

**Response of the Coordinator-General to the
Queensland Ombudsman
22 July 2011**

Response to recommendations of the Queensland
Ombudsman's Report:

*The Airport Link Project Report
An investigation into complaints about night-time
surface work, June 2011*



Queensland Government
Department of Infrastructure and Planning

Office of the Coordinator-General
Department of Employment, Economic Development and Innovation
Level 5
100 George Street
Brisbane QLD 4000

Submission to the Queensland Ombudsman

Contents

1	Introduction	2
2	Chapter 6 of the Ombudsman's Report – Project documents	4
2.1	Recommendation 1	4
3	Chapter 7 of the Ombudsman's Report – Steps leading to 24/7 work	5
3.1	No recommendations are contained within Chapter 7	5
4	Chapter 8 of the Ombudsman's Report – Is surface construction work permitted at night?	6
4.1	No recommendations are contained within Chapter 8	6
5	Chapter 9 of the Ombudsman's Report – Excessive noise under imposed condition 7(b)	7
5.1	Recommendation 2	7
5.2	Recommendation 3	8
5.3	Recommendation 4	8
5.4	Recommendation 5	8
5.5	Recommendation 6	9
5.6	Recommendation 7	9
5.7	Recommendation 8	9
5.8	Recommendation 9	10
5.9	Recommendation 10	10
5.10	Recommendation 11	11
5.11	Recommendation 12	11
6	Chapter 10 of the Ombudsman's Report – Investigation and enforcement of imposed condition 7(b)	12
6.1	Recommendation 13	12
7	Chapter 11 of the Ombudsman's Report – Coordination resourcing and future monitoring	13
7.1	Recommendation 14	13
7.2	Recommendation 15	13
7.3	Recommendation 16	13
7.4	Recommendation 17	14
7.5	Recommendation 18	14
7.6	Recommendation 19	14
7.7	Recommendation 20	15
7.8	Recommendation 21	15
7.9	Recommendation 22	16
7.10	Recommendation 23	16
7.11	Recommendation 24	16

1 Introduction

By letter dated 27 June 2011, the Queensland Ombudsman wrote to the Coordinator-General (CG) enclosing a copy of the Ombudsman's report *The Airport Link Project Report An investigation into complaints about night-time surface work, June 2011* ('the Ombudsman's Report').

In accordance with s. 51(2)(a) and (b) of the Ombudsman Act 2001, the Ombudsman has asked the CG to notify him by 22 July 2011 of:

- i. the steps taken or proposed to be taken to give effect to the recommendations; or
- ii. if no steps or only some steps are intended to be taken to give effect to the recommendations, the reasons for not taking all the steps necessary to give effect to the recommendations.

The Ombudsman's recommendations provide both guidance and objective actions to improve the regulation of noise from night time surface construction activities that do not constitute works that could be considered 'special circumstances' work.

The recommendations generally comprise:

- i. actions to better define noise regulation terms; or
- ii. actions to better determine what works being conducted at night fall outside of the 'special circumstances' provisions and more effectively regulate noise generated by those night time construction activities.

The Ombudsman also provides guidance on a range of issues to assist with the regulation of future projects declared as significant projects under the *State Development and Public Works Organisation Act 1971*.

By virtue of the machinery of government changes on 21 February 2011, the Office of the CG now forms a part of the Department of Employment, Economic Development and Innovation (DEEDI) and is funded by DEEDI. Accordingly, recommendations made by the Ombudsman that relate to the human and technical resources available to the CG will now need to be considered in close consultation with the Director-General (DG) of DEEDI.

The CG is appointed under the *State Development and Public Works Organisation Act 1971* and is responsible for the administration of that Act by virtue the *Administrative Arrangements Order (No.2) 2011*. The DG of DEEDI has no ability to direct the CG in respect of the Coordinator-General's functions under that Act. All tasks undertaken or proposed to be undertaken by the CG in fulfilment of the Ombudsman's recommendations that relate to the adequacy of human or technical resources will be done in consultation between the CG and DG of DEEDI.

Similarly, all tasks undertaken or proposed to be undertaken jointly by the CG and the Department of Environment and Resource Management (DERM) in fulfilment of the Ombudsman's recommendations will be done with consultation between the CG and DERM.

All commitments made by the CG in this document have been prepared in consultation with DERM.

The following is the response from the CG in response to the Ombudsman's request.

