

ADDITIONAL COMMENTS BY GOVERNMENT SENATORS

Senator Winston Crane

Senator Brett Mason

Overview

D1.1 The Liberal members of the Committee, Senator Winston Crane and Senator Brett Mason note with approval that the Committee in its report agrees with expert legal opinion concerning the status of the Brisbane Airport Corporation's Master Plan (paras. 2.44-2.46). This confirms that the view propounded by Mr Kevin Rudd MP and Mr Wayne Swan MP is incorrect. Liberal Senators also note with approval the Committee's conclusion that the Brisbane Airport Corporation fulfilled all its obligations under the *Airports Act*.

D1.2 However, Liberal Senators note their disagreement with some conclusions of the report. Specifically, Senators Crane and Mason disagree with the view that there is any real or practical uncertainty in the *Airports Act* as to the status of a Master Plan and a Major Development Plan and the relationship between the two. The evidence of all practitioners in the field and the experience of all airport developments carried out under the Act thus far highlight not only the inherent workability of the legislation but also its certainty in practice. Liberal Senators observe that any uncertainty surrounding the Brisbane Airport Corporation's Master Plan was largely cultivated for political gain.

D1.3 Liberal Senators also disagree with the proposition that the Brisbane Airport Corporation should have done more by way of public consultation than it was required to under the Act. Liberal Senators also question the observation that in those circumstances the Minister should have approved the draft Master Plan only after more adequate public consultation. Hence, Senators Crane and Mason cannot support Recommendations 1, 2, 5, 6 and 7. What follows is the Liberal Senators' evaluation of these points of disagreement with the conclusions of the majority of the Committee.

Background

D1.4 On 23 August 1999 the Senate referred to the Rural and Regional Affairs and Transport References Committee for inquiry and report:

"The development of the Brisbane Airport Corporation's Master Plan for the future construction of a western parallel runway, with particular reference to:

- a) whether the Brisbane Airport Corporation (BAC) failed to adequately investigate all runway options, including the adequacy of the BAC's methodology for evaluation runway options, including the economic,

social (for example, comparative numbers of households affected by noise), environmental, public health and public safety impacts of each;

- b) whether the BAC failed to release flight path information to the community and, if so, why;
- c) the role of Airservices Australia and any conflict of interest which may exist between its BAC consultancy role and its obligation to provide advice to government;
- d) the adequacy of public consultation undertaken by the BAC; and
- e) why the Minister for Transport and Regional Services (Mr Anderson) proceeded to endorse the BAC Master Plan."

D1.5 The option of a western parallel runway was foreshadowed in the plans of the Brisbane Airport Advisory Committee as early as 1971. It was included in the Brisbane Airport's first Master Plan in 1983 and has been a part of subsequent Master Plans ever since. For almost 30 years the parallel runway was an uncontroversial part of the proposed development of the Brisbane Airport; it attracted little attention.

D1.6 This all suddenly changed in 1998. A campaign against existing aircraft noise, in which Mr Kevin Rudd MP, Federal Member for Griffith, and Mr Wayne Swan MP, Federal Member for Lilley, played a leading role in the run-up to the 1996 federal election, became in the run-up to the 1998 federal election enmeshed with the campaign to dissuade the Minister for Transport and Regional Services from approving the BAC's Master Plan, which included a parallel runway. The issue of *existing* aircraft noise is not part of the committee's Terms of Reference. The valid concerns of residents affected by noise pollution around Brisbane Airport undoubtedly deserve a proper forum and an appropriate response. Their plight, however, is not helped by confusing separate issues and politically motivated scare-mongering.

D1.7 So what changed to suddenly make the parallel runway a controversial issue in Brisbane south-east and north-east suburbs after almost 30 years of silence? Evidence from Mr Rudd and Mr Swan was that what changed were the terms of the *Airports Act* 1996. According to Mr Rudd "[The *Federal Airports Corporation Act* 1986 and the *Air Navigation Act* 1920 did] not contain any reference to Master Plans having any particular legal or administrative status. This is in radical contrast to the *Airports Act* which contains specific and elaborate provisions about not only the content of a Master Plan, but the grounds on which Master Plan can be approved and also the decisive role of a Master Plan in the overall decision-making process prior to actual runway construction." (Mr Rudd's submission, vol.2, p.136, para 26.1) In essence, the argument ran, the Master Plan that had until this time simply been a planning document now became a document, which "decisively" bound the government.

