

14 February 2011

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Dear Mr Clarke

### **Complaint about 24/7 works at Kalinga Park**

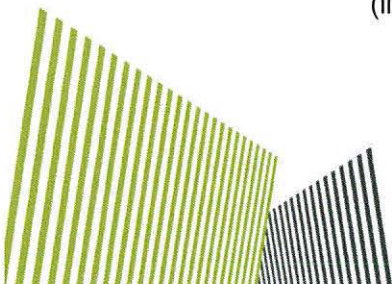
Thank you for the opportunity to respond to the Proposed Report "Brisbane Airport Link Report: An investigation into complaints about night-time surface work" ("Proposed Report") pursuant to Section 50 of the Ombudsman 2001.

CNI has been requested to provide our written response to the proposed opinions and recommendations relating to CNI and to provide a submission in respect of any other issue about which we have concerns.

### **CNI Preliminary Observations of the Proposed Report**

In preparing our response, CNI makes the following observations:

- Throughout the Proposed Report there are references to supporting evidence which post-dates the community consultation process for the EIS and also post-dates the Coordinator-General's evaluation of the Project. CNI has prepared a detailed timeline which can be found at **Annexure 1**. In considering evidence that post-dates the imposition of project conditions by the Coordinator-General and the finalisation of the contract for delivery of the project, it is important to note the following:
  - (i) The EIS was publicly notified from 11 October 2006 until 8 December 2006, with public consultation occurring both prior to the public release of the EIS and during the public notification period. The Coordinator-General's imposed conditions for the project (which included Condition 7(b), the subject of the Proposed Report) was publicly released in May 2007 and has been publicly available since that time;
  - (ii) The EIS and Imposed Conditions were prepared prior to the introduction of most of the standards and policies noted in Section 5 of the Proposed Report;



- (iii) Consultation on the EIS and the Request for Project Change occurred from 2006 to 2008, prior to the incorporation of Kalinga Woolloowin Residents Association (KWRA) in 2009; and
  - (iv) The CLG's were formed as required by the Coordinator-General's imposed conditions during the Project Construction Phase in August 2008, and did not form part of the consultation for the EIS or Request for Project Change.
- In terms of the timeline, it is critical to note that, by May 2007, surface night works were permitted by the conditions imposed by the Coordinator-General. Condition 7(b) replicated in part the Draft Outline Construction EMP contained in Chapter 19 of the EIS.
  - Community consultation for the Feasibility Study, the EIS and the Request for Project Change was extensive and a wide range of issues were canvassed. Throughout consultation, there was a particular emphasis **by the community** on operational issues, such as the ventilation station outlets. Not all issues raised by the State in the consultation process were subsequently the subject of submissions by members of the community.
  - The Proposed Report notes that the possibility of night time noise was canvassed in the EIS and the imposed Conditions (Chapter 8 of the Proposed Report). The EIS Team have stated that the question of night time noise was discussed in community briefings as part of the community consultation. It is inconsistent to subsequently make a finding that the community was not informed of the possibility of night time surface works.
  - Through the Proposed Report there are references to night works without noting what type of work was involved and whether it was night time surface works the subject of the complaint by the KWRA. In the context of making a finding regarding night time surface work and excessive noise, it is important to clearly identify specifically the type of works the subject of the issue as there are different requirements applying to different types of works under the Coordinator-General's imposed conditions. The works to which the "excessive noise" condition 7(b) applies is Surface Night Works (general construction) but not special circumstances works, underground works or spoil haulage.

In providing our detailed response, we have followed the same paragraph numbering that was have adopted in the Proposed Report.

### 1.2.3.1 Pre-construction

It is noted that:

- the Coordinator-General's evaluation report did not evaluate the Northern Busway CDIMP;
- At all relevant times, the State of Queensland was and continues to be the proponent of the Project.

### **2.3.1 Complaints received by TJH**

The Proposed Report indicates that it is not possible to accurately identify how many complaints relate to night time surface works noise. CNI was not requested to provide an analysis of the complaint's break-up, however we note that a review of the Airport Link - Community Enquiries and Complaints Reports available on the TJH website shows that 'site noise out of hours' complaints are often identified in the pie graph at the top of the page as a percentage of total complaints.<sup>1</sup> For example, we **enclose in Annexure 2** the September 2010 report for your review which shows that Site noise out of hours comprised 13% of complaints at Bowen Hills, 4% at Lutwyche/Windsor, 8% at Kedron, 18% at Wooloowin, 10% at Toombul and did not register as a percentage on the ARU project. Please note that for the purposes of this graph, site noise out of hours complaints may also include complaints about night time road switch works which are special circumstance works.