Unless stated otherwise, terms used in this response have the same meaning as in the Ombudsman's Report of June 2011.

I value transparency, accountability and continuous improvement in the operations of the Office of the CG and welcome the opportunity offered by the Ombudsman's recommendations to identify and implement improvements to the administrative practices of my Office.

A handwritten signature in black ink, appearing to read 'KD Davies', with several horizontal strokes extending to the right.

Keith Davies

Coordinator-General

Department of Employment,

Economic Development and Innovation

22 July 2011

2 Chapter 6 of the Ombudsman's Report – Project documents

2.1 Recommendation 1

The CG incorporate, in the terms of reference for each future EIS, the requirement 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.

For significant projects declared under section 26(1)(a) of the *State Development and Public Works Organisation Act 1971* (SDPWO Act), the CG commits to improving terms of reference for the Environmental Impact Statement (EIS) by incorporating a requirement that the EIS more explicitly describe whether night-time surface construction work may occur, whether such work may impact residences or other sensitive receptors and if so, the circumstances in which that work is proposed to be undertaken and the likely duration (if known) of that work.

This commitment will take effect for all projects for which the terms of reference for the EIS are finalised under section 30 of the SDPWO Act after 31 August 2011.

3 Chapter 7 of the Ombudsman's Report – Steps leading to 24/7 work

3.1 No recommendations are contained within Chapter 7

4 Chapter 8 of the Ombudsman's Report – Is surface construction work permitted at night?

4.1 No recommendations are contained within Chapter 8

5 Chapter 9 of the Ombudsman's Report – Excessive noise under imposed condition 7(b)

5.1 Recommendation 2

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, the location of the noise generating activities and the location and height of the noise meter microphone
- 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 exceedences by the Project
- where exceedences 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 exceedence attributable to the Project.

The CG commits to requesting that Thiess John Holland Ltd (TJH) include the information outlined in Recommendation 2, as a minimum, in future Airport Link monthly reports.

The CG notes the CG's powers to require TJH to include such information are limited to the requirements about monitoring and reporting construction noise in the imposed conditions for the Airport Link Project.

Following consultation with DERM, the CG notes the intention that this information be sought more formally each month by DERM through a notice under section 451 of the *Environmental Protection Act 1994* (EP Act).

5.2 Recommendation 3

DERM monitor and evaluate the information contained in the revised monthly reports to assist it in investigating exceedences of the noise goals.

Whilst this is a matter for DERM, the CG notes that officers of the CG currently participate in the evaluation of monitoring information and will expand this activity to include the revised monthly reports.

5.3 Recommendation 4

In the event the information gained as a result of proposed recommendation 3 indicates noise from night-time surface work may constitute noise nuisance, DERM:

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

The CG notes that officers of the CG jointly review the evaluation of monitoring information and will expand this activity to include evaluating the revised monthly reports and assisting with any necessary actions arising as a result of reviewing the reports.

5.4 Recommendation 5

The CG publish on DIP's website, a statement clarifying the meaning of the terms 'temporary' and 'long term' for steady construction noise under condition 9(d).

CG commits to publishing, on the CG's website, a statement clarifying the meaning of the terms 'temporary' and 'long term' for steady construction noise under condition 9(d).

The published statement will be based on:

- a review of the information, including expert advice, presented by the Queensland Ombudsman in his report;
- a review of the information already obtained by the CG about the terms 'temporary' and 'long term' in relation to steady construction noise. The CG notes in this respect that in the submission in response to the Ombudsman's Proposed Report it was submitted that the noise expert reports show there is room for different interpretations of these terms and 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; and
- if necessary, consideration of further expert opinion, commissioned by the CG.

It is possible that, following completion of review of that information and advice, it may be determined by the CG that it is not possible to provide a simple definition of each of those terms that can be satisfactorily applied in every project circumstance.

5.5 Recommendation 6

The CG publish on DIP's website, a statement clarifying the meaning of the terms 'major road' and 'minor road' under condition 9(f).

The CG commits to publishing on the CG's website a statement clarifying the meaning of the terms 'major road' and 'minor road' under condition 9(f), with reference to the Brisbane City Council (BCC) *City Plan 2000*.

It is now common in more recent CG EIS assessment reports to use the alternative, better understood terms 'local' and 'arterial' roads. Nonetheless, where relevant to future assessment reports, it is intended that road terms would be defined with reference to the relevant local government road hierarchy where definition of roads may not otherwise be clear.