D1.8 According to Mr Rudd this "radically changed" (Committee Hansard, 10 December 1999, p.181) the legal status of the Master Plan and set in concrete the Master Plan's inclusion of a western parallel runway as the future development.

D1.9 Both Mr Rudd and Mr Swan stood by their own selective (and hence incorrect) interpretation of the Act. In his submission to the inquiry Mr Rudd said:

"Section 94(5) of the Airports Act is important in defining the interrelationship between airport Master Plan and Major Development Plans. Section 94(5) states "If a final Master Plan is in force for the Airport, the Minister must not approve the draft Major Development Plan *unless it is consistent* with the final Master Plan" (my [Mr Rudd's] emphasis). In the case of the present debate about the future of Brisbane Airport, the implications of Section 94 (5) are as follows:

The final Master Plan that is currently in force for Brisbane Airport (approved by the Federal Minister in February 1999) recommends the construction of a western parallel runway. On the basis of Section 94 (5), this means that whatever subsequent major Development Plan is proposed by the BAC, the Minister must not approve such a Major Development Plan unless it is compatible with the Master Plan recommendation to construct a parallel runway." (Vol.2, Submission 92, p.126-7)

D1.10 Mr Swan argued similarly in his submission to the inquiry:

"Despite the Minister's claims that the Master Plan did not set in concrete a parallel runway, it quickly became clear this was indeed the case. It should be noted that the 1998 Master Plan is unlike those which preceded it. For the first time BAC flagged that additional airport capacity would be required by 2006. As such the option it proposed - the 01L/19R parallel runway - is a concrete proposal that is imminent. With construction likely to take three years a Major Development Plan will need to be prepared in the next 12 to 18 months. Since the Major Development Plan must be consistent with the approved Master Plan the proposed 01L/19R runway is now the only option on offer." (Vol.4, Submission 146, p.64) [emphasis added]

D1.11 While Mr Rudd's and Mr Swan's understanding of the Master Plan under the *Airports Act* 1996 is incorrect (see below) that is not really the issue. The issue is why a former Director-General of the Queensland Cabinet Office and a former State Secretary of the Queensland ALP propounded their view in numerous articles and letters to the community and constituents without adequately checking on the legal status of the Master Plan. Mr Rudd launched a campaign not only without bothering to seek a legal opinion on the central point of his case, but also in the face of official government advice from Minister Anderson dated 18 February 1999 (as well as earlier advice from Minister Macdonald). Mr Rudd never took the time to seek advice to check what he sees as the "radical change" in law underlying his entire public campaign for this Senate inquiry.

The inquiry

D1.12 The Terms of Reference of the Inquiry focus principally on the activities of the Brisbane Airport Corporation and its actions in adequately investigating runway options; releasing flight path information to the community; potential conflict of interest with Airservices Australia; adequacy of public consultation and, finally, the

Minister's reasons for endorsing the BAC's Master Plan. The Senate inquiry was to be focused on the question of consultation and provision of sufficient information and, thus, a meaningful choice for the residents affected by development. In Mr Rudd's own words:

"No alternative runways or flight paths have been advanced, and the proposition that the bulk of use... of take-offs and landings will be over Moreton Bay again remains unproven. *It is for these reasons and these reasons alone that*, 18 months into the process, we have been left with no alternative but to advance a Senate inquiry to get to the truth of this matter. We require an independent examination against five sets of criteria of all the runway options which are possible." (House of Representatives, 23 August 1999) [emphasis added]

D1.13 The opening statement of the Terms of Reference, however, sets the scene for much of the Committee's difficulty over the course of the inquiry: "The development of the Brisbane Airport's *Master Plan for the future construction of a western parallel runway* with particular reference to..." [emphasis added] The embedded assumption (subsequently supported by much of the non-expert witness testimony given before the Committee) is that it is the Master Plan that finally determines the development of new runways. This is not borne out by the law.