### **2.3.3 Complaints Received by DERM**

This section notes that there may be some duplication of complaints between the various bodies that manage noise issues. The complaints system is designed to ensure that there should be almost total duplication of complaints. Complaints that are made directly to CNI, the Coordinator-General, Department of Infrastructure and Planning or Department of Environment and Resource Management are almost always referred back to TJH as the appropriate starting point for a complaint in line with the complaint management process.<sup>2</sup> Considering that almost all of the complaints will be duplicated between the various agencies, it is more accurate to state that, "In assessing the number of complaints, there will be many duplications as complainants make the same complaint to more than one agency or complainants follow the complaints management process that provides:

1. Complaints must initially be made to TJH;
2. If unsatisfied with TJH's handling of the complaint, they are asked to refer it to CNI; and
3. If unsatisfied with CNI's handling of the complaint, they are then asked to refer it to the Coordinator-General."

The Proposed Report as currently written might be interpreted to suggest that the project suffers a greater number of complaints than it actually receives.

It is also noted that in considering the number of project complaints, the context of the project should be acknowledged. It is noted that the project is a large-scale, complex construction activity in the inner-city suburbs of Australia's third largest city by population. So far the project has involved more than 14 million man-hours of work over 19 work sites with more than 31,000 households within the modeled potential area of impact.

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<sup>1</sup> If further detail is required, we can seek more information from TJH in this regard.

<sup>2</sup> Some complaints are not project complaints and, as such, are not referred back to TJH for initial response.

## 5.6 Relevant noise standards and policies

***In this section, the relevance of some material is unclear as it post-dates the imposition of the Conditions.***

The Proposed Report refers to a number of noise standards and policies in this section which were created after the Coordinator-General's conditions and the contractual arrangements for the Airport Link Project were established.

Those 'relevant noise standards and policies' described below were not available or in force when the Coordinator-General's Imposed Conditions (which are the subject of this report) were finalised in May 2007.

For example, the Proposed Report references the Environmental Protection (Noise) Policy 2008 in clause 5.6.1 which came into effect several months after the conclusion of the Coordinator-General's evaluation report and Coordinator-General's change report and the Airport Link contract was let. The reference in clause 5.6.4 to the World Health Organisation report indicates that it was published in 2009. In clause 5.6.6 of the Proposed Report references the NSW Interim Construction Noise Guideline indicates that it was also created in 2009.

Those 'relevant noise standards and policies' described above were not available or in force when the Coordinator-General's imposed conditions (which are the subject of the Proposed Report) were finalised in May 2007.

To ensure that no confusion results from the references to numerous standards that were not in place at the time of the Conditions being established, **CNI recommends that the Proposed Report acknowledge that many of these policies were created after the Conditions of the Airport Link project were imposed and that the Proposed Report recommends using them as references only for the development of best practice for future projects.**

## 5.7 PPP Policies and guidelines

The National PPP Guidelines mentioned in clause 5.7.1 did not come into existence until after the Airport Link contract was let. **CNI recommends that a similar acknowledgement be adopted for 5.7 as is recommended above in response to 5.6.**

### 6.2.1 Observation

***The project description that the Proposed Report refers to is an extract from part of the EIS prepared in 2006 and is not a Condition on the project imposed by the Coordinator-General in 2007.***

To balance the community's desire for the construction timetable to be as short as possible and the environmental objectives to maintain a reasonable acoustic environment for living and use of properties along the corridor of construction influence during construction works, the draft outline Environmental Management Plan (construction) ("EMP") in Chapter 19 of the EIS contemplated night time surface construction works that did not exceed the established goals.

The elements of this EMP that provided for night works were replicated in imposed condition 7(b) and Chapter 8 of the Proposed Report confirms the effect of this condition.

It is noted that the community impacts would be protracted if no night works were permitted, resulting in significant impacts to both the local and wider communities over an extended construction period. This position concurs with the views expressed by the community during the EIS process and members of the community who approached you in this regard, as indicated on page 19 of the Proposed Report.

#### **6.4 Evaluation report – May 2007**

***As per CNI's preliminary observations, Section 6.4 contains inconsistencies and an error of fact.***

CNI has sought further information from the EIS Team who conducted the community consultation for the EIS process.

CNI has been advised by the EIS Team that:

*"It should be noted that, during preparation of the EIS, the community focus was on the design, construction and operation of AL. In particular, the community at Toombul and Clayfield were concerned about the location and operation of the ventilation outlet and about the location, construction and operational noise from the portals or connections of AL with the surface road network at Sandgate Road and the East West Arterial.*

*The scale, intensity and duration of construction works in Kalinga Park were one specific concern that was addressed by the project team in numerous meetings with residents, including a site meeting in the local streets and in Kalinga Park. People expressed concerns about construction works, including night works, based on their then recent experiences with the construction of AirTrain, involving night works.*

*The draft outline EMP (construction) sought to address these concerns and balance the requirements of the community and the Project."<sup>3</sup>*

The Proposed Report at Proposed Opinion 9 concludes that 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. Condition 7(b) replicates in part the Draft Outline Construction EMP in Chapter 19 of the EIS.