5.6 Recommendation 7

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.

In the future, should proponents of significant project intend to use BCC's Noise Impact Assessment Planning Scheme Policy (NIAPSP) 'R categories' as the basis for the categorisation of noise during the EIS process and/or the CG intends to use those R categories in imposed conditions, then the CG commits to incorporating into the terms of reference for the EIS for those projects a requirement that the EIS address the assessment of background noise, particularly between 10pm and 7am. This will include details about the receiving environment and other relevant matters to determine the relevant R category.

This commitment will take effect for projects for which the terms of reference for the EIS are finalised under section 30 of the SDPWO Act after 31 August 2011.

NIAPSP R categories have only ever been used in two significant projects; the Clem7 Tunnel and Airport Link. It is intended that R categories not be used for future significant projects. Consequently, there may be no need for practical implementation of Ombudsman Recommendations 7 and 8.

5.7 Recommendation 8

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 in consultation with the authority that holds jurisdiction of any condition that may be affected by the change and make a decision about the change.

In the future, should the CG use NIAPSP R categories as the basis for the categorisation of noise in imposed conditions, then the CG commits to developing and implementing an R category complaint receipt and determination process where the NIAPSP categorisation of noise has been adopted.

This commitment will take effect for conditions finalised under section 54B of the *State Development and Public Works Organisation Act 1971* after 31 August 2011.

NIAPSP R categories have only ever been used in two significant projects; the Clem7 Tunnel and Airport Link. It is intended that R categories not be used for any other significant project. Consequently, there may be no need for practical implementation of Ombudsman Recommendations 7 and 8.

5.8 Recommendation 9

For the remaining stages of the Project, the CG:

- (i) 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
- (ii) make a decision about the change
- (iii) advise DERM and TJH of the decision

The CG commits, for the remaining stages of the construction of the Airport Link Project, to develop and implement a system to evaluate any proposed changes by TJH to relax an R category. This evaluation system may include the CG's coordination of expert advice, on a case by case basis, including detailed consideration of the receiving environment and other relevant matters.

An evaluation process may be triggered by:

- advice from CNI and/or DERM indicating that TJH propose to change an R category from R1-R3 to R4-R6;
- advice provided by the Independent Verifier;
- advice contained in the independent compliance report; and/or
- receipt of a complaint alleging an R category change from R1-R3 to R4-R6.

Following the evaluation, the CG commits to advising DERM, CNI and TJH of the CG's view about the proposed change.

The system for evaluation of changes will be applied to all proposals to change the R category since the tabling of the Ombudsman's Report on 27 June 2011, not to changes or alleged changes prior to that date.

5.9 Recommendation 10

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 LA_{90} background noise level in each acoustically similar locality, 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 LA_{eq} noise level in each acoustically similar locality, in the absence of noise from the Project.

As part of the system developed for Recommendation 9 to evaluate any proposed changes by TJH to relax an R category, in the event that background noise readings contained within the project's EIS are not able to be applied to the particular sensitive receptor, the CG and DERM will determine the relevant day time and/or night-time background noise level based on coordination of an assessment:

- for night-time noise, the LA_{90} background noise level in each acoustically similar locality, 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 LA_{eq} noise level in each acoustically similar locality, in the absence of noise from the Project

5.10 Recommendation 11

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.

Where the CG imposes conditions under section 54B of the *State Development and Public Works Organisation Act 1971* after 31 August 2011 involving the use of internal noise goals for sleep disturbance, the CG commits to incorporating the facade reduction approach proposed by the Ombudsman in Recommendation 11 for noise monitoring purposes.

The CG has consulted with DERM about the use of a facade reduction approach for noise monitoring and notes that DERM has cautioned that this approach may be insufficient for all enforcement purposes.

5.11 Recommendation 12

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 'In a residence that has had noise mitigation applied to the sleeping area as a result of predictive modelling, monitoring is to be undertaken with the mitigation active. However, in a residence that has not had noise mitigation applied to the sleeping area, monitoring is to be undertaken with the sleeping area in the state in which it is normally occupied'.

The CG commits to reviewing and further refining the statement published on the CG's website about the CG's clarification and reinforcement of the term 'excessive noise', and the manner in which noise from night time surface work captured by condition 7(b) of the CG's EIS Evaluation Report is to be measured.

