG accepts Proposed Opinion 35 to the extent that the CG has a coordination role in respect of the monitoring of noise from the Project to ensure compliance with condition 7(b).

However, the CG does not accept Proposed Opinion 35 to the extent that it states that part of the CG's coordination role is to ensure that a proactive noise monitoring program is in place.

Proactive monitoring by the CG is not efficient or effective and is not a good use of limited resources. Some observations about the value of proactive and reactive monitoring follow:

- The Ombudsman has drawn the conclusion that the reactive monitoring conducted by DERM is not effective and the Heggies monitoring organised by DIP was a proactive program. While DERM will comment on their program, the CG is aware of at least one example of DERM successfully reacting to a complaint, monitoring the noise source, and as a result identifying an exceedance of noise goals and enforcing change (ventilation fans on Woolloowin acoustic shed). It does not fairly reflect the situation to draw a conclusion that DERM's reactive noise program was ineffective and therefore a proactive noise monitoring program must be the solution.
- It is acknowledged by the Ombudsman (page 152 of the Proposed Report) that monitoring of construction noise is difficult, particularly as noises which cause the most

complaints are intermittent. However, it is unlikely that complaints would be made for single instances of these noises occurring, and DERM would not conduct monitoring unless repeated intermittent noise was occurring. As such it is correct to say that a single intermittent sound will have already taken place and not be recorded, but if such instances were occurring regularly it is more than likely that a reactive monitoring program would capture further noise occurrences. A more appropriate conclusion to be drawn would be to make recommendations for improvement and resourcing of the reactive noise monitoring program.

- DERM's approach is consistent with the approaches of other State jurisdictions. Other jurisdictions may mandate through licensing or other regulatory arrangements that proponents or constructors conduct proactive monitoring to check noise modelling (as is done in this Project), however, the State regulatory bodies only conduct monitoring after complaints identify issues of concern.
- NSW DECT noise policy section and DECT Newcastle operations office both report that noise control is based on:
 - Construction noise – Interim Construction Noise Guideline <http://www.environment.nsw.gov.au/noise/constructnoise.htm>
 - Construction is licensed with DECT and requires a Construction Noise and Vibration Management Plan as set out in the guideline. Control is based on monitoring and reporting by the proponent and reactive monitoring by DECT if complaints occur.
- Inquiries by DIP with a noise specialist in the NSW Department of Planning confirmed that this was also their approach to approvals, and had been the situation when he was at NSW RTA.
- Based on an examination of guidelines and discussion with NSW officers, proactive monitoring is not a normal part of construction industry monitoring. The transient nature of the work noise from varying activities and using a range of equipment makes monitoring either a very long task or a very low frequency of detection task. Either way this is not an appropriate use of limited resources, particularly when monitoring is already being carried out by the proponent.
- TJH is conditioned through imposed condition 4(a) and the requirements of 4(d)(ii) to conduct ongoing monitoring to check noise modelling and the effectiveness of mitigation. Monitoring must include a range of activities such as but not limited to scientifically conducted measurements of specified parameters, visual inspections, recording of events and communications with affected property owners and occupants. The Construction EMP Sub-Plans which set out how this monitoring is conducted include both proactive and reactive monitoring, including the following requirements:
 - Conduct ongoing noise monitoring at premises identified in the predictive noise modelling where noise levels are predicted to exceed day and night time noise goals. For every monitoring occasion a sample of ambient noise (in the absence of construction work) will be recorded at a suitable pause in the construction activity.
 - Conduct attended noise monitoring, including the personal observations, at sensitive receptors during construction activities which are predicted to exceed noise goals.
- The overview and auditing of TJH's compliance is conducted by DERM, as well as through 6 monthly independent audits by DCLS.
- The CG's coordination role has so far extended to attending stakeholder meetings, assisting DERM and CNI in negotiations with TJH, and funding a monitoring program. Where CNI-funded monitoring by Heggies identified equipment such as the metal rimmed waste loading scaffolding being noisy TJH changed the equipment. This is behaviour change and at source mitigation as a result of reactive monitoring.
- In light of consultation with other jurisdictions and the examples from the Project so far it seems to be a reasonable approach to continue to rely on proponent monitoring and reactive assessment.

It is requested that Proposed Opinion 35 be amended as follows:

"The CG has a coordination role in respect of the monitoring of noise from the Project to ensure compliance with condition 7(b)."