It is therefore clear that the EIS, together with the Coordinator-General's imposed conditions (which have been unchanged since May 2007) contemplated the possibility of night time surface work.

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<sup>3</sup> SKM-Connell Wagner Joint Venture Memo to CNI dated 28.1.11.

The SKM-Connell Wagner Joint Venture has further advised CNI that:<sup>4</sup>

1. Residents at the North eastern end of the Airport Link project around Clayfield and Toombul were aware of night works due to the Airtrain construction (which also involved night works), and the requirements of mitigation.
2. Residents in other areas also asked about night time works. The initial community information session where some of these concerns were aired attracted 650 people and the community made their comments publicly. We are advised that, in subsequent community information sessions, the EIS and consultation teams discussed with people the conditions anticipated for Airport Link in relation to noise and mitigation, based on similar conditions imposed on the NSBT project (aka Clem7).
3. Members of the Project team including the EIS Team conducted informal discussions with interested people residing in the streets around the proposed worksites at Kedron and Clayfield as part of the community consultation process supporting development of the EIS and reference design. During these sessions, questions were raised about 24/7 works. Again, Project team members discussed with people who enquired, the anticipated scope of the conditions anticipated from the Coordinator-General. These conditions reflected the preliminary findings of the EIS and the similar conditions imposed by the Coordinator-General on the North South Bypass Tunnel (aka Clem7).

The Proposed Report equates the Kalinga Woolloowin Residents Association (KWRA) with the Community. While it is acknowledged that the KWRA clearly represents some element of the community, the KWRA came into existence after the community consultation processes for the EIS and the Change Report for Airport Link and after the Coordinator-General established his Imposed Conditions for Airport Link. Further, we can find no record of principal members of the KWRA ( ) having made submissions as part of the community consultation on the EIS or 2008 Request for Project Change. ***As CNI noted in its preliminary observations, it is difficult to assess the KWRA or the Community Liaison Group Members (both of which came into existence after the EIS process) as representative of the entire community at the time of the EIS.***

The Proposed Report concludes that the Coordinator-General's imposed condition 7(b) permitted night time surface work. Condition 7(b) was contained within the EIS. Despite this, the Proposed Report observes that the EIS process did not address the possibility of such work (4<sup>th</sup> paragraph page 47). CNI suggests that, throughout this community consultation process, the EIS clearly included the possibility of such work, and this was replicated in the Coordinator-General's imposed conditions in May 2007. ***CNI suggest that the observation in the 4<sup>th</sup> paragraph page 47 be removed for consistency with the findings of the proposed report.***

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<sup>4</sup> The EIS Team advise that the scope and nature of the community sessions (650 people in a single room at times or door knocking and engaging people in the street) meant that minutes were not taken of these meetings.

#### 6.4.1 Observation

We refer you to our comments in relation to clause 6.4 above. As noted in CNI's preliminary observations, there are many things contained in the EIS on which no formal comment or submission was received by the Coordinator-General. That does not mean that the community consultation staff did not talk about these issues with the community. For example, planning and managing blast patterns during construction, the methods underpinning the traffic forecasts, background to health risk assessment were all part of the consultation process and little or no comment was received by way of submission in relation to these important things. ***It is unclear how the lack of submissions on any particular point such as night works supports the KWRA contentions. CNI suggest that this purported finding be removed from the Proposed Report.***

#### 6.5 2008 Request for Project Change and 6.5.1 Observation

In response to comments in this paragraph, we note that:

1. The State was the proponent for the Airport Link Project and it was the State that made the Request for Project Change to the Coordinator-General.
2. The Proposed Report states that Report 20-1605-56 Airport Link Changed Project Noise and Vibration Report is a technical attachment to the request for project change. The Proposed Report quotes a paragraph from that report which explicitly states that certain works were proposed for 24 hours a day. The Proposed Report then states, at 6.5.1, that the possibility of surface works at night-time ... was not explicitly raised in the request for project change. ***The technical report was a part of the Request for Project Change and was publicly notified as part of the Request for Project Change. It is therefore unambiguous that the possibility of 24 hour works was explicitly raised in the Request for Project Change and was publicly available to the community.***

The fact that the community asked questions during the community consultation process regarding night time works and 24/7 works (see above in response to the response to 6.4), further supports the view that the possibility of such works was communicated to the community at the time of the EIS process.

#### 7.2 TJH Decision to work 24/7

At page 58 you refer to a meeting held on 18/8/09. No minutes were taken for that meeting. It is unclear how this statement assists the investigation.

