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Department of the  
Premier and Cabinet

23 February 2011

Mr Phil Clarke  
Queensland Ombudsman  
GPO Box 3314  
BRISBANE QLD 4001

Dear Mr Clarke

**Notice of proposed adverse comment - section 55 Ombudsman Act 2001**

I refer to your letter of 8 February 2011 notifying me about various proposed adverse opinions about my role as Coordinator-General in the Airport Link Project.

I was the Coordinator-General at the time the Environment Impact Statement (EIS) was prepared, notified and evaluated. I was responsible for the preparation of the evaluation report. That evaluation was done in an open and transparent way, following the making of public submissions about the project.

You have concluded that I was responsible for unreasonable administrative action in not defining the term "excessive noise" in the imposed conditions. I reject that conclusion for the reasons set out in this submission.

I am aware that the former Department of Infrastructure and Planning (DIP) (now Department of Local Government and Planning) has prepared a response which deals with this issue. I adopt the submissions in that response, and add my further submissions below. I have not been provided with the entirety of your report, and my response should be read in that light.

***Proposed Opinion 10: Failure to define excessive noise in the Project documents constitutes unreasonable administrative action for the purposes of s.49(2) of the Ombudsman Act.***

I would like to draw your attention to the following factors which, in my view, clearly show that the steps taken by me in evaluating the EIS for the Airport Link Project in relation to noise were reasonable and appropriate.

**1. Clear, objective noise conditions were imposed**

In arriving at proposed opinion 10, I am concerned that insufficient (or any) weight has been given to the fact that the imposed conditions, namely condition 9, specifically addressed the Proponent's obligations in respect of noise.

Condition 9 required (in summary) that the proponent must:

- prepare and implement a construction noise and vibration EMP sub-plan addressing the environmental objectives and performance criteria for noise and vibration management;
- provide measures to mitigate and manage the adverse environmental impacts from noise and vibration; and
- establish early consultation with the owners and occupants of potentially affected sensitive places.

Imposed condition 9(c) required the sub-plan to include measures for mitigation of predicted impacts on sensitive places.

Imposed condition 9(d) relevantly provides:

"(d) where the predictive modelling predicts that noise goals for sleep disturbance are likely to be exceeded by construction works, then consultation, reasonable and practicable mitigation and management measures, and a monitoring program must be adopted. These measures must be developed in consultation with owners and occupants of potentially-affected premises. The noise goals are:

- (i) For intermittent construction noise, the internal noise goals (sleeping areas) to avoid sleep disturbance during night hours (i.e. 6.30pm to 6.30am) are:
  - A. 50dBA  $L_{Amax}$  (for residences within R4 – R6 categories<sup>1</sup> as described in NIAPSP), or
  - B. 45 dBA  $L_{Amax}$  (for residences within R1 – R3 categories as described in NIAPSP).
- (ii) For steady construction noise, the internal noise goals (sleeping areas) to avoid sleep disturbance during night hours (i.e. 6.30pm to 6.30am) are:
  - A. 40 dBA  $L_{Aeq,adj}$  (15 minutes) for temporary noise and 35 dBA  $L_{Aeq,adj}$  (15 minutes) for long-term noise (for residences R4 – R6 categories as described in NIAPSP<sup>2</sup>), or
  - B. 35 dBA  $L_{Aeq,adj}$  (15 minutes) for temporary noise and 30 dBA  $L_{Aeq,adj}$  (15 minutes) for long-term noise (for residences within R1 – R3 categories as described in NIAPSP<sup>2</sup>).

(my emphasis)

It should be borne in mind that the conditions imposed were based on *predictive* models of what the noise might be. At the time of conditioning the project (which was conceptual at that stage), there was no way of knowing precisely how much noise would be generated and how much impact it would have on residents. The expert advice available to me, at the time of conditioning the project, was reflected in conditions 7 and 9. As outlined in the evaluation report, the target goals for noise and vibration established by the proponent, City

<sup>1</sup> Section 6.2.2 – Areas with dense to extremely dense transportation or commercial and industrial activities

<sup>2</sup> NIAPSP, section 6.2.2 – Application of AS2107

North Infrastructure Pty Ltd (CNI), were set following consultation with the then-Environmental Protection Agency (EPA). I was satisfied, as was the EPA, that the goals were reasonable and achievable. In instances where the goals were likely to be exceeded unavoidably for a period of time, the Proponent had indicated in the EIS that it would implement measures to manage the impact on affected residents and businesses.