D1.14 Not surprisingly then, considering the initial confusion, the inquiry to a very large extent has revolved around the question of the legal status and consequences of a Master Plan approved under the *Airports Act*. Essentially, Messrs Rudd and Swan argued that the approval of such Master Plan by the Minister sets in concrete development options for the airport, and any subsequent Major Development Plan cannot propose development that is inconsistent with the approved Master Plan.

D1.15 The Department and the Brisbane Airport Corporation have argued consistently before as well as during the inquiry that section 78 of the *Airports Act* allows a Master Plan to be amended so that a Master Plan and a Major Development Plan are consistent. Thus any development options canvassed by the Master Plan approved by the Minister in February 1999 are by no means final.

Failure to seek legal advice

D1.16 The views expressed by Messrs Rudd and Swan in the run up to the Inquiry are incorrect. They are based on the personal opinion of Mr Rudd and his staff, and on unspecified (and untendered) legal advice obtained by Mr Swan (Committee Hansard, 15 December 1999, p.106, 107).

D1.17 When discussing the interpretation of the Act in Parliament, Mr Rudd stated:

"[M]y reading of the act suggest that, if a master plan is approved, it fundamentally constraints the parameters within which the major development plan can be developed." (Adjournment speech, "Brisbane Airport Corporation", House Hansard, 11 February 1999, p.2607) [emphasis added]

D1.18 Again, at the Committee hearing Mr Rudd was evasive in answering the question put to him as to whether he did obtain any independent legal advice to support his position. Mr Rudd said, in part:

"I am me. I am a private individual, I am a member of parliament and I have three staff. The department of transport have thousands of staff, they have a legal division and they have the Australian Government solicitor to call upon. The Brisbane Airport Corporation is a billion-dollar-plus company and it has its own legal team. Then you have the resources of the Airservices Australia. What you are looking at here is me and 125,000 people whose livelihood I have a moral and legal responsibility to stand up for. This is what I am doing." (Committee Hansard, 10 December 1999, p.182-3)

D1.19 Mr Rudd was notified as early as December 1998 that his interpretation of the Act was incorrect. Letters from Senator the Hon Ian Macdonald, Minister for Regional Services, Territories and Local Government (dated 24 December 1998) and from the Hon John Anderson MP, Minister for Transport and Regional Services (dated 18 February 1999) both clearly stated, in response to Mr Rudd's representations, that the BAC's Master Plan did not pre-empt a subsequent Major Development Plan. Both letters represented a consistent (and correct) legal position. While Mr Rudd is under no obligation to necessarily agree with the Department's interpretation of the Act, his actions in continuing to promote to the electorate his own personal opinion, without apparently obtaining any independent legal advice to check its accuracy, are less than might be expected from a responsible Member of Parliament.

Scare-mongering in the community

D1.20 Despite receiving advice from Ministers Macdonald and Anderson, and despite a self-confessed failure to obtain legal advice to support his own personal interpretation, Mr Rudd has consistently presented this incorrect and incomplete view to the public over the course of the year prior to the inquiry (for the full text see the attached letters at the end of this chapter):

"The Minister, under the Act, has until 25 February to either accept or reject the [master] plan. If he accepts, the Parallel Runway will be *irreversible*." (Mr Rudd's letter to residents of Griffith, 10 December 1998) [emphasis added]

"A large part of [the discussion with the Federal Transport Minister] turned on the question of whether the Minister's decision on 23 February would be final. His advisers have argued that even after the approval of a Masterplan the Commonwealth Government will give a 'second bite of the cherry' when the Major Development Plan (MDP) for the Airport is subsequently developed. *I argued* that under the Airport's Act 1996 if a Minister approved a Masterplan, it was impossible for the MDP to consider alternative runway options which were incompatible with those contained in the Masterplan." (Mr Rudd's letter to residents of Griffith, 3 February 1999) [emphasis added]

"[Proceedings of the inquiry] confirmed my argument for some time now - namely that if the Master Plan approves a particular runway, it is not possible for the major development plan to recommend for approval a runway options which is inconsistent with the Master Plan." ("My evidence before the Senate inquiry" Kevin Rudd Reports, a column in the "South East Advertiser, 15 December 1999, p.4)