#### 7.3 Advice to and response from the general community and CLG references more generally throughout the report

While CNI acknowledges the valuable role played by the Community Liaison Groups (CLG), in considering the information contained within the CLG minutes it should be acknowledged that:

1. The CLG minutes are not a verbatim report but form a record of actions and such minutes do not reflect the technical or legal position of the State;

2. CNI does not have an approval role in relation to the CLG minutes, and in most instances, CNI does not see the minutes prior to public release. The minutes of these meetings are not approved or signed off by CNI or the State prior to issue;
3. Discussion held at a CLG does not represent a decision making process under the Project Deed; and
4. By their nature, the minutes do not provide full background or context to the CLG discussion.

As noted in our preliminary observations, throughout this section, and the Proposed Report more generally, references to various night-works are not qualified by indications as to whether they are surface works, special circumstances work, tunneling works or Public Utility Plant (PUP) works. For example, in response to one question by your officers, (paragraph 7.3.5 refers) CNI specifically noted that some of the CLG minutes referred to night works when they were in fact tunneling works.

Each of these types of works may have different enforcement and management mechanisms and different Conditions (PUPs work because we are told by PUPs providers that some of those works are separately authorised by statute). CNI's understanding was that the focus of the KWRA complaint and the investigation within the Proposed Report has been night time surface works. It is necessary to consider the nature of particular works before relying on minutes from a CLG meeting in order to make a finding. By far, the largest number of complaints received by the project have related to special circumstance works like PUP works requiring road closure. As the Proposed Report and your Queen's Counsel opinion affirms, special circumstance work is not conditioned the same as night-time surface works under clause 7(b). It is not reasonable to use references to special circumstances work as evidence to support comments regarding management of night-time surface works.

As the CLG minutes do not clearly differentiate the different types of night time works and responsibility for those works, it is difficult to draw accurate inferences from this material.

#### **7.4 Night time Surface Work**

The Proposed Report indicates that you sought advice from TJH as to the location of other work sites at which night time works will be or is likely to be commencing during the balance of the project and the indication of the dates of commencement and completion of such work. According to the Proposed Report, TJH did not answer this question.

Changes to construction schedules are frequently made for reasons outside a project team's control including inclement weather; non availability of outside service providers (eg water utilities or power providers). Some work is subject to permit and there can also be delays in the granting of the required authority. Our experience has been that providing stakeholders with notice in advance of confirmed work schedules can lead to distress or frustration when the schedule is not as previously advised.



The program changes regularly based on the construction activities undertaken, needs of the project, the effects of the environment (eg floods, wet weather), availability of machinery and other construction issues which dictate the works that will be conducted in a particular area.

TJH works to ensure at least 48 hours' notice of out of hours works (this is an internal TJH protocol). Prior to the commencement of such works it is normal practice for local residents and business operators to receive a detailed advisory; be 'door-knocked' by the project's Community Liaison Officers so that they may be personally briefed on work. This is in addition to quarterly and monthly 'look-aheads'; information sessions at the Visitor Information Centre and project run coffee mornings which the project runs in local streets ahead of any major or significant works or changes in correspondence. In addition advertising and media releases are also used where appropriate, particularly if a road closure is planned.

## **7.6 Queensland Ombudsman Meeting with Agency Officers**

CNI notes that the initial meeting dated 9 July 2010 quoted extensively in this section was represented to CNI to be an introductory meeting and all questions were delivered without notice. It is noted that, following that meeting, DIP provided a clear and unambiguous written response (dated 27 July 2010) which provided answers to each of the questions posed. In particular it is noted that the questions asked at the initial meeting related to past events where a significant amount of time had elapsed and at the time, CNI made it clear that a formal detailed written submission would be provided once the questions could be reviewed and the appropriate CNI staff could be consulted. A further copy of the detailed submission from DIP is enclosed with this letter.

CNI further notes that it has not been given the opportunity to check the transcript for accuracy, for context and to ascertain how people were identified when giving comments. **We request, prior to your report being released that we be given the opportunity to review this transcript and be given the opportunity to make further comments in this regard as necessary.**

In response to specific issues contained in paragraph 7.6 we note:

1. At bullet-point 3 on page 73, CNI officers are quoted regarding the difficulty in advising people what is going to happen in various timeframes. **We do not believe that this response was contextually quoted correctly.** CNI does not believe that the difficulty in reporting specific construction details and timeframes has anything to do with the possibility of night time works being notified to the community as part of the EIS process. Please see our comments in response to 6.4 above which provides evidence that the community was told about 24/7 works during the EIS process.
2. The Proposed Report quotes CNI as advising that before 24/7 surface works take place at any site, TJH needs to satisfy CNI that they will be able to meet the Imposed Conditions set by the Coordinator-General. CNI submits that there was considerable discussion on this issue and **the Proposed Report does not accurately reflect CNI's position on this issue.** In DIP's written response to the initial meeting, it stated (accurately), "There is no contractual requirement that requires BrisConnections to seek permission to do things in compliance with the Conditions.

