

## ***AIRPORTS AMENDMENT BILL 2010 – Australian Airports Association Submission***

### ***Introduction***

*The Australian Airports Association ("the AAA") welcomes the opportunity to make this submission to the Senate Standing Committee on Rural and Regional Affairs and Transport in relation to the Airports Amendment Bill 2010 ('the Bill').*

*The AAA is a non-profit organisation founded in 1982 and represents the interests of over 270 airports Australia-wide, from the local country community landing strips to the major international gateway airports. There are a further 85 Corporate members representing aviation stakeholder companies and organisations that provide goods and services to airports.*

*The Charter of the Association is to facilitate co-operation among all member airports and their many and varied partners in Australian aviation, whilst maintaining an air transport system that is safe, secure, environmentally responsible and efficient for the benefit of all Australians.*

*In making this submission, the AAA particularly notes that all airports subject to regulation under the Airports Act 1996 ("the Act"), each of which is vitally interested in the amendments to that Act that would be made by the Bill, are members of the Association.*

*To a considerable degree, the AAA's submission reflects a consensus view amongst most or all affected airports.*

*However, it may be that an individual member airport has a different view on issues discussed in this submission. Should that be the case, we would expect that particular airport to raise those issues in their own individual submission and we would ask, and are confident, that the Committee would give any such submission the full consideration it deserves.*

### ***Background***

*The amendments proposed in the Bill generally derive from announcements made in the Government's National Aviation Policy White Paper released on 16 December 2009. The AAA and its members welcomed the Government's initiative in compiling a National Aviation Policy and valued the extensive consultative process that was conducted in the course of its development.*

*That is not to say that the AAA and its members necessarily welcome all of the policy positions and announcements set out in that White Paper. There are some areas of contention and disappointment for some or all airports. However, the AAA and its members fully recognise that it is the proper role of Government to formulate and take policy decisions even where they may not please all stakeholders. Accordingly, the AAA does not seek in this submission to reopen the various policy decisions underlying the individual amendments proposed in the Bill. Nor does it seek to comment on those proposed amendments that it views as uncontentious or merely technical.*

*Rather in this submission the AAA seeks instead to comment on various of the amendments with the aim of highlighting and seeking a remedy for difficulties that are perceived in the implementation of the amendments in the terms in which they are currently drafted.*

*In this regard the AAA notes that, in contra-distinction to the process followed in the development of the White Paper, there was no consultation whatsoever with affected parties in the development of the Bill. The AAA believes that some of the difficulties highlighted below could well have been resolved had such consultation occurred. The AAA now looks to the Committee to effect that consultation and resolution.*

### ***General observations***

*Before turning to detailed provisions in the Bill, there are two general comments that should be made:*

- First, the Bill would make the development planning process for affected airports more intrusive, more expensive and more time consuming than it already is. This contrasts with the trend of recent years evidenced in all States and Territories, with the active support of the Commonwealth and oversight from the Council of Australian Governments, to simply, clarify, standardise and expedite development assessment and approval processes in all other areas of the economy, especially where it involves the provision of critical and/or nationally important infrastructure. There is a real risk that, if these contrasting trends persist, Australia's most important airports will become a developmental "island", resulting in them being subject to development approval processes that are far more cumbersome than those applying to other major infrastructure providers and operators. As such, Australia's major airports will be disadvantaged in providing, in a timely and commercially viable manner, the vital national infrastructure that is so clearly required.*
- Second, the Bill would dramatically increase the already very high level of discretion and judgment conferred by the current Act upon the Minister. It would significantly add to the heavy use of undefined and value-laden terminology already to be found in the Act and thereby deny both the community and affected airports any reasonable prospect of anticipating with any confidence how particular provisions may be applied. The AAA notes that this problem stems essentially from various of the imprecise policy decisions reflected in the White Paper. As noted above, the AAA does not seek to reopen those policy decisions here, beyond noting the adverse impact that they have on the attainment of understandable and predictable legislation.*

## ***Detailed comments***

### ***1. Master Plans***

*The Bill proposes to expand the range of matters that are to be included in an airport's Master Plan.*