The review will consider:

- information presented by the Ombudsman in his report of June 2011;
- information provided by the then CG in his submission responding to the Proposed Report of 5 January 2011;
- information provided by the then CG to the Ombudsman subsequent to his submission responding to the Proposed Report of 5 January 2011; and
- any further expert advice considered necessary.

In conducting the review, the CG notes that consideration must be given to circumstances where a property owner and/or resident refuses mitigation measures offered by the proponent. In these circumstances, the review will consider the application of a 'reasonable and practical' test to both the proponent and resident to determine whether the monitoring should be undertaken with the sleeping area in the state in which it is normally occupied.

6 Chapter 10 of the Ombudsman's Report – Investigation and enforcement of imposed condition 7(b)

6.1 Recommendation 13

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

The CG notes Recommendation 13 and understands that DERM has undertaken the necessary measures to implement this recommendation.

7 Chapter 11 of the Ombudsman's Report – Coordination resourcing and future monitoring

7.1 Recommendation 14

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.

For projects over which the CG imposes conditions under section 54B of the *State Development and Public Works Organisation Act 1971* after 31 August 2011, the CG commits to developing appropriate documented arrangements identifying which agency is the lead agency for each condition and the responsibilities of the lead agency and partner agencies, in addition to the jurisdictional advice already provided in CG's EIS evaluation reports.

7.2 Recommendation 15

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
- if necessary, acquire or engage sufficient human and technical resources to meet their obligations to coordinate compliance with such conditions.

The CG commits to completing an internal assessment of the capacity of the CG's Compliance Unit to discharge the CG's responsibility to coordinate compliance with conditions on Significant Projects, including consideration of any resource implications resulting from implementing applicable Ombudsman recommendations.

The CG commits to considering whether further human and technical resources, beyond those recently committed, are necessary to coordinate compliance with conditions on significant projects, and if additional resources are considered necessary, commit to taking the steps necessary, in consultation with the DG of DEEDI, to acquire those additional resources.

7.3 Recommendation 16

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.

Whilst Recommendation 16 relates directly to DERM, the CG notes Recommendation 16 and will liaise with DERM regarding its progress against that recommendation in so far as that may impact upon the implementation of Recommendation 15.

7.4 Recommendation 17

In addition to the matters identified in my Recommendation 2 concerning the information contained in the Airport Link monitoring reports, I consider the CG should request TJH to produce external monitoring results in the monthly reports.

The CG commits to requesting that TJH publish, in the monthly Airport Link monitoring reports, results obtained from the conduct of external noise monitoring by TJH.

The CG notes the CG's powers to require TJH to include such information are limited to the requirements about monitoring and reporting construction noise conditions imposed in the CG's EIS Evaluation Report.

7.5 Recommendation 18

The CG and/or DERM issue a notice, or notices, under s.323 and/or 451 of the EP Act and/or SDPWO Act requiring BrisConnections or TJH to investigate and report on:

- The plant and machinery proposed to be used in future night-time surface work at any worksite along the project corridor until the Project's completion
- The sound power levels of that plant and machinery, and the measures that can be taken to muffle or screen those levels including the use of temporary and mobile noise barriers
- Any reasons why amelioration measures cannot reasonably or practically be taken

The CG has consulted with DERM about Recommendation 18 and developed a staged approach under which DERM issues notices under s.451 of the *Environmental Protection Act 1994*.

The notices issued by DERM will be used for the purpose of determining:

- what night time surface works are proposed for the remainder of the construction phase of the Airport Link project;
- of these works, what works constitute night time surface works not captured by the 'special circumstances' provision of condition 7(b);
- for night time surface works not captured by the special circumstances provisions, potential noise to be generated by these works, mitigation, management and monitoring measures to be applied, and any reasons why amelioration measures cannot reasonably or practically be taken.

An assessment will then be made, based on the evidence obtained and other relevant considerations, as to whether the CG should issue an enforcement notice or seek an enforcement order under the *State Development and Public Works Organisation Act 1971*. It is noted that before the CG can issue an enforcement notice the CG must have a reasonable belief a person has contravened, or is contravening, an enforceable condition.

7.6 Recommendation 19

If the CG and/or DERM does not have sufficient evidence to issue a notice, or notices, mentioned in Recommendation 18 or otherwise decides not to, the CG and/or DERM should provide the Ombudsman with reasons why, within two weeks of the date of publication of this report.