Submissions by BrisConnections regarding 24/7 works are presented to demonstrate that the works can be conducted in compliance with the imposed Conditions.”

The written response should be acknowledged and referenced in this section. In particular, please refer to pages 17-21 of the DIP response.

#### **Clause 7.7.1 Was the community alive to the possibility of 24/7 works?**

The Proposed Report cites that the KWRA submitted that prior to October 2009 they were assured that 24/7 works would never occur. The Proposed Report at section 1.3.9 identifies that the KWRA was incorporated in August 2009. We note that KWRA did not exist at the relevant times when the conditions were imposed in 2008 nor did they exist during the community consultation process for the EIS or the Request for Project Change.

The Draft Outline EMP (Construction) in Chapter 19 of the EIS that contemplated 24/7 surface works was part of the publicly available EIS in 2006 and was replicated in the imposed conditions in May 2007. We submit that the bullet list contained in the clause 7.7.1 identifying some examples of the indicators which were available that 24/7 works were possible should be expanded to include the following critical examples:

- October 2006 EIS - section 19.6 where the Draft Outline EMP (Construction) - General - provides as follows:

*“Construction for 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”*

- May 2007 Coordinator-General's evaluation report imposed conditions 7(b) and 9;
- May 2008 Request for Project Change in relation to surface works at Kedron Brook where it was provided that “For possible night work to construct the cut and cover tunnels beneath Kedron Brook, effective mitigation 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 the management of noise and vibration effects of construction” (p102);
- July 2008 Coordinator-General's Change Report where it was provided that “Section 4.1.2 of the Request for Project Change notes that there is potential for night works in accordance with the Coordinator-General's conditions for the cut and cover construction of the Gympie Road connection in Kedron Brook. These works are subject to the noise goals applying to night works in Condition 9(d).”
- July 2008 Coordinator-General's Change Report imposed conditions 7(b) and 9.

The Proposed Report states that there is “no evidence that until just prior to the night time surface works commencing the community was **orally advised** in clear and unambiguous terms there is a possibility of 24/7 surface works being undertaken”. CNI has sought further information from the EIS Team and they indicate that they did orally advise interested community members in relation to the possibility of night time surface works. They confirm that many community members were interested in night works and noise due to their experiences with Airtrain. Please see our comments on the statements made by the EIS Team in relation to the oral discussions they held with the community through the EIS process described above in reference to clause 6.4 of your report.

In 6.4 of the Proposed Report, the three submissions received in relation to 24 hour work which is consistent with the advise that the EIS Team discussed 24/7 work with the community.

We note that the DIP Response to your initial questions also noted the following material put to the community:

- Noise goals were set for both daytime and nighttime works;
- Posters present at the community information sessions with notations about managing noise from night time surface works.

### **Proposed Recommendations 2 and 3**

Proposed Recommendations 2 and 3 propose that particular steps be taken by CNI.

CNI notes that under Annexure 6 of the Project Deed, BrisConnections is required to undertake community consultation and communication activities. While CNI has a role in approving public communication material, including notifications, CNI does not have either a contractual or conditioned role in providing detailed information directly to impacted residents and businesses.

CNI's ability to comply with these Proposed Recommendations would be dependent on information provided by BrisConnections and in turn TJH. While CNI could advise the community that there will be night time surface works on the project at various times and places until completion, it is unlikely that CNI will be able to secure information that will clearly identify exactly when or where such night time surface works may occur more than a few weeks out from specific activities happening. Advice from our community engagement officers suggests that a generic statement regarding the possibility of night time surface works would be counter-productive.<sup>5</sup> **Accordingly, CNI suggests that recommendation 2 be removed.**

Consistent with proposed recommendation number 3, Conditions 1 and 4(d)(iii) of the Coordinator-General's Imposed Conditions already requires notification of works as they are to happen on the project, and this task has been contracted to BrisConnections and in turn, TJH. TJH and BrisConnections issue those notices to the community in which the works are done in a variety of forms including written notices, verbal notices, door knocking, advertising and other types of notification.

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<sup>5</sup> From experience in dealing with the Airport Link community, it may cause unnecessary concern as it is unlikely to be particularly accurate.

CNI encourages TJH and BrisConnections to provide as much notice as possible to the community. As the Imposed Conditions already provide for public notification, **CNI suggests that recommendation 3 provides for duplication of an existing process and that recommendation 3 should be removed.**

CNI notes that the community already receives a significant level of notification of works in accordance with the Coordinator-General conditions. Since construction began more than 560,000 community advisories have been provided to people living within the project corridor (which comprises approximately 31,000 households). Between January 2009 and December 2010 at least 644 advisories to the community on subjects like upcoming works were generated by the project.