D1.21 By presenting this incomplete and thus misleading picture of the legal status of the Master Plan, Mr Rudd created within the community a false understanding. He asserted that following Ministerial approval of the Master Plan the development of the parallel runway is now unavoidable. Mr Rudd has only told the people of his electorate half of the story - the half that was politically convenient to him. What he failed to mention was that preparation of a Major Development Plan (which is required under the Act before any construction work can commence) entails its own, very detailed and comprehensive consultation and assessment process, at the end of which the canvassed option might be deemed inappropriate and thus not receive Ministerial approval. More importantly, that the Master Plan itself can be amended if the need to do so arises.

D1.22 There is no legal advice that has been either tendered to the Committee or obtained by the Committee that accords with the views expressed by Messrs Rudd and Swan as to the legal status of a Master Plan. Quite the contrary, the legal advice obtained by the Department of Transport and Regional Services (from the Senior General Counsel, Australian Government Solicitor) and the Brisbane Airport Corporation (from Mallesons Stephen Jacques) and presented to the inquiry, as well as legal advice obtained by the Committee from Professor Denis Pearce, clearly contradicts the selective presentation of the law by Mr Rudd and Mr Swan.

Does the approval of the Master Plan restrict development options?

D1.23 The Committee Report states that "The proposition was put to the Committee in a number of submissions and by several witnesses that under the current legislation an approved Master Plan prevents the consideration of other development options" (para 2.25) and that "both Mr Swan and Mr Rudd asserted that s.94(5) of the Airports Act 1996 has the effect of preventing *substantive* changes to an approved Master Plan at the Major Development Plan stage." (para 2.31) [emphasis added] Both positions not only evidence a subtle shift of Messrs Rudd's and Swan's position in the face of overwhelming legal opinion to the contrary, but are also irrelevant to the issue at hand. This is for two reasons.

D1.24 First, the production and approval of the Major Development Plan entails its own exhaustive process as specified under the Act. The Major Development Plan, being far more specific and detailed a document than the Master Plan (as it refers to a specific development at the airport), among other differences, involves much more extensive public consultation as well as a much greater onus to be satisfied by the airport developer in terms of issues such as environmental impact studies.

D1.25 If for any reason the Minister, at the end of this extensive process, finds the specific development unacceptable he or she can withhold approval. It is, therefore, totally incorrect for Labor Senators to assert that the “assumed... view of the principal participants in this debate is that the BAC, having an approved Master Plan, is entitled to proceed to construction in accordance with the Plan.” (para 2.52) As previously argued, the Master Plan is a general planning document that canvasses, among other things, various development options for the airport over the next 20 years. It does not give airport developers any right to “proceed to construction.”

D1.26 The second reason is that the Master Plan itself can be amended (section 78) to canvass a different range of option for the next 20 years of the airport’s operation. The Master Plan is in reality no more than an attempt at present to foresee and plan for the contingencies of the next two decades. With the pace of technological, economic and demographic change it is quite logical to assume that the Master Plan will need a more constant on-going revision than just once every five years as envisaged to occur under the Act under ordinary circumstances. Quite apart from that fact, considering the time frame involved, the next draft Master Plan, due in 2003, will almost certainly have to be developed and approved before any Major Development Plan examining a new runway is prepared.

D1.27 Labor Senators have in fact acknowledged this reality by adding paragraph 5.14 to the Report, stating that since a staggered parallel runway is not an option canvassed under the Master Plan currently in force the BAC will have to amend the Master Plan before it produces a Major Development Plan for that option. By adding that paragraph Labor Senators acknowledge that there is very likely to be another two rounds of public consultation before any construction work begins – *another* Master Plan, and a specific Major Development Plan. This acknowledgment contrasts strongly with Labor's previous misplaced assertion that any particular option has been effectively set in stone.