8.13 Proposed Opinion 36

Other than arranging testing through Heggies Pty Ltd in response to complaints, the CG has not established or coordinated a proactive monitoring program to ensure compliance with the imposed conditions. This constitutes administrative action that is unreasonable for the purposes of s.49(2)(b) of the Ombudsman Act.

For the reasons outlined under Proposed Opinion 35 it is requested that Proposed Opinion 36 be removed.

8.14 Proposed Opinion 37

DERM has a partner role in respect of monitoring noise from the Project to ensure compliance with the noise goals in condition 9. Part of that role is to ensure that a proactive monitoring program is in place.

The CG notes that Proposed Opinion 37 is directed at DERM, but refers the Ombudsman to the above comments regarding proactive noise monitoring.

8.15 Proposed Opinion 38

DERM has not established a proactive monitoring program to monitor compliance with the CG's imposed conditions. This constitutes administrative action that is unreasonable for the purposes of s.49(2)(b) of the Ombudsman Act.

The CG notes that Proposed Opinion 38 is directed at DERM, but refers the Ombudsman to the above comments regarding proactive noise monitoring.

8.16 Proposed Recommendation 25

By 14 February 2011, the CG and DIP, in conjunction with DERM, develop a program to proactively monitor noise from night-time surface work having regard to the following factors:

- the guidance on compliance with the imposed conditions contained in my report
- the existing and planned program of construction for worksites for the duration of the Project
- the worksites where there is a significant risk of work impacting on the amenity of residents in the evening, particularly in sleeping hours between 10pm and 6:30am
- delivering the program in the most cost effective manner including, if necessary, the engagement of acoustic consultants for part or whole of the program
- the objectives of the program to include obtaining information capable of being used to informally resolve issues as quickly as possible, where appropriate, but of a standard capable of being adduced as evidence in regulatory proceedings
- the officers, at a senior level, within DIP and DERM who will be responsible for assessing the information (for example, noise monitoring reports) obtained by the program
- the coordination of that assessment between the CG, DIP and DERM
- how timely decision-making will be made between the CG, DIP and DERM as to the regulatory use to which that information will be put (to be clear, I am also referring to non-statutory regulation, such as the negotiation for stopping the use of a particular item of equipment at night).

DIP and the CG do not accept Proposed Recommendation 25 and request it be removed.

The CG refers to the comments made under Proposed Opinion 35 that a proactive noise monitoring program is inconsistent with current practice and is not the most efficient use of resources.

The CG considers a more effective approach to be one coordinated between the CG, CNI and DERM, and which may involve:

- DERM targeting the capability and capacity of the contractors to monitor and manage noise from the project (for example, targeted review of the accreditation of the contractor's environmental officers, calibration of equipment, demonstration or side-by-side analysis of in-the-field noise monitoring and management).
- CNI arranging expert noise monitoring, based on complaint, matters raised by DCLS in its audit report, a request from the CG or DERM, or of its own motion.
- CNI providing expert noise monitoring results and any supporting advice to the regulatory agencies (DERM and CG) for consideration.
- CG and DERM, in consultation, determining the most efficient regulatory tools to use should non-compliance be suspected or detected.

8.17 Proposed Recommendation 26

The CG commence and implement the proactive noise monitoring program as soon as possible, but no later than 14 March 2011.

The Ombudsman is referred to the comments made under Proposed Recommendation 25.

8.18 Proposed Opinion 39

The failure of the DIP Compliance Unit to properly monitor DERM's regulation of noise from night-time surface work from the Project constitutes administrative action that is unreasonable for the purposes of s.49(2)(b) of the Ombudsman Act.

Please give consideration to removing Proposed Opinion 39 for the following reasons.

The Ombudsman appears to have concluded from the statements by Officer E in his interview (extracted at pages 168-169 of the Proposed Report) that DIP has not adequately discharged its responsibilities.

The DIP Compliance Unit has acted in accordance with the Strategic Compliance Plan¹¹ in its reliance on third party audits. The Strategic Compliance Plan states that third party-auditing is a fundamental aspect of an effective compliance program and through conditions the CG may require proponents to have their activities audited by an independent and suitably qualified person and report to the CG. The Compliance Unit will review audit reports and make recommendations to the CG if any further action is necessary. Such an approach has been used in relation to this Project.

The DIP Compliance Unit has had significant interaction with DERM in relation to the regulation of noise from night-time surface work. Officer E gave examples of such interaction in his interview when he stated that DERM attend monthly meetings with DIP and CNI and are invited on a regular basis to attend inspections.¹² Evidence of attendance at these monthly meetings is provided in the Supporting Material along with a sample of email communications and exchanges of information between DIP and DERM officers.