Each month residents and business owners receive a range of advisories, updates and newsletters. These include look aheads for each month; detailed notices for out of hours/night works; and specific advisories regarding matters including traffic changes; special circumstances works; heavy machinery/material deliveries etc. As an example, a snap shot of all of the communications material delivered in March 2010 is **enclosed as Annexure 3** to this letter.

### **Proposed Opinion 8**

It is incorrect to say that TJH and BrisConnections were not required to give reasons for their decision to conduct night-time surface works. Under the Project Deed, clause 38.5 allows the State to ask for such information relating to the Projects that it may reasonably require from time to time. As the State representative had asked for a response to questions regarding TJH and BrisConnections' reasons for conducting night time works, they needed to respond.

Perhaps it would be more accurate to rephrase this opinion to state, "TJH and BrisConnections were not required to seek permission from the State or CNI for works that were permitted by the project conditions."

Despite this, CNI sought information from BrisConnections and TJH regarding compliance by proposed works with the Project Deed and the Coordinator-General's Imposed Conditions.

**CNI is concerned that Proposed Opinion 8 may serve to undermine the good administration of the Project by adversely impacting on the flow of information that is presently provided to CNI.**

### **8.3 DIP and CNI Legal Advice**

The Proposed Report at sections 8.3 (and also 9.5.3 and 10.5.2) discusses the content and detail of legal advice provided for the Project.

While CNI accepts that it is not entitled to the protection of legal professional privilege in relation to the Ombudsman's investigation, s.45(2) of the Ombudsman Act 2001 does not abrogate CNI's legal professional privilege against the world at large.

CNI is concerned that, particularly if the Proposed Report is released publicly, the reference to legal advice obtained for the project in the Proposed Report may destroy the legal professional privilege in that advice.

The Ombudsman is requested to preserve the confidentiality of legal advice provided to CNI and produced to the Ombudsman for the purposes of the investigation. It is therefore requested that either the Proposed Report be revised to remove reference to confidential legal advice and its content, or the relevant sections of the Proposed Report be quarantined so that confidentiality is maintained over those sections, the publication of which would otherwise serve to destroy CNI's legal professional privilege in relation to its legal advice.

### **9.5.3 CNI's View**

***This section contains misrepresentation and misquoting of CNI material.***

CNI can find no record of where the detail in the second paragraph derives from in regard to CNI views, however it is noted that the Coordinator-General used very similar wording when making the clarification of excessive noise in his letters of April 2010 (to TJH and the CLG's and which is also available on the DIP website). There is also misquoting of CNI's report in footnote 303 and 304, which misrepresents the views of CNI. For example, CNI note that an exceedance above a goal is not *necessarily* a breach whereas the Report states that CNI believe it is '...not a breach...'. This is not correct. It is noted that CNI is not the enforcement agency and does not determine whether a particular action is a breach of the Imposed Conditions.

### **9.6.6 CNI report**

***There are errors in the Proposed Report's review of the CNI Report.***

The Proposed Report in the last paragraph on page 111 and in paragraph 3 on page 112 suggests that CNI's focus on a single month starting on 7 November 2009 was not the appropriate way to conduct monitoring for the CNI Report. CNI note that the analysis of that one month was from TJH (see Appendix 9 of CNI's Report) with CNI comments contained within the CNI Report. That section of the CNI Report was looking at the noise effects associated with the first month of the 24/7 works which started on 7 November 2009. CNI provided an analysis of all night work noise monitoring (p14 of CNI's Report) which includes TJH night time noise monitoring from August 2009 through to and including January 2010. Analysis is provided within the table, noting that further comments and conclusions cannot easily be drawn due to the often limited and subjective TJH annotations provided and for the different goals the conditions provide. For this reason, the statement in the Proposed Report that "I consider a more accurate picture would have been to highlight in the report the full results of monitoring over the period..." gives the impression that such work was not performed as part of the report, which is incorrect.

We note that the Noise Consultant's report contained in the Proposed Report does not include any analysis of the CNI Report similar to that quoted in section 9.6.6 of the Proposed Report. CNI would appreciate reviewing the source material for analysis. In particular, it is not clear how key factors including the effects of mitigation, the particular location of the measurement (for example many measurements were taken in or near empty houses purchased by the State to form an additional noise barrier between the worksite and the community) and similar steps were used to assess potential exceedences.

The Proposed Report finds on page 113 that, "I do not agree with CNI's assessment that the results show that TJH is generally within the noise goals." This finding appears to rely solely on raw data without consideration of the effects of mitigation, location of the reading and similar things needed to conduct an accurate and technical analysis of the noise monitoring. For example, all properties in the table on page 113 of the Proposed Report were mitigated properties where 15-20dBA reduction can be assumed (in fact, the reduction could be 20-30dBA). Applying an additional 5-10dBA reduction to the dBA readings listed on the table extracted from the Heggies report (which already includes a 10dBA façade), then the table effectively measures no exceedences at all. This is why it is necessary to consider essential issues like specific mitigation when assessing the alleged exceedences derived from these reports. On the basis that the table referred to shows no actual exceedences due to the effects of TJH provided mitigation, CNI maintains its statement that "generally" TJH is within the noise goals for the assessment made in that report.