*One of these changes<sup>1</sup> would simply move the existing "free-standing" Airport Environment Strategy into the Master Plan without necessarily increasing the regulatory burden on airports. The AAA supports this move in principle, as it offers the opportunity for more efficient and comprehensive and less expensive consultation between airports, their local communities and relevant Government authorities.*

*At the same time, however, the AAA would be very concerned if the increased complexity of airport Master Plans resulting from this change operated in practice to unduly complicate the assessment process, delay the approval of airport Master Plans or result in more onerous conditions than those experienced under the present bifurcated processes. In particular, we would be concerned if the incorporation of the Environment Strategy allowed the Commonwealth Environment Minister to place any conditions or other requirements on the broader Master Plan through their involvement in the Environment Strategy, or if the Environment Department did not afford such matters the same priority as they receive from the Transport Department, thereby delaying the whole process.*

*The AAA notes that, with this and other changes in the Bill, the original concept of an airport Master Plan as providing a strategic overview of future development at the airport is increasingly changing to require much more detailed documentation of the initial five years of development. There is a risk that this trend will simply result in more time-consuming, costly and unproductive bureaucracy as inevitable changes to foreshadowed developments trigger requirements for an ongoing flow of Master Plan variations.*

*The other new matters required to be included in a Master Plan<sup>2</sup> will clearly add to the regulatory burden borne by airports in their preparation. On passage of the Bill it would be necessary for a Master Plan to specifically address the ground transport system on-airport and as it relates to that off-airport; proposed on-airport developments that are unrelated to "airport services"; and likely effects of on-airport developments on employment at the airport and on the local and regional economy and community.*

*The AAA does not contend that it is inappropriate for each of these matters to be dealt with in a Master Plan. But it does note that it is far from clear what degree of analysis will be required by the Minister to meet the statutory requirement for "detailed information" or exposition of "likely effect". Airports would obviously be concerned if the level of analysis demanded under these new provisions was unreasonably complex. Master Plans are intended to be long-term, predictive and strategic documents, with individual major developments forecast in them requiring separate approval under the Major Development Plan process. It is at that latter stage that more detailed examination is appropriate.*

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<sup>1</sup> Schedule 1, Part 1, Item 1 - new section 71(2)(h) and Item 4 - new section 71(3)(h)

<sup>2</sup> Schedule 1, Part 1, Item 1 - new sections 71(2)(ga), (gb) and (gc) and Item 4 - new section 71(3)(ga), (gb) and (gc)

*The AAA would also hope that the proposed new requirement to predict the likely effect of an on-airport development on the local economy and community does not signal a predisposition to refuse to approve any development that has any adverse off-airport effect. Inefficient off-airport businesses should not be insulated from competing and more efficient businesses simply because they may be located within the boundaries of an airport. Local communities deserve access to competitive and efficient suppliers of goods and services, wherever they may be located.*

*With respect to the proposed new “ground transport plans”, during the Master Plan process airports will need to obtain from State and Territory governments details of how and when those governments intend to deliver the landside road and public transport infrastructure and services that are required to complement growth in aviation activity at airports.<sup>3</sup> This approach has theoretical merit in terms of the need to better coordinate the provision of aviation infrastructure by airports with the provision of supporting landside ground transport infrastructure by State and Territory governments and the AAA expects that airports will work through the new Planning Coordination Forums – on which relevant state government transport agencies will be represented – to achieve such coordination.*

*However, in practice, should a State or Territory government be unwilling to provide a landside road network and/or public transport system that is adequate to facilitate growth in aviation activity at an airport, that government would effectively be undermining one of the fundamental purposes of the Master Plan: that is, demonstrating how the future needs of civil aviation users of an airport will be met over a 20 year period. At least for Australia’s major airports, this would be contrary to the national economic interest.*

*The AAA would be concerned if, in such circumstances, any unwillingness on the part of a State or Territory government to provide the necessary landside infrastructure and services for which it was responsible was interpreted by the Australian Government in such a way as to prejudice the final approval of the Master Plan or, indeed, to invalidate transport assumptions or conclusions post-approval.*