¹¹ Refer to Supporting Material.

¹² Lines 554-557.

8.19 Proposed Opinion 40

DIP's failure to keep the CG informed; and to give instructions to the DIP Compliance Unit (as the Unit assisting the CG in his coordination role) or DERM, about environmental coordination issues arising from the Project is unreasonable in light of the CG's environmental coordination role. This constitutes administrative action that is unreasonable for the purposes of s.49(2)(b) of the Ombudsman Act.

Please give consideration to removing Proposed Opinion 40 for the following reasons.

The suggestion that the CG was not aware of and/or not kept informed of the issues arising from the Project and consequently did not provide instructions to DIP Compliance Unit, is inaccurate and does not fairly represent the circumstances.

Proposed Opinion 40 appears to rely primarily on the fact that the Ombudsman was unable to locate materials relating to advice provided to the CG, or resultant instruction, in the material provided by DIP during the investigation (page 170 of the Proposed Report). The material provided by DIP and the CG in response to the Ombudsman's request for information was focussed on action taken in relation to night surface construction activities, and not on the course of communications between the CG and the Compliance Unit in relation to environmental coordination issues arising from the Project.

The former CG, Mr Colin Jensen, was actively involved in and alive to the complex issues arising from the Project. There were (and continue to be) regular discussions and other communications between the CG and the DIP Compliance Unit (including the giving of instructions by the CG) about environmental coordination issues arising from the Project. The subsequent CG and current CG have similarly been regularly informed and actively involved in issues arising from the Project.

Examples are contained in the Supporting Material and include:

- attendance by the CG at a fortnightly briefing from TJH on the progress of and issues arising with the Project. The briefing is also attended by DIP officers from the Infrastructure Projects Group and Compliance Unit;
- the issuing of instructions by the CG to the DIP Compliance Unit to issue a show cause notice for non-compliance;
- the issuing of a request by the DCG to CNI by email to provide information in relation to the conducting of 24/7 works;¹³ and
- the provision of briefing notes to the CG and DCG about topics such as the lateness and inadequacy of the six-monthly compliance report submitted by CNI, the submission of independent noise monitoring conducted by CNI, and a Toombul CLG request to halt Saturday and Sunday night works.

These are just some examples. The CG and DIP would be happy to provide the Ombudsman with further information on this issue, if required.

8.20 Proposed Recommendation 27

The CG take steps to be kept regularly informed, and to give instructions to the DIP Compliance Unit and DERM, about environmental coordination issues arising from the Project.

The CG acknowledges Proposed Recommendation 27 but considers that such steps have already been taken by the CG.

It is noted that Proposed Recommendation 27 relies on Proposed Opinion 40. The Ombudsman is referred to the submissions under Proposed Opinion 40, including the examples of instruction and advice on this topic.

¹³ Email from Principal Executive Officer to the Deputy DCG to CNI on 6 August 2009 (page 57 of Proposed Report).

The CG intends to institute a monthly briefing note from the Compliance Unit, which will include information from DERM on compliance issues. This will serve to document a process which already occurs through meetings, emails and briefing notes on environmental coordination issues.

8.21 Proposed Recommendation 28

The CG regularly meet with the Minister to advise him about environmental coordination and the status of environmental regulation of the Project, including the regulation of noise from night-time surface work.

The CG acknowledges Proposed Recommendation 28 but considers that such action is already taken by the CG.

The CG currently attends the fortnightly meetings the Minister attends with CNI and TJH which are referred to in the extract of the interview with Officer C in the Proposed Report (page 171).

The CG also regularly meets with the Minister in his capacity as the CG about many topics, including the Airport Link project. In these meetings the CG and the Minister or his advisors raise respective issues of concern.

The new CG notes that new arrangements will have to be considered in relation to his meetings with the Minister going forward to deal with the fact that the role of the DG of DIP is now undertaken by another person.