### **9.8.3 Long term or temporary noise & Proposed Opinion 17**

We note proposed opinion 17. CNI did not accept TJH's application of the temporary noise goal and did engage in discussion with TJH regarding this issue (these documents have been provided to you). CNI accepted that TJH had a strong argument for use of the temporary goal as described in the source documents.

CNI notes that the construction sites involve many types of noise sources. Some things – for example an extractor fan on a static shed in a work site will operate continuously 24/7 and will do so for perhaps the entire project. That is a long term noise. Others might relate to a temporary work on the worksite which is happening at night. For example, excavations in a specific location over a specific time period (several weeks). Once that activity or machinery moves to a new location or changes scope within the worksite the noise at the receiver will change and therefore TJH argue that the noise levels provided at any time are temporary and not a continuous or long term noise source. A concrete pour which might occur once a month or only once in a particular area, according to WM's view, is a temporary noise from a one-off event. CNI also would agree that it is reasonable to consider this example as temporary works. CNI may be able to assist your noise consultant obtaining greater clarity of TJH's arguments on this subject if desired.

It is unclear what analysis has been performed by WM to ascertain if its analysis is not consistent with the current application of the temporary and long-term noise goals to the project. CNI does not believe any information was sought regarding this issue by either WM or the Ombudsman's office during the investigation. CNI would be more than happy to assist in gathering the additional information required to inform the views endorsed in this section.

## Proposed Opinion 20

***This section contains an error of fact.***

CNI was not specifically requested to supply information regarding CNI questioning the R Category adopted by TJH. ***The statement that CNI failed to question TJH's adoption of the R categories or the numerical noise goals is incorrect.***

We enclose in Annexure 4 two (2) responses to [REDACTED] KWRA regarding responses given to her about the adoption of the R4-6 category by TJH. These responses clearly show that CNI had turned their minds to the adoption of the R4-6 category by TJH. Further, CNI notes that Heggies, who provided CNI with professional noise consultancy work, adopted R4 as the appropriate category for noise monitoring at Kalinga Park in their report. CNI can provide more information regarding its analysis of the TJH argument for the adoption of R4-6 if required.

### 9.8.7 Previously mitigated residence or unaltered residence?

CNI offer the following observations on Proposed Opinions 22 and 23 and Proposed Recommendation 16 of the Proposed Report:

- the Project is required to be constructed in accordance with the Construction EMP and Construction Noise and Vibration EMP Sub-Plan (imposed condition 9(a));
- the Construction Noise and Vibration EMP Sub-Plan is to be prepared addressing the environmental objectives and performance criteria for noise and vibration management (imposed condition 9(b)). The Construction EMP must adopt and incorporate the environmental objectives and performance criteria set out in the EIS Chapter 19 Draft Outline EMP (Construction) (imposed condition 4(c));
- relevantly, the Draft Outline EMP for Noise and Vibration (Construction) in Chapter 19 of the EIS includes as an environmental objective "Maintain a reasonable acoustic environment for living, in particular for sleeping, and use of properties along the corridor of construction influence during construction works"; and
- the Construction Noise and Vibration EMP sub-Plan must include "measures for mitigation of predicted impacts on sensitive places (e.g. installation of acoustic screen, enclosure of worksites possibly with purpose-built sheds, fitting of mufflers and similar measures to vehicles, plant and equipment) identified in the predictive modelling. Measures may include those contained in the Draft Outline EMP (Construction) in Chapter 19 of the EIS or other measures in accordance with Condition 4(d)(i)" (imposed condition 9(c)(i)).

The mitigation measures in the Draft Outline EMP for Noise and Vibration (Construction) in Chapter 19 of the EIS includes the following:

*"For surface construction works beyond standard construction hours, take reasonable and practical measures to minimise potential impacts to achieve the noise goals established in Tables 1 and 2 below for nearby properties".*

Reasonable and practicable measures to achieve the construction noise goals may include, for example:

- Commence advanced notification of works and undertake on-going consultation with potentially affected property owners and occupants.
- Establishing temporary noise barriers between construction worksites and sensitive activities (e.g. residential, schools, community facilities).
- Launching tunnel construction from within an acoustically screened enclosure, except for surface works and cut and cover construction works that are to be mitigated by effective temporary screens.
- Fitting noise-reduction measures to all plant and equipment engaged in above-ground construction works.
- With the consent of owners and occupants of potentially-affected premises, undertake off-site mitigation actions such as temporary modifications to nearby buildings or other measures to achieve reasonable environmental conditions.