Although there was no specific definition of "excessive noise" in condition 7, the goals for the proponent in respect of noise were directly and specifically dealt with in condition 9. It is simply not true that there were no criteria by which a person adversely affected could know what was excessive.

## **2. The later clarification was consistent**

When asked to clarify the meaning of excessive noise, my successor, Colin Jensen, said in a letter to TJH<sup>3</sup>:

"...I understand that "excessive levels of noise" has not been defined and that it is not possible to determine whether the activity on the worksites is generating excessive noise. The term "excessive levels of noise" has been disputed in recent letters to me and my department.

I take the view that the generation of excessive levels of noise, as stated in Condition 7, occurs when noise measured at a sensitive place exceeds the noise goals stated in Appendix 1, Schedule 3, Condition 9 or the background noise (whichever is greater)."

(my emphasis)

That interpretation is consistent with my understanding of the meaning of "excessive", and is also plainly self-evident, bearing in mind that the acoustic environment in which the worksites were to be located already had a degree of ambient noise. You will recall that in my evaluation report I commented that monitoring as part of the EIS had shown that the study corridor was largely dominated by existing road traffic noise at all times of the day, as well as rail noise, aircraft noise and/or mechanical plant noise. One of the construction sites as I recall was surrounded by a number of suburban rail lines, two major arterial roads and was quite close to Brisbane Airport.

## **3. All submissions were taken into account**

The EIS was released for public comment from 11 October 2006 to 8 December 2006. Written submissions about the EIS were received from 297 parties raising more than 2000 individual matters.

The majority of comments from the community related to operational air quality and the effects of operational traffic (as opposed to construction impacts). These were provided to the Proponent, which was requested to prepare a Supplementary Report to address the issues raised in the submissions.

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<sup>3</sup> Letter Colin Jensen, Coordinator-General, to [REDACTED] TJH, dated 28 April 2010, referred to at p.5 of your Notice.

My evaluation report of 23 May 2007 addressed the environmental effects of the project, concluding that the potential adverse environmental impacts could be adequately managed through the implementation of specific conditions and recommendations set out in the report.

The following submissions were received:

Submission From:	No. Received:
Government Advisory Agencies	16
Community Organisations	9
Private individuals or companies	141
Pro-forma letters	131
<b>Total</b>	<b>297</b>

The principal issues raised in submissions in relation to the operational phase were:

- increased traffic on some surface routes (i.e. Stafford Road and East West Arterial)
- increased road traffic noise in some locations (e.g. Gympie Road and Stafford Road)
- diminished air quality in proximity to the ventilation outlets, and potential health risk associations
- visual impact of the infrastructure on urban amenity
- impact on future land uses and regeneration potential around the surface connections; and
- reductions in pedestrian connectivity across major roads adjacent to the Project connections (e.g. Lutwyche Road, Sandgate Road and Campbell Street).

The principal issues raised in submissions in relation to the construction phase were:

- air quality, due to potential dust nuisance
- noise and vibration from tunnelling and surface works
- disruption to local and regional traffic flows due to construction traffic and spoil haulage traffic in particular
- increased traffic hazards and safety concerns adjacent to worksites and some community facilities (e.g. Woolloowin State School, Kedron State High School)
- reduced connectivity due to worksite impacts on pedestrian and cycle routes and open space networks
- loss of locally important places and vegetation (Kalinga Park); and
- duration of construction program, particularly in terms of impact on nearby community facilities and residential communities.