9 Matters of clarification

There are a number of statements in the Proposed Report which is suggested could be clarified to make them more consistent with the SDPWO Act and the material provided in this submission.

| Section of Proposed Report | Suggested Clarification |
|--|---|
| Abbreviations and Dictionary (page 2) – definition of “CG” | Change definition to <i>“The corporation sole constituted under the SDPWO Act and constituted by the person who at the material time is the Coordinator-General”</i> . ¹⁴ |
| Abbreviations and Dictionary (page 2) – definition of “Imposed conditions” | Change definition to <i>“Conditions imposed by the CG under s.35(4)(d) and s.35(2)(d) of the SDPWO Act”</i> . |
| Abbreviations and Dictionary (page 5) - definition of “The Project documents” | Change defined term to <i>“Project documents”</i> . |
| Section 1.3.2 (page 14) - fourth dot point under what the CG can do | Change wording to <i>“prepare a report <u>which evaluates the EIS and nominates conditions and/or makes recommendations for subsequent development approvals under other legislation</u>”</i> . ¹⁵ |
| Section 5.1.2 (page 28) - fifth dot point under the description of the initial EIS process | Change wording to <i>“Also, <u>to the extent that the project does not involve a material change of use that, under the Sustainable Planning Act, is impact assessable, and division 4, subdivision 2 and divisions 5, 6, 6A and 7 of the SDPWO Act do not apply to the project, the CG may impose his own conditions (in this report, referred to as ‘imposed conditions’)</u>”</i> . ¹⁶ |
| Section 5.1.3 (page 28) - third and fourth dot points under the description of the project change process | Change wording to: <ul style="list-style-type: none"> • <i>“<u>The CG must decide whether to require the proponent to publicly notify the proposed change and its effects on the project and advise the proponent of his decision.</u>”</i> • <i>“<u>If the CG’s decision is to require public notification, the proposed change and its effect on the project is publicly notified in the way decided by the CG and a call made for submissions.</u>”</i>¹⁷ |
| Section 5.5.3 (page 35) – statement that the 2007 Evaluation Report and Change Report are vague as to the extent that noise nuisance is authorised | Refer to the submission in respect of Proposed Opinion 10 and the findings by the Ombudsman in Proposed Opinion 27 that condition 7(b) is enforceable. This statement should be reconsidered. |

¹⁴ Section 8 of the SDPWO Act.

¹⁵ Section 35(3) of the SDPWO Act.

¹⁶ Section 54A and 54B of the SDPWO Act

¹⁷ Section 35G of the SDPWO Act.

10 Legal professional privilege

The Proposed Report refers to and discusses internal and external legal advices obtained by the CG and DIP, and a file note of a DIP legal officer.¹⁸ The opinion of Robert Wensley QC (being Appendix 1 of the Proposed Report) also refers to and discusses legal advice obtained by the CG and DIP.

Copies of the legal advices and file note were provided by DIP and the CG to the Ombudsman in accordance with their obligations under the *Ombudsman Act 2001* and in compliance with the Ombudsman's requirement for the production of those documents.

The CG and/or DIP have not waived (and do not intend to waive) legal professional privilege in the legal advices and file note. The CG and DIP are concerned to ensure that such legal professional privilege is maintained.

Should the Ombudsman decide to publish his report of the investigation as a public report then all references to the legal advices and file note should be removed, otherwise it is view of the CG and DIP that their legal professional privilege in the legal advices and file note will be effectually waived.

As the Ombudsman is aware, the decision as to whether legal professional privilege can be waived in legal advice provided to the State of Queensland rests with the Attorney-General as the first law officer of the State.

There is a high risk that any waiver of legal professional privilege would adversely impact the legitimate interests of the CG and/or the State. For example, the release of legal advices might inhibit the ability of the CG to take enforcement proceedings in relation to the Project.

The Proposed Report also refers to legal advice obtained by CNI, which was provided to DIP by CNI under cover of letter dated 15 July 2010. The legal advice was subsequently provided to the Ombudsman by DIP in Appendix 5 of the DIP Submission. CNI's legal advice was provided to DIP on the basis of common interest privilege. Accordingly, references to this legal advice should also be removed in any report of the investigation that is published as a public report.

¹⁸ For example, the legal advice is discussed at length in Chapter 8 (in particular in section 8.3) and in the formation and content of Proposed Opinions 11 and 12. It is also referred to in sections 9.8.7 (page 132), 10.5.2 (page 143) and 10.7.2 (page 152). The file note of the DIP legal officer is referred to in section 10.5.2 (page 143).

11 Identification of DIP officers

The Proposed Report identifies 4 DIP officers who were interviewed in the investigation by their full names and position titles and defines them as Officers C, D, E and F in the Abbreviations and Dictionary and in section 4.3 (page 25).

Should the Ombudsman decide to publish his report of the investigation as a public report then it is requested that the names of these 4 DIP officers and their position titles be removed from the public report and that the officers only be referred to as Officers C, D, E and F.

The Proposed Report also refers to the names of DIP officers in various footnotes when citing the source of information for particular statements. It is requested that the names of these DIP officers be removed from any public report of the investigation.