By letter dated 18 July 2011, the CG advised the Ombudsman that following recent consultation with DERM, the CG and DERM intend to take necessary steps to give effect to Recommendation 18.

7.7 Recommendation 20

The CG and/or DERM evaluate the relevant responses to the notices mentioned in Recommendation 18.

The CG commits to evaluating, in consultation with DERM, the responses provided to the notices issued by DERM for the purpose of determining:

- what night time surface works proposed for the remainder of the construction phase of the Airport Link project constitute night time surface works not captured by the 'special circumstances' provision of condition 7(b);
- for night time surface works not captured by the special circumstances provisions, potential noise to be generated by these works and the mitigation, management and monitoring measures to be applied;
- the validity of any reasons why amelioration measures cannot reasonably or practically be taken;
- necessary refinement to elements of the CG coordinated targeted monitoring program for night time surface works not captured by the 'special circumstances' provision of condition 7(b). (refer Recommendation 22); and
- whether, based on the evidence obtained and other relevant considerations, the CG should issue an enforcement notice or seek an enforcement order under the *State Development and Public Works Organisation Act 1971*.

It is noted that before the CG can issue an enforcement notice the CG must have a reasonable belief a person has contravened, or is contravening, an enforceable condition.

7.8 Recommendation 21

Within four weeks of the date of publication of this report, the CG in conjunction with DIP and DERM, develop and publish on DIP's website a statement about the roles and responsibilities of the CG, DIP, DERM and CNI about noise monitoring from night-time surface work, including proactive monitoring proposed to be undertaken, who is to do which monitoring, and the methodology of that monitoring.

The CG commits to documenting and publishing on the CG's website, before 26 July 2011, the ongoing targeted monitoring program for night time surface work not captured by the 'special circumstances' provision of condition 7(b). The targeted monitoring program is to incorporate:

- a statement about the roles and responsibilities of the CG, DERM and other entities to support the targeted monitoring program;
- a process to determine what works constitute night time surface works not captured by the 'special circumstances' provision of condition 7(b);
- a risk based assessment process to determine those night time surface works not captured by the 'special circumstances' provision of condition 7(b) warranting further examination under the targeted monitoring program; and
- descriptions of the suite of activities which may progressively be applied to those night time surface works targeted for further examination.

The published targeted monitoring program will specifically note that should the CG progress to the stage of coordinating the gathering of independent noise monitoring data, this will require the agreement of private property owners to access the internal areas of a dwelling.

The published statement will also acknowledge that should private property owners be unwilling to provide internal access at night, the CG may be unable to coordinate the gathering of independent noise monitoring data of a standard sufficient for some enforcement purposes.

7.9 Recommendation 22

Within two weeks of the CG and/or DERM's receipt of any responses to any notices mentioned in Recommendation 18, the statement mentioned in Recommendation 21 is to be revised to set out the general details of a proactive monitoring program, informed by the response to the notice.

The CG, in consultation with DERM, commits to revise the targeted monitoring program, where necessary, based on information provided by TJH in response to the notices issued by DERM.

7.10 Recommendation 23

For the duration of the Project, the CG arrange receipt of a monthly briefing note from the DIP Compliance Unit that:

- Gives an update on the implementation of my recommendations
- Includes information from DERM on compliance issues

and, as may be required, give instructions to the DIP Compliance Unit and DERM about those issues and environmental coordination issues generally arising from the Project.

The CG commits to taking the necessary steps to improve the existing reporting to the CG by the Compliance Unit about environmental coordination issues. These steps are to include:

- further development of the existing monthly briefing note by the Compliance Unit about environmental coordination issues arising from significant projects;
- incorporation of reporting on implementation of Ombudsman Recommendations;
- further development of existing provisions for instructing the Compliance Unit about environmental coordination issues arising from the Airport Link project; and
- further development of existing provisions for instructing the Compliance Unit and other relevant agencies about environmental coordination issues arising from other significant projects.

7.11 Recommendation 24

The CG regularly report to the Minister to advise him about:

- The regulation of noise from night-time surface work
- Environmental coordination and the status of environmental regulation in each significant project

The CG commits to taking the necessary steps to improve and systematise reporting to the Minister about:

- the regulation of noise from night-time surface work that does not constitute 'special circumstances' work; and
- environmental coordination and the status of environmental regulation for each significant project.