## **2. “Incompatible” Developments**

*The Bill proposes the creation of a new statutory concept of “incompatible development”<sup>4</sup>. Any development falling within the definition of this condemnatory term must be foreshadowed in a Master Plan. Despite approval of a Master Plan containing such a prediction, the proponent will not be able to proceed to the preparation of a more detailed Major Development Plan unless the Minister has permitted such on the basis that there are “exceptional circumstances”. And of course, like all other existing developments that require a Major Development Plan, it will not be able to proceed to implementation unless the Minister approves that Plan.*

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<sup>3</sup> see par 8, p18 of the Explanatory Memorandum)

<sup>4</sup> Schedule 1, Part 2, Items 27 and 46

*The AAA believes that the term “incompatible development” is both inaccurate and undesirable. None of the developments listed within the definition of that term<sup>5</sup> is inherently incompatible with the operation of an airport. A development that prevented the airport being used as an airport would be “incompatible”, but none of the listed developments necessarily fall into that category. This is evident from the terms of the provision itself. For example, while an educational institution is said to be “incompatible”, an “aviation educational facility” is not. And while a “community care facility” is prima facie “incompatible”, it will somehow become “compatible” if the Minister decides that there are (undefined) “exceptional circumstances” that justify its development.*

*The AAA is not just concerned with the inappropriate use of the label “incompatible” as a matter of English usage; its greater concern is that this pejorative label is likely to effectively “kill off” any development, no matter how sound it may be, by generating a groundswell of opposition simply by reason of the “incompatible” nomenclature and without regard to the merits of the proposal.*

*At the same time, the AAA accepts that the current Minister, and perhaps some future portfolio Ministers, may validly hold the view, albeit that it is subjective, that some types of developments generally should not proceed on an airport site as a matter of policy. But this does not mean that these new provisions are required (whether with or without the “incompatible” terminology).*

*This is because decisions based on such opinions can already be legally made under the current law. An almost identical range of developments has been prescribed in the Airports Regulations 1997<sup>6</sup> for the purposes of section 89(1)(o) of the Act. This has the effect of requiring that they cannot proceed without Ministerial approval for a Major Development Plan. That is, the essence of the policy set out in the White Paper on this matter has already been implemented in the present Regulations and no further amendment of the Act is required - especially one in such pejorative terms.*

*In any event, the AAA notes that, while there is a close correlation between the list in the Regulations of developments that require a Major Development Plan and those listed in the definition of “incompatible developments” (for which a Major Development Plan will be able to be prepared only if the Minister accepts that there are “exceptional circumstances”, but which can equally not be implemented without approval of a Major Development Plan), there are some important differences which should be resolved.*

*The Regulations require that a child care facility (except a facility that caters principally for the children of persons working at the airport) be subject to a Major Development Plan. Such a development is not expressly listed as an “incompatible development”. While we understand that this was a deliberate exclusion, we are concerned that such facilities might nevertheless be argued to be a “pre-school” (for which neither the Regulations nor the Bill provides a definition) or a “community care facility” (for which both the Regulations and the Bill provide only a non-exhaustive definition).*

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<sup>5</sup> Schedule 1, part 2, Item 27

<sup>6</sup> Regulation 5.02A

*The AAA submits that, if the incompatible development provisions remain, the exclusion of child care facilities from the definition of “incompatible developments” should be made express.*

*The AAA is also concerned that the definition of “incompatible developments” included in the Bill extends the range of developments that require Major Development Plans beyond the scope of what was stated in the White Paper and beyond that which the Government included in the Regulations. The White Paper referred simply to “schools”. The Regulations refer to “a primary, secondary or tertiary educational institution (except an aviation educational facility)”. However, the Bill now proposes to expand this yet further so that it covers “a primary, secondary, tertiary or other educational institution (except an aviation educational facility)”.*

*The AAA submits that this extension to “other educational institution” (which was not foreshadowed in any of the Government’s Aviation Issues, Green or White Papers) should be deleted.*

*Furthermore, and regardless of whether the reference to “other educational institution” is retained or deleted, in order to ensure that unintended and unwarranted outcomes are avoided it should be made clear that developments associated with education in airport operation, security and defence related matters are not “incompatible developments” – the current carve out for “aviation educational facility” is unlikely to be wide enough to cover activities in relation to such matters.*

*And if, contrary to the AAA’s submission, the extension to “other educational institution” is retained, an appropriately precise definition should be included to avoid the creation of unnecessary uncertainty.*

### **3. Time Limits**

*The Act currently sets time limits within which the Minister is required to approve or not approve a Master Plan or a Major Development Plan. Failing to take a decision within the specified time would result in a deemed approval. These time limits are subject to a “stop-the-clock” mechanism so that, if the Minister requires additional information to allow a proper decision to be made, the time taken by the proponent airport to provide that information does not count towards the time limit. At 50 business days, each of these time limits is already extensive by reference to contemporary State and Territory planning regimes. Despite this, the Bill proposes<sup>7</sup> to allow the Minister to extend these time limits even further, to up to 60 business days. The AAA believes that the time-limits should be reduced, not increased, to reflect best-practice in State and Territory regimes applicable in the economy more generally.*

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<sup>7</sup> Schedule 1, Part 2, Items 33, 36, 55 and 57

#### **4. Additional Developments requiring a Major Development Plan**

*The Bill proposes the following to add to the list of developments that require a Major Development Plan:*

*"altering a runway, including altering a runway in any way that changes:*

- (i) flight paths; or*
- (ii) the patterns or levels of aircraft noise"<sup>8</sup>*

*The AAA is concerned that this amendment is fundamentally flawed and will result in unintended consequences. It would catch any alteration of a runway, and not just those that would affect flight paths or aircraft noise. And there is no definition of what constitutes "altering" - does it extend, for example, to simple routine maintenance such as surface repair, or the installation of new or the maintenance of existing runway lighting ? The AAA would not object to a requirement that runway developments that significantly affected flight paths or increased aircraft noise on an ongoing rather than simply temporary basis should only proceed after a Major Development Plan was proposed. But this proposed amendment (which was not foreshadowed in any of the Government's Aviation Issues, Green or White Papers) goes so far beyond that as to be simply unreasonable. In practical terms it could result in essential maintenance work that would cause part of a runway to be unavailable for a short period being extensively delayed to allow for a lengthy Major Development Plan process. thereby potentially compromising aviation safety.*

*The Bill also proposes that a Major Development Plan will be required for:*

*"a development of a kind that is likely to have a significant impact on the local or regional community".<sup>9</sup>*

*The AAA is concerned at the lack of precision in this terminology, and the fact that it extends to developments where the community impact is positive rather than negative. At the same time, however, the AAA accepts that some developments that are likely to have a major ongoing adverse community impact may require the rigour of the Major Development Plan process and would not object to redrafting along these lines.*

*The AAA notes that the Explanatory Memorandum for the Bill proposes that "administrative guidelines on what may constitute 'significant impact on the local or regional community' will be provided to relevant industry stakeholders". The AAA believes that:*

- such guidelines should not only be "provided to" stakeholders but "developed in close and cooperative consultation with" such persons;*

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<sup>8</sup> Schedule 1, par 2, Item 40

<sup>9</sup> Schedule 1, part 2, Item 42

- *the guidelines should clearly specify those developments that are not to be regarded as having a significant effect on the community and that will not therefore trigger a requirement for a Major Development Plan. Failing this, there is a risk that the imprecision in the Bill may cause Airport Building Controllers to refer every development to the Department for confirmation as to whether or not it was a development that might cause a "significant impact" ; and*
- *consistent with the policy intent of the White Paper to encourage investment in aeronautical investment, the Minister should retain a discretion to not apply this trigger where the relevant development relates to aeronautical services only.*

### **5. Waiver of the Major Development Plan Requirement**

*The Bill signals an endeavour to allow the requirement for a Major Development Plan to be waived in certain cases. These are where the Minister is satisfied that constructing or extending a terminal or constructing or extending a taxiway:*

*"will not*

- (i) increase the operating capacity of the airport; or*
- (ii) change flight paths; or*
- (iii) change the patterns or levels of aircraft noise; or*
- (iv) unduly increase the noise heard by, or unduly cause a nuisance to, the community adjacent to the airport".<sup>10</sup>*

*While the AAA welcomes the intent apparently underlying this proposal, its drafting is legally and practically ineffective.*

*From a legal perspective, a new or extended taxiway only requires a Major Development Plan if it "significantly increases the capacity of the airport to handle movements of passengers, freight or aircraft". Accordingly, if a Major Development Plan is required for such a development, the Minister will never be able to be satisfied that it will not "increase the operating capacity of the airport" and will therefore never be able to waive the requirement for a Major Development Plan. Conversely, if the development would not increase the operating capacity of the airport, a major Development Plan will not be required and there will be nothing to waive.*

*And from a practical perspective, it is beyond realistic expectation that a commercial airport operator would ever construct a new terminal or taxiway, or undertake a terminal or taxiway extension, that would not "increase the operating capacity of the airport".*

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<sup>10</sup> Schedule 1 Part 2, Item 45



*Accordingly, the AAA believes that:*

- *this provision should be amended so as to delete the requirement that the Minister be satisfied that the development would not increase operating capacity. Instead, the Minister should be able to waive the requirement for a Major Development Plan where satisfied that any one of the three remaining criteria is met; and*

*the provision should be expanded to apply in relation to aeronautical investment in general, and not just to terminal and taxiway works.*

## **6. Reduction in Public Consultation Process**

*The Bill also signals another change with an apparently welcome intent. It is proposed that the usual 60 business-day public consultation period for a Major Development Plan should be able to be reduced to a period of not less than 15 business-days where the Minister is satisfied that the draft Major Development Plan aligns with the details of the development set out in the airport's Master Plan and:*

*"the proposed development does not raise any issues that have a significant impact on the local or regional community."<sup>11</sup>*

*While this is a sensible proposal in principle, the AAA believes that it does not go far enough. As a matter of necessity, the process leading to the approval of the relevant Master Plan will have involved extensive consultation with the local or regional community and community views about the impact of the proposed development on that community will have been aired and considered by the Minister. When development moves on to the Major Development Plan stage, those same issues will remain. As the provision is currently drafted, the Minister could not reduce the consultation period even where he was satisfied that all issues of community concern had been heard and considered during the Master Plan process.*

*Accordingly, the AAA suggests that this provision be amended so that the Minister can reduce the public consultation period to a period not less than 15 business days where it appears that the draft Major Development Plan raises no significant new issues not raised at the Master Plan stage. This would be reasonable given the additional detail to be required for the first 5 years covered by a Master Plan and would still give the community at least 3 weeks to express or re-express its concerns. If new issues did in fact emerge contrary to expectation, the Minister would still have the option of issuing a "stop-the-clock" notice to ensure that he or she had access to all necessary information to allow a proper consideration of those concerns.*

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<sup>11</sup> Schedule 1, Part 2, Item 53

## **Conclusion**

*Without seeking to reopen the substance of those policy decisions previously announced by the Government in the National Aviation Policy White Paper and now sought to be implemented in the Bill, the AAA believes that there are significant defects in the Bill that warrant its amendment.*

*The existing Master Plan and Major Development Plan processes are complicated and, as a result, expensive for airport operators to comply with. This expense is necessarily built into the airport's charges to airlines and other airport tenants, and is eventually borne by fare-paying passengers and the community more generally. Exacerbating this situation when it is not necessary to do so in order to give effect to Government policy should be avoided.*

*The AAA and its affected members would be happy to consult with the Committee and the Government in the development of detailed amendments to the Bill that would allow the Government's policy intent to be implemented without any unnecessary or unintended adverse consequences.*

*Finally, the AAA notes that, in commenting upon the proposed amendments to the Airports Act which are the subject of the Committee's current inquiry, it has not yet seen other legislative proposals that might flow from the White Paper process which might affect its members' interests. To that extent, it must at this stage reserve its position with respect to any such proposals, including any interaction between such proposals and the amendments to the Airports Act being considered by the Committee.*