Mitigation measures generally are to be designed and implemented to achieve goals for construction noise for acceptable internal living conditions consistent with AS/NZS 2107:2000 and summarised in Table 1 and Table 2.

The purpose of predictive modelling for construction noise is to provide for the development of mitigation measures, where necessary, that when implemented will achieve the construction noise goals. If noise goals set for the project are based on noise measured in sleeping areas before all reasonable and practicable mitigation and management measures have been applied, this would have the effect that:

- a) there would be no purpose in mitigation measures being applied to the project if they could not be considered in the measurement of noise goals;
- b) the noise goals as predicted would not be representative of the true noise levels experienced; and
- c) monitoring noise levels where mitigation measures (which may include measures at the source or boundary of works) were present would be less accurate.

It is also noted that the Proposed Opinions and Proposed Recommendation appear to be inconsistent with the procedure adopted by WM in determining excessive noise, in particular that "criteria should be compared with noise levels measured with open windows, unless the residence has been specifically treated by TJH or supplied with the means to allow windows to be closed." (Section 9.9, Page 134, Proposed Report).

Accordingly, CNI does not believe the findings of fact on page 132 of the Proposed Report are an accurate reflection of the way the Conditions were drafted and informed by the EIS including the draft outline environmental management plans. The Proposed Report states that, for the purpose of predictive modeling in condition 9(d), the noise must be measured against



an unmitigated property. That noise modeling is used to assess what mitigation may be needed in order to reasonably and practically mitigate the noise of works in the area and to consider what works are feasible to carry out within the remit of the Conditions relating to noise and the community. The opinions and recommendations on page 133 of the Proposed Report appear to suggest that excessive noise is to be measured with reference to an unmitigated property.

We note that the Ombudsman's noise consultant WM (at section 2.7) states, "If the resident agrees to this (mitigation) being supplied by the proponent, then noise mitigation can be claimed."

#### **Proposed Opinion 24**

Please see our comments in response to 9.6.6 above.

It is not clear to CNI the technical basis of the Ombudsman's finding that 'regular' and 'considerable' excessive noise has occurred at nearby residences. CNI would appreciate access to this technical analysis as it may assist in future assessments of noise in this area. We note the summary table in section 9.7.3 of the Proposed Report, but note that in drawing conclusions based on the noise monitoring in the BrisConnections Monthly Reports, consideration needs to be given to mitigation measures, the source of the noise and the particular works being undertaken.

#### **10.4.2 CNI's powers**

CNI undertakes on behalf of the State the project management role. Its CEO has been appointed as the State's Representative under the terms of the Project Deed. CNI is not the proponent.

#### **Proposed Opinion 31**

CNI wishes to clarify the views expressed as Proposed Opinion 31. Where CNI performs noise monitoring, the results of that monitoring are referred to the Coordinator-General. If CNI has particular concerns about the results of noise monitoring it performs, those concerns are sent to the Coordinator-General, as is evident from the noise report referenced at section 9.6.6 of the Proposed Report. It should not be implied that if CNI had concerns about noise monitoring that those concerns would not be shared with the Coordinator-General.

#### **11.10 Reporting to the Minister**

No specific information was sought from CNI as to the level of briefing given to the elected representatives in Queensland. The implication in this section appears to be that there is limited briefing given to the relevant Minister and that briefing is conducted only by CNI. We understand that this implication is incorrect. CNI provides the following briefings:

All elected representatives within the project corridor (local, state and federal) are offered briefings about the project. Council representatives and State Members of Parliament have accepted regular briefings which occur in general about every six weeks and involve project Community Liaison officers and CNI Communications officers. In addition, the CEO of

BrisConnections and the CEO of CNI also meet with elected representatives on an irregular or as needs basis. Meetings with federal representatives have occurred on an ad hoc basis.

These meetings are to provide elected representatives and/or their staff with briefings on current and future project activities. Elected representatives also discuss complaints or concerns which they may have regarding project construction activities/permanent design.

In addition to this CNI also provides information and briefings to the State Government as required. Ministers with an interest or responsibility for the project include the Premier, the Minister for Infrastructure and Planning, the Minister for Transport (Northern Busway Windsor to Kedron) and the Minister for Roads (Airport Roundabout Upgrade). Information provided includes updates on progress, community and business issues and future works. BrisConnections and Thiess John Holland also provide information and attend meetings as required.

These briefings do not represent or replace internal agency process but are supplementary in nature.

Yours sincerely

David Lynch  
Chief Executive Officer  
**CITY NORTH INFRASTRUCTURE PTY LTD**  
*Delivering Airport Link, the Northern Busway (Windsor to Kedron) and the Airport Roundabout Upgrade*

cc. [REDACTED]

Enc/