Two types of pro-forma submissions were received (accounting for 131 responses), which related to Project impacts on and around the Kedron State High School which raised these key issues:

- the safety of students and the wider school community during both construction and operation of the Project
- the negative construction impacts arising from dust, noise, loss of grounds and reduced access
- ongoing operational impacts from traffic noise, air pollution and loss of access and amenity
- air quality and impacts on health



- tunnel emission filtration; and
- negative operational impact on traffic congestion.

### **Issues raised regarding noise**

Specific submissions on noise were from the areas of Bowen Hills regarding construction and operational noise, Galway Street Windsor regarding noise barriers for construction noise, and Kedron State High School regarding the effects of construction noise on students and the learning environment. There were also submissions regarding the location of the ventilation station near the end of Alma Road at Kalinga Park and resultant construction noise and operational noise from the ventilation station and traffic.

Issues raised in submissions were responded to in the Supplementary Report to the EIS and satisfactory clarifications were provided. None of these submissions or clarifications altered the mitigation measures to be provided by the project in relation to managing the impact of noise.

As Coordinator-General I operated in an open, transparent way. I welcomed submissions and following that process, I was satisfied that the consultation process adequately engaged with stakeholders, sufficiently communicated the Reference Project concept design, and explained design modifications aimed at mitigating potential Project impacts.

### **4. A performance based, rather than prescriptive, approach to conditioning**

The noise goal provision in condition 9 is a behavioural condition which is designed to drive behaviour of the contractor to mitigate the impact of noise without affecting its ability to construct the Project.

The requirement is to take all reasonable and practical measures to mitigate so that construction can continue. This has the benefit of reducing the time the community is exposed to the impacts arising from the construction period.

Having considered the Reference Project in its entirety, there was no alternative but to acknowledge, as I did in my evaluation report, that negative impacts on the community would result from construction. I considered that there was a need to balance the impacts with the need to minimise the construction period (and hence the duration of the impacts). I considered the most appropriate way to achieve this was through management and mitigation of the impacts, with adequate consultation and monitoring. It was never considered to be reasonable (or practical) to impose prescriptive conditions in the circumstances. Based on the fact that the wording of the conditions had been used without issue on the CLEM7 Project, I consider that it was reasonable for me to adopt them in the present Project.

### **5. An evolutionary process with a proven track record**

The relevant wording of condition 7(b) of the May 2007 Evaluation report, about "excessive noise", was taken from imposed condition 5(a) (General Construction) for the CLEM7 project.

During the assessment of the Airport Link EIS, none of the advisory agencies, legal, technical or environmental advisors raised issues about the delivery of the CLEM7 project which would have triggered a review of the use of the words "excessive noise" in the

CLEM7 condition before the condition was imposed in the CG's May 2007 evaluation report for the Airport Link project.

At the time of drafting it was reasonable for me (on advice from my technical, [REDACTED] and environmental advisers) to consider that the conditions as drafted would achieve the desired objectives. Agencies that provided advice to me for consideration when drafting conditions and recommendations for the evaluation report included the Environmental Protection Agency, the Department of Main Roads, Queensland Transport and Queensland Health. I accepted that advice in good faith and in the belief that it was accurate and relevant. It was entirely reasonable in my position as Coordinator-General to rely on and adopt that advice.

I request that you remove Proposed Opinion 10 from your report.

***Proposed Opinion 17: CNI's acceptance of TJH's application of the temporary noise goal for monitoring was unreasonable.***

As I understand it, the events referred to in this opinion were subsequent to my departure from the role of Coordinator-General.

***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***

Although I have read and support the DIP submission in respect of this opinion, I am unable to personally comment. As I understand it, the change to the noise criteria by TJH was made in September 2009, which was approximately two years after I ceased as Coordinator-General. Colin Jensen was in the role at that time.

***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***

In relation to this opinion, I adopt the comments of DIP in its submission to you. I also repeat my comments above in relation to the reasonableness of adopting previously used conditions with which no issue had arisen. As I understand that no significant issues arose in relation to the definitions of these terms until well after my departure from the role of Coordinator-General, it is impossible for me to comment on what occurred, or put the events in context.

If I can be of any further assistance please do not hesitate to contact me.

Yours sincerely



Ken Smith  
Director-General