Consultation

D1.28 The *Airports Act* provides for “public comment” as part of preparations for the development of a Master Plan (section 79). No evidence was presented to the Committee that the BAC failed to fulfil its obligation under the Act. Quite the contrary, the Committee agrees that the BAC has done *more* than is required of it by way of consulting interested parties and the public generally. In particular the BAC has:

- conducted 51 personal meetings,
- distributed 100,000 brochures to residents,
- set up displays at 17 prominent locations around Brisbane,
- placed advertisements in “The Courier Mail” and seven Quest newspapers,
- set up a special telephone info line (The BAC submission to the inquiry, vol. 3, p.171)

In light of this, the BAC's duty under the Act was more than fulfilled, showing the often heard cry of "no consultation" to be misplaced.

D1.29 It is spurious to argue that the BAC was under some sort of "moral" obligation to do more, or that more was expected of it as a "responsible corporate citizen." Whether or not the law, as it currently stands, provides for appropriate levels of consultation is a question for separate debate. It is for the legislators to recognise that "legislation is deficient in the area" (para 3.49) - if that is indeed the case - and to remedy the situation appropriately. To criticise private individuals and organisations for failing to recognise the inadequacy of legislation and therefore failing to do more than the legislation requires is an example of bad faith. This sort of thinking makes mockery of the concept of certainty of the law.

Conclusion

D1.30 The inquiry Report states:

"The Committee notes that under the Airports Act, an airport master plan is a planning document designed to identify the options for future development at an airport. However, the Committee is concerned that the Act is silent on a purpose statement for an airport master plan - one of the major deficiencies of the Airport Act is that it does not state the precise purpose and impact of a master plan, but clearly is open to interpretation. The absence of such a statement has led to significant confusion within the community and stakeholder groups about the purpose and status of airport master plans." (para 5.8)

D1.31 Whether the Airports Act, on its reading by a *lay* person, is clear as to the legal status of a Master Plan and a Major Development Plan, and the inter-relationship between the two, is a matter for argument. It is, however, irrelevant to the current inquiry. There is no evidence whatsoever of any confusion from stakeholders directly connected with preparing and implementing the Master Plan - the Brisbane Airport Corporation, the Department, planners and legal advisers. There is also no evidence of confusion in any of the other seven Australia cities (including Melbourne, Perth and Townsville) where airport Master Plans have been prepared over the last three years in accordance with the *Airports Act*.

D1.32 While Mr Rudd might argue that he is a "private individual" the standard required of him as federal parliamentarian is much higher than that of an average person reading the Act. Given that the validity of the whole inquiry essentially hinged on the question of the legal status of the Master Plan, someone in Mr Rudd's position of responsibility and public trust should have sought advice in order to clarify the situation, instead of calling for a Senate inquiry for that purpose. Even assuming that there exists some legal uncertainty surrounding the Airports Act (and there is no evidence of that) it was reckless of Mr Rudd, the former Director General of the Queensland Cabinet Office, to demand an inquiry to resolve an issue that would have been settled for him by any competent lawyer had he chosen to seek legal advice. The

resources of the Senate and the Committee – both financially and in terms of time – have been largely wasted in this crude political exercise.

D1.33 It is arguable that whatever public confusion exists regarding the legal status of the Master Plan it has been to a large extent, if not wholly, created within the community by Messrs Rudd and Swan. Without the benefit of independent legal advice, they proceeded to make airport re-development a political issue, and stirred up public sentiment by misinforming the residents of their electorates as to the legal status of the Master Plan. This was done in order to scare the electorate and create anti-Government sentiment in the run-up to Federal election.

D1.34 Mr Rudd's and Mr Swan's campaign seems even more ironic in light of the fact that the *Airports Act* 1996 was originally drafted by the ALP. While it was enacted by the Coalition Government after coming to power in 1996, it was done with the complete support of the Labor Opposition.

D1.35 This Inquiry has achieved nothing for the residents in the electorates of Griffith and Lilley, except to prolong uncertainty and contribute to public confusion. In the end, the construction teams are not ready to move - and for quite some time yet. The residents concerned about the impact of airport redevelopment will be given ample opportunity to put their views across when the Major Development Plan is being considered.

D1.36 In the meantime, by sowing confusion in the community Mr Rudd and Mr Swan have succeeded in fermenting public dissatisfaction for their own political ends, and causing fear and uncertainty to rise as the property values in their electorates have dropped. If this is what goes for credible and sensible political representation, then the electors of Griffith and Lilley have been badly let down by people in the highest positions of